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THE
NORTHEASTERN REPORTER,
VOLUME 45,

CONTAINING ALL THE CURRENT DECISIONS OF THE

SUPREME COURTS OF MASSACHUSETTS, OHIO, ILLINOIS, INDIANA,
APPELLATE COURT OF INDIANA, AND THE COURT
OF APPEALS OF NEW YORK.

PERMANENT EDITION.

NOVEMBER 27, 1896—FEBRUARY 26, 1897.

WITH TABLE OF NORTHEASTERN CASES IN WHICH REHEARINGS HAVE BEEN DENIED.

KF
135
126
N62

ST. PAUL:
WEST PUBLISHING CO.
1897.

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¹ Elected December 16, 1895.

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THE
NORTHEASTERN REPORTER.
VOLUME 45.

(167 Mass. 143)

**SPAULDING v. INHABITANTS OF
TOWN OF BEVERLY.**

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 12, 1896.)

MUNICIPAL CORPORATIONS—LIABILITY FOR PERSONAL INJURY—DEFECTIVE SIDEWALK.

A town is liable for an injury occasioned by snow and ice negligently allowed to remain on a sidewalk, rendering it dangerous.

Exceptions from superior court, Essex county; Henry N. Sheldon, Judge.

Action by Edith B. Spaulding against the inhabitants of the town of Beverly. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

L. H. Wardwell and S. A. Fuller, for plaintiff. D. W. Quill, for defendant.

PER CURIAM. There was evidence for the jury of a defect in the sidewalk, caused by the presence of snow and ice, which might have been remedied by reasonable care and diligence on the part of the town, and of which the town might have had notice by the exercise of proper care and diligence. It is not contended that there was not evidence of the due care of the plaintiff. Exceptions overruled.

(167 Mass. 144)

COMMONWEALTH v. BROWN.

(Supreme Judicial Court of Massachusetts.
Suffolk. Nov. 11, 1896.)

CONSTITUTIONAL LAW—RIGHTS OF PERSONS CONVICTED OF CRIME—PUNISHMENT AND PENALTIES—CRIMINAL LAW—MOTION TO STAY EXECUTION OF SENTENCE—FALSE PRETENSES—EVIDENCE—VARIANCE—INDICTMENT—FORMER JEOPARDY.

1. St. 1895, c. 469, allowing a person convicted of crime to be sentenced notwithstanding his exceptions, is constitutional.

2. The judge need not state his reasons for refusing to stay sentence or execution thereof.

3. St. 1895, c. 504, requiring sentence in certain cases to be for a term of not less than 2½ years, and not more than a maximum fixed by the court, and not longer than the longest term fixed by law for the punishment of the offense, applies to all sentences passed after the act became operative, and is constitutional.

4. On an indictment for obtaining property by false pretenses, evidence that the defendant induced another to pay him a specified sum for an interest in a certain business by false representations as to the daily receipts, and as to

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the length of time the business had been carried on at a particular store, and that the money paid to defendant did not go into the partnership funds, but was paid to him as his own, he giving a personal undertaking to put a certain sum out of his own money into the business afterwards, as occasion should require, warrants a conviction.

5. Where an indictment for obtaining property by false pretenses alleges that the defrauded party was induced thereby to give defendant a check for \$385, evidence that \$10 of the amount was for that sum in cash handed back by defendant does not constitute a variance.

6. On an indictment for obtaining property by false pretenses, the time when the fraudulent representations were made need not be proved as laid.

7. It is proper for the court to charge, in accordance with the provision of Pub. St. c. 169, § 18, cl. 3, that the neglect or refusal of the accused to testify shall not create any presumption against him.

8. The offense of obtaining property by false pretenses is not purged by the defrauded party releasing the offender from liability.

9. A prosecution for obtaining property from various persons by false pretenses is not barred by the pendency of a previous indictment in respect to one of the counts, upon the trial of which a verdict of guilty was set aside on defendant's own motion.

Exceptions from superior court, Suffolk county; Justin Dewey, Judge.

Charles E. Brown was convicted of obtaining property by false pretenses, and brings exceptions. Exceptions overruled.

M. J. Sughrue, First Asst. Dist. Atty., for the Commonwealth. R. Augustus Duggan, for defendant.

HOLMES, J. This is an indictment for obtaining property by false pretenses. The case went to the jury only on certain allegations in two counts,—the second and fifth. The allegations in the second count are of false representations to one Martin that the daily receipts of a certain business then carried on by the defendant at a certain shop "then averaged, and for some time theretofore had averaged, from twenty to twenty-five dollars," and that the defendant "had occupied said store in carrying on said business for the period of five years theretofore." It is alleged that Martin was induced by these pretenses to pay the defendant \$350 for one-half interest in the business.

The allegations in the fifth count are of false

representations to one Day that the amount of business done by the defendant in a certain shop in Boston "had been more than four hundred dollars per week," and that the defendant "had no other store than said store, except one" on Dudley street, in Boston. It is alleged that Day was induced by these pretenses to give the defendant a check of the amount and of the value of \$385 for a half interest in the business.

A great number of points are raised by the exceptions, many of them of a very flimsy character; and we shall confine our discussion to those for which the defendant has offered some reason in argument, or which seem to us important, and shall follow in the main the order adopted by his counsel.

The defendant was sentenced notwithstanding his exceptions, as required by St. 1895, c. 469. It is suggested that this statute is unconstitutional. No reason is offered for the suggestion. A statute looking in the same direction long has been in force and unquestioned. Pub. St. c. 153, § 12; Com. v. Clifford, 145 Mass. 97, 98, 13 N. E. 345, 347. See *Jacquins v. Com.*, 9 Cush. 279, 280.

The judge was right in refusing to stay the sentence, or execution of the sentence, and was not called on to state his reasons for doing so.

It is suggested, again without argument, that St. 1895, c. 504, under which the defendant was sentenced, is unconstitutional. This statute requires the sentence in certain cases to be for a term of not less than 2½ years, and not more than a maximum fixed by the court, and not longer than the longest term fixed by law for the punishment of the offense. Such a sentence is in effect a sentence for the maximum fixed by the court, unless a permit to be at liberty is issued as provided by section 2. But the form of the sentence is made to recognize and carry out a policy familiar to our legislation, and acted on heretofore without question. Pub. St. c. 222, § 20; St. 1884, c. 255, § 33; *Conlon's Case*, 148 Mass. 168, 19 N. E. 164. Such a form of sentence does not make the punishment more severe than it otherwise would have been, and we see no reason why the law should not be construed to apply to all sentences, in the cases referred to, passed after the act goes into operation. See *Jacquins v. Com.*, 9 Cush. 279; *Upham v. Raymond*, 132 Mass. 186; *Wood v. Westborough*, 140 Mass. 403, 5 N. E. 613; *Nott v. Manufacturing Co.*, 142 Mass. 479, 8 N. E. 406.

With regard to the substance of the offense, it is argued that what the defendant received became partnership funds at once, and therefore continued to belong in part to the defrauded party. *Reg. v. Watson*, 7 Cox, Cr. Cas. 364. But this was left to the jury, with directions to acquit if they found that to be the fact, as, no doubt, much of the testimony tended to show that it was. It was possible, however, on the evidence, for the jury to find that the money was paid to the defendant as his own for an interest in the firm, and

that he merely gave a personal undertaking to put a certain sum out of his own money into the business afterwards, as occasion should require. On that state of facts a conviction was warranted. This consideration disposes of the general objections to testimony on the ground that the defendant was forming a partnership, as well as of the request for a ruling that if the prosecutors afterwards treated the partnership as existing the defendant could not be convicted. The request, no doubt, was based on the suggestion as to the possible effect of rescinding the contract of partnership when the money was a contribution to capital made in *Reg. v. Watson*, 7 Cox, Cr. Cas. 364, 371, but has no application to the facts which the jury must have found under the very clear instructions of the court. On these facts it does not matter if the payment was made after the partnership was begun. The payment did not become an item in the partnership accounts for that reason, if it was not made as an advance of capital.

We may as well say in this connection that the representations are sufficient to constitute false pretenses. *Com. v. Blood*, 141 Mass. 571, 6 N. E. 769. See *Com. v. Wood*, 142 Mass. 459, 461, 8 N. E. 432, 434. It is not necessary for us to consider nicely whether the latitude allowed to sellers of chattels would apply to representations made as the inducements to enter into confidential relations with the speaker.

Next it is said that there was a variance under the fifth count, because it is alleged that Day was induced by false representations to part with a check for \$385, whereas it appeared by the evidence that \$10 of the amount was for that sum in cash handed back by the defendant. But the check was delivered as alleged, and, under the instructions of the court, the representations must have been found to have given a motive without which the transaction of which the payment was part would not have been entered into. That is enough for conviction. *Com. v. Drew*, 19 Pick. 179, 183; *People v. Haynes*, 14 Wend. 546, 555; *State v. Thatcher*, 35 N. J. Law, 445, 448. The time of the representations alleged in the second count did not have to be proved as laid. It would be overrefining to no useful purpose to say that, inasmuch as the representations referred to as a starting point to the time when they were made, therefore the time when they were made entered into the description of the offense. The representations referred to the time of speaking, whatever it might be, but went no further, and they were not changed or enlarged by an allegation as to what the time was.

No exception was taken to the instruction that the defendant was not to be prejudiced because he had not testified, and the instruction was proper. Pub. St. c. 169, § 18, cl. 3; 1 *Com. v. Harlow*, 110 Mass. 411.

¹ Pub. St. c. 169, § 18, cl. 3, declares that the neglect or refusal of the accused to testify shall not create any presumption against him.

The judge was not requested to instruct the jury not to consider the evidence on the counts which were thrown out. If he had been asked to, doubtless he would have done it. No exception was taken on the matter.

The releases to the defendant from Martin, one of the defrauded parties, did not purge the crime. *Com. v. Coe*, 115 Mass. 481, 502, 503.

A previous indictment had been found against the defendant in respect of the fraud on Day, on which a trial had been had and a verdict of guilty rendered; but the verdict had been set aside on the defendant's motion, and the indictment had been placed on file. These facts were pleaded. The pendency of this indictment is no defense. *Com. v. Drew*, 3 Cusb. 279; *Com. v. Cody*, 165 Mass. 133, 42 N. E. 575. The effect of the verdict is no greater than if it had been rendered on the fifth count now before us, and the prevailing view in such a case is that when a verdict is set aside on the prisoner's own motion, and for his benefit, he may be tried anew. *Com. v. Green*, 17 Mass. 515, 534; *State v. Blaisdell*, 59 N. H. 328; *Gannon v. People*, 127 Ill. 507, 522, 21 N. E. 525, 529; *Veatch v. State*, 60 Ind. 291, 295; *People v. Hardisson*, 61 Cal. 378; *State v. Stephens*, 13 S. C. 285; *Dubose v. State*, 13 Tex. App. 418. See *Com. v. Sholes*, 13 Allen. 554; *People v. Palmer*, 109 N. Y. 413, 17 N. E. 213.

Exceptions overruled.

(55 Ohio St. 183)

H. B. CLAFFLIN CO. et al. v. EVANS et al.
(Supreme Court of Ohio. Oct. 20, 1896.)

PARTNERSHIP—INSOLVENT FIRM—ASSIGNMENT BY MANAGING PARTNER—CONSENT OF ABSENT PARTNER—ASSIGNMENT DATES FROM DELIVERY TO PROBATE JUDGE.

1. A managing partner, intrusted with the sole charge of the business and effects of the firm, may, in case of its insolvency, make a valid assignment of its property for the benefit of its creditors, without having obtained the consent of a co-partner who is a nonresident of the state where the business was carried on, and absent therefrom. The assent of the absent partner to the assignment in such case will be presumed.

2. An assignment for the benefit of creditors takes effect, as to all persons, from the time of its delivery to the probate judge of the proper county; and it is his duty to indorse thereon the exact time of its delivery to him. *Rev. St. § 6335*. Neither the delay of the judge in making the indorsement, nor the indorsement of a date later than that of the delivery to him, though done in obedience to instructions received from the assignor, can postpone the taking effect of the assignment beyond the time of its actual delivery, or affect rights acquired thereby.

3. While the presumption is that the officer performed his duty, and the indorsement speaks the truth, it is not conclusive, but the true time of the delivery of the assignment may be shown by the parties whose interests are affected.

(Syllabus by the Court.)

Error to circuit court, Delaware county.

In the matter of the assignment of Snodgrass Bros. The case originated in the probate

court, upon an application for an order directing the assignee of the Snodgrass Bros. to distribute funds in his hands to certain creditors who were asserting priority by virtue of liens alleged to have been acquired previous to the assignment. The application was resisted by the general creditors, and an appeal taken from the judgment rendered to the court of common pleas, where a special finding was made of the facts, which, so far as they are material to an understanding of the questions upon which the case is reported, are substantially as follows: The Snodgrass Bros. was the name of a co-partnership which, prior and up to the 30th day of June, 1892, had been engaged in carrying on a commercial business in Delaware county. It had become financially embarrassed, and on that day was confessedly insolvent. The firm consisted of John F. Snodgrass, who had the actual charge of the partnership effects, and the entire management and control of the business, and Samuel Snodgrass, who was a resident of the state of California, where he was engaged in other business not connected with that of the firm, and who at no time had taken any active part in the business of the firm. John F. Snodgrass, becoming aware of the insolvency of the firm, and convinced of the certainty of immediate suspension of business, concluded to make an assignment of the effects of the partnership for the benefit of its creditors; but desired, before doing so, to create certain preferences. With that purpose in view, on the 29th day of June, 1892, he executed, in the firm name, separate promissory notes, making them payable respectively to the creditors whom he desired to prefer, for the amount of the firm's indebtedness to each creditor. These notes were dated back, so as to appear to be due, and each had attached a warrant of attorney, authorizing judgment to be taken upon it by confession in any court of record; and on the same day judgments were obtained on each of the notes in another county, upon which executions were issued to the sheriff of Delaware county, who, early on the morning of the next day (June 30, 1892), received the writs, and at 7 o'clock on that morning levied the same on the partnership property, and made return of the levies of that date. In the meantime, after the writs were received by the sheriff, but before any of the levies were made, John F. Snodgrass, without having consulted his co-partner, who was then absent from the state, executed in the name and behalf of the firm an assignment of all the partnership property to a trustee for the benefit of the firm creditors, and handed it to the probate judge of Delaware county, with instructions not to file it until after the executions should be levied by the sheriff. From the time the deed of assignment was so handed to him it continued in the custody of the probate judge, who, following the instructions he had received, did not mark it "Filed" until after the levies of the executions were made. This was done in order

that the execution creditors might have priority over the general creditors. The assignee qualified, took possession of the property, and sold it, having agreed with the execution creditors that the proceeds should stand in the place of the property, and the rights of the creditors, with respect to it, be determined on distribution. The assignment was adjudged to be valid, but the court held that it did not take effect until it was marked "Filed" by the probate judge, which, being after the levies were made, entitled the execution creditors to priority in the distribution of the fund; and, as that was insufficient to pay all of them in full, it was ordered distributed among them in proportion to the amount of their respective claims. That judgment was affirmed by the circuit court, and the H. B. Clafflin Company and others, the general creditors, who were denied participation in the fund, prosecute error in this court.

Powell & Minahan, for plaintiffs in error.
McClure & Smyser and W. A. Hall, for defendants in error.

WILLIAMS, C. J. (after stating the facts). The plaintiffs in error, it is conceded, are entitled to share in the fund for distribution by the assignee ratably with the creditors who were accorded priority by the judgment below, unless the assignment is invalid, or did not take effect until after the executions were levied. The validity of the assignment is questioned on the ground that, though executed in the name of the firm, it was so executed by one of the partners only, and without having obtained the consent of the other. That one member of an insolvent firm cannot make a valid assignment of the partnership effects to a trustee for the benefit of its creditors, against the expressed will of a co-partner, or without his assent, when he is present or accessible, was held by this court in *Holland v. Drake*, 29 Ohio St. 441. That decision is placed upon the ground that the appointment of a trustee to dispose of the effects of the firm for the benefit of its creditors is not within the contemplation of the ordinary partnership, or the usual course of its business, and therefore beyond the scope of the agency arising from the partnership relation. The contrary doctrine is maintained by high authority, and with much show of reason. It is not doubted that one partner may sell any part of the partnership property to one or more of the creditors in payment of the partnership indebtedness, or sell all of its effects to all of its creditors; and, if insufficient to satisfy their debts in full, the sale may be so made to them as to secure a pro rata division; and it is not surprising that authorities are found which strenuously maintain that the power of the partner to accomplish the same result by an assignment to a trustee to make such distribution is included in the agency resulting from the partnership relation. The dissolution of the partnership ensues not less certainly from a sale of the whole of its effects directly to

the creditors than from the transfer to a trustee for their benefit. But we are not disposed to depart from the rule laid down in *Holland v. Drake*, supra, nor are we disposed to extend it. It does not apply where the partner whose assent has not been obtained to the assignment was not accessible in the exigency which seemed to call for immediate action, nor where his authority or assent may be fairly implied from the situation of the parties, or the manner of conducting the business. In the case referred to, the partner whose assent was lacking not only resided in the city where the partnership had its place of business, but he was the active managing member of the firm, having control and management of its property and business. The circumstances were such as to repel, rather than give rise to, any inference of authority or assent by him to a final disposition of the firm effects by his co-partner, who had taken no active part in its affairs. The situation is reversed in the case we have before us. Here the partner who executed the assignment was the active managing member of the firm, having the entire charge and control of the partnership business and custody of its property; and it is plainly inferable from the permanent absence of the other partner, and his total inattention to the business, that he intended to intrust the affairs of the firm wholly to the resident partner. The absent partner, having withdrawn from participation in the conduct of the partnership affairs, and being inaccessible for consultation and advice, might reasonably expect and be held to intend that the member placed in control should not only exercise the implied powers of agency ordinarily possessed by a partner, but, in addition, should have the discretionary power in case of emergency to do what, under the circumstances, should appear to be just and proper in the disposition of the firm property. And where a commercial house so situated is overtaken by financial distress amounting to obvious insolvency, the authority of the acting partner to appropriate the property to the creditors equally, by placing it in the hands of a trustee for that purpose, may well be presumed, in the absence of express dissent by the co-partner, or of circumstances which would fairly indicate his dissent. Equality among creditors of equal merit is favored in equity, and accords with natural justice; and a disposition of the partnership assets, in case of insolvency, which secures that equality, the courts will not be eager to disturb.

The validity of an assignment of the partnership property executed by one partner in the name of the firm, under circumstances similar to those existing in the present case, was sustained in an opinion by Chief Justice Marshall in *Anderson v. Tompkins*, 1 Brock. 456, Fed. Cas. No. 365, and also by the same learned judge in *Harrison v. Sterry*, 5 Cranch, 289. And it was held in *McCullough v. Sommerville*, 8 Leigh, 415, that, "when a partner resides out of the state where the partnership business is

carried on, the managing partner in charge of the business may make a valid assignment of the firm effects for the benefit of its creditors." We find no difficulty, therefore, in sustaining this assignment, both on reason and authority, without calling in question the decision in *Holland v. Drake*, supra.

There having been a valid execution of the assignment, the question is presented, when did it take effect so as to vest the title to the property in the assignee? This question is answered by the statute, which provides that every assignment for the benefit of creditors shall take effect from the time of its delivery to the probate judge of the proper county, and such delivery may be made by the assignor to the probate judge, "either before or after its delivery to the assignee;" and the probate judge shall indorse thereon the exact time of its delivery and "note the filing on the journal of the court." Rev. St. § 6335. The instrument of assignment in question was delivered to the probate judge of Delaware county when it was handed to him by the assignor on the morning of the 30th day of June, 1892. True, it was so handed to him, as shown by the findings of fact, with instructions not to indorse upon it the exact time of delivery, but to make the date of its delivery appear to be subsequent to the levies of the executions, and thus enable the execution creditors to secure a lien giving them priority over the other creditors. The assignment was nevertheless delivered to the probate judge when it was placed in his possession, and there was no condition attached to the delivery. It was the purpose and intention of the assignor that the instrument should become operative as an assignment, and it thereafter remained in the custody of the judge. There was no other delivery of it. The assignee qualified under it, and has proceeded in the execution of the trust. By the positive terms of the statute, the assignment became effective from the time of such actual delivery, and the observance by the probate judge of the assignor's instructions to delay making the indorsement of the filing, and so make it as to show its filing of a date later than its delivery, could not defeat or postpone its operation, or change the legal consequences which resulted from its delivery. Upon receiving the instrument, the probate judge had a plain statutory and official duty to perform, which was to indorse thereon the exact time it was so received, and make a corresponding entry on the journal of the court. The presumption, of course, is that duty was performed, and the indorsement speaks the truth. The indorsement, however, is but *prima facie* evidence of the time of the filing, and the true date of the delivery of the instrument may be shown. It is established by the finding of the trial court that the deed of assignment in question was in fact delivered to the probate judge before the executions were levied, but was held by him, and not indorsed "Filed," until after the levies were made, in obedience to the instructions of the assignor;

from which that court concluded—erroneously, as we think—that, as a matter of law, there was not a delivery until the date of the filing was so indorsed thereon. It seems clear that any such understanding or arrangement must be wholly ineffectual to displace or interfere with rights which accrued upon the delivery of the assignment. The judgment below must be reversed, the application of the defendants in error overruled, and the cause remanded to the probate court for further proceedings. Judgment accordingly.

(53 Ohio St. 311)

FRAME, Auditor, et al. v. STATE.
(Supreme Court of Ohio. June 25, 1895.)

FINES UNDER DOW LAW—DISTRIBUTION.

In counties other than Hamilton, having a county infirmary, revenues and fines under the Dow law because of business carried on in townships outside of a municipal corporation should be distributed, to the state two-tenths, and to the county fund the remainder. Minshall, C. J., dissenting.

Error to circuit court, Athens county.

Action by the state against Frame, auditor, and others. From the judgment, defendants bring error. Reversed.

J. P. Woods, for plaintiffs in error. J. M. McGillivroy and W. E. Peters, for the State.

PER CURIAM. In counties other than Hamilton, having a county infirmary, the revenues and fines resulting under what is known as the "Dow Law" on account of business carried on in every township outside of a municipal corporation should be distributed as follows: To the state two-tenths thereof, and to the county poor fund all of the remainder. Judgment reversed.

MINSHALL, C. J., dissents.

(53 Ohio St. 312)

CITY OF CINCINNATI v. STEADMAN.
(Supreme Court of Ohio. June 25, 1895.)

APPEALABLE ORDER.

The allowance of a *nunc pro tunc* order showing an exception to the overruling of a motion for a new trial is not a final order and appealable.

Error to circuit court, Hamilton county.

Action between the city of Cincinnati and one Steadman, trustee. From the judgment the city of Cincinnati brings error. Dismissed.

Frederick Hertenstein, Corp. Counsel, for plaintiff in error. Healy & Brannan, for defendant in error.

PER CURIAM. The action of the court allowing a *nunc pro tunc* order showing that an exception was taken to the overruling of a motion for a new trial cannot be reviewed in a proceeding instituted simply to reverse such order. It is not a final order. The error, if any, is of no consequence, unless a proceeding

is commenced to reverse the final judgment in the action, and in such case the defendant in error may insist on the affirmance of the judgment on the ground that it is shown by the bill of exceptions in the record that the exception was in fact taken to the overruling of a motion for a new trial. For this reason the judgment of the circuit court is reversed, and the petition in that court dismissed.

(55 Ohio St. 146)

KELCH v. STATE.

(Supreme Court of Ohio. Oct. 20, 1896.)

MURDER—DEFENSE OF INSANITY—PREPONDERANCE OF EVIDENCE—INSTRUCTIONS.

1. Where, in a trial for murder, the accused sets up his insanity as a defense, he is bound to establish it by a preponderance of the evidence, but should be held to no higher degree of proof.

2. The proof should be deemed to preponderate in favor of this, as of any other, disputed fact, whenever its existence is made probable upon a full and fair consideration of all the evidence adduced for and against it.

3. An instruction given to the jury in such case, to the effect that the evidence introduced to establish insanity is not "sufficient if it merely show it to have been probable. The proof must be such as to overcome the legal presumption of sanity; it must satisfy you he is insane,"—requires of the defendant more than a preponderance of the evidence to maintain this defense, and is, therefore, erroneous.

(Syllabus by the Court.)

Error to circuit court, Cuyahoga county.

Bushrod Kelch was convicted of murder, and brings error. Reversed.

Foran & Dawley, for plaintiff in error. F. L. Strimple, for the State.

BRADBURY, J. The plaintiff in error, Bushrod Kelch, in December, 1895, was indicted in the county of Cuyahoga for murder in the first degree for killing a woman who had been his wife, but who, shortly before the homicide, had procured a divorce from him. In February, 1896, he was placed on trial in the court of common pleas of said county for such offense, and in March following was convicted of murder in the first degree, and adjudged to suffer death. Upon proceeding in error, this judgment was affirmed by the circuit court, whereupon the cause was brought to this court for review.

That the plaintiff in error shot and killed the deceased was not denied or contested upon the trial; the chief contention being over the mental condition of the accused at the time the homicide was committed. Counsel for him contended: First, that the evidence of the state did not sufficiently establish deliberation or premeditation; and, second, that his evidence was sufficient to show insanity, superinduced by the excessive use of alcoholic stimulants. The question of the burden of proof, where insanity is set up as a defense in criminal causes, has been fruitful of discussion, and has occupied the attention of the ablest criminal jurists of this country and of England. The contention has not so much concerned the

degree of proof as upon whom the burden rested. Some authorities entitled to great consideration have steadily held that this burden rested upon the state; that, while the presumption of sanity was sufficient to support this burden where the evidence did not suggest mental alienation, yet, if the defense was made, the state was bound to establish sanity beyond a reasonable doubt. This view was founded upon the obligation which rests upon the state to establish beyond a reasonable doubt every fact necessary to create in the defendant criminal liability. Criminal intent being one of such facts, it was included within the general obligation above stated; and to establish this criminal intent a mental condition capable of entertaining it must be established. This course of reasoning would render immaterial the question whether the doubt of sanity arose upon the evidence of the state, or of the defendant, or upon that of both the state and the defendant; the doubt, however arising, being available by the defendant. This view of the question finds support in numerous well-considered cases, among which may be cited: *Hopps v. People*, 31 Ill. 385; *Chase v. People*, 40 Ill. 352; *State v. Crawford*, 11 Kan. 32; *People v. Garbutt*, 17 Mich. 9; *Cunningham v. State*, 56 Miss. 269; *Bradley v. State*, 31 Ind. 492; *McDougal v. State*, 88 Ind. 24; *Guettig v. State*, 66 Ind. 94; *Wright v. People*, 4 Neb. 407; *Ballard v. State* (Neb.) 28 N. W. 271; *State v. Pike*, 49 N. H. 399; *State v. Bartlett*, 43 N. H. 224; *State v. Jones*, 50 N. H. 369; *People v. McCann*, 16 N. Y. 58; *O'Connell v. People*, 87 N. Y. 376; *Dove v. State*, 3 Heisk. 348; *State v. Patterson*, 45 Vt. 308. The logical consistency of this view of the question is its chief support. In the practical administration of criminal law, however, experience has found much to commend in that opposite view which treats the defense of insanity as independent and affirmative, and which, consequently, casts upon the accused who asserts it the burden of sustaining it by evidence sufficient to overcome the natural presumption of sanity. Among the cases that sustain this side of the contention may be cited: *State v. Jones*, 64 Iowa, 349, 17 N. W. 911, and 20 N. W. 40; *Ford v. State* (Ala.) 5 Or. Law Mag. 32, *State v. Lawrence*, 57 Me. 574; *Com. v. Eddy*, 7 Gray, 583; *McKenzie v. State*, 26 Ark. 334; *Cavaness v. State*, 43 Ark. 331; *People v. Bell*, 49 Cal. 485; *Dejarrette v. Com.*, 75 Va. 867; *Webb v. State*, 9 Tex. App. 490; *King v. State*, Id. 515; *Coyle v. Com.*, 100 Pa. St. 573; *Lynch v. Com.*, 77 Pa. St. 205; *State v. Redemeler*, 71 Mo. 173; *State v. Gut*, 13 Minn. 341 (Gil. 315); *State v. McCoy*, 34 Mo. 531. This doctrine has prevailed in Ohio from an early period in its judicial annals. *Clark v. State*, 12 Ohio, 483; *Bond v. State*, 23 Ohio St. 349; *Bergin v. State*, 31 Ohio St. 111; *Leoffner v. State*, 10 Ohio St. 598. This being the established doctrine of this state, the burden of proving his insanity rested on the plaintiff in error. If this burden should be sustained, the law ex-

onerates him from criminal responsibility for his act. It is apparent, therefore, that to him it was of prime importance that an accurate measure of this burden should be given to the jury. If the charge of the court, in this respect, imposed on him a greater burden than the law prescribes, it contained error prejudicial to this defense.

In most of the cases relating to the burden of proof of insanity in criminal causes the contention was confined to the question of where it rested,—whether on the state or on the defendant,—and the quantum or degree of proof, where made to rest on defendant, received little, if any, consideration, either by counsel or the court; and language was sometimes employed by the court which seemed to require of the defendant, to establish his insanity, more than a preponderance of the evidence. In some of the cases, however, the question of the quantum of proof where the burden was placed on the accused came directly before the court. Among them is the case of *Coyle v. Com.*, 100 Pa. St. 573, where it was held that a charge to the jury which required of the defendant "clearly preponderating evidence" instead of "fairly preponderative evidence" of insanity, was error. In *Com. v. Rogers*, 7 Metc. (Mass.) 500, in trial for murder, Shaw, C. J., presiding, the jury, after receiving the charge of the court, and consulting several hours, came into court for instructions respecting the degree of proof requisite to establish insanity, and were instructed that, "if the preponderance of the evidence was in favor of insanity of the prisoner, the jury would be authorized to find him insane." In *Boswell v. State*, the supreme court of Alabama laid down the rule as follows: "We hold, then, that insanity is a defense which must be proved to the satisfaction of the jury by that measure of proof which is required in civil causes." 63 Ala. 326. In *State v. Jones*, 64 Iowa, 350, 17 N. W. 911, and 20 N. W. 470, the charge was murder in the first degree. The supreme court held that: "where one charged with murder relies upon his insanity as a defense, the burden is on him to establish by a preponderance of the evidence that at the time of the killing he was in such a state of insanity as not to be accountable for the act; but an instruction that, if the evidence goes no further than to show that such a state of mind was merely probable, it was not sufficient, was erroneous, because its effect was to require more than a mere preponderance of the evidence to establish the defense." See *People v. Bell*, 49 Cal. 485-488. In *Bond v. State*, 23 Ohio St. 349, it is held: "The burden of proof to establish the defense of insanity in a criminal case rests upon the defendant, but a bare preponderance of testimony is all that is necessary for that purpose." This rule is reasserted in *Bergin v. State*, 31 Ohio St. 111, a case, like the one under consideration, of murder in the first degree: *Leoffner v. State*, 10 Ohio St. 598. Self-defense, in Ohio, as well as insanity, is regarded as affirmative defense. In *Silvus v. State*, 22 Ohio St. 90, and *Weaver*

v. State, 24 Ohio St. 584,—both cases where self-defense was relied upon by the accused for justification,—this court held that the defense should be shown by preponderating evidence. These cases relating to the burden and quantum of evidence required to establish a plea of self-defense are, of course, only material as tending to show the steadiness with which this court has held to the rule that a preponderance of the evidence is sufficient to sustain an affirmative defense in a criminal cause.

We come now to the question whether the instructions given by the learned judge of the court of common pleas, prescribing the quantum of evidence required to establish the defense of insanity, imposed on the plaintiff in error a higher degree of proof than the settled doctrine of the state imposed. After the learned judge had stated to the jury the claim of the plaintiff in error respecting his mental condition at the time of the homicide, he proceeded to prescribe the measure of proof requisite to maintain such claim, as follows: "In the first place, the law presumes every person who has reached the age of discretion to be of sufficient capacity to be responsible for crime; and therefore the burden of establishing the defense of insanity of the accused affirmatively to the satisfaction of the jury rests upon the defendant. It is not required, however, that this defense be established beyond a reasonable doubt; but it is sufficient if the jury is reasonably satisfied by the weight or preponderance of the evidence that the accused was insane at the time of commission of the act." This language extended the obligation resting on the accused to the extreme limits of the rule prescribed by the former decisions of this court, but we cannot say that it clearly went beyond them; and therefore, if it had halted there, error would not have intervened. The learned judge, however, after stating to the jury that the character and extent of mental aberration must be shown to exonerate the accused from criminal responsibility, returned to the subject of the quantum of evidence necessary to establish that mental state, and instructed the jury as follows: "It is not enough, I say to you, that the proof barely show that such a state of mind was possible; nor is it sufficient if it merely show it to have been probable. The proof must be such as to overcome the legal presumption of sanity; it must satisfy you that he was not sane. Again, I say to you that, if the proof satisfy you of his insanity at the time of the committing of the act, though such defenses are not uncommon in the law, yet it must be regarded by you as a full and complete humane defense when satisfactorily established. If not satisfactorily established, then it should not avail the prisoner at the bar as a pretext or means of escaping punishment imposed by law." The quantum of evidence to establish insanity made necessary by this instruction is substantially greater than a preponderance. It is not sufficient, according to this instruction, that the fact of insanity be made probable; some-

thing more than that is required; the jury must be "satisfied" that it existed. To satisfy the mind, according to the common notion of mankind, is to free it from doubt, to set it at rest. This is the primary meaning of the word, according to all the lexicographers, when used in this connection. To accomplish this result—to "satisfy" a body of men of the truth of a disputed fact—requires much more than a preponderance of the evidence. Clear and convincing evidence must be adduced in its favor. Evidence of this potency is rarely attainable in cases where insanity is contested. There must be grounds to assert insanity, founded upon some peculiar conduct, natural or feigned, of the party, or the claim will not be made. There also must be conduct consistent with mental soundness, or the claim will be conceded. Where a long course of conduct is established, or a large number of mental or physical acts of a party are adduced, and parts of this conduct and some of the acts tend to establish mental aberration, while the others consist with mental soundness, the whole evidence might not satisfy a jury that the mind of the party was disordered to the extent of rendering him criminally irresponsible for his acts; and yet might preponderate upon that side sufficiently to engender a belief that such mental condition was probable,—that is, likely,—or supported by evidence sufficient to incline the mind to that belief, but which leaves some room for doubt. Webster.

Doubtless, insanity is a defense that may be feigned, and frequently is, where no other defense is available; but because artful criminals may adopt it as a last resort is not a sufficient reason to impose upon the unfortunate, in whose behalf this humane defense is honestly interposed, a higher degree of proof than intrinsically belongs to it. The remedy for this mischief is a searching analysis by counsel, court, and jury of the conduct of the party wherever there is reason to suspect that the insanity is feigned. The learned judge may have been misled as to the quantum requisite to establish the defense of insanity in a criminal case by a note found at the end of the case of *Clark v. State*, 12 Ohio, 483, which purports to give the charge of Judge Birchard, who presided at the trial in the court of common pleas. The language imputed to Judge Birchard by that note was disapproved by the circuit court of the Second circuit in a well-considered case reported by Judge Shauck, now a member of this court. *Sharkey v. State*, 4 Ohio Cir. Ct. R. 101. By what authority that language is ascribed to Judge Birchard does not appear. If such language was employed by that learned judge, it was at a period in our judicial history before the question of the burden of proof in such case had been finally settled. In the charge referred to Judge Birchard explicitly laid down the rule, still adhered to by this court, that the burden of proof rested on the accused to establish his insanity. Nothing appears in the case, however, to show that the degree of proof neces-

sary to sustain this burden was discussed by counsel or specially considered by this court. Since then, in the case of *Bond v. State*, 23 Ohio St. 349, this court held that a bare preponderance of the evidence was sufficient to establish this defense. This rule was adhered to in *Bergin v. State*, 31 Ohio St. 111. The original contention, as we have seen, respected the party upon whom the burden rested. This court adopted the view of this question most unfavorable to the accused, by casting upon him the burden of proving his insanity, but we do not think this burden should be further increased by requiring of him more than a preponderance of the evidence. As the instructions given to the jury by the learned judge who presided at the trial in the court of common pleas prescribed more than this, it was erroneous in this respect.

Other questions are raised by the record and discussed by counsel, but we think none of them contain any substantial error. Judgment reversed.

(150 N. Y. 94)

PEOPLE ex rel. ATTORNEY GENERAL v.
LIFE & RESERVE ASS'N OF
BUFFALO.

(Court of Appeals of New York. Oct. 6, 1896.)

CO-OPERATIVE LIFE INSURANCE—RESERVE FUNDS.

1. A co-operative life insurance company issued "life-reserve" and "life" certificates. A reserve fund was created by assessments on all holders of reserve certificates only, and a death fund by equal assessments on all members, and by transferring from the reserve fund not less than the proceeds of one death assessment of the maximum death claim. The constitution provided that no person holding a life certificate should in any manner derive any benefit from the reserve fund, but such fund should be for persons holding life-reserve certificates only, and for the exclusive benefit of the old members, and to make the association sound, thereby guaranteeing the payment of every member's certificate at death to the maximum limit named therein. *Held*, that no portion of the reserve fund could be used in payment of losses arising from the death of members holding life certificates. 36 N. Y. Supp. 1059, reversed.

2. On the insolvency and dissolution of such company, such a portion of the reserve fund as is necessary for that purpose should be appropriated for the payment of death claims of members holding reserve certificates, instead of distributing the whole fund pro rata among all the holders of such certificates.

3. The constitution of such company also provided that a portion of the reserve fund should be set apart, and an interest bearing bond issued for same to members, at the end of each four years; the principal of the first bond to be available six years from its date, and all others four years from date, towards paying future dues and assessments. *Held*, that persons who held bonds issued under their reserve certificates, which had not yet become available for payment of assessments, were not entitled to receive from the fund the amount of such bonds in addition to the amount of their certificates.

Bartlett and Haight, JJ., dissenting.

Appeal from supreme court, general term, Fifth department.

Proceeding by the attorney general of the state of New York to dissolve the Life & Reserve Association of Buffalo, N. Y., and to

distribute its assets. A receiver was appointed, and questions in controversy between certain claimants were tried by a referee. From an order of the general term (36 N. Y. Supp. 1059) modifying an order on referee's findings, the receiver and other claimants appeal. Reversed.

The Buffalo Mutual Life & Reserve Association was incorporated in February, 1883, under the provisions of chapter 267 of the Laws of 1875. It commenced and continued business under the provisions of that statute until February, 1886, when it was reorganized under chapter 175 of the Laws of 1883 as the Life & Reserve Association of Buffalo, N. Y. Under the latter name it continued business until the 23d day of September, 1892, when this action was commenced. A judgment dissolving the association was entered therein on the 27th day of December, 1892. An order winding up its affairs, and for the distribution of its assets to and among its members and other persons entitled thereto, was granted upon the same day. Herman Waterman was duly appointed first as temporary receiver, and subsequently as permanent receiver, of such corporation. The order or judgment of dissolution also contained a provision appointing Hon. Henry F. Allen referee to take proof of the condition of the affairs of the corporation, and to ascertain to whom the assets of the association should be paid. The assets of the company at the time of its dissolution amounted in the aggregate to \$176,816.22, some portion of which was uncollectible. At the time of the dissolution the members of the association holding certificates numbered 4,600, of which 3,000 were members of the reserve class, and held life-reserve certificates, and the members of the association holding life certificates numbered 1,000. The general and outside indebtedness of the association amounted to about \$5,000. The death claims in the reserve class unpaid at the commencement of this action amounted to \$23,450, while the death claims unpaid at that time based upon life certificates were \$25,500. When the receiver took possession of the property of the corporation, it was ascertained that \$32,833.94 of the reserve fund was not accounted for on the books of the association, that \$3,906.05 had been lost in real-estate investments, and that \$36,000 of this fund had been used in paying death claims against the association; thus making a total of \$72,739.99 of the reserve fund which had not been held exclusively for persons holding life-reserve certificates. The assets on hand were not equal to the amount of the reserve fund which had been collected, and its accumulations. The death fund was overdrawn, and the safety fund had been exhausted. Substantially all the moneys on hand for distribution belonged to the reserve fund, and had been contributed by the reserve members of the association. Before the commencement of this action, and in December, 1886, Gilmore D. Royce became a member of

the association, and it issued to him a certificate for \$1,000 in the reserve class, making Ella Royce the beneficiary therein. Gilmore D. Royce died in February, 1892, while a member of the association in good standing. Thereafter Ella Royce presented a claim against the association for the amount named in such certificate. It was submitted upon proper proofs to the referee, who disallowed it. To that determination she filed exceptions, which were heard at a special term of the supreme court, May 7, 1895. The court sustained the exceptions, held that the claimant had an equitable lien upon the reserve fund, and directed her claim, with interest, to be paid therefrom. The appellant Frank Spooner is the beneficiary named in a certificate in the reserve class issued to his wife for \$1,000. She died August 23, 1892, while a member in good standing. The matters affecting his claim are the same as those existing in the case of Ella Royce. The appellant Ellen Dwyer is a beneficiary under a life certificate issued to John Dwyer, who died prior to the commencement of this action, and at the time of his death was a member in good standing. The amount of his certificate was \$2,000. The claim was disallowed by the referee, and the claimant thereupon filed exceptions to his report, which the special term overruled.

The special term in effect held (1) that death claims arising on life certificates were not entitled to be paid out of the reserve fund; (2) that death claims arising upon life-reserve certificates were entitled to be paid therefrom; (3) that after payment of the general debts existing at the time of its dissolution, the expenses of winding up its affairs, and the death claims existing against the association arising on life-reserve certificates issued to members who died before the commencement of this action, the remainder of the reserve fund should be distributed to the living members of the life-reserve class in good standing, and to the representatives of members of that class who have died since the commencement of this action, in the proportion which the amount contributed by each bears to the whole amount of the fund; and (4) that all moneys in the hands of the receiver derived from the assessments levied by the association in September, 1892, should be returned to such members respectively. The court thereupon ordered that from the moneys in his hands the receiver pay and distribute to the claimants whose claims have been established the sum of \$55,000 as follows: (1) That he pay each and all of the claims allowed for money paid the association by claimants which came to the hands of the receiver from the assessment of its members in September, 1892; (2) that out of the remainder he pay each and all claims of general creditors in full as established by the report of the referee; (3) that he reserve in his hands \$28,249 for the payment of death claims upon life-reserve certificates until the question whether they should

be paid in full was finally determined; and (4) that the residue of the sum of \$55,000 be paid to the executors, administrators, or beneficiaries of members of the association whose claims as holders of life-reserve certificates have been allowed. From the order of the special term sustaining their exceptions, and adjudging that Royce and Spooner have an equitable lien on the reserve fund of the association, and that their claims should be paid therefrom, the receiver appealed to the general term, and Ellen Dwyer also appealed from the order of the special term overruling her exceptions to the report of the referee. By stipulation of all the parties, and with the consent of the court, these appeals were heard and determined by the general term as one. The order of the special term was modified by the general term, and that court directed that \$10,000 of the reserve fund should be paid to and distributed among the holders of the death and disability claims of both classes which existed at the time of the commencement of this action, and that the residue of the reserve fund should be distributed to and among the members of the reserve class, whether living or dead at the time of the commencement of this action, without any diminution by reason of having shared in said \$10,000. From so much of the order of the general term as directed that only \$10,000 should be distributed among the holders of death claims, and that the remainder be distributed among the holders of life-reserve certificates, the appellants Royce, Spooner, and Dwyer appealed to this court. The receiver appealed to this court from that part of the order which directed that \$10,000, with interest, should be transferred from the reserve fund to the death fund, and held that it was properly applicable to the payment of the valid death and disability claims made against the association arising either upon life certificates or life-reserve certificates.

The constitution and by-laws of the association, so far as material to the questions involved, are as follows:

"Object. The object of the Life and Reserve Association is to combine the efforts of all its members with the view to furnish life indemnity of pecuniary benefits to the widows, orphans, heirs, or relatives by consanguinity or affinity, devisees or legatees of deceased members, or permanent disability indemnity to members thereof; and, further, to collect and accumulate funds to be held in trust, and to be used by the association and its members in reducing future dues and assessments, and for such other purposes as are hereinafter provided for under the constitution, by-laws, and amendments thereto." Article 1, § 3. The constitution then provides that in no case shall the amount of certificates exceed \$10,000 for males and \$5,000 for females. Article 2, § 2. Section 3, art. 2, provides: "Certificates. This association shall issue two kinds or forms of certificates, one of which shall be known as a 'life certificate,' and the other as a 'life-reserve

certificate.' No person holding a life certificate shall be entitled to, or shall in any manner derive, any benefit from the reserve fund, but such fund shall be and is for persons holding life-reserve certificates only." It then states when life certificates shall issue, when life-reserve certificates may be issued, and the amount of assessments upon each, the life-reserve certificates being assessable to twice the amount of the life certificates. It then declares: "After four years from the date of the life-reserve certificates, and at the end of each period of four years thereafter, during the continuance of the certificates, commencing with the first day of January first preceding the date of such certificates, a bond will be issued (bearing interest) for the reserve fund, set apart according to article 6; said bond and interest being available to pay future dues and assessments at such periods from their date as set forth in article 6." Section 3 of article 3, which relates to assessments, contains the following: "There shall be accumulated in the death fund a permanent sum from surplus of death assessments after the payment of claims assessed for, or from transferring from the reserve fund, of not less than the proceeds of one death assessment of the maximum death claim, which shall be invested in such security as the laws of the state permit insurance companies to invest their capital in, or deposited to the credit of the association in a bank or trust company, and which, together, with all interest and accretions thereto, shall be held in trust, unimpaired, for the benefit of policy or certificate holders, for the purpose of paying death or disability claims only. Should this sum, or any portion of it, be withdrawn for the purpose of said trust, the same shall be replaced as originally constituted." Section 5 of article 3, which is entitled, "Death Fund," provides: "Whenever the death fund of the association shall be insufficient to pay and satisfy the deaths occurring in any one year after having made twelve times the above assessment schedule (or collected a sum equal to that amount in six bimonthly calls), or when the death rate of the association exceeds the American Experience Tables of Mortality, if such an excess should ever occur, or nine-tenths of one per cent., the executive committee may make good any deficiency in the death fund out of the safety fund, as provided by section 12, article 3, of the by-laws. There shall be nothing in this constitution and by-laws, however, that may be construed as prohibiting the transfer of money from the safety fund to the death fund for the purpose of paying death claims on or before said safety fund shall exceed its limit." Article 4, § 2: "Death Claims. Payment of all death claims shall be made within ninety days from the date of the bimonthly assessment first ensuing after the approval of the said claim." Article 4, § 6: "Payments of Certificates. When a death claim becomes due and payable, the maximum amount may be paid from the death fund as

the certificates and the constitution and by-laws may prescribe, or such part thereof, as an assessment of once the schedule, at the time said death occurred, will pay the death fund."

Article 6 of the constitution is entitled "Reserve Fund," and, so far as it relates to the questions to be considered, reads:

"Section 1. How Created. All members holding life-reserve certificates will pay a reserve assessment, as shown by graded assessment table (article 3, section 4, of the constitution), which net reserve assessment * * * will be set aside as a reserve fund, which, together with interest earnings of said fund, shall be securely invested in United States bonds, or mortgages on unincumbered real estate, or other first-class, interest bearing securities, in the name and by the direction of the association. * * * This reserve fund, together with its earnings, is for the exclusive benefit, and to reward the fidelity, of the old and persistent members, and to make the association sound and permanent, thereby guarantying the payment of every member's certificate, at death, to the maximum limit named therein.

"Sec. 2. Disposition of the Reserve Fund. A portion of the reserve fund mentioned in the preceding section will be set apart, and an interest bearing bond issued for same to members at the end of each period of four years. The principal of the first bond shall be available six years from its date, and all other bonds four years from date, towards paying future dues and assessments under the certificates on which said bonds were issued. The interest on all bonds shall be applicable, as it accrues and becomes available, for the payment of assessments; and should said certificate of membership, on which said bonds were issued, cease by death, the amount of principal and interest of said bonds which is available to pay assessments, and not thus used, shall be paid beneficiaries in addition to the amount of certificates of membership; but should certificates of membership under which said bonds were issued cease, by failure of the member to keep up his dues or assessments on said certificates as provided for in the constitution, any portion of the said principal or interest not thus used, or any portion of the bonds at death not available to pay assessment, shall be applied to increase the bonds issued at the next quadrennial apportionment to members of the association.

"Sec. 3. Contingent Liability and Absolute Surplus. The association shall on the first business day of January in each year, beginning with the year 1887, set apart from the reserve fund a sum, and cause the same to be divided among the members who shall hold life-reserve certificates, and who are at the time of four (4) and every multiple of four (4) years' standing in the association, and issue to them bonds representing their proportion. This sum shall be taken and considered as a contingent liability upon the association. The amount to be set apart in any one year shall

not, in the aggregate, exceed a dividend of one hundred per cent. of the amount paid in assessments and dues during the four years by members entitled to receive bonds, nor shall any individual member be entitled to bonds exceeding in amount that which has been paid by such member in total assessments and dues during the four years. The reserve fund which has not been set apart, or for which no bonds have been issued, shall be held by the association as absolutely and strictly a surplus fund, and no member of the association shall have any claim whatever upon this fund, and it shall be regarded in equity and in law as a surplus fund."

The words, "and to make the association sound and permanent, thereby guarantying the payment of every member's certificate at death, to the maximum limit named therein," were added to section 1 by amendment in 1888.

In article 3 of the by-laws of the association is the following: "§ 12. Safety Fund. The stability and permanence of the association are further guarded, in order to prevent the possibility of its ever becoming unsound, by setting apart eighteen per cent. of the net receipts from death assessments, * * * together with the admission fees and dues received, into a fund to be known as the 'Safety Fund.' The board of directors are hereby prohibited from using any money received for death or reserve funds for the purpose of paying salaries or running expenses of the association, except from safety fund, from which the actual expenses of the association shall be paid. Such safety fund in excess of thirty thousand dollars shall be transferred to the death fund whenever the death rate of the association exceeds the American Experience Tables of Mortality."

The certificates which were issued to reserve members provided that the association would pay from the death fund the amount of the certificate, or, in case of total, permanent disability for life, half that amount. It also contained this provision: "The death fund of the association is set apart from assessments, for the exclusive and sole purpose of paying claims by death or total disability. * * * The reserve fund shall be securely invested in United States bonds, mortgages on unincumbered real estate, or other first-class, interest bearing securities, for the exclusive benefit of members of the association. At each period of four years of continuous membership of this certificate, a bond will be issued (bearing interest) for an equitable proportion of the reserve fund. Interest on said bond may be used annually from its date towards paying future assessments, and the principal of said bond, when available, towards paying future assessments under this certificate, or, in case of death, paid to the beneficiary, together with this certificate of membership. Thus the interest is available after four years, and the principal after ten years, to pay future assessments. This certificate is issued and accepted

subject to all the provisions and stipulations contained in the constitution and by-laws of this association, which are hereby made a part of this certificate, with any amendments that may hereafter be made thereto." The certificate issued to life members was similar to that issued to reserve members, and contained the provision, "The death fund of the association is set apart from assessments, for the exclusive and sole purpose of paying claims by death or total disability," but contained none of the other provisions quoted. Nor did it in any way refer to the reserve fund. Upon the notice of assessment used by the association was indorsed an explanation as to the reserve fund, in which it is stated that the reserve fund, with its earnings, "is for the exclusive benefit and to reward the fidelity of the old and persistent members, and to make the association sound and permanent, thereby guarantying the payment of every member's certificate at death, to the maximum limit named therein."

William E. Prentice, for appellants Royce, Spooner, and Dwyer. Hamilton Ward, Jr., for respondent Dwyer. John Cunneen, for receiver.

MARTIN, J. (after stating the facts). Several questions presented on the trial before the referee are not before us, as the parties have not appealed from the portion of the order which determined them. The most important question we are called upon to decide is whether the general term properly held that \$10,000 of the reserve fund should be applied to the payment pro rata of death claims arising under both kinds of certificates, where the claim existed before the commencement of this action; that death claims under reserve certificates should not be paid in full; and that the remainder of the fund, after deducting \$10,000, should be distributed among the holders of life-reserve certificates. As the certificates under which the parties claim an interest in the fund provide that the constitution and by-laws of the association shall form a part of the contract, it follows that in determining the proper disposition of the fund, the liability of the association, and the rights of the parties, reference must be had to the provisions of the certificate, and to the constitution and by-laws as they existed at the time of the commencement of this action. Taken together, they constitute the contract between the parties, and the standard by which their rights and liabilities are to be determined, and they are to be adjusted as of the date of the commencement of the action. In *re Equitable Reserve Fund Life Ass'n*, 131 N. Y. 354, 369, 30 N. E. 114. Section 21 of chapter 175 of the Laws of 1883, as amended by section 5 of chapter 285 of the Laws of 1887, declares, "Nor shall anything in this act prevent the creation of a reserve fund by any corporation, association or society transacting the business of life or casualty insurance, or both, upon the

co-operative or assessment plan, which funds or its accretions, or both, are to be used for the payment of assessments or death losses, or for benefits in case of physical disability only." It was under the provisions of this statute that the defendant was reincorporated, and its constitution and by-laws created. The portion of the statute quoted contains the only authority the association possessed to create a reserve fund, and states the purposes for which such a fund may be created. It authorizes its creation for the payment of assessments, or for the payment of death losses or disability benefits. Under the statute those are the only purposes to which such a fund could properly be devoted. In its constitution the objects of the association, so far as they relate to the reserve fund, are stated to be to collect and accumulate a fund to be held in trust and used by the association and its members in reducing future dues and assessments, and for such other purposes as are thereafter provided for by the constitution, by-laws, and amendments thereto. Notwithstanding this general statement as to its purpose, it is manifest that, while a fund thus accumulated might be devoted to the reduction of future dues and assessments, yet under the statute the association had no authority to devote it to any other purpose than that, except to pay death losses or disability benefits. While the statute, in its reference to death losses, is general and unlimited, yet it could not have been the intention of the legislature to permit such associations to accumulate a reserve fund wholly from the contributions of one class of members, and then devote it to the payment of death losses of another class who in no way contributed to it. To attribute to the legislature such an intent would be to impeach its integrity and fairness of purpose. We think the statute should not be construed so as to permit any such unjust and absurd result.

One of the questions presented is whether, under the statute and contract between the parties, losses arising by the death of persons holding life certificates can be properly paid from the reserve fund thus accumulated. Obviously, the reserve fund was intended to be used only for the benefit of those holding reserve certificates. To place that question beyond cavil or peradventure, the constitution expressly provides that no person holding a life certificate shall be entitled to, or shall in any manner derive, any benefit from the reserve fund, but such fund shall be and is for persons holding life-reserve certificates only. No plainer, more definite, or positive statement as to the members who were to be benefited by the accumulation of that fund could have been made. In the most decisive and emphatic language it is declared that the holders of life certificates shall derive no benefit from the reserve fund. Thus it not only awards to the holders of reserve certificates all benefits to be derived from such fund, but positively forbids life members participating therein. Un-

der the constitution the association was authorized to issue two distinct and different kinds of certificates,—one, a mere life certificate; the other, a life-reserve certificate. The difference between them is marked, and seems well-nigh controlling as to the rights of the holders of life certificates to share in the fund in the hands of the receiver. This difference is that the amount paid by a life member is only one-half that required to be paid by a reserve member, and, in consideration of the payment of such increased assessments, the increase is to be held by the association as a reserve fund for the sole benefit of the reserve members. Indeed, the dominant purpose of the contract was to provide for two kinds of certificates, and that the holders who paid increased assessments should alone share in the benefit of the reserve fund. Nothing can be plainer than this. Therefore, while examining the other provisions of the contract, it is necessary that this purpose should be borne in mind. Section 3 of article 3 of the constitution provides that there shall be accumulated in the death fund a permanent sum from the surplus of the death assessments, or from transferring from the reserve fund not less than the proceeds of one death assessment of the maximum death claim. It was upon the latter provision that the learned general term based its decision directing \$10,000 to be distributed among the holders of death claims. If construed alone, and entirely independent of the other provisions of the constitution, it may be that the effect given to that provision by the general term would be proper. The language is general, and, standing alone, sufficiently broad to sustain the contention that a portion of the reserve fund might be devoted to the payment of death losses, even under life certificates. But, when read in connection with those provisions of the constitution which in absolute and unqualified terms declare that no person holding a life certificate shall in any manner derive any benefit from the reserve fund, it becomes obvious that the conclusion of the general term cannot be sustained. When all the provisions relating to this subject are considered together, it is clear that it was not the intent of the constitution to provide that any portion of the reserve fund should be transferred to the death fund for the payment of death claims which were expressly excluded from any participation in that fund. Its purpose, doubtless, was to provide, in an emergency or case of necessity, for the transfer from the reserve fund to the death fund of an amount necessary to pay death losses arising under reserve certificates. In other words, the provision for transferring a portion of the reserve fund to the death fund must be limited and governed by the other provisions of the constitution. When so limited it is plain that such transfer could be made only for the purpose of paying death claims arising under reserve certificates. This construction renders all the provisions of the contract harmonious, and carries out its manifest spirit and purpose. Any other construction would be contrary to

the evident intent of the statute, as well as to the clear and positive terms of the constitution. Moreover, as the reserve fund was created solely by the contributions of reserve members, it would be highly unjust and inequitable to distribute any portion of it among life members. Such a disposition of the fund would result in a practical confiscation of the property of the reserve members. Our conclusion is that the reserve fund was created for the exclusive benefit of the holders of the reserve certificates, and that the holders of life certificates were not entitled in any way to share in its distribution.

This brings us to the consideration of the question whether such a portion of the reserve fund as is necessary for that purpose should be appropriated to the payment of death claims of members holding reserve certificates who died before the commencement of this action, or whether the whole fund should be distributed pro rata among all the holders of such certificates. If this fund was pledged or dedicated to the purpose of assuring or guarantying payment of such certificates to the maximum limit upon the death of such a member, then plainly the holders of such death claims are entitled to resort to that fund for their payment. Section 1 of article 6 of the constitution, which relates solely to the reserve fund, contains this provision: "This reserve fund, together with its earnings, is for the exclusive benefit, and to reward the fidelity, of the old and persistent members, and to make the association sound and permanent, thereby guarantying the payment of every member's certificate at death, to the maximum limit named therein." In construing this provision, it must be remembered that it is contained in that portion of the constitution which relates only to the reserve fund, and consequently it must be regarded as referring solely to members interested therein. The provision guarantying the payment of every member's certificate was clearly intended to refer to reserve members only. No others could have been intended. If otherwise, that provision would have been in direct conflict with the other provisions of the constitution, which declare that no person holding a life certificate shall be entitled to, or shall in any manner derive, any benefit from such fund. Here we have, then, a provision which, properly construed, provides that the reserve fund of the association, with its earnings, is for the exclusive benefit and to reward the old and persistent members holding reserve certificates, by assuring or guarantying the payment of every such member's certificate to the maximum limit. This was a guaranty among contributors to the reserve fund, and as there was no other provision for the full payment of the amount of their certificates unless resort might be had, when necessary, to that fund, it was in effect a pledge of it for that purpose. The last clause of that provision was added by amendment in 1888, and its obvious intent was to bring the association within the provisions of the statute which authorized the use of the

reserve fund for the payment of death losses, and to provide that members who were entitled to share in that fund should receive the maximum amount of their certificates. Thus, by the terms of the constitution the reserve members of the association dedicated that fund, so far as necessary, to the payment at death of every such member's certificate.

The receiver, however, persistently urges that the intent of this provision was to insure the payment of the dues of the reserve members, and only in that way guarantying the payment of death claims, but that it was not intended that any part of that fund should be applied to that purpose. If such was its only object, why was there any necessity to amend that section of the constitution? Before it was amended the reserve fund was as available to pay assessments as it was after. No change in that respect was made. The amendment must have been made to accomplish some purpose. Evidently it was not to insure the payment of dues and assessments, as that had already been provided for, and was not affected by the amendment. We think its purpose was to bring itself within the provisions of the statute, and to devote the reserve fund to the payment of death losses of reserve members, so far at least as was necessary to secure their payment in full. If such was not its purpose, the amendment was meaningless and ineffective. We do not think the contention of the receiver can be sustained. We are of the opinion that such a portion of the reserve fund as is necessary should be appropriated to the payment of death claims of members holding reserve certificates who died before the commencement of this action, and that the remainder of the fund undistributed should be divided *pro rata* among the other holders of reserve certificates.

The case of *Burdon v. Association*, 147 Mass. 360, 17 N. E. 874, cited with approval in *Re Equitable Reserve Fund Life Ass'n*, 131 N. Y. 354, 374, 30 N. E. 114, is relied upon as sustaining a contrary doctrine. In the *Burdon* Case the only ground upon which it was claimed that the funds belonging to the insolvent corporation could be applied to the payment of death losses was that upon the back of the certificates issued there was an unsigned statement to the effect that the association would provide material and substantial protection for the families or other dependents of deceased members, by means of a safety fund which combined an improved plan of co-operative protection with the safety-fund deposit, thereby rendering all the members and their dependents perfectly safe at the lowest possible rate. In that case, without passing upon the question as to what would have been the effect if the notice had been a part of the contract, the court distinctly held that it was not, and hence was entitled to no consideration in determining the question before the court. There the safety fund provided for was to inure to the benefit

of members of five years' standing, by having the income from it, after five years, or after the accumulation should have amounted to \$100,000, applied to the payment of their future dues and assessments; and, if the association should fail to pay the indemnity provided for in the certificate, then the safety fund was to be converted into money, and divided among all the holders of certificates then in force, and not to be drawn upon to make good the indemnity for a loss by death, and it contained an express stipulation that the fund mentioned should be in no wise chargeable or liable for any use or purpose except that mentioned. Under those circumstances, it was held that the fund must be devoted to the purpose specified in the contract, and could not be applied in payment of death losses. That case is clearly distinguishable from the case under consideration, as in that case there was no pledge or dedication of the fund to the payment of such claim, while in this, as we have already seen, one of the purposes for which such a fund was created was to insure the payment of death losses where the member held a life-reserve certificate. So in *Re Equitable Reserve Fund Life Ass'n*, 131 N. Y. 354, 30 N. E. 114, where a reserve fund was created, and was to be deposited in trust for purposes specified, which were for the benefit of living members, it was held that upon a dissolution of the corporation death losses could not be paid from the reserve fund. The principle of that case is clearly right, and fully sustains our conclusion that death losses, where a deceased member held a life certificate only, could not be paid from such fund. But in this case there was an express provision in the constitution, which formed a part of the policy, which dedicated the reserve fund to the payment of losses where the member held a reserve certificate. The cases are therefore wholly unlike. The same may be said of *People v. Life Union*, 83 Hun. 598, 31 N. Y. Supp. 1120, affirmed 145 N. Y. 608, 40 N. E. 164. In that case, as in the case in 131 N. Y., and 30 N. E., there was a reserve fund which was created by the appropriation of 15 per cent. of all the net assessments for mortuary and benefit purposes, and contained no provision by which the reserve fund was dedicated to the payment of death losses. We find nothing in either of the cases cited which is in conflict with the conclusion we have reached in this case. It is doubtful if the question as to the claims of persons who hold bonds issued under their life-reserve certificates is before us. We are, however, of the opinion that they have no claim which can be paid by the receiver out of the funds in his hands. The contract between the parties was to the effect that the principal of such bonds was not available to pay future assessments until 10 years after the issuing of the bonds. It was only then that the amount of the principal and interest of such bond was to be paid to the beneficiary in addition to the amount of the cer-

tificate. Hence, until the bonds became available to pay the assessments, the beneficiaries were not entitled to receive their amount in addition to the certificates of membership. Any interest or principal which was not available for that purpose was to be applied to increase the bonds issued at the next quadrennial apportionment to members of the association. We find nothing in the record to show that any of the bonds had become available for that purpose, and therefore conclude that none of the appellants who held bonds issued on life-reserve certificates is entitled to be paid any portion thereof by the receiver, either upon death claims, or in the distribution of the fund among the holders of such certificates. As to the claims of persons holding life-reserve policies, whether bonds were issued or not, we are of the opinion that the remainder of the reserve fund in the hands of the receiver, after paying the claims of general creditors, and claims based upon life reserve certificates, where the member died prior to the commencement of this action, should be distributed among the holders of life-reserve certificates in proportion to the amount paid by each.

The appellant Dwyer contends that the assessment of July, 1892, was made for her benefit, with others, and that a fund was thereby established which was expressly dedicated to the payment of the certificate held by her, and therefore a trust was created, and the funds thus collected were impressed with such trust to an extent which entitled her to payment of the amount of her certificate out of the funds in the hands of the receiver. It may be, if there was a fund in the hands of the receiver that was collected for the express purpose of paying that loss, that the principle contended for might apply. But the record shows that no portion of the money collected by that assessment reached the hands of the receiver. It was all expended by the corporation before that time, but in what manner or for what purpose does not appear. Moreover, there is nothing in the constitution, by-laws, or certificate which appropriates money collected by assessment to the payment of any particular claim, or to the claims that are mentioned in the assessment. On the contrary, they seem to contemplate that a fund should always be kept on hand to meet claims as they arise, and that assessments should be made and collected in anticipation of death losses. Under the circumstances shown by the record in this case, and under the contract between the parties, we are unable to discover any principle under which it can be held that a trust in favor of Dwyer was impressed upon any portion of the moneys or fund that came into the hands of the receiver. These considerations lead to the conclusion that the order of the general term should be reversed, and the order of the special term affirmed, with costs to the receiver, and one bill of costs to the appellants Spooner and Royce, to be paid out of the

funds in the hands of the receiver. All concur, except BARTLETT, J., who dissents on the ground that the general term modification of the special term order was right, and HAIGHT, J., who dissents from Judge MARTIN'S opinion and concurs in the views adopted by the referee. Ordered accordingly.

(150 N. Y. 459)

RATHBONE et al. v. WIRTH et al.

(Court of Appeals of New York. Oct. 27, 1896.)

CONSTITUTIONAL LAW—LOCAL SELF-GOVERNMENT
—MINORITY REPRESENTATION.

1. Laws 1896, c. 427, amends Laws 1870, c. 77, and other acts relating to the police department of the city of Albany, and in effect removes the present police force from office, and provides for the organization of a new one. Section 1 creates a board of four police commissioners for the city, to be elected by the common council, and provides that not more than two of them shall belong to the same political party; that for the purpose of such election the members of the council attending the meeting shall constitute a quorum; that each member of the council shall be entitled to vote for not more than two commissioners; that no person shall be eligible to the office of police commissioner unless he is a member of the political party having the highest or next highest representation in the common council; and that, if a vacancy shall occur in the board of commissioners, it shall be filled by appointment by the mayor on a written recommendation of a majority of the members of the council belonging to the same political party as the commissioner whose office shall become vacant. *Held*, that such statute is in conflict with Const. art. 10, § 2, which provides that "all city officers whose election or appointment is not provided for by the constitution" shall "be appointed by such authorities thereof as the legislature shall designate for that purpose," in that it is an attempt to limit or control the exercise of a power of appointment which the constitution has conferred upon the local authority to be designated. 40 N. Y. Supp. 535, affirmed. *Rogers v. Common Council*, 25 N. E. 274, 123 N. Y. 173, distinguished. Bartlett, Martin, and Haight, JJ., dissenting.

2. Such statute cannot be held valid to the extent of conferring power on the common council to appoint commissioners, on the ground that the objectionable clauses can be stricken out as null and void, and the remainder be upheld as conferring such power; the statute being intended to amend the existing law on the subject of a police commission, and to remove from office the four commissioners and all their subordinates, except "the person who was senior captain on January 1, 1896," and to compel the substitution as commissioners of four persons who would be representatives of two certain political organizations. Martin, Haight, and Bartlett, JJ., dissenting.

3. Such act cannot be sustained on the ground that it secures minority representation, since it puts the minority on an equality with the majority. 40 N. Y. Supp. 535, affirmed.

Appeal from supreme court, appellate division, Third department.

Action by John F. Rathbone and George D. Miller against Jacob Wirth, Jr., and others, members of the common council of the city of Albany, to enjoin defendants from electing police commissioners in pursuance of the provisions of Laws 1896, c. 427, on the ground

that such statute is unconstitutional. From a judgment of the appellate division, Third department (40 N. Y. Supp. 535), affirming a judgment in favor of plaintiffs, defendants appeal. Affirmed.

This action was brought to obtain a judgment which should perpetually restrain the common council of the city of Albany from electing police commissioners in pursuance of the provisions of chapter 427 of the Laws of 1896. The ground of the action is the unconstitutionality of the act, which was passed to amend chapter 77 of the Laws of 1870 and other acts relating to the police department of that city. The first section of the present act amends section 3 of the previous act, so as to make it read as follows: "The police board of the city of Albany shall consist of four police commissioners, not more than two of whom shall belong to the same political party or organization, and who shall be chosen and hold office as hereinafter provided. On the first Monday after the passage of this act, the common council shall meet at eight o'clock in the evening in the common council chamber and shall proceed to elect four persons, residents and freeholders in the city, as such police commissioners, and for the purpose of such meeting the members attending shall constitute a quorum. Each member of the common council shall be entitled to vote for not more than two of such persons, and the four persons receiving the highest number of votes shall be such police commissioners. The common council shall not transact any other business until the said four police commissioners are elected. The commissioners so appointed shall hold office as such until the first day of February, eighteen hundred and ninety-eight. During the month of January, eighteen hundred and ninety-eight, and in each and every second year thereafter, the common council shall meet and proceed in like manner to elect four police commissioners, who shall hold office for two years from the first day of February following. If a vacancy shall occur in said board of police commissioners, otherwise than by expiration of term, it shall be filled by appointment by the mayor upon the written recommendation of a majority of the members of the common council belonging to the same political party or organization as the police commissioner whose office shall become vacant. No person is eligible to the office of police commissioner unless, at the time of his election, he is a member of the political party or organization having the highest or the next highest representation in the common council. The commissioners shall receive no compensation for any services performed by them under the provisions of this act." The other provisions of the act need not be quoted, in the view which is taken by the opinion. The supreme court, at special term and in the appellate division, has upheld the plaintiffs in their demand for an injunction, and certain of the defendants have appealed to this court.

Arthur L. Andrews and J. Newton Fiero, for appellants. E. Countryman, Matthew Hale, and Albert C. Tennant, for respondents.

GRAY, J. The learned justices who, at the special term and in the appellate division, have expressed their views of the unconstitutionality of this act, have done so with such thoroughness as to leave but little to be added to this very important discussion. Mr. Justice Parker, at special term, rested his determination of the question upon the ground that the act violates section 1 of article 1 and section 1 of article 13 of the state constitution; the former of which declares that "no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers"; and the second of which declares that "no other oath, declaration, or test shall be required as a qualification for any office of public trust" than the oath or affirmation prescribed in the constitution to be taken. Mr. Justice Herrick, in the appellate division, while expressing his assent to the views which Mr. Justice Parker has so well presented, has devoted the greater part of his opinion to pointing out the respects in which the act is in conflict with section 2 of article 10 of the constitution of the state, which requires that "all city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or by some division thereof, or be appointed by such authorities thereof, as the legislature shall designate for that purpose." In this view the majority of the learned justices of the appellate division have been able to concur. The discussion of the question exhibits a critical examination of many authorities, and its statement of the general principles which underlie our popular form of government and which recognize the existence of a right in the people of the various political subdivisions of the state to self-government, without hindrance from the state government as to the right of choosing or appointing local officers, should command our acquiescence. Without denying force to the objection that such legislation violates the spirit, if not the letter, of the constitutional inhibition against the requirement of any other test than is prescribed, I think the main and the insuperable objection consists in the plain attempt to limit, or to control, the exercise of a power of appointment which the constitution has unqualifiedly conferred upon the local authority to be designated. If that be true, there is no occasion to consider other objectionable features, for the question then presented becomes one of surpassing importance to the citizens of the state. The constitutional provision, I repeat, is that "all city, town and village officers, whose election or appointment is not provided for by this constitution, shall * * * be appointed by such authorities thereof, as the legislature shall designate for that purpose." It

is, of course, evident that the provision authorizes the legislature to confer the power of appointment upon any local authority; but that the power, which is to be thus conferred, may be qualified, or hampered in its exercise, by the legislature, is not only not evident, but such a proposition, in my opinion, threatens what we are bound to regard as a cardinal principle of our form of government. I refer to the right of local self-government; a right which inheres in a republican government, and with reference to which our constitution was framed. The habit of local self-government is something which we took over, or rather continued from, the English system of government, and, as Judge Cooley has remarked with reference to the constitutions of the states, "If not expressly recognized, it is still to be understood that all these instruments are framed with its present existence and anticipated continuance in view." Const. Lim. *35. The principle is one which it takes but little reflection to convince the mind of being fundamental in our governmental system, and as contributing strength to the national life, in its educational and formative effect upon the citizen. It means that in the local or political subdivisions of the state the people of the locality shall administer their own local affairs, to the extent that that right is not restricted by some constitutional provision. I do not think it can be seriously disputed that the conception of the state is free from the element that it belongs to it to control purely local affairs, and that state interference finds justification only when state policy or local abuses demand it. I think that no inference is warranted that other powers have been conferred by the people upon their legislative body than those which are mentioned in the constitution, or which are necessary to carry into effect those which are expressly given.

In this clause of the constitution under consideration we find the express reservation of the right of local self-government. The legislature is expressly authorized to designate the local authority, who shall appoint the local officers, and it is impliedly prohibited from doing more than that, or from placing limitations upon this power of appointment. As it was said in *People v. Draper*, 15 N. Y. 544: "Every positive direction contains an implication against anything contrary to it, or which would frustrate or disappoint the purpose of that provision." When, therefore, we read in the act under consideration that "no person is eligible to the office of police commissioner unless, at the time of his election, he is a member of the political party or organization having the highest, or the next highest, representation in the common council," we must perceive a very clear violation of the constitution. A right which is an accompaniment of our political institutions, which is expressly recognized as such by the constitution, and the permanency of which is guaranteed therein, is deliberately trespassed upon by the legislative body. What becomes of the right of the ma-

jority of the people in a locality to manage their own affairs, and to appoint their local officers, when that majority can have no advantage in the constitution of the board by numbers, or when the choice is limited to the members of a designated class? Is it not clear that the legislature has assumed to add to the power to designate the appointing authorities of the municipality the further power to designate the particular persons from whom the appointments must be made, and, still further, to place the minority upon an equality with the majority? This is too evident an excess of power to be explained away, or to be excused upon the ground of political expediency. It is not too much to say of it that it is an attack upon one of those fundamental forms of personal liberty against which the constitutional provision was intended to act as a safeguard. I think it to be as opposed to a safe state policy as to the very letter of the constitution.

It ought not to require much of argument to show the importance of this clause in our constitution, or what its presence means for our political institutions. Its very presence in the constitution of the state since 1846 evidences the importance which the people attach to the preservation of this right in the management of their local affairs. It means the right to choose their local officers, in all its reality, or it means nothing. If it does not mean that the people have reserved the right of administering existing local offices by officers of their own choosing, whether it be done directly, through an election, or indirectly, through the method of an appointment by some of their local authorities, I am at a loss to understand its significance, or in what consists its peculiar value. This clause was inserted in the constitution of 1846, and it has been, not infrequently, considered by this court. In *People v. McKinney*, 52 N. Y. 374, the present chief judge of this court then said of it: "The obvious purpose of the provision of the constitution which has been quoted was to secure to the people of the cities, towns, or villages of the state the right to have their local offices administered by officers selected by themselves." Later, in *People v. Albertson*, 55 N. Y. 50, Judge Allen spoke to the same effect, and used the following language: "Faithfully observed, and effect given to it in its spirit as well as in its letter, it effectually secures to each of the governmental divisions of the state the right of choosing or appointing its own local officers, without let or hindrance from the state government, and none can be deprived of the rights and franchises thus guaranteed to all. The theory of the constitution is that the several counties, cities, towns, and villages are, of right, entitled to choose whom they will have to rule over them; and that this right cannot be taken from them, and the electors and inhabitants disfranchised, by any act of the legislature, or of any or all the departments of the state government combined. This right of self-government

lies at the foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or evasion of it to be promptly met and condemned, especially by the courts, when such acts become the subject of judicial investigation." This is strong and significant language. Read in its light, the provision of the act under consideration appears as legislation hostile to that freedom of action which the people of Albany have the right to claim, under the constitution, in the management of their own affairs. It cannot be denied that legislation of this character has an inimical tendency, and, unless the check of the constitution is strictly enforced by the courts, it may develop a germ of menace to local self-government, to the presence of which we should not suffer ourselves to be blinded by any partisan considerations; or until it becomes too late to extirpate it. I believe the principle to be too useful and too healthful a part of our governmental system to be denied its full effect, and, while it is recognized in the fundamental law of the state, the court should not be reluctant to enforce it whenever a case fairly involving its efficacy is presented. The judicial power was intended to stand as a bulwark against all legislation which impairs any of the constitutional guarantees. The legislative power of the state is vested in the legislature, and it is plenary with respect to the state at large, or to any portion thereof, in matters of government, except as restricted by the constitution. But the people not only have not consented that the legislative power shall include the power to control their selection of local officers; but, fearing to trust the discretion of the legislature not to assume such a power, they have inserted in their constitution an express restriction. We must not forget that a constitution is the measure of the rights delegated by the people to their governmental agents, and not of the rights of the people. It apportions the powers of government, with such limitations as are appropriate to keep their exercise clearly defined. The judicial power can and should pronounce null all laws which contravene its provisions, — a feature of our governmental system which De Tocqueville declared to be "one of the strongest barriers ever devised against the tyrannies of political assemblies." Volume 1, p. 129. The remarks of Judge Denio, in *People v. Draper*, 15 N. Y., at page 537, where section 2 of article 10 was under consideration, may be quoted in connection with our application of this section: "We must keep in mind that the constitution was not framed for a people entering into a political society for the first time, but for a community already organized, and furnished with legal and political institutions, adapted to all, or nearly all, the

purposes of civil government; and that it was not intended to abolish these institutions, except so far as they were repugnant to the constitution then framed."

Having in mind this principle of local self-government, as an inherited and pronounced feature in the general governmental system, let us turn to the statute in question, and, more particularly, consider the provisions of the first section. What was it intended to do, and what will it do, if allowed effect? What are its spirit and its purpose? for we must consider them in determining whether the legislative intent may be effectuated. It was passed as an amendatory act, affecting chapter 77 of the Laws of 1870, and the acts supplemental thereto, which related to the police department of the city of Albany. At the time of its passage the board of police commissioners consisted of five persons, viz. of the mayor ex officio and of four persons whom he might appoint. The present statute provided for a board of only four commissioners, "not more than two of whom shall belong to the same political party," who shall be chosen or elected at a prescribed meeting of the common council, and "for the purpose of such meeting the members attending shall constitute a quorum." Each member of the council is restricted in his vote to two persons, and "no person is eligible to the office * * * unless, at the time of his election, he is a member of the political party or organization having the highest or the next highest representation in the common council." If a vacancy occur in the board, "it shall be filled by appointment by the mayor upon the written recommendation of a majority of the members of the common council belonging to the same political party or organization as the police commissioner whose office shall become vacant." These provisions are very radical and peculiar in their character. Whereas, under existing statutes, the mayor was designated as the appointing authority, unfettered in his choice of men, and in the board, which would result, a majority could always act, the legislature, by this act, has undertaken to designate an appointing authority whose appointees should only be taken from, and equally divided between, the two political parties dominant in the common council upon a certain date, and provision is made that that order of things should not be disturbed in the filling of any vacancy which might arise later. Then, again, instead of leaving the designated local authority to act in its regular or chartered way, provision is made for its action in ways unsanctioned by custom, or by other law than the act itself provides. The purpose of the act was to change the personnel of the board, and taking the appointments from the executive power of the city, to place them with its legislative power, under such restrictions as to choice as to compose a body of four commissioners, equally divided among two sufficiently well-defined political organizations. The spirit of the legislative act is manifested by the attempt to secure the appointment of such a

board, at the time fixed therein, by constituting an arbitrary quorum of the body out of any number of members attending. It may also be remarked, as illustrating the spirit of an act which provides for a board whose action may be blocked by a division of the members, that in section 4 provision is made for the discharge upon a certain date of every member of the force from office, "with the exception of the person who was senior captain on January 1, 1896," and, in the event of a failure of the board to appoint a chief of police, "the said senior captain * * * shall act as such," and in case of its failure to appoint the captains and sergeants, "then it shall be the duty of the chief or acting chief to assign members of the force to perform such duties until the board shall make such appointments." Thus "the person who was senior captain on January 1, 1896," is not only protected and kept in office by this act, but, in the very possible contingency of a tie in the board of commissioners blocking any action, he is invested with extraordinary powers of control. I do not need to comment upon the wisdom or the prudence of the legislative act, for the court is not concerned with that. Its concern ceases when it determines that the legislature has not transcended the limits of its powers, as they are defined in the constitution of the state. If it has the right to interfere, to the extent that the act proposes, with the local government and concerns of the city of Albany, then we have only to affirm the constitutionality of its proceeding. If it has exceeded its legislative power, we are bound to say so, and to declare its act null, because unconstitutional.

That this statute violates the constitution in its letter, as in its spirit, seems to me an indisputable proposition. It goes beyond the power to designate the local authority, who, under the new system, shall appoint police commissioners. It designates the class of persons from whom the selection must be made and excludes all others, and it precludes the majority in the common council from naming the majority of the board. Nor does it confine the designation of an authority to what would be, in fact, such under the charter of the city of Albany; for it attempts to create an appointing body in violation of the provisions of the city charter. At the time of the adoption of the constitution of 1894 the local authorities of the city of Albany, under its charter, were the mayor, as the executive power, and the common council, as the legislative power. Laws 1883, c. 298. The reference, therefore, of the constitutional provision in question was to local authorities as they were constituted by force of existing public laws, for the legal presumption must be that the revisers used those words not only intelligently, but with knowledge of the forms of municipal government and of the rules which guide executive and administrative action. The legislature was, consequently, clearly restricted, in its designation of an appointing authority, to what was a local authority within the meaning of the public laws;

and in determining upon the common council it could not go further, and reform or re-constitute its powers as a municipal agent or authority, by this indirect method. Power was not vested in any one member of the common council, but in the aggregate of the members who compose the body, and its action is the action of the body as a whole. *U. S. v. Ballin*, 144 U. S. 1, 12 Sup. Ct. 507. To act validly, the vote of a majority of the members was required, both at common law and under the charter. *Ex parte Willcocks*, 7 Cow. 402; Laws 1883, c. 298, tit. 3. One alderman, or member of the common council, or a group of members, or anything short of what is required by the charter to constitute a valid meeting of the board, would not be a local authority, competent to perform an act of municipal government. The legislative power is vested only in the common council, acting by a majority of the body. The minority was not empowered to bind the city, and the legislature cannot give it that power. The provision, therefore, for a quorum, to consist of any number of attending members, is clearly in conflict with the constitution. In passing upon the validity of an act, we are to consider what is possible and what may be done under its authority, and the vice of the one before us is that it affects the common council's power to act, as designed and created by law to act,—that is to say, through the majority of its members; and it authorizes, in a certain contingency, something less or other than that local authority to act. The legislature could not, constitutionally, deprive the municipal authority, selected for the purpose, of the power to exercise its functions as prescribed by the law of its being,—an indisputable proposition with respect to a law which purports not to amend a municipal charter, but to confer some new power upon a municipal authority. We are not confronted here with any question of "minority representation." That is not the purpose of the act. It places the political minority in the legislative body upon an equality with the political majority, and in that feature consists the violation of that fundamental principle of our popular form of government, which demands that the majority shall govern. The principle of minority representation recognizes the right in the majority to control. It must be the majority who shall appoint the officers of government, and this extends more clearly to the governmental officers of localities, perhaps, than to the affairs of the state government. Mr. Justice Herrick refers to the only instance of the surrender by the people of the power of the majority to select their officers as being found in the constitutional provision for the passage of a law securing equal representation among the election officers of the two political parties, which, at the next preceding general election, cast the highest and the next highest number of votes (section 6, art. 2), and he appropriately observes that "the provision for such equal representation in the one case, by implication excludes it in all others." He re-enforced his observa-

tion by a reference to the constitutional debates, which resulted in the defeat of propositions authorizing the legislature to provide for minority representation in city governments.

I will refer to two cases, which are deemed to bear upon the discussion of this case. In *Rogers v. Common Council*, 123 N. Y. 173, 25 N. E. 274, the law provided, as to a board of three civil service commissioners, there in question, that "not more than two shall be adherents of the same political party." It was held that "nothing in the law compelled the appointment of even one member of any political party, but that it simply prevented the appointment of more than two from such party." Commenting upon the case of *Attorney General v. Detroit Common Council*, 58 Mich. 213, 24 N. W. 887, where the provision was for the appointment of two election inspectors from each of the two leading political parties, Peckham, J., said: "The law recognized but two political parties, and made it necessary for the appointments to be made from and confined to members of those parties. An individual not a member of either was not eligible to appointment. In the case before us there is not a citizen in the state, otherwise capable, who would not be eligible in the first instance to one of these appointments. * * * There is no provision making it necessary to appoint two from the same party, or making it necessary to appoint some one who has been known up to that time as a member of any particular party." Again, he says: "The purpose of the statute * * * is not to arbitrarily exclude any citizen of the state, but to provide that there shall be more than one party or interest represented." The opinion in the *Rogers Case* seems very strongly to support the view that the act in question now violates the constitution. The case of *People v. Crissey*, 91 N. Y. 616, cannot be deemed to confuse the present discussion. The act confined the vote of each alderman for police commissioners to one out of the two to be chosen, so that the minority would be sure to elect one. The common council had already acted upon the appointments and the court refused to pass upon the restriction in the act. Finch, J., observed, in that connection: "If we assume this provision to be unconstitutional, it was a nullity. * * * They [the common council] are presumed to have known the law, and had an official legal adviser. * * * They must be held then to have voted without restraint." In the case at bar, however, the appointments remain to be made, and the answers either admit that the defendants intend to comply with the provisions of the act, or are silent as to the allegations of the complaint with respect to what is proposed to be done in obedience to the provisions of the act.

I perceive no force in the argument that there has been a practical construction of the constitution given by the legislature, and acquiesced in and acted upon by the executive and administrative departments of the government. The question here is purely one of law: Is the con-

stitutional provision referred to violated by this statute? Is the passage of such a law authorized by the constitution? Practical construction of a law is usually accorded force when it relates to the business conducted by the departments of the state government, and when the legislation depended upon to establish it has been clear and uniform in character for a long period of years. But, to use Judge Cooley's language, "acquiescence for no length of time can legalize a clear usurpation of power where the people have plainly expressed their will in the constitution, and appointed judicial tribunals to enforce it." The question before us is not one of legislative policy in relation to the business of state government. It is whether the legislature has the power to interfere with the local concerns of a municipality, and by arbitrary methods to prevent majority rule in the selection of local officers. In the presence of the constitutional provision, is it not an assumption of a power, neither expressly granted nor to be implied? The question is no less than this: Having a written constitution, shall we, and may we, disregard one of its commands, and, though the court is set as the people's bulwark against legislation which contravenes constitutional provisions, shall it aid the legislature when overstepping the limits assigned to its action? We cannot dispose of the question as one of legislative discretion; for, if we construe away such an express provision, upon however so plausible a theory, we open the door to future attacks upon the fundamental law, which underlies the structure of the state.

It is argued, however, that the objectionable clauses can be stricken out as null and void, and that the statute may remain valid to the extent of conferring power on the common council to appoint police commissioners. I do not see how that may be done, within any correct or salutary application of a rule which is frequently resorted to to uphold the acts of the legislative department of government. It is only applicable where not only that which is vicious in the law is so distinct as to permit of being severed from the rest, but where, the severance being made, enough remains to effectuate the object which the legislature had in view. It will not do, to save legislative enactments from annulment, to strike out provisions which so clearly express the intention of the legislature as to characterize the purpose of the act, and make their presence essential to the existence of the statute. Judge Cooley, in his work on *Constitutional Limitations* (star page 178), has so well expressed himself on this point that I will repeat his words: "If its purpose is to accomplish a single object only, and some of its provisions are void, the whole must fall, unless sufficient remains to effect the object without the aid of the invalid portion. And, if they are so mutually connected with and dependent on each other, as conditions, considerations, or compensations for each other, as to warrant the belief that the legislature intended them as a whole, and, if all could not be carried into effect, the legislature would not pass

the residue independently, then, if some parts are unconstitutional, all the provisions which are thus dependent, conditional, or connected must fall with them." This case falls within the class of cases thus referred to. This is not a new scheme for the creation of a municipal body of police commissioners. This statute was intended to amend the existing law upon the subject of a police commission, and it is perfectly plain, upon its reading, that what was aimed at was to remove from office the present four commissioners and all of their subordinates, except "the person who was senior captain on January 1, 1896," and to compel the substitution, as commissioners, of four persons, who would be representatives of two certain political organizations. If we eliminate the prescribed methods for the accomplishment of this purpose, we emasculate the legislative act, and it cannot seriously be contended that then there would remain any such law as was intended to be enacted by the legislature. In the performance of the duty of endeavoring to uphold the validity of a legislative act the court may not carve out from its provisions such as would make a law, to which the judicial approval might be given, unless the law then be such as can be deemed to have been within the contemplation of the legislature. In other words, the court is not to make a law for the people, but to uphold one which its representatives have enacted; and its duty in that direction, where provisions are found which are antagonistic to any of the constitutional guarantees, is to see if by their excision the main object of the enactment can be preserved. If that object constitutes an evident interference with constitutional rights, if it can only be effectuated through unconstitutional provisions, then the court can do nothing, and must pronounce its condemnation of the statute as a whole. The recent case of *Bridge Co. v. Smith*, 148 N. Y. 540, 42 N. E. 1088, furnishes an illustration. There the act was in amendment of various acts, the original of which provided for a single scheme to construct a bridge over the East river. The act, however, contained many provisions of an extraordinary nature, and foreign to that single purpose, which empowered the construction of indefinite extensions by way of approaches, connections with railroad companies, and consolidations with other corporations. It was held that these were void provisions, and, under the rule, separable from those which were lawful, and that what remained was capable of being executed as complete in itself. Here, however, one scheme runs through the act, and towards its accomplishment provisions have been enacted which are interdependent, and without which the scheme falls. The very language of the first section makes the birth of a new commission to depend upon a definite and prescribed action being taken, and it is not reasonably conceivable that the legislature would ever have passed this statute without its particular mechanism for the formation of a new police commission from the certain political materials allowed to be

used. I quote the language of the present chief judge in *Lawton v. Steele*, 119 N. Y., at page 241, 23 N. E. 881: "Where the court can judicially see that the legislature only intended the statute to be enforced in its entirety, and that by rejecting part the general purpose of the statute would be defeated, the court, if compelled to defeat the main purpose of the statute, will not strive to save any part." The main purpose of this statute was to bring about the appointment of a new police commission in such a way as that its body will be equally composed from two certain political elements dominant for the time in the common council. We cannot assume that the legislature would have passed this act except as a whole, and therefore it is our duty, for the reasons assigned, to declare it to be unconstitutional and void. The judgment appealed from should be affirmed, with costs.

O'BRIEN, J. (concurring). This action was brought by the plaintiffs, who are residents and taxpayers of the city of Albany, to enjoin the common council of that city from proceeding to execute and carry out a statute passed during the last session of the legislature, which, in effect, removes the present police force from office and provides for the organization of a new one. The act is chapter 427 of the Laws of 1896, and by its title and provisions amends chapter 77 of the Laws of 1870, and also amends or repeals various other statutes relating to the municipal government of that city and to the organization and government of the police force therein. It is alleged in the complaint that this act is in conflict with the constitution of the state, and therefore void, and that proceedings on the part of the common council in execution of its various provisions would be illegal official acts, within meaning of the statute, which should be enjoined by the courts.

On a trial of the issues at special term the action was sustained, and the judgment there pronounced has been affirmed by the appellate division of the same court. The controversy involves important principles concerning the right of local self-government in cities and the individual and political rights of the citizen. These questions always open a very wide field of discussion, the materials for which are to be found in abundance in historical and judicial records. The provisions of our constitution on these subjects, which it is claimed have been violated in the passage of this act, are, as is well known, but the expression in brief and comprehensive language of general principles of remote origin, the development and recognition of which required centuries of discussion and civil strife before they were adopted here as the fundamental law. Hence, when questions arise for determination concerning their true meaning and interpretation, the nature of the case permits a very wide range of discussion based upon historical facts by means of which principles are traced to their source

and origin, and their progress and application marked, from time to time, until finally embodied, as they have been, in our written constitution.

The particular questions presented by this appeal have been illustrated, both at the bar and in the opinion of the court below, by ample materials drawn from this source. We can add little of any value to what has been said upon this feature of the argument in the decision now under review, and we can safely and properly leave that branch of the discussion where it was placed by the learned judge who spoke for the majority in the court below. Assuming, without further argument, that the leading and fundamental principles there stated with respect to individual rights and local self-government are correct,—and there is very little, if any, dispute in this respect between counsel,—it remains to apply them to the provisions of this bill. What has been frequently called the “political tendency of the constitution” is not always to be found expressed in words, but is to be derived from acknowledged principles of government that existed long before its adoption, and are to be implied from the general language and evident purpose and scope of particular provisions.

The principal objections to the bill are founded upon the provisions of the first section, which amends section 3 of the act of 1870, and reads as follows: “Sec. 3. The police board of the city of Albany shall consist of four police commissioners, not more than two of whom shall belong to the same political party or organization, and who shall be chosen and hold office as hereinafter provided. On the first Monday after the passage of this act, the common council shall meet at eight o'clock in the evening in the common council chamber and shall proceed to elect four persons, residents and freeholders in the city as such police commissioners, and for the purpose of such meeting the members attending shall constitute a quorum. Each member of the common council shall be entitled to vote for not more than two of such persons, and the four persons receiving the highest number of votes shall be such police commissioners. The common council shall not transact any other business until the said four police commissioners are elected. The commissioners so appointed shall hold office as such until the first day of February, eighteen hundred and ninety-eight. During the month of January, eighteen hundred and ninety-eight, and in each and every second year thereafter, the common council shall meet and proceed in like manner to elect four police commissioners, who shall hold office for two years from the first day of February following. If a vacancy shall occur in said board of police commissioners otherwise than by expiration of term, it shall be filled by appointment by the mayor upon the written recommendation of a majority of the members of the

common council belonging to the same political party or organization as the police commissioner whose office shall become vacant. No person is eligible to the office of police commissioner unless at the time of his election he is a member of the political party or organization having the highest or the next highest representation in the common council.” There are some other provisions of the act which will be referred to hereafter, but this section is the basis of nearly all the constitutional objections which have been urged against the bill. At the date of its passage, on the 30th of April, 1896, and at the time of the adoption of the present constitution, and for a long time before, the common council was the regularly organized legislative and governing body of the city, composed of 19 aldermen, elected from the different wards by the electors. There was then, and had been for many years, a board of police commissioners, composed of the mayor and four citizens, nominated by him and confirmed by the common council, and upon this board the government of the police force devolved. It is clear that it was the purpose of the act in question to abolish this board, and to substitute another in its place, and, as will be seen hereafter, to disband the whole police force, and to create a new one. We are not concerned so much with the justice or wisdom of this legislation as we are with the methods through which it was to be carried into execution. The purpose of the legislature was to be attained through a board of police commissioners to be created under the act, and composed of two members from each of the political parties having the highest and the next highest representation in the common council, and the last clause of the section declares in terms that no citizen outside these two political organizations is eligible to the office.

The first objection urged against the validity of the act is that it violates section 1 of article 1 of the constitution, which declares that “no member of this state shall be disfranchised, or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land, or the judgment of his peers”; and also section 1 of article 13, prescribing the oath to be taken by all officers, and providing that “no other oath; declaration or test shall be required as a qualification for any office of public trust.” At the expiration of the term of office of the commissioners created by the act, their places are to be filled by the same process, and, in case of a temporary vacancy, it must be filled by the mayor, upon the written recommendation of a majority of the common council belonging to the same political party or organization as the police commissioner whose office shall become vacant. It is plain that the legislature has taken every possible precaution to exclude for all time to come any person from holding the office, either for a full term or to fill a tem-

porary vacancy, who is not a member of one of the political parties designated in the act. When the validity of such legislation is brought in question, it is not necessary to show that it falls appropriately within some express written prohibition contained in the constitution. The implied restraints of the constitution upon legislative power may be as effectual for its condemnation as the written words, and such restraints may be found either in the language employed or in the evident purpose which was in view and the circumstances and historical events which led to the enactment of the particular provision as a part of the organic law. A written constitution must be interpreted as the paramount law of the land according to its spirit and the intent of its framers, as indicated by its terms. In this sense it is just as obligatory upon the legislature as upon other departments of the government or upon individual citizens. *People v. Albertson*, 55 N. Y. 50.

When the two sections of the constitution above referred to are read together, and all are read in the light of the historical events and notorious abuses of power which led to their insertion in the constitution, it cannot, I think, be doubted that they are broad enough in their terms, and that they were in fact intended, to prevent the enactment of laws proscribing any class of citizens as ineligible to hold office by reason of political opinions or party affiliations. The section of the constitution last cited comprehends more than a mere prohibition of test oaths, such as are familiar to the student of English history. It deprives the legislature not only of all power to exact any other oath, but also any other declaration or test as a qualification for office. That the statute under consideration does prescribe a political test as a qualification, and makes party adhesion a condition, of holding office cannot well be denied. It not only, in effect, requires the four commissioners to be divided equally between the two political parties, but in terms brands every other citizen, except those who are members of the two parties, as ineligible to hold the office. The courts of this state have not passed upon the validity of a statute containing a disqualifying clause like the one in question, but principles have been established which plainly lead to the conclusion that such enactments are destructive of local self-government and individual rights. That is plainly the result of the discussion in the case of *Barker v. People*, 3 Cow. 686, in which the principles embodied in these clauses of the constitution were stated and explained.

In other states, with constitutional restrictions identical in scope and purpose, statutes containing similar provisions to these now under consideration were held to be void or inoperative. In the case of *Mayor of Baltimore v. State*, 15 Md. 379, the court had under consideration a provision of the city charter relating to the police board, which provided "that no black Republican or Indorser or sup-

porter of the Helper Book shall be appointed to any office under such board." The reasoning of the court in that case sustains the conclusion that the judicial department will not give effect to such disqualifications when interposed by the legislature against the right of any citizen to hold office if conferred upon him by the appointing power. The supreme court of Michigan held that a statute providing that the members of a board should be selected in equal numbers from the two political parties represented in the common council was in conflict with a similar provision of the constitution of that state in that it disqualified all other citizens from holding the office, and prescribed party adhesion or attachment to certain political opinions as a test for holding office in addition to the constitutional oath. *People v. Hurlbut*, 24 Mich. 44; *Attorney General v. Detroit Common Council*, 58 Mich. 213, 24 N. W. 887. The same result was declared by the supreme court of Indiana when considering a statute which required positions in the police and fire departments in cities to be filled by selection from the two leading political parties in these cities. *City of Evansville v. State*, 118 Ind. 426, 21 N. E. 267. The vice which the courts found in all these statutes was that they prescribed a test based upon political opinions for appointees to office, and disqualified all whose political views did not conform to such test. In these cases it was fairly shown that legislation of this character is in conflict with the letter and spirit of the constitutional provisions referred to, and with the fundamental principles of free government. They can be safely followed in disposing of the same features in this case.

The legislature of this state has no power to enact a law which proscribes any class of citizens as ineligible to hold public office on account of political belief or party affiliations, and, consequently, the last clause of the section of the bill in question violates the provisions of the constitution referred to, and is void. The learned counsel for the defense contends that this provision, if held to be invalid, may be eliminated from the act, and the remainder permitted to stand; but, when that provision is excised, nothing would remain in the bill to require the appointment of adherents of either of the parties named. There would, indeed, be a prohibition against appointing more than two persons from any political party, but nothing whatever to require the appointees to belong to any party. The common council would then be at liberty to make the selections from that class of independent citizens who were not adherents of any party. This, however, would defeat one of the main purposes of the bill. When the several provisions are carefully read together, it is quite manifest that it was the intention to divide the power of the police department and the police force itself equally between the two political parties designated,

and the exclusion of all other persons as ineligible to be members of the board was a necessary means to the accomplishment of that end. The principle of a division of the board and the whole police force equally between the two parties is so firmly imbedded in the act, and so inseparably connected with all of its provisions, that it cannot be omitted without frustrating the fundamental purpose which was in view. When the statute is so reduced as to permit the common council to constitute the board from independent citizens, not members of either party, it would not only fail to embody the main purpose of its enactment, but it could not reasonably be asserted that the legislature would have passed it at all in that form. The purpose of the legislature to constitute a board of police commissioners and a police force equally divided between two political parties is so closely interwoven with all the provisions of the bill that the disqualifying words at the close of the first section cannot be eliminated without essentially changing the scope and operation of the law, and reducing it to a form in which it could not be said that it would have been originally passed. But the essential and operative provisions of this statute are open to still other constitutional objections, which will now be considered without reference to the clause referred to. If these objections are valid, as we think they are, then, obviously, there would remain no basis whatever for the contention that any material part of the act could be saved.

It is admitted that police commissioners are city officers within the meaning of article 10 of section 2 of the constitution, which reads as follows: "All city, town and village officers whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose." The true interpretation, scope, and meaning of this section of the constitution has been frequently passed upon by this court, and it has been uniformly held that its obvious purpose was to secure to the people of the cities, towns, and villages of the state the right to have the local offices administered by officers selected by themselves. It was designed to protect and give force and effect to the principle of local self-government, which has always been regarded as fundamental in our political institutions, and to be the very essence of every republican form of government. The local government, even in the smallest division of the state, is the preparatory school in which the citizen acquires the rudiments of self-government, and hence these institutions have been justly regarded as the nurseries of civil liberty. *People v. McKinney*, 52 N. Y. 374; *People v. Albertson*, 55

N. Y. 50; *People v. Porter*, 90 N. Y. 68; *People v. Crooks*, 53 N. Y. 648; *People v. Bull*, 46 N. Y. 57; *People v. Foley*, 148 N. Y. 683, 43 N. E. 171.

In the case of *People v. Albertson*, *supra*, the meaning of this provision of the constitution was stated in the following comprehensive language: "The purpose and object of section 2 of article 10 of the constitution, as is very obvious, was to secure to the several recognized civil and political divisions of the state the right of local self-government, by requiring that all county, city, town, and village officers, whose election or appointment was not provided for by the constitution, save those whose offices might thereafter be created by law, should be elected by the electors of the respective municipalities, or appointed by such authorities thereof as the legislature should designate. As to offices known and in existence at the time of the adoption of the constitution, this provision is absolute in its prohibition of an appointment by the central government or its authority, or by anybody other than the local electors, or some local authority designated by law. Faithfully observed, and effect given to it in its spirit as well as in its letter, it effectually secures to each of the governmental divisions of the state the right of choosing or appointing its own local officers without let or hindrance from the state government, and none can be deprived of the rights and franchises thus guaranteed to all. The theory of the constitution is that the several counties, cities, towns, and villages are, of right, entitled to choose whom they will have to rule over them; and that this right cannot be taken from them, and the electors and inhabitants disfranchised, by any act of the legislature, or of any or all the departments of the state government combined. This right of self-government lies at the foundation of our institutions, and cannot be disturbed or interfered with, even in respect to the smallest of the divisions into which the state is divided for governmental purposes, without weakening the entire foundation; and hence it is a right not only to be carefully guarded by every department of the government, but every infraction or evasion of it to be promptly met and condemned; especially by the courts, when such acts become the subject of judicial investigation." There can be no doubt that this provision of the constitution secured to the people of the city of Albany the right of choosing or appointing their own local officers without let or hindrance from the state government. The only power that the legislature had with reference to a board of police commissioners in that city was to provide either for their election by the electors or their appointment by such agencies or authority as the people had selected to administer their local affairs. If the

statute now before us, either in form or substance, violates these principles, it cannot and ought not to be upheld. It is conceded that the legislature had no power to appoint the police commissioners, and what it cannot do directly it cannot do indirectly. It cannot extend the term of office of a local officer who has been already elected, for the plain reason that for the extended period of time it is virtually an appointment. A constitutional provision cannot be evaded under color of exercising some other general power which the legislature may possess. In the case at bar the common council was designated as the authority to make the appointment of police commissioners, and so far the legislature acted within its powers. But in making the designation it had no power to so bind and restrict its action as to make that body a mere instrument of its own will. The right of the people to select their local officers cannot be evaded or disregarded by conferring the power of appointment upon some agency of their own selection, coupled with such conditions and restrictions as to make the choice virtually that of the legislature, and not of the people. It needs no argument to show that the constitution may, in that way, be as effectually violated as if the officers to be appointed had been named in the bill; and therein lies the vicious principle which, as it seems to me, pervades the act in question. The common council of a city, like every other legislative body composed of individual members, acts in its official capacity as a unit through the vote of the majority. While the power to elect or appoint the four police commissioners under the act in question is nominally conferred upon this body or authority, yet the members are, in terms, prohibited from voting for more than two. There is nothing in the bill to prevent the whole body from voting for the first two candidates presented, but, having so voted, their powers are exhausted, and, acting in the ordinary way, only two members of the board could be elected. But the bill was evidently framed with reference to a known political situation, and for the purpose of producing a particular result. It was known that the members of the common council were divided between the two political parties, a majority belonging to one and a minority to the other. How overwhelming in point of numbers the majority may have been, or how insignificant the minority, we cannot know from the record, nor are we concerned with that question. What is more important is the fact, which plainly appears upon the face of the bill, that the minority, however feeble in point of numbers, are given the power to elect half the commissioners while the majority are given the right to elect the other half, and this division and distribution of power is carefully perpetuated for all future time, by other provisions of the bill. Of course, if such a system

can be introduced into all the cities, towns, and villages of the state, local self-government must disappear, and government by the majority in the legislature will be substituted in its place. It would be difficult to suggest a contrivance better calculated to undermine and destroy the spirit of civic freedom than a statute enacted by the central authority conferring powers upon a minority equal to those which can be exercised by the majority.

The question is whether the legislature, while professing to confer power upon the common council to appoint four persons to compose a board of police commissioners, can at the same time and in the same breath empower a minority of the body, whether it be composed of one person or more, to appoint half of them. It would seem to be clear that any attempt on the part of the legislature to divide the appointing power into groups or fragments, each acting independent of the other in such a way as to enable a minority to exercise the same power as the majority, and thus, indirectly, to bring about the same result as the legislature itself would desire if it could act directly, is a violation of the spirit and purpose, if not the letter, of the constitution. The two commissioners who, under the scheme of this statute, are to be elected by a mere minority fragment of the common council, would hold their offices, not from the people of the city, but from the legislature. In every substantial sense such officers, thus selected, must be regarded as the creation of the central power of the state, rather than the choice of the people, acting directly or through their chosen agencies. If the legislature can lawfully authorize a minority of the common council to appoint one-half the police board, there is no reason why it cannot authorize a tax to be imposed, and ordinance enacted, or any other legislative or administrative act to be performed by the same vote. The fallacy of all the reasoning in support of the measure is to be found in the assumption that a single member of the common council, or a minority of the body, is a local city authority within the intent and meaning of the constitution. When the common council of a city is designated as the appointing power, the term is to be understood in its usual, ordinary, and popular sense, and the authority is to be exercised in the ordinary manner, according to the procedure governing legislative or deliberative bodies. When it is so fettered and cramped in its official action, and its power so divided, that the vote of a single member in the minority is made as potential as that of a dozen in the majority, it then ceases to be the common council, or the local authority, in any just or practical sense, and becomes a mere instrument to register the legislative will.

The fatal objection to the bill is that, while professing to comply with the constitution by designating the common council as the appointing authority, it violates it by restrictions upon its action, and by the enactment of methods of procedure for a special purpose

which, in their practical operation, confer the power to select upon two political groups in the body, each acting independently of the other. The unity and efficiency of the common council as a deliberative body, representing the people, and as an organ of city authority, is thus destroyed by the distribution of its legitimate powers between two unequal groups or fragments of the whole body. City officers selected in this manner are in no just or proper sense either chosen by the people or appointed by the common council, or any other local authority; and nothing less than this will satisfy the letter or the spirit of the constitution. The act should not be viewed as an expedient for a day, but a permanent law for all time, and, thus considered, it is obvious that the powers conferred upon the minority may be exercised by a single member. Such a situation is, of course, possible, and quite conceivable. To say that the two commissioners elected under such circumstances held office and exercised the important powers conferred by the bill, either by the choice of the electors, the common council, or any other city authority, would be to state a proposition so glaringly erroneous as to merit no consideration whatever. Their appointment under such circumstances would manifestly be due to the fact that, by a legislative edict, all the other members of the common council were prohibited from participation in the choice. It would be quite as competent under such conditions for the legislature to omit mere formalities, without substance, and to name the commissioners in the bill. The principle is the same whether the minority consists of one member or more. When the common council is designated as the appointing authority, but the majority of the members are disqualified and debarred from voting, and the minority empowered to make the choice, the official organ of the popular will is silenced, and, though the real nature of the procedure may be disguised by the observance of forms, yet the appointment in such a case is, in substance, the act of the central, and not the local, authority; and so the constitution is violated. *Menges v. City of Albany*, 56 N. Y. 374; *Warner v. People*, 2 Denio, 272; *People v. Angle*, 109 N. Y. 564, 17 N. E. 413; *State v. Denny*, 118 Ind. 449, 21 N. E. 274; *Clapp v. Ely*, 27 N. J. Law, 622. This objection affects the most important section of the bill, without which the other provisions can have no practical operation. In this section the principal purpose of the legislature is embodied and declared, and when eliminated the whole act must fail.

If the views here stated are correct, they are sufficient to dispose of the appeal. But it may not be improper to notice some other sections of the bill containing important provisions which seem to be equally objectionable in the light of the constitutional enactment last referred to. Having attempted to create a board composed equally of members of two political parties, a disagreement or deadlock is anticipated and provided for. In the fourth section

power is conferred upon the board to organize an entirely new police force, and to appoint a chief of police. It is true that it may, in its discretion, retain and continue in office members of the present force, but such continuance must be manifested by an affirmative resolution duly passed, which, of course, requires the vote of a majority of the board; and, unless the two parties in the board can agree to pass such a resolution, the present force shall cease to exist on the 1st day of August, 1896. To this sweeping provision, however, a single exception is made in favor of the person who was senior captain on the 1st day of January, 1896, who, for some reason, is retained by force of the act itself. The section then provides that, in case of a failure of the board to agree upon the appointment of a chief of police, this person who was such senior captain at that time shall act as and perform all the duties and possess all the powers and receive the salary of the chief of police until the board shall agree upon an appointment. In case the board cannot agree upon the appointment of the various members of the police force who are designated in the act as captains or sergeants, it is made the duty of the person so acting as chief to assign members of the police force to perform such duties until the board shall agree upon appointments. But, since the present force is disbanded on August 1, 1896, with the exception of such members as the board can agree to retain by resolution of the majority, and as there may be no police force in existence after that date, the authority to assign persons to police duty is, in substance, an authority to organize and create a new police force. Thus it appears that the legislature, having attempted to create a board of police commissioners which is tied politically, has also designated a certain police captain, in a certain contingency quite likely to happen, to be chief of police, with all the duties, powers, and emoluments of that office, and, upon a like contingency, he becomes vested with all the powers that the board itself could exercise with respect to the organization and government of the police force of the city. In this way the senior captain is made a new officer, not by appointment of any city authority, but by the direct action of the legislature. The constitutional validity of a law of this character must be determined by the nature, character, and scope of the powers attempted to be conferred, whether actually exercised or not. *Stuart v. Palmer*, 74 N. Y. 183; *Coxe v. State*, 144 N. Y. 396, 39 N. E. 400; *Gilman v. Tucker*, 128 N. Y. 190, 28 N. E. 1040. The appointment by the legislature of city officers in whatever form or under whatever guise it may be attempted is a clear invasion of the right of local self-government secured by the constitution. The very extensive powers conferred by the fourth section upon a designated individual who was captain at a certain date is, in substance and effect, an appointment by the legislature of this person to discharge the new duties prescribed therein. It cannot be

contended that the legislature has power to appoint a chief of police, or to authorize a designated person to organize and govern the police force in a city; but the act in question confers such powers, and provides for such an emergency. The powers thus attempted to be conferred indicate quite plainly the general scope and purpose of the bill, and enable us to measure the results in case the intention of the law is carried out. The two members of the commission selected by the minority of the common council, whether that minority consists of one member or more, are empowered to disband the whole police force of an important and populous city, the capital of the state. They may do that without any regard to the wishes of the people of the city who pay the taxes, and for whose safety and protection a police force is maintained. It can be accomplished without even any affirmative action on their part. They may remain passive, and refuse to vote for the resolution retaining the force, or any part of it, and then the statute does the rest; since, in the absence of some affirmative action on the part of the board on or before the 1st day of August, 1896, the present organization is completely swept away by force of the statute itself. All this may be done with or without cause, and without charges, trial, or investigation of any kind whatever. Moreover, a single man, selected by the legislature, may organize a new police force, since there is no one else with power to do it in case the two political elements in the board, equally divided, fail to agree. It seems to me impossible to reconcile a bill so framed, and involving such possibilities, with the principles of local self-government so plainly expressed in the constitution.

The last clause of this section requires the board to appoint the requisite number of patrolmen within 10 days from August 1, 1896, from the civil service list, and provides that no person shall be eligible who is over the age of 40 years. It is urged that this restriction is in violation of article 5 of section 9 of the constitution, which requires appointments and promotions in the civil service of the state and in cities to be made according to merit and fitness, to be ascertained, so far as practicable, by competitive examinations. In a statute which authorizes the discharge of the whole police force of a large city, this disqualification, based upon age, is quite significant. The discharged members of the present force might be able to satisfy all the requirements of the civil service regulations as to merit and fitness so completely as to be placed at the head of the list, but none of them could be appointed if over 40 years of age. While the legislature has the power to prescribe a qualification based upon age as a condition of admission to the civil service, and particularly to the police force in a city, yet, since the constitution has made merit and fitness the primary and controlling test, it is obvious that the spirit and purpose of the fundamental law cannot be defeated or evaded by statutory con-

ditions or restrictions merely arbitrary, or plainly unreasonable. The decision of the legislature that the constitutional test of merit and fitness is not practicable in a particular case, or that still other conditions or qualifications should be attached to the right of appointment, is not conclusive, but is open to the scrutiny of the courts. In *re Keymer*, 148 N. Y. 219, 42 N. E. 667; In *re Jacobs*, 98 N. Y. 98. Whether the age qualification required by this statute is, under the circumstances, a justifiable exercise of power or an arbitrary and unreasonable condition, presents a question which, in view of the preceding discussion, it is not now necessary to decide.

The learned counsel for the defendants has attempted, with much industry and ability, to defend the various provisions of this bill by arguments drawn largely from the legislative interpretation of the constitution manifested by the creation and operation through a long series of years of bipartisan boards and commissions, and our attention is called to numerous laws enacted for that purpose, providing sometimes for their appointment, and sometimes for their election by the people. None of these statutes, however, contain such provisions as the one now under consideration, and, it should be added, this court has carefully refrained from expressing any opinion as to the validity of provisions which preclude the people or the appointing power from voting for or approving of all the members composing them. *People v. Kenney*, 96 N. Y. 303; *People v. Crissey*, 91 N. Y. 616; *Demarest v. City of New York*, 147 N. Y. 203, 41 N. E. 405. It will be found, I think, upon careful examination of the laws creating such boards, that they have been organized with such scrupulous fairness that in every case they can reasonably be considered as the result and outgrowth of local sentiment and local authority. Moreover, they have proved to be, as thus constituted, such useful instruments for the promotion of economy, order, and good government as to disarm all opposition on the part of the people in the localities where they are in operation, and to meet with general public approval. We do not decide or intimate anything against the validity of the laws under which such boards exist. When their particular provisions are questioned, or brought regularly before us, it will then be pertinent to inquire whether there is not sufficient warrant within the pale of the constitution for their organization and existence.

The construction placed by the legislature upon limitations on its powers expressed in the constitution, while entitled to respectful consideration, can never, of course, be conclusive. The interpretation of the constitution is confided to the judicial, and not the legislative, department. But the argument in this case in favor of legislative construction loses much of its force by the circumstance that the recent convention to revise the constitution framed and inserted in that instrument an entirely new provision for constituting election boards on the bipartisan plan. If the argument now made

is sound, this provision was unnecessary. But it can scarcely be supposed that such an able and intelligent body, embracing as it did many of the most eminent members of the bar, introduced, debated, and passed an entirely new provision intended to confer upon the legislature a power which it already possessed. It does not follow, however, that laws which merely require the local appointing power to so constitute boards as to be nonpartisan or bipartisan are in conflict with the constitution. So long as the people have the benefit of the judgment and discretion of the local authority in making the selection from the citizens, it may not be a fatal objection that they are restricted from selecting all the appointees from the same party. So long as the appointment is in fact as well as in form made by the mayor or common council, as the case may be, and the appointing authority is left free to act in its integrity, the mere fact that they may be prohibited from making the choice from one particular class or political party may not invalidate the statute. There is, we think, a distinction between such a statute and that now under consideration, where the local authority is so divided that its action cannot be said to represent the popular will, but rather the choice of the central authority. In any case where the selections have been made, and the persons selected have qualified and assumed the duties of the office, it may be that their official acts would not be void merely because the power under which they were appointed obeyed a statute open to some constitutional objection, in making the selection of the appointees. It is unnecessary, however, to consider or decide such questions until they are properly before us. All we mean to say is that the condemnation of this statute does not necessarily vacate the places or invalidate the official acts of city officers holding under statutes to which attention has been called, and which it is claimed are identical with that now under consideration. *Curtin v. Barton*, 189 N. Y. 505, 34 N. E. 1093. We are dealing now with the provisions of the bill before us, and with nothing else. Confining the discussion and examination to that alone, we are compelled to hold that, in the particulars pointed out, it is in conflict with the constitution.

There was nothing decided in the case of *Rogers v. Common Council*, 123 N. Y. 173, 25 N. E. 274, which tends to sustain the provisions of this bill. That case involved no question which is really pertinent here. The question there was with respect to the power of the legislature to create the state civil service board. Since it was not claimed that they were in any sense city or local officers, the meaning of that provision of the constitution which secures local self-government to cities was not involved. It was held that the legislature had the power to provide that not more than two of the members should belong to the same political party, but that is not the question here. The law did not require that any of them should be a member of any party, or

profess any particular political faith. It prescribed no one and disfranchised no one on account of his political opinions. It simply provided that a state board, the object and purpose of which was to remove the civil service from the conflicts of politics, should not itself be or become a political machine. The bill now under consideration is framed upon widely different principles. It carefully provides that no one but a partisan shall be appointed, or can under any circumstances hold the office. In a board composed of four persons two political parties are each represented by two adherents, and in case of a disagreement, practically certain to occur, the legislature has designated a person to discharge its functions until such time as the members may be able to agree. We think that the plaintiffs were entitled to maintain the action, and that it was not prematurely brought. *Williams v. Boynton*, 147 N. Y. 426, 42 N. E. 184; *Flood v. Van Wormer*, 147 N. Y. 284, 41 N. E. 569. The judgment should be affirmed, with costs.

BARTLETT, J. (dissenting). This appeal presents the question whether chapter 427 of the Laws of 1896, amending existing statutes and repealing others for the purpose of reorganizing the police board and the police force of the city of Albany, is constitutional. The plaintiffs are taxpayers of the city of Albany, who secured a judgment at special term perpetually enjoining the common council of that city from electing or appointing police commissioners under the act in question, upon the ground that it is unconstitutional. The appellate division, Third department, having affirmed the judgment, this appeal is taken.

The questions involved were exhaustively discussed by the courts below, and in the appellate division many general legal propositions were debated at great length, and fortified by citations of authority, concerning which there can be no real difference of opinion. It goes without saying that under our form of government the majority are to rule, and that the principle of local self-government is recognized and protected in the constitution and statutes of the state. If the act now under review subverts either of these great principles of popular government, it must be declared unconstitutional and void. I shall refrain from discussing the proposition pressed upon the attention of the court involving general principles, and consider only the specific grounds upon which the act is attacked.

Section 1 of the act amends section 3 of chapter 77, Laws of 1870. Among other new provisions are the following: "The police board of the city of Albany shall consist of four police commissioners, not more than two of whom shall belong to the same political party or organization, and who shall be chosen and hold office as hereinafter provided. * * * No person is eligible to the office of police commissioner unless, at the time of his election, he is a member of the political party or organization having the highest or next highest

representation in the common council." The first quoted sentence, in so far as it limits eligibility, is not in violation of the constitution, as this court approved similar phraseology in *Rogers v. Common Council*, 123 N. Y. 173, 25 N. E. 274. The second quoted sentence, which practically confines eligibility to members of the two great political parties, cannot, I think, be sustained as a constitutional provision. If this latter sentence can be eliminated from the section where it is found, and still leave the act complete in itself, and capable of enforcement, it disposes of one of the principal objections relied upon by the plaintiffs, and greatly simplifies this discussion. With this unconstitutional provision stricken out, the section would provide that the number of police commissioners should be four, not more than two of whom shall belong to the same political party. In the *Rogers Case*, 123 N. Y. 173, 25 N. E. 274, the civil service act was attacked on the ground that the limitation placed upon the governor in appointing commissioners, to the effect that not more than two of the three commissioners should "be adherents of the same party," rendered the act unconstitutional and void, as violating that provision of the constitution which declares that "no member of this state shall be disfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land or judgment of his peers." Article 1, § 1. It was also claimed to violate that part of section 6 of article 1 which declares that no person shall be "deprived of life, liberty, or property without due process of law." Still another ground was urged that the act was in conflict with article 13 of section 1, as exacting an unlawful test of eligibility for public office. Judge Peckham, in delivering the opinion of the court, refers to the fact that provisions of a similar nature are contained in numerous statutes, the latest being the state railroad commission and the state board of arbitration. While no conclusive argument can be based upon such legislation, it is proper to refer to it as showing the practical construction of the constitution which has been acquiesced in for many years. A few sentences from Judge Peckham's opinion disclose the precise ground on which this court rested its decision. The opinion, after calling attention to the fact that the legislation under review was an effort to do away with the "semi-barbarous maxim" that "to the victors belong the spoils," and replace it by a system of appointment based solely upon merit, administered by a commission that could not be made up exclusively of the adherents of any one political party, goes on to say: "The appellant bases his argument upon the proposition that every citizen has a right, which is protected by the constitution, to be regarded as eligible to hold any office, unless the constitution has itself prescribed certain qualifications for such holding. He then asserts that the statute in question violates this constitutional right." The court, after stating that it was not neces-

sary to pass upon the correctness of this general claim, said: "We think his right to be regarded as eligible to hold office under this statute is fully recognized when he stands on an equal footing with others of his class, all of whom are eligible. * * * It must be remembered that there is nothing in this statute which compels the appointment of even one member of any political party. It simply prevents the appointment of more than two from such party. * * * The purpose of the provision is, of course, plain. It seeks to secure the appointment of persons who are not all of the same political views, and thus to provide for a representation in the body so appointed of different, and probably conflicting, interests in the state. We cannot believe that the section in question does, or was intended to, operate so as to prevent the execution of such a purpose so carried out." This reasoning applies with equal force to the case at bar, and must be deemed conclusive. The fact that we are dealing now with the police commissioners of a city, and that the *Rogers Case* treats of a state commission, does not affect the situation. The question of the authority conferred upon the common council and its legality is not here considered, but will be dealt with later.

I come, then, to the provision that no person is eligible to the office of police commissioner unless at the time of his election he is a member of the political party or organization having the highest or next highest representation in the common council. The effect of this provision is to exclude from eligibility all persons who do not belong to one or the other of the great political parties of the country. This is the practical disfranchisement of a numerous class of citizens, and violates the constitution (article 1, § 1). I do not refer to legislative limitations requiring skilled knowledge in the appointee when the duties of the position call for it, as that situation would present a very different question, even if the constitution was silent as to the qualifications of the officer. The case at bar presents an instance of the arbitrary and unexplained exclusion of a considerable number of the citizens of Albany from the class eligible to fill the office of police commissioner. No sufficient reason has been suggested for such legislation. In *Barker v. People*, 3 Cow. 686, the court of errors, in construing the penal provisions of an act to suppress dueling, had occasion to discuss this question of arbitrary exclusion from eligibility to office, and uses this language (page 703): "Eligibility to office therefore belongs not exclusively or especially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever, not excluded by the constitution. I therefore conceive it to be entirely clear that the legislature cannot establish arbitrary exclusions from office, or any general regulation requiring qualifications, which the constitution has not required."

It is further urged on behalf of the plaintiffs that this provision we are considering prescribes a political test, in violation of article 13

of section 1 of the constitution. As the provision is void for reasons already stated, it is unnecessary to consider this point in detail, but I am of opinion it is well taken.

We come, then, to the question whether, if this provision is eliminated from the section where it stands, the act will remain complete in itself, and be capable of enforcement. It cannot be assumed that the main object of the amendatory statute was to provide that the police commissioners should belong to one or the other of the great political parties. It is rather to be inferred that the legislature was seeking to remove the board from partisan control, and the general legal presumption is that it intended to enact a constitutional measure. So far as providing for eligibility is concerned, section 1 of the act would be complete and constitutional if permitted to stand with the sole provision that not more than two of the four commissioners should belong to the same political party or organization. The general scope and object of the act would not be in any way impaired by this change. This court has recently reaffirmed the well-settled principle that, where the void provisions of an act are separable from those that are lawful, and that which remains is capable of being executed, it may be treated as constitutional. *Bridge Co. v. Smith*, 148 N. Y. 540, 554, 42 N. E. 1088, 1091. The application of this principle to the case at bar leads to the elimination of the unconstitutional provision, and permits the act to be carried into effect without it.

The next ground of attack upon the act is that certain provisions of section 1 are violative of article 10 of section 2 of the constitution, which provides that: "All city, town and village officers, whose election or appointment is not provided for by this constitution, shall be elected by the electors of such cities, towns and villages, or of some division thereof, or appointed by such authorities thereof as the legislature shall designate for that purpose. All other officers whose election or appointment is not provided for by this constitution, and all officers whose offices may hereafter be created by law, shall be elected by the people or appointed, as the legislature may direct." Section 1 of the act provides: "On the first Monday after the passage of this act the common council shall meet at eight o'clock in the evening in the common council chamber, and shall proceed to elect four persons, residents and freeholders in the city, as such police commissioners, and for the purpose of such meeting the members attending shall constitute a quorum. Each member of the common council shall be entitled to vote for not more than two of such persons, and the four persons receiving the highest number of votes shall be such police commissioners." It was undoubtedly the intention of the legislature to designate the common council, as a body, to appoint the police commissioners under this act in pursuance of the provisions of the constitution just quoted. While it does not seem to be seriously questioned that the common council is a city authority under

the constitution, it is insisted that the legislature had no power to direct or restrict its action in the appointment of police commissioners. As the constitution authorizes the legislature to impose this new duty of appointing the police commissioners upon the common council, it seems reasonable that it should prescribe the details of procedure, provided it does not deprive the appointing authority of the power to act in the premises. Has the common council, in any proper legal sense, been deprived of the power conferred upon it by the act in question? The plaintiffs insist that it has, in several important particulars.

The first point made is that the common council, in this one instance, is deprived of the power to act as a collective official body in the usual manner. This point refers to the provision of section 1, already quoted, requiring the common council to meet at a time and place designated; and further enacts that "for the purposes of such meeting the members attending shall constitute a quorum." The very obvious reason for this provision as to quorum was to secure prompt action, and prevent obstructive tactics on the part of those aldermen who might be opposed to carrying the act into effect. Full notice of this meeting appears on the face of the act, and every alderman was at liberty to take part in the action of the common council, if he saw fit to attend. It was competent for the legislature, "for the purposes of such meeting," to provide for a special quorum in order to compel full attendance and speedy action. It rested wholly with the aldermen to preserve the old quorum. The same line of reasoning justifies the provision that the common council should transact no other business until the police commissioners were elected.

The next point taken against the act is based on the provision of section 1, that each member of the common council shall be entitled to vote for not more than two of the four police commissioners. The argument against the validity of this provision loses much of its force by dropping out of section 1 the unconstitutional provision which limits eligibility to the members of the two great political parties. We then have an act which provides, with the sanction of this court speaking in the *Rogers Case*, 123 N. Y. 173, 25 N. E. 274, that only two of the four police commissioners shall belong to the same political party. If this salutary principle, approved by this court, is to be carried out by appropriate legislation, why may not a member of the common council be restricted in his vote to two of the candidates, in order to secure that result, precisely as the governor was limited to naming but two adherents of any one political party in making his appointment of civil service commissioners with the approval of this court in the *Rogers Case*? If the effort to constitute public boards to some extent nonpartisan or bipartisan by legislation that makes it impossible for all the members to belong to one political party or organization is commendable, and approved by this court as constitutional, why are not minor provisions in

an act calculated to accomplish the desired result not only necessary, but legal? With what propriety or logic can it be said in the case at bar that the common council of the city of Albany, and every member thereof, is vested with the indefensible legal right to vote for all four of the police commissioners, thereby defeating the will of the legislature as constitutionally expressed, and rendering impossible the creation of a nonpartisan board? The legislature has not invaded the right of its constitutional agent to appoint this board. With the act stripped of the provision confining eligibility to members of the two great political parties, the common council is free to select its board of police commissioners from the entire body of freeholders in the city of Albany, subject only to the constitutional restraints imposed by the act in order to secure a nonpartisan board. The appellants have urged the argument of practical construction with great earnestness, and insist that years of legislative interpretation of the constitution and the practical construction given to a statute by the public officers of the state, and acted upon by the people thereof, are decisive in case of doubt. *People v. Dayton*, 55 N. Y. 367, 377; *People v. Home Ins. Co.*, 92 N. Y. 337; *People v. Murray*, 149 N. Y. 367, 44 N. E. 146.

I am not able, within the reasonable limits of this dissenting opinion, to examine the numerous statutes and precedents to which we have been referred, although I do not fail to recognize their persuasive force; but, for reasons already stated, I think it was competent for the legislature to provide that each member of the common council should be entitled to vote for not more than two of the police commissioners, and in so doing it did not violate the principle of local self-government, but carried out the bipartisan policy approved by this court.

I will only state my conclusions as to some of the remaining points argued at the bar.

Objection is made to the provision that, if a vacancy shall occur in the board of police commissioners, otherwise than by expiration of term, it shall be filled by appointment by the mayor upon the written recommendation of a majority of the members of the common council belonging to the same political party or organization as the police commissioner whose office shall become vacant. Unless some mode of procedure is provided to maintain the nonpartisan character of the board in filling vacancies, the purpose of the act in this regard might easily be defeated. Having that end in view, I see no objection to the provision under consideration.

Attack is made on the provision in section 4 of the act that, in case of a failure of the board to appoint a chief of police, then the senior captain of police on January 1, 1896, shall act as such, and possess all the powers and perform all the duties of the chief of police, and receive the salary of chief of police, until the board shall make an appointment. In case of the failure of the board to appoint the captains or sergeants provided for by this

act, then it is the duty of the chief or the acting chief "to assign members of the police force to perform such duties until the board shall make such appointment." The plaintiffs claim that when the senior captain is given the power of chief of police he is given new powers and invested with the duties and emoluments of a distinctively new office, in direct hostility to the command of the organic law. This is not the effect of the provision as to the senior captain's duties in case the board failed to appoint a chief of police. No new office is created. The duties of the chief of police are devolved upon the senior captain in a certain emergency, which might arise in a board consisting of four members, if tied, as to the appointment of a chief of police. The senior captain was to act only during an interregnum, if at all, in order to preserve the efficiency of the force in case the police board failed to act promptly for any reason. A provision like this, seeking to guard against a mere possible danger, is in no legal sense an appointment to public office by the legislature. It is no more, in legal effect, than saying that, when a regular officer is disqualified to act in a given case, some other official may discharge his duties on that occasion. In *re Hathaway's Will*, 71 N. Y. 238.

The point is made that the provision that no person shall be eligible to appointment on the police force who is over 40 years of age is in violation of the civil service provisions of the constitution. It is a common practice in military and police organizations not to receive new members who are over a certain specified age. This is supposed to conduce to the efficiency of the force, and any reasonable legislation in this direction is valid.

The other points raised on the briefs have been considered, but will not be discussed. In conclusion, it may be remarked that the attention of the court has been called to the alleged fact that the motives of those who secured the passage of the act now under review were unworthy and partisan. I am not informed, judicially or otherwise, upon this point; nor could such a fact, if it existed, be material in this controversy. The court is required to pass upon the constitutionality, not the propriety, of this legislation. I am clearly of opinion that the act under consideration is constitutional and valid, except as to the clause limiting eligibility to the office of police commissioner to membership in the two great political parties, which should be eliminated therefrom. The judgment appealed from should be reversed, and judgment ordered for defendants in conformity with this opinion.

MARTIN, J. (dissenting). The only question involved in this case is the constitutionality of chapter 427 of the Laws of 1896. The principal question relates to the validity of section 1 of that act, which amends section 3 of title 12 of chapter 77 of the Laws of 1870. Whether this act was politic or impolitic, wise or un-

wise, is not to be considered by this court, as the authority to determine those questions is vested in the legislature alone. The power of the legislature to pass such laws as it may, in its discretion, deem proper, and for the best interests of the state, or any division thereof, or of the whole or any portion of its inhabitants, has been conferred upon the senate and assembly, and is absolute and unlimited, unless in conflict with some provision of the federal or state constitution. Const. art. 3, § 1. While the people of the state are sovereign, and originally possessed the sole power of legislation, yet they have delegated that power to the senate and assembly, except as they are restricted by constitutional limitations. Therefore, before a law can be declared invalid, it must be found to be in conflict with some provision of the organic law. *People v. Fisher*, 24 Wend. 215, 220; *Cochran v. Van Surlay*, 20 Wend. 365, 382; *Wynehamer v. People*, 13 N. Y. 378, 430; *Cooley, Const. Lim. (6th Ed.)* 202, 204; *Bank v. Brown*, 26 N. Y. 467, 469; *People v. Cannon*, 139 N. Y. 32, 42, 34 N. E. 759, 762; *People v. Flagg*, 46 N. Y. 401, 404; *Rogers v. Common Council*, 123 N. Y. 173, 181, 25 N. E. 274, 275. The act under consideration, like every other statute, must be upheld, unless it is in plain and substantial conflict with some particular provision or provisions of the constitution. *People v. Briggs*, 50 N. Y. 553, 558; *People v. Gillson*, 109 N. Y. 389, 397, 17 N. E. 343, 345; *People v. Durston*, 119 N. Y. 569, 577, 24 N. E. 6, 8; *People v. Rice*, 135 N. Y. 484, 31 N. E. 923.

The respondents contend that the provisions of this statute which declare that not more than two of the police commissioners shall belong to the same party or organization, that each member of the common council shall be entitled to vote for not more than two of such persons, and that no person is eligible to the office unless, at the time of his election, he is a member of the political party or organization having the highest or next highest representation in the common council, are in contravention of the constitution of this state, and, consequently, void. The general principle contained in these provisions is by no means new. For more than a quarter of a century the current of public opinion and of federal and state legislation has been in the direction of establishing nonpartisan boards or commissions for the administration of federal, state, and municipal affairs. Without particularly referring to the various statutes creating boards or commissions for the administration of the affairs of the federal or state government, but confining our examination to a portion of the cities of the state, we find that in some form or other this principle exists in the statutes regulating the municipal affairs of a majority of them. Thus, in the city of Yonkers, four commissioners of police are appointed by the common council by ballot, and each member present can vote for only two. Laws 1873, c. 163. In the city of Utica the mayor appoints the police

and fire commissioners, two of whom are appointed from each of the two principal political parties of the state. Laws 1874, c. 314. In the city of Elmira such commissioners are appointed by the common council, and such appointments are required to be so made that the two principal political parties represented in the council shall be equally represented. Laws 1875, c. 370, tit. 8, § 103, subd. 2, as amended. The charter of the city of Binghamton requires the mayor to appoint four such commissioners, two from each of the two principal political parties of the state; and when a vacancy occurs that the common council shall appoint a successor in the same manner. Laws 1881, c. 6, § 1. An act to establish a board of fire commissioners for the city of Rome provides that the mayor shall appoint four commissioners, two of whom shall be selected from each of the two principal political parties of the state, and at the expiration of the term of any such commissioner, his successor shall be appointed from the political party to which the former belonged. Laws 1881, c. 517, §§ 2, 4. The charter of the city of Lockport provides for the appointment of four police commissioners, two of whom shall be members of each of the two principal political parties. Laws 1882, c. 48. An act to establish a police department in the city of Buffalo provides that the mayor shall appoint two citizens as commissioners of police, one from each of the two principal political parties, and that in all appointments thereafter made the nonpartisan character of the board shall be preserved and maintained. Laws 1883, c. 359, § 2. An act to increase and reorganize the police force in the city of Troy provides that the common council shall appoint two police commissioners of opposite politics, and at the expiration of their term the successor of the two whose terms of office shall expire shall be elected by ballot by the common council, but that no member of the council shall vote for more than one of such commissioners. Laws 1885, c. 54, § 1. Chapter 79 of the Laws of 1877 provided for the reorganization of the fire department of the city of Syracuse, that such commissioners should be elected, but that no ballot should contain more than one name, and the two persons receiving the highest number of votes should be elected. Chapter 17 of the Laws of 1869 provided for the election of four police commissioners in that city, but declared that no ballot should contain more than two names. Laws 1874, c. 542. The charter of the city of Syracuse provides for a fire commission, and also for a police commission, and that the commissioners then in office should continue until the expiration of their term, when the mayor is required to appoint as successors to such commissioners persons who shall belong to the same political party as the commissioners whom they are appointed to succeed. The provisions as to fire and police commissioners are identical. Laws 1885, c. 26, §§ 186, 187, 203, 206. The statute establishing a board of police commissioners for the city of Watertown requires the mayor to appoint four commissioners, two from

each of the two principal political parties of the state, and that the successor to any such commissioner shall be a member of the political party to which the commissioner whose office has expired belonged. Laws 1885, c. 189, § 19. Chapter 255 of the Laws of 1870 provides for the election of four police commissioners for the city of Oswego, but that no ballot shall contain more than two names. Chapter 46 of the Laws of 1879 contains the same provision as to the election of school commissioners for that city. Chapter 197 of the Laws of 1867 provided for filling vacancies in the board of fire commissioners in the city of Albany, and that no ballot should contain more than one name. Chapter 323 of the Laws of 1880 declared that no member of the common council of the city of Troy, in electing police commissioners, should vote for more than one. Chapter 186 of the Laws of 1872 provided for the election of four police commissioners for the city of Albany, but that no voter should be entitled to vote for more than two persons for such office. Chapter 515 of the Laws of 1874 related to the election of aldermen in the city of New York, and provided that three should be elected for each ward except the eighth, but that no voter should vote for more than two. The same principle has existed in statutes relating to the appointment of election officers since the organization of our state government, although not protected by any constitutional provision before the amendment of 1894, the obvious purpose of which was to forbid any change in these time-honored laws. The statutes already referred to sufficiently show the course of legislation in this state upon the subject, and render the examination of other statutes quite unnecessary.

If all the various statutes of the state relating to the government of cities which contain provisions involving the principle contained in the statute under consideration are to be held void, it must result in a general derangement of the affairs of all the cities in the state, and lead to boundless confusion in matters relating to their government. "An unconstitutional act is as if it had never been passed by the legislature. It can confer no rights and afford no protection." *Bridge Co. v. Paige*, 83 N. Y. 178, 190; *Cooley*, Const. Lim. 188; *End. Interp. St.* § 358. Relying upon the validity of this principle, commissions for the police, fire, and other departments of the various cities have been organized under statutes containing the identical principle contained in this, which must be regarded and treated as invalid if this statute is held void for that reason. If the various statutes under which such commissions have been appointed are invalid, it must necessarily follow that all the appointments made by such commissions are also invalid, and, consequently, all the members of the police force, fire and other departments of such cities, and all officers appointed by these various commissions, are without title to their office, are entitled to

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no compensation, and may be held liable for many acts they have performed in reliance upon the integrity of the provisions of these various statutes. It is to be presumed that this court will adhere to the principle of the decision in this case, and it must apply to every such city in the state, and be regarded as condemning all such provisions in the various statutes under which they were incorporated or by which they are governed. Hence the question of their validity is a far-reaching one, and is of great importance, involving, as it does, the governmental affairs of nearly every city in the state. Therefore it should not be hastily or inconsiderately held invalid, whatever may have been the purpose which induced the passage of this particular act. Its purpose must be presumed to have been proper, especially in view of the fact that the police and fire commissioners for that city were elected nearly 30 years since, under a statute which included the principle contained in this. Not only is every intentment in favor of the validity of statutes, but no motive, purpose, or intent can be imputed to the legislature in the enactment of a law other than such as are apparent upon the face of and gathered from the law itself. *People v. Albertson*, 55 N. Y. 54. Moreover, if the purpose which induced its passage was improper, still the responsibility is not ours, but rests elsewhere. Unless these provisions of the statute are plainly and clearly in substantial conflict with some particular provision of the constitution, this court should not declare them void. There should be no reasonable doubt of the unconstitutionality of a statute before it should be annulled by judicial action, and all doubtful questions should be resolved in favor of the validity of the act, or, as was said by Allen, J., in *People v. Albertson*, supra: "A law which has received the sanction of the legislature and the approval of the executive should only be held void as repugnant to the constitution when the repugnancy is clearly demonstrated."

From 1867 to 1896 the legislature has almost yearly passed statutes involving in some form the general principle contained in the statute under consideration, which have been approved by the executive and acted upon by the different municipalities without dissent or question. As early as 1867 that principle was applied to the election of fire commissioners in the city of Albany, and in 1872 was applied to the election of police commissioners for that city. Thus for nearly 30 years, notwithstanding the frequent changes of officers in the different municipalities, a practical construction has been given to the constitution, so far as it affects laws containing this principle, to the effect that they are valid, and controlling as to the matters to which they relate. The practical construction given by the legislature to constitutional provisions, for many years acquiesced in and acted upon, unques-

tioned by the executive and administrative branches of the government, is entitled to controlling weight in its interpretation, and has almost the force of a judicial exposition. *People v. Dayton*, 55 N. Y. 367, 378; *People v. Home Ins. Co.*, 92 N. Y. 328, 337; *In re Washington St. A. & P. R. Co.*, 115 N. Y. 442, 447, 22 N. E. 356, 357; *People v. Murray*, 149 N. Y. 367, 376, 44 N. E. 146, 150. As was said by Ruger, C. J., in the *Home Ins. Co. Case*, supra: "It would now seem too late to raise a question of such importance and fraught with such dangerous consequences to those engaged in the enforcement of the laws." I think, as was in effect said by Andrews, C. J., in the *Murray Case*, supra, this legislative policy which has prevailed for so long a period, sanctioned by numerous statutes, never questioned in the courts, and acquiesced in by all departments of the state and municipal governments, is a practical construction of the provision now in question; and this construction ought not now to be disturbed. I had supposed the foregoing to be a well-established rule of law, to be applied with the same certainty and uniformity as any other, and not a mere rule of convenience. If this supposition is correct, then I cannot understand why it should have been applied to sustain the excise law, and the various other statutes under consideration in the cases cited, and not in this. If there was ever a case where the principle of practical construction should be applied, manifestly this is one. Every correct principle and proper consideration requires it. The confusion, derangement, and consequent hardship that must follow the condemnation of all these statutes seem to me to demand the application of that principle in this case, if necessary to uphold this and the various other statutes authorizing the organization of commissions for the management and control of the municipal affairs of a majority of the cities of the state. The principle involved in this class of legislation has been expressly approved by this court. In the case of *Rogers v. Common Council*, 123 N. Y. 173, 25 N. E. 274. Judge Peckham, who delivered the opinion of the court in that case, fully discussed the question of improving the public service by means of nonpartisan commissions or boards. He in strong terms commended that principle, and as strongly condemned what he termed the semibarbarous system represented by the maxim that "to the victors belong the spoils." In that opinion all the judges of this court concurred, except Ruger, C. J., who concurred in the result. Thus to the wisdom and propriety of this class of legislation this court seems fully committed. If the principle there commended is to be now condemned, and this class of statutes is to be held invalid, we shall take a long step backward. It will constitute a positive retreat from the position that the public affairs of the municipalities of the state should be removed from

the influence of partisan politics; and, besides, it will be accompanied by the disastrous consequences already indicated, and demoralize and seriously injure the public service.

The question in the *Rogers Case* arose under the civil service act of 1883, which provided for the appointment of three civil service commissioners, not more than two of whom should be adherents of the same party; and it was held not to be violative of any of the provisions of the state constitution. We have in that case a direct authority to the effect that the provision of the statute under consideration, which provides that not more than two of the four police commissioners to be appointed shall belong to the same political party or organization, is valid. Indeed, it is conceded by the respondents that, if this provision stood alone, the constitutional objections now urged against it could not be sustained. They, however, insist that the provision which follows, declaring that each member of the common council shall be entitled to vote for not more than two of such persons, and the four persons receiving the highest number of votes shall be such commissioners, is in conflict with the provisions of the constitution. The claim now most strongly urged is that under the provisions of section 2 of article 10 the legislature had the power to select the local authority by which the appointment should be made, but that, having conferred that power upon the common council, it must be regarded as conferring the authority upon that body as such; that it can only act as a collective, official body by the voice of its majority, and that this provision is consequently void. If by this act the legislature had selected the common council as the authority by which such appointment should be made, without any provisions as to the manner in which such commissioners should be elected, it might, perhaps, be that it could have acted only in the manner suggested. But such is not the case. It provided that in determining who should be elected such commissioners each member of the council should vote for not more than two, the practical effect of which was to carry into execution the provision that no more than two of such commissioners should belong to the same political party or organization, on the assumption that the members constituting the common council would vote for commissioners who were members of their own party. That the legislature possessed the power to amend the charter of the city of Albany so as to define the duties and prescribe the powers of the common council, and to direct the manner in which it, as the authority of that city, should elect the police commissioners, I have no doubt. It could have provided that there should have been a two-thirds vote, a majority vote, or less. The municipality, the existence of the common council, the duties it shall perform, and all its acts of a governmental character are under the control of the legislature.

Section 1 of article 8 of the constitution of

the state authorizes the legislature to create municipal corporations by general or special acts, and to alter or repeal such acts from time to time. In *People v. Briggs*, supra, Church, C. J., said: "A municipal corporation is a part of the governmental machinery of the state, organized not for the purpose of private gain, like private corporations, but for the purpose of exercising certain functions of government, within a specified locality; and it possesses such powers, and such only, as are conferred upon it by the legislature; and they are to be exercised in such form, mode, and manner, and by such agencies, as the legislature may from time to time prescribe, within the limits of the constitution. * * * Over all its civil, political, or governmental powers the legislature is, in the nature of things, supreme, and without limitation, unless restrained by the constitution." Dillon, in his work on *Municipal Corporations*, in treating of the power of the legislature over municipal corporations, says: "Over all its civil, political, or governmental powers the authority of the legislature is, in the nature of things, supreme, and without limitation, unless the limitation is found in the constitution of the particular state."

Assuming, then, as we must, that the legislature had the power to provide in what manner the common council should discharge its duties, it had the authority to provide for the election of police commissioners in the manner pointed out by the statute. The effect of this provision was to amend the charter of the city of Albany so far as it related to the manner in which the common council should act. As there is no constitutional provision which in any way prevents the legislature from providing the manner in which that body shall act in the selection of officers, it is quite plain, I think, that this statute is not in conflict with the provision of the constitution under consideration. It is, however, suggested that under this statute the members of the common council might all vote for only two members of the police commission, and that then their power would be spent, and only two members elected. This suggestion must, I think, be regarded as too speculative and improbable to require discussion or serious consideration. But, should that condition arise, there would, at most, be a vacancy in the office of two commissioners, which might be filled in the manner pointed out in the statute. Moreover, if the statute is simply defective, it by no means follows that the whole statute must be condemned. It may be observed, in passing, that the question whether the police commissioners to be thus appointed were officers of the city within the meaning of the provisions of section 2 of article 10 may not be entirely free from doubt. *Fire Department of New York v. Atlas S. S. Co.*, 106 N. Y. 566, 13 N. E. 329.

It has been intimated that, while the legislature possesses the power to select and confer upon the authorities of a city the right to ap-

point all city officers whose election or appointment is not provided for by the constitution, yet it has no power to in any way limit that right by providing the method in which such appointments shall be made by the city authorities, or the qualifications which such appointees shall possess. In *People v. Warden of City Prison*, 144 N. Y. 529, 39 N. E. 686, the validity of chapter 602 of the Laws of 1892 was considered by this court, and it was held to be constitutional and valid. By the provisions of that act it was made the duty of the mayor of each of the cities of the state to appoint a board for the examination of plumbers of each city, to consist of five persons; two to be master plumbers of not less than 10 years' experience, one to be a journeyman plumber of like experience, and the others to be the chief inspector of plumbing and drainage of the board of health, and the chief engineer having charge of sewers in such city. Thus, by that act the legislature in effect prescribed not only the qualifications which the appointees should possess, but, as to some, practically who should be appointed. It is possible that that decision may be sustained upon the ground that those officers fell within the last sentence of that section of the constitution which provides that all officers whose office may hereafter be created may be elected or appointed, as the legislature may direct, although not placed on that ground. It seems to me, however, that the doctrine of that case bears upon the question, and tends to sustain the validity of the statute under consideration, so far as this immediate question is concerned.

In the *Rogers Case*, supra, it was argued that the civil service act, which was then under examination, was violative of this section of the constitution. The provisions of that statute required the mayor to prepare certain rules under which the city officers were to be selected, which were to go into effect only when approved by the state civil service commission, and that no officer or clerk should be appointed, and no person should be permitted to enter or be promoted into the classes established, until he had passed the required examination. It was contended that the power conferred upon the public authorities of the city to appoint a street or health inspector of that city was limited by such requirement, and hence the act of 1883 was void, as being in contravention of section 2 of article 10 of the constitution. Thus, by that act, the authority to appoint city officers was limited to an extent which required them to be examined under the provisions of that statute, and under rules to be approved by the civil service commission; but it was held that there was no such limitation upon the rights of the local authorities to appoint such officers as to bring the statute within the condemnation of that provision of the constitution. It will be remembered that that statute was passed before the amendment to the constitution.

Again, it is a well-established rule of con-

struction that before a statute should be declared invalid it should appear that it is in plain and substantial conflict with some particular provision of the constitution. Thus the conflict must not only be plain, but it must be substantial as well. The statute must be affected by the provision of the constitution relied upon in some substantial and material particular. If that portion of a statute which is relied upon as a basis for its condemnation is not essential to the accomplishment of its general purpose, the statute cannot be said to be in substantial conflict with the constitution. The fact that a statute may be in conflict with the fundamental law in some slight or unessential particular forms no just basis for its condemnation. In other words, unless the provision of a statute will effect a result which will subvert the object and frustrate the purpose of the constitution, it should be held valid. "The substance of a thing is the essential or important part; the material thing; that in and for which a thing chiefly exists." See "Substance," Abb. Law Dict.; And. Law Dict.; Rap. & L. Law Dict.

It is manifest from a reading of this statute that the purpose of this provision was merely to carry into effect the former provision that not more than two of the commissioners should belong to the same political party. It was the means devised by the legislature to carry into execution what is conceded to be a valid provision of the statute. The dominant purpose of that provision was to establish for the city of Albany a nonpartisan board of commissioners. Whether the means to secure that result was a provision that each member of the common council should not vote for more than two of such commissioners, or that each member should vote for the four commissioners, only two of whom should belong to the same political party, was at most a mere matter of detail by which to accomplish the chief purpose of the act. If this provision had not been included in the statute, manifestly the latter would have been the plan by which the purpose of the legislature would have been carried into effect. That the statute has provided a different method to accomplish the same purpose is unessential, and the provision cannot be properly said to be one of substance. Indeed, that the aldermen or members of the common council as such were authorities of the city within the meaning of the constitution, I have no doubt. *People v. Raymond*, 37 N. Y. 428, 431; *People v. State Board of Canvassers*, 129 N. Y. 366, 29 N. E. 346.

The respondents also contend that the provision of this statute which declares that no person is eligible to the office of police commissioner unless, at the time of his election, he is a member of the political party or organization having the highest or next highest representation in the common council, is void under the provisions of the constitution of the state. Many of the statutes to which we have already referred contain a similar provision, and

hence the doctrine of practical construction is applicable, and this provision may be sustained. Independent of that doctrine, I might be inclined to agree with the contention of the respondents. But I do not deem it necessary to determine the question whether that provision is valid or invalid. If the latter, I am of the opinion that it may be eliminated from the act, and still the apparent and manifest object and purpose of the legislature be effected by the statute as it would then remain. It seems to be well settled that where only a part of a statute is unconstitutional that fact does not authorize the court to declare the remainder void, unless the provisions are so dependent and connected with the object or purpose of the act that it cannot be presumed that the legislature would have passed it without including such void provision. The fact that the legislature may have erred in a matter of detail does not defeat the whole act where, when the unconstitutional portion of the statute is stricken out, that which remains is complete in itself, and capable of being executed in substantial accordance with the apparent legislative intent. *People v. Bull*, 46 N. Y. 57, 69; *Gordon v. Cornes*, 47 N. Y. 608, 617; *People v. Briggs*, 50 N. Y. 553; *People v. Kelly*, 76 N. Y. 475, 489; *In re Village of Middletown*, 82 N. Y. 196; *Duryee v. Mayor, etc.*, 96 N. Y. 477; *People v. Kenney*, Id. 294; *Lawton v. Steele*, 119 N. Y. 226, 23 N. E. 878; *Bridge Co. v. Smith*, 148 N. Y. 540, 42 N. E. 1088. An examination of these cases discloses the extent to which this court has proceeded in applying that rule to various statutes when they have contained unconstitutional provisions and still have been upheld as to the remainder. In many of them this court seems to have gone further than is required to sustain the statutes in question. Who can say that there is any such connection or dependence between this provision and the remainder of the statute that it must be presumed that the legislature would not have passed it with this provision eliminated, or, in other words, that it cannot be presumed that it would have passed it omitting that provision, if it had been regarded as invalid? I do not think it can be reasonably doubted that, if the legislature had supposed or understood that this provision was invalid, it would still have passed the statute without it. Nor do I think the other provisions of the statute are so connected with or dependent upon that provision that they cannot be divided without defeating the object and intent of the statute.

As has already been suggested, the controlling purpose of this statute is to provide for the appointment of four police commissioners for the city of Albany, only two of whom should belong to the same political party. If the provision that no person is eligible to the office of police commissioner, unless at the time of his election he is a member of the political party or organization having the highest or next the highest representation in the

common council, were entirely blotted out, the statute, as it would then remain, would obviously carry into effect the fundamental and substantial intent and purpose of the legislature.

The respondents also contend that the provision of the statute for filling vacancies, by which the mayor is permitted to appoint commissioners upon the written recommendation of a majority of the members of the council belonging to the same political party or organization as the police commissioner whose office is vacant, is also in conflict with section 2 of article 10 of the constitution. Section 5 of article 10 of the constitution provides that the legislature shall provide for filling vacancies in office. In *People v. Snedeker*, 14 N. Y. 32, 59, it was said: "The effect of this provision of the constitution doubtless was to confer upon the legislature the power to provide for filling vacancies in a different manner from the existing method in case it should be deemed proper." In the case of *Rogers v. Common Council*, 123 N. Y. 173, 25 N. E. 274, chapter 354 of the Laws of 1883 was under consideration. That statute contained a provision that any vacancy in the position of commissioner should be so filled by the governor, by and with the advice and consent of the senate, as to conform to the conditions for the first selection of such commissioner. The spirit of that provision is practically identical with that contained in the act under consideration; and that case should, I think, be regarded as an authority to the effect that such a provision is valid. I am unable to discover any provision of the constitution with which this portion of the statute is in conflict. It is simply the means adopted by the legislature to carry into effect and continue the principal purpose of the act that no more than two of the commissioners should at any time belong to the same political party. The latter provision being confessedly valid, I think the means provided to continue the condition thus created were also valid.

I am unable to find in the constitution any provision which renders void that portion of the act which provides that, in case of a failure by the board of police commissioners to appoint the chief of police, the senior captain should act as such until the board should make an appointment. The purpose of this provision clearly was to provide for an emergency that might arise, and thus prevent the city from being without a chief of police until such appointment should be made. Its effect was to confer temporarily upon a city officer added powers, and impose upon him other duties, which he would be required to discharge while the emergency continued. That the legislature possessed the power to amend the charter of the city of Albany so as to provide that in such an emergency one of its officers should discharge other and added duties, I have no doubt. The authority of the legislature

over such a municipality has already been considered, and I think it possessed the power to enact the provision under consideration, and that it is valid.

Nor do I think the provisions of section 4 of the act, which provide that no person shall be eligible to appointment as patrolman of the city who is over the age of 40 years, violate the provision of section 9 of article 5 of the constitution, which declares: "Appointments and promotions in the civil service of the state, and of all the civil divisions thereof, including cities and villages, shall be made according to merit and fitness to be ascertained, so far as practicable, by examinations, which, so far as practicable, shall be competitive; provided, however, that honorably-discharged soldiers and sailors from the army and navy of the United States in the late Civil War, who are citizens and residents of this state, shall be entitled to preference in appointment and promotion, without regard to their standing on any list from which such appointment or promotion may be made." That provision of the statute would seem to be a proper and useful one, as it is manifest that the office of patrolman is one which requires a degree of activity, vigor, and endurance that does not usually exist in older persons. Moreover, the value of the services of a patrolman increases by experience, and hence the necessity of appointing at the outset young men to that position. The provision seems to be one that is not only proper, but necessary to secure the best service in that department. It is found in many of the charters of the cities in this state, and is not, I think, in conflict with the provision of the constitution referred to. The purpose of that provision was to secure appointments according to merit and fitness, and not to interfere with proper provisions of statute in regard to the qualifications that a particular officer should be required to possess. Notwithstanding that provision, I think the legislature still has the power, when necessary or proper, to provide the qualifications, such as age, residence, business and profession, which a person shall possess to entitle him to be appointed to a particular office.

The only remaining ground upon which it is claimed that this statute is invalid is that it does not strictly comply with the provisions of section 2 of article 12 of the constitution which require the insertion after the title of such an act of the words "Passed without the acceptance of the city." The precise words required by the constitution were not inserted after the title in this act, but the words "Not accepted by the city" were inserted, and were manifestly intended to be in compliance with the requirements of the constitution. While the language first stated is, in terms, required, still I do not think that the omission to use the precise words mentioned makes a statute invalid

when, as in this case, words which are equivalent to those provided for are used. Such a construction of this provision would be too narrow and technical. The words used were within the spirit of the provision, although not within its letter, and were, I think, sufficient.

These considerations lead me irresistibly to the conclusion that the judgment in this action should be reversed, and hence I am unable to concur in the result reached by a majority of the court.

GRAY and O'BRIEN, JJ., read for affirmance.

ANDREWS, C. J., and VANN, J., concur in that result on the grounds:

1. That a minority of the common council is not a city authority, within the meaning of section 2 of article 10 of the constitution.

2. That the clause prescribing the qualification of the police commissioners is so connected with the purpose of the act and the object in view that it cannot be said that it was not an essential part of the scheme of the act, and may, therefore, be rejected, leaving the remainder of the act to stand.

BARTLETT and MARTIN, JJ. (with whom HAIGHT, J., concurs), read for reversal.

Judgment affirmed.

(146 Ind. 129)

BAILEY et al. v. RINKER et al.

(Supreme Court of Indiana. Oct. 21, 1896.)

EXECUTORS AND ADMINISTRATORS—ORDER TO SELL LAND—VALIDITY—ACTION TO SET ASIDE—SUFFICIENCY OF COMPLAINT.

1. Rev. St. 1894, § 2763 (Rev. St. 1881, § 2593), provides that a probated foreign will may be produced to the circuit court, and if it is satisfied that the instrument ought to be allowed it shall order the same to be filed and recorded by the clerk, and the will shall then have the same effect as if originally admitted to probate in the state. Section 2519, Rev. St. 1894 (section 2363, Rev. St. 1881), provides that a foreign executor may file an authenticated copy of his appointment in the circuit court of any county in which there is land of the deceased, and then be authorized by the court to sell land for payment of debts or legacies, as in case of a domestic executor. *Held*, that though the failure of the circuit court to require a foreign executor to file an authenticated copy of his appointment, and the foreign will to be allowed and recorded, before granting his application to sell land, is an irregularity or error, such error does not deprive the court of jurisdiction over the subject-matter, and render the order void.

2. In an action to set aside an executor's sale, the complaint alleged that he procured the order to sell without making any of the heirs or legatees parties to the petition therefor, and without giving any of them any notice of the filing of the proceeding. *Held*, that the complaint was bad in not alleging what the order discloses as to notice and parties, especially under Rev. St. 1894, § 2498 (Rev. St. 1881, § 2343), providing that any person not a party to the petition may be admitted as a party, and set up any interest in or lien on the land, etc.

Appeal from circuit court, Morgan county; W. A. Johnson, Judge pro tem.

Action by Mattie V. Bailey and others against Jennetta A. Rinker and others to set aside an executor's sale of real estate, and for partition thereof. From a judgment in favor of defendants entered on failure of plaintiffs to plead further after demurrer to the complaint was sustained, plaintiffs appeal. Affirmed.

Oscar Matthews, for appellants. Holstein & Barrett, Chas. G. Renner, and W. R. Harrison, for appellees.

MCCABE, J. This was a suit seeking to set aside an executor's sale, and to obtain partition between the heirs and legatees of Lewis Bailey of certain lands situate in Morgan county, Ind., which are particularly described, and of which said Lewis died seised. The circuit court sustained a demurrer to the complaint by each of three of the defendants for want of sufficient facts, and the plaintiffs refusing to plead over or amend, and standing upon their complaint, the court adjudged that they take nothing by their complaint. The correctness of the ruling on such demurrers is the only question presented by the assignment of errors. After stating that said Lewis Bailey departed this life in Cowley county, Kan., testate, on the 15th day of July, 1880, where he had long resided, naming all the heirs at law he left, and their degree of relationship to the deceased, and the share each was entitled to in the land mentioned under the will which it is alleged that the deceased left, in which he directed "that, after all my just debts are paid, that all my real estate, of every kind and nature, be sold by my executor, and all of the proceeds of such sale be invested in good, interest-bearing securities or bonds, and that my wife, Keziah Bailey, and my daughter, Sarah A. Bailey, have the interest on said investment during their natural lives, the principal to remain intact. And at the death of my said wife and daughter it is my will, and I do hereby declare, that all my property, except as hereinafter or otherwise provided, shall be divided, share and share alike, between my children, and the child or children of a deceased child of mine to take the share its or their parent would have taken,"—G. L. Rinker was nominated as executor of the will. It is then alleged that the widow surviving said Lewis, Keziah Bailey, died in Cowley county, Kan., on the — day of June, 1885, and his said daughter, Sarah A. Bailey, died at the same place on the — day of —, 1892. Then it is alleged that said Rinker as such executor on November 8, 1880, filed a petition in the Morgan circuit court praying for an order to sell the above-described real estate, whereupon such proceedings were had that the said court did upon the 29th day of November, 1880, grant an order to sell said real estate at private sale; that on the 10th day of September, 1886, the said Rinker sold to the defendant Mary J. Kitchen the following part of said

real estate, which is described, whereupon the said executor executed and delivered to said Kitchen a deed of conveyance, which deed is recorded in the record of deeds in the office of the recorder of Morgan county, Ind.; that on the 9th day of January, 1894, the said Rinker sold the remainder of said land to the said defendant Jennetta A. Rinker, and on the 5th day of February, 1894, reported the said sale to said court, and executed and delivered to said Rinker a deed of conveyance therefor, which deed is also recorded in the deed records in said recorder's office; that said sales to Kitchen and Rinker were void for the following reasons, to wit: That said testator at the time of his death, and a long time prior thereto, was a nonresident of the state of Indiana, and was a resident of the state of Kansas, and the petition asking for the order to sell aforesaid was an ex parte petition, and on the presentation thereof said executor procured the order to sell aforesaid without making the heirs or legatees of said Lewis Bailey, or any of them, parties to said petition, and without giving them, or either of them, any notice whatever of the filing of said petition and the pendency of said cause, and the said executor did not, prior to the time of filing of said petition and obtaining said order, nor has he at any time since, filed or caused to be filed an authenticated copy of said will and the probate thereof, together with his appointment as such executor, in the said circuit court of Morgan county, Ind., and that he did not prior to the filing of said petition, and prior to the entry of said order of sale, nor has he at any time since, procured and presented said will, or a copy and the probate thereof, to the circuit court of Morgan county, Ind., and have the same adjudged by the Morgan circuit court to be the last will and testament of said Lewis Bailey, nor did he prior thereto, nor has he at any time, caused said will and the probate thereof to be probated and recorded in the order book of said Morgan circuit court, or upon any of the records of said court. And plaintiffs further aver that said sales are void for the further reason that it is provided in said will that at the death of the said testator's wife, Keziah, and daughter, Sarah A. Bailey, all his property, both real and personal, should be divided, share and share alike, between his children, the child or children of a deceased child to take the parent's portion; that no power was conferred on the executor by the will to sell or dispose of any of said real estate after the death of the beneficiaries therein named, Keziah and Sarah A. Bailey, but that in violation of the express terms of said will said sales were made after the death of said Keziah and Sarah A. Bailey. It is also alleged that Jennetta A. Rinker mortgaged her portion of said real estate to Hiram Brown, which mortgage it is alleged has been recorded, and that the same has been assigned to the defendant Clark N. Smith. A part of the relief sought is to set aside this mortgage because, as it is claimed, the executor's sales were void. The invalidity

of such sales is sought to be maintained on the ground that if they rest on the power of the foreign executor, conferred on him by the terms of the will, then the sales are void because a certified copy of the will and the foreign probate thereof had not been allowed by the Morgan circuit court as the last will of the deceased, and ordered by such court to be filed and recorded by the clerk thereof, and if such sales rest on the alleged order of the Morgan circuit court, then they are void because the heirs and legatees were not made parties to the petition to sell, and were not notified of the proceedings resulting in the order of sale.

In case of a domestic executor, where the will, as here, directs and empowers him to sell real estate, he may do so without a petition or an order of court. Rev. St. 1894, §§ 2514, 2515 (Rev. St. 1881, §§ 2359, 2360); *Munson v. Cole*, 98 Ind. 502; *Davis v. Hoover*, 112 Ind. 423, 14 N. E. 468. Among other things, it is provided in our statute of wills, as to foreign wills, that: "Such will or copy and the probate thereof, may be produced by any person interested therein to the circuit court of the county in which there is any estate on which the will may operate; and if said court shall be satisfied that the instrument ought to be allowed as the last will of the deceased, the court shall order the same to be filed and recorded by the clerk; and thereupon such will shall have the same effect as if it had been originally admitted to probate and recorded in this state." Rev. St. 1894, § 2763 (Rev. St. 1881, § 2593). A foreign executor may sell, or procure an order of sale of, lands in this state by complying with our laws, in the same manner that a domestic executor can. *Lucas v. Tucker*, 17 Ind. 41; *Rapp v. Matthias*, 35 Ind. 332. It would seem, then, if a foreign executor attempts to make a sale of real estate in this state by virtue of the power to sell conferred on him in the will, he must comply with the above-quoted section of the statute. A section of the decedents act provides that: "When any executor or administrator shall be appointed without, and there shall be no executor within this state, the testator or intestate not having been at the time of his death an inhabitant thereof, the executor or administrator so appointed may file an authenticated copy of his appointment in the circuit court of any county in which there may be real estate of the deceased; after which he may be authorized by the court to sell real estate for the payment of debts or legacies in the same manner and upon the same terms as in the case of an executor or administrator appointed in this state except as hereinafter provided." Rev. St. 1894, § 2519 (Rev. St. 1881, § 2363). This section authorizes the proper circuit court to make an order of sale, upon the application of a foreign executor, precisely the same as a domestic executor or administrator, except that it requires the foreign executor to file an authenticated copy of his appointment in the circuit court. The failure of the circuit court to

require the foreign executor to file an authenticated copy of his appointment and the foreign will to be allowed and recorded, before granting the application to sell, may have been an irregularity or error, but such error did not deprive the court of jurisdiction over the subject-matter. A judgment cannot be collaterally impeached, as is attempted to be done here, for a mere error, if the court rendering it had jurisdiction of the subject and parties. *State v. Morris*, 103 Ind. 161, 2 N. E. 355; *Dowell v. Lahr*, 97 Ind. 146. Therefore the allegation of the commission of the error named was not sufficient to enable the appellant to collaterally impeach and set aside the order of sale.

The other ground for assailing and setting aside the order and sale thereunder is stated in the complaint in the following words: "And did, without any other authority, and without making said heirs and legatees, or any of them, parties to said petition, and without giving them, or either of them, any notice whatever of the filing of said petition and the pendency of said cause," on, etc., make the order of sale. It has long been settled in this court that, where it is sought to collaterally impeach a judgment for want of notice to the parties against whom it is rendered, it is not sufficient to allege generally the want of such notice, but the complaint must allege what the record of the judgment sought to be impeached discloses on the subject, or the complaint will be bad. In *Bank v. Ault*, 102 Ind. 327, 1 N. E. 565, it was accordingly said: "Where a party seeks by complaint or cross complaint to impeach the judgment or decree of a court of superior jurisdiction upon the ground that he had no legal notice of the pendency of the action wherein such judgment or decree was rendered, it is necessary that he should allege in his pleading what, if anything, is shown by the record in relation to the issue and service of process on him in such action. The Owen circuit court had jurisdiction of the subject-matter of such action, and we are bound to presume, in the absence of any averment to the contrary, that the court had acquired jurisdiction of the person of the cross complainant before it rendered the decree against him, and which he asked the court in the pending suit to set aside and declare void. If the record of the former action shows, as we must presume that it does in the absence of any allegation to the contrary, that the court below had acquired jurisdiction of Thomas B. Ault by the issue and service of a summons on him in such action before it entered the default and decree against him therein, of which he now complains, it is certain, we think, that he cannot impeach or avoid such judgment in this collateral suit." To the same effect are *Reid v. Mitchell*, 93 Ind. 469; *Dowell v. Lahr*, supra; *Shoemaker v. Spark-Arrester Co.*, 135 Ind. 471, 35 N. E. 280; *De Puy v. City of Wabash*, 133 Ind. 336, 32 N. E. 1016. And the same rule has been applied by this court—correctly, we think—as to other matters

whereby the validity of the former judgment is sought to be collaterally assailed. In a suit on a forfeited recognizance an answer set up an unauthorized change in the date of the indictment, but did not state what the record disclosed as to whether such change was made without the knowledge or consent of the recognizers. And as to that matter this court said, "It is settled by our decisions that a record cannot be impeached collaterally by the allegation of matters dehors the same * * * in relation to such matters." *Rubush v. State*, 13 N. E. 880. In another very similar case (*Reid v. Mitchell*, supra) a special judge had been called to try a case on a change of judge, and pending the trial he called an attorney to sit in his place, went off home, out of the county, the called attorney finishing the trial, and afterwards the special judge returned and resumed the bench, and rendered judgment on the verdict rendered in his absence. The unsuccessful party filed a complaint to set aside that judgment. This court there said: "Aside from these matters, however, it is very clear, as it seems to us, that in each paragraph of his complaint the appellant makes a collateral attack upon the judgment in the original cause, by alleging facts not shown by the record. If the record fails to show, as we must assume that it does, in the absence of an averment to the contrary, that Judge Robinson was absent at any time during the trial of the cause, the appellant cannot procure the vacation of the judgment by alleging as facts the absence of Judge Robinson or the action of Voris during the trial, in contradiction of the record. If, in other words, the record of the original cause, as we must assume that it does, in the absence of any contrary averment, fails to show that Judge Robinson alone presided at, during, and throughout the entire time of the trial, and at the rendition of the judgment, then the appellant cannot collaterally attack or contradict the record by alleging as facts that Judge Robinson was absent from the court and county, and that while so absent Mr. Voris presided as judge during a part of the trial of the original cause. That is precisely what the appellant has sought and is seeking to do in each paragraph of his complaint in this cause." For these reasons the complaint was held insufficient.

The allegation that none of the heirs and legatees were made parties to the petition to sell is not an allegation that the record discloses that they were not parties to the proceeding. The statute provides that "any person not a party to the petition may * * * be admitted as a party to the proceedings and set up any interest in or lien upon the land and have the same heard and determined." Rev. St. 1894, § 2498 (Rev. St. 1881, § 2343). These persons may be parties to the proceeding without being parties to the petition, and therefore, in the absence of an averment that the record shows the contrary, we are bound by the principles above set forth to presume that they were made parties to the proceeding, though

not made parties to the petition to sell. For these reasons the complaint did not state facts sufficient, and the court did not err in sustaining the demurrer thereto. The judgment is affirmed.

JORDAN, J., took no part in this decision.

(146 Ind. 77)

SMITH v. McCLAIN et al.

(Supreme Court of Indiana. Oct. 14, 1896.)

CONVEYANCES BETWEEN CHILDREN AND CHILDLESS WIFE OF INTESTATE — ESTOPPEL — BONA FIDE PURCHASER — DECLARATIONS — STATUTE VALID IN PART.

1. One may become a bona fide purchaser under a quitclaim deed.

2. C. died intestate, leaving his children, W. and F., heirs to two-thirds of his land, and M., his second wife, without children, heir to a third of his land, subject to descend at her death to said children. M. and F., by quitclaim, conveyed to W. "all the right, title, and interest" which the grantors had as such heirs in a certain tract, the consideration being recited \$1,000 to M. and \$3,500 to F. At the same time W. and F. quitclaimed to M. another tract, by deed reciting that it was made "in settlement and adjustment of their interests" in the lands described in the two deeds. *Held*, that the deed to M. vested absolutely in her the two-thirds interests of the children, and was not, and could not by extraneous matter be shown to be, made merely to effect a partition.

3. Declarations of a person in possession of land cannot be used against those claiming under him to destroy his record title.

4. Though Act March 11, 1889, § 1, be unconstitutional, because attempting to amend a statute already repealed, still the other parts (Rev. St. 1894, §§ 2645-2647) will be sustained, being so complete in themselves as to stand alone, and the subject thereof being sufficiently expressed in the title, after elimination of so much thereof as relates to the first section.

5. Act March 11, 1889, §§ 2, 3 (Rev. St. 1894, §§ 2645, 2646), provide that where, during the life of the second or subsequent childless wife of an intestate, his children convey in fee lands affected by her life estate, and receive full payment therefor, such conveyance shall, at her death, be held to convey their interest in such lands that would descend to them through her, and estop them to claim it; and that, where she and the children attempt to dispose of the life estate by conveyances, one to the other, of certain parts of intestate's lands, such conveyances shall estop all parties from claiming any interest so conveyed. *Held* that, where such children quitclaim to such widow a tract of which intestate died seised, the question whether the children are estopped to claim the interest therein which she inherited from the intestate subject to descend to the children on her death depends on whether the deed was executed to vest in her in fee the interest she inherited, and whether they had received full payment therefor.

Appeal from circuit court, Marion county; R. A. Stepheson, Special Judge.

Action by Frances A. McClain and others against Jesse Smith. Judgment for plaintiffs. Defendant appeals. Reversed.

Miller, Winter & Elam, for appellant. Denney & Taylor, for appellees.

MONKS, C. J. Appellees brought this action to quiet their title to and recover possession of certain real estate described in the

complaint. Appellant filed an answer, and also a cross complaint to quiet his title to the same real estate. Appellees filed an answer to said cross complaint and a reply to appellant's answer. The cause was tried by the court, and a finding made in favor of appellees, and, over a motion for a new trial, judgment was rendered against appellant. The causes specified for a new trial were: First. Errors of law occurring at the trial in admitting certain evidence over appellant's objection. Second. That the finding of the court was not sustained by sufficient evidence. Third. That the finding of the court was contrary to law. Fourth. Error in assessing the amount of the recovery, the same being too large.

The action of the court in overruling the motion for a new trial is assigned as error. It appears from the evidence that the real estate in controversy—a house and lot in the town of Zionsville, worth about \$1,000—was owned in fee simple, at the time of his death, in April, 1884, by one Jonas Case, and was his family residence. He owned at the same time 120 acres of farming land in Marion county, Ind., worth about \$7,000, and some business property in the town of Zionsville. His heirs at law were his widow, Margaret E. Case, a second wife, without children, and the appellee Frances A. McClain, and one William H. Case, children by a former wife. William H. Case died in December, 1891, leaving the appellees Aletta M., Neldo O., and Flossie A. Case his only children and heirs at law. The widow, Margaret E. Case, died in January, 1892. After the death of Jonas A. Case, she married Ithamar Whicker, who survived her, and, with one Mary Stultz, her mother, constituted her sole heirs at law. After the death of Jonas Case, on the 19th day of September, 1884, his children William H. Case and his wife and Frances A. McClain and her husband executed a quitclaim deed to the widow, Margaret E. Case, for the house and lot in Zionsville. The deed recites a consideration of \$1,000, and immediately following the description of the property contained a further recital in the following language: "The grantors herein, William H. Case and Frances A. McClain, being the sole and only heirs of Jonas Case, except the grantee, who is the widow of said Case, and without children; and this conveyance being made in settlement and adjustment of their interests in real estate herein described and certain lands in Marion county, Indiana, described in deed of even date herewith, by grantee herein and Frances A. McClain and her husband to William H. Case." At the same time Margaret E. Case and Frances A. McClain and her husband executed a quitclaim deed to William H. Case for "all their right, title, and interest" in the 120 acres of farming land in Marion county, Ind. This deed recites a consideration of \$1,000, and following the description contains a further recital, as follows: "Which the said Margaret E. Case, as widow, without children, and Frances A. McClain, as daughter, have

derived as heirs of Jonas Case; said Frances A. McClain and the grantee herein being the only children and heirs of Jonas A. Case." In consideration of the conveyance to William H. Case by Margaret E. Case and Frances A. McClain and husband of "all their right, title, and interest" in said 120 acres of real estate, he paid his sister, Mrs. McClain, \$3,500, and he and said Frances A. McClain promised to pay Margaret E. Case \$1,000, and executed the quitclaim deed to her for the real estate in controversy. The first deed was properly recorded, shortly after its execution, in Boone county, Ind., and the second deed in Marion county, Ind. No disposition was made of the business property in Zionsville of which Case died seised. It continued to be held by his widow and children as tenants in common until the death of the widow. After the execution of the deeds of September 19, 1884, Margaret E. Case remained in exclusive possession of the house and lot in Zionsville until her death, after which her second husband, Ithamar Whicker, and mother, Mary Stultz, claimed that it had descended to them as her heirs at law. On the 25th of March, 1892, Mrs. Stultz, by quitclaim deed, conveyed her interest to Mr. Whicker, and on the 21st of April, 1892, he conveyed the entire property by quitclaim deed to the appellant, who took and retained possession until the time of the commencement of this suit. The court permitted the witness Sarah S. Case to testify as to the purpose of making such deed, and as to statements made by Margaret E. Case before and at the time of its execution, to show that it was made for the purpose of effecting a partition, and without any intention of increasing the title of Margaret E. Case. For the same purpose the deed executed at the same time by Margaret E. Case and Frances A. McClain to William H. Case for the farming land in Marion county was admitted in evidence, and Mrs. Klingenschmidt was also permitted to testify as to certain statements made to her subsequently by Margaret E. Case, which it was claimed tended to show that she understood at her death the property in controversy would go to the appellees. All this evidence was objected to by the appellant, and its admission properly excepted to.

The theory upon which appellees base their right to recover is that the interest of Margaret E. Case in the real estate of Jonas Case, deceased, at her death descended to the appellees, the children and grandchildren of Jonas Case, as her forced heirs; and that the deed which was executed to her on the 19th day of September, 1884, by the children of Jonas Case was made only for the purpose of effecting a partition between her and the children of Jonas Case of the house and lot in Zionsville in controversy in this action, and the 120 acres of farming land in Marion county, and that her title to the property in controversy was not increased by such deed, but that at her death it descended to the appellees as her forced heirs, precisely as if such deed had

not been made. The theory of the appellant was: First, that the legal effect of the deed of September 19, 1884, executed by Frances A. McClain and William H. Case to Margaret E. Case, was to make the latter the absolute owner in fee simple of two-thirds part in value of the real estate in controversy, leaving only the one-third part which had descended to her from Jonas Case subject to descend at her death to the children and grandchildren of Jonas Case as her forced heirs, and that such legal effect could not be impaired or changed by parol evidence that the deed was made for the purpose of effecting a partition only, or of statements or declarations of the parties thereto as to the title that was intended to be conveyed thereby; second, that by force of the second section of the statute of March 11, 1889 (Acts 1889, p. 430; Elliott's Supp. §§ 423-426; Rev. St. 1894, §§ 2644-2647), the deed to Margaret E. Case of September 19, 1884, had the effect, upon the death of Margaret E. Case, to estop the appellees from asserting that they took as her forced heirs the one-third interest in the property in controversy which descended to her as the widow of Jonas Case; third, that the evidence as to the deed of September 19, 1884, having been made for the purpose only of effecting a partition, did not establish such fact. After the death of Jonas Case, in 1884, intestate, one-third part in value of the real estate of which he died seised descended in fee simple absolutely to each of the children of his first wife, Frances A. McClain and William H. Case. Rev. St. 1894, § 2622 (Rev. St. 1881, § 2467). The remaining one-third descended in fee simple to his widow, Margaret E. Case, but under a disability personal to herself to make any conveyance of such interest as would prevent the descent at her death to the children of her husband by his first wife. Rev. St. 1881, §§ 2483-2487 (Rev. St. 1894, §§ 2640-2644); *Haskett v. Maxey*, 134 Ind. 182, 33 N. E. 358. On the 19th day of September, when the deed to the property in question from Frances A. McClain and William H. Case was executed, they had full power to convey their absolute title in fee simple to two-thirds in value of said real estate to any person who was not under disability to receive such conveyance. The widow, Margaret E. Case, was under no disability to take by deed title in fee simple to such two-thirds interest. The statute provides that a quitclaim deed, unless limited to a less interest, shall pass the entire estate of the grantor as effectually as a deed of bargain and sale. Rev. St. 1894, §§ 3343, 3347, 3348 (Rev. St. 1881, §§ 2924, 2928, 2929); *Rowe v. Beckett*, 30 Ind. 158; *Davidson v. Coon*, 125 Ind. 497, 502, 25 N. E. 601, 602. The ordinary effect of such a deed is to convey all the existing interest of the grantor in the land described, and to that extent is as operative as any deed can be. *Hastings v. Brooker*, 98 Ind. 158, and cases cited. There is nothing in the deed to the widow to indicate that it was not the intention of the grantors that it should have its full legal

effect, and vest in her an absolute title in fee simple to the undivided two-thirds of the real estate described which the grantors then owned in fee simple. It follows that the deed to the widow, Margaret E. Case, conveyed to her the undivided two-thirds of the real estate in controversy, unless there was something which changed or controlled the ordinary legal effect of such a deed.

Appellees urge that, as appellant acquired title to the real estate in controversy by quitclaim deed, he cannot be, for that reason, a purchaser in good faith, and is not entitled to any consideration as such. A quitclaim deed conveys all the title a grantor has, and is as effectual to transfer title to land as a deed of bargain and sale. Rev. St. 1894, §§ 3343, 3347, 3348 (Rev. St. 1881, §§ 2924, 2928, 2929); Davidson v. Coon, 125 Ind. 497, 502, 25 N. E. 601, 602; Hastings v. Brooker, 98 Ind. 158. While there is some conflict in the authorities upon this question, we think the correct doctrine under the recording acts is that one may become a bona fide purchaser under a quitclaim deed, the same as under any other form of conveyance. Hastings v. Brooker, supra; Dow v. Whitney, 147 Mass. 1, 16 N. E. 722; Chapman v. Sims, 53 Miss. 154; Willingham v. Hardin, 75 Mo. 429; Fox v. Hall, 74 Mo. 315; Graff v. Middleton, 43 Cal. 341; Frey v. Clifford, 44 Cal. 335; Hamilton v. Doolittle, 37 Ill. 473; Brown v. Oil Co., 97 Ill. 214; McConnel v. Reed, 4 Scam. 117; 2 Jones, Real Prop. & Conv. §§ 1394-1396, and cases cited in notes.

Appellees insist: "That, where voluntary partition is made by quitclaim deeds executed by the tenants in common, such deeds do not convey title, but they simply have the effect to sever the unity of possession, and do not vest in either of the co-tenants any new or additional title. That, after the execution of such deeds, each has precisely the same title he had before, except that he holds his share of the whole in severalty instead of in common. Bumgardner v. Edwards, 85 Ind. 117; Taylor v. Birmingham, 29 Pa. St. 306; Dawson v. Lawrence, 13 Ohio, 543; Stehman v. Huber, 21 Pa. St. 200." See, also, Yancey v. Radford, 86 Va. 638, 10 S. E. 972; Dooley v. Baynes, 86 Va. 644, 10 S. E. 974; Harrison v. Ray, 108 N. C. 215, 12 S. E. 993; Chace v. Gregg (Tex. Sup.) 32 S. W. 520; Davis v. Agnew, 67 Tex. 213, 2 S. W. 43, 376. That under this doctrine they had the right to give parol evidence to prove that the two deeds executed September 19, 1884, were partition deeds, and that the statements of Margaret E. Case testified to by Mrs. Sarah S. Case and Mrs. Klingenschmidt tended to prove that fact, and that the court did not err, therefore, in admitting their testimony. Appellant contends that what was said in Bumgardner v. Edwards, supra, cited by appellees, "as to mutual deeds for the purpose of perfecting partition, not conveying title, was obiter dictum," and that this court, in Davidson v.

Coon, 125 Ind. 497, 25 N. E. 601, declared the contrary doctrine; that the other cases cited by appellees are not applicable here, for the reason that the deeds in those cases either recited that they were partition deeds, or parol partition had been made, and each co-tenant had taken possession of his own part, and the same was vested in him in severalty, before the deeds were executed; so that, when they were executed, the grantors had no interest in the real estate described therein which they could convey to the grantee, he being already the owner thereof in severalty.

As we view the facts of this case, it is not necessary to determine, and we do not determine, whether or not mutual deeds of partition containing no statement or recital that they are such convey title or merely sever possession. The deed for the Marion county land conveyed to William H. Case "all the right, title, and interest which the grantors, Margaret E. Case, as widow, without children, and Frances A. McClain, as daughter, have derived as heirs of Jonas Case." This conveyance did not merely operate to set off to the grantee to hold in severalty what he had before its execution held in common in both tracts. It vested in him the absolute title in the 120 acres of Marion county land, so far as the grantors had the power to convey the same, leaving no interest whatever in them. After said deed was executed, he held the undivided one-third of said Marion county land as heir of Jonas Case, and the other two-thirds by virtue of said deed. It was not a partition deed, and was not claimed to be such. Margaret E. Case received for her interest in said Marion county land the quitclaim deed of William H. Case and wife and Frances E. McClain and husband for the real estate in controversy and \$1,000 in money. It is recited in this deed that it was made "in settlement and adjustment of their interests in the real estate herein described and certain lands in Marion county described in a deed of even date herewith." Construing these two deeds together, there is nothing to show that they were executed for the purpose of effecting a partition. Considering that William H. Case, Frances A. McClain, and Margaret E. Case owned the real estate described in the deeds as tenants in common, and that the deeds were executed at the same time containing the recitals set forth, and that Margaret E. Case was to receive \$1,000 and Frances A. McClain \$3,500, these facts do not show that the deeds were mutual deeds of partition. After these deeds were executed, William H. Case owned property valued by the parties at \$4,500 more than the interest he owned before, and Mrs. McClain had parted with real estate valued at \$3,500, and Mrs. Margaret E. Case owned real estate valued at \$1,000 less than her interest before the deeds were made. It was not a mere partition of real estate, but a transaction to which the rules of evidence with reference to ordinary

contracts in the purchase and sale of real estate apply.

It is the general rule that, when two parties have entered into a written contract, all previous negotiations and propositions in relation to such contract are merged in the final agreement, and, in the absence of fraud or mistake, cannot be given in evidence to vary or modify such written agreement. *Bever v. Bever* (Ind. Sup.) 41 N. E. 944; *King v. Insurance Co.*, 45 Ind. 43; *Sage v. Jones*, 47 Ind. 122; *Ice v. Ball*, 102 Ind. 42, 46, 1 N. E. 66, 69; *Reynolds v. Railway Co.*, 143 Ind. 579, 614-616, 40 N. E. 410, 421, and cases cited; *Coy v. Stucker*, 31 Ind. 161; *Hostetter v. Auman*, 119 Ind. 7, 20 N. E. 506; *Oiler v. Gard*, 23 Ind. 212. It has also been held by this court that by the execution of a deed the preliminary contract is executed, and any inconsistencies between its terms and those in the deed are to be explained and settled by the deed alone. *Phillbrook v. Emswiler*, 92 Ind. 590, and cases cited; *Cole v. Gray*, 139 Ind. 396, 38 N. E. 856, and authorities cited on pages 407, 408, 139 Ind., and page 860, 38 N. E. In *Cole v. Gray*, supra, this court said: "In 2 Devl. Deeds, § 837, it is said the question is not what the parties to a deed may have intended to do by entering into that deed, but what is the meaning of the words used in the deed?—a most important distinction in all classes of construction, and the disregard of which often leads to erroneous conclusions." And the same author, in section 840, says: "The intent, when clearly expressed, cannot be altered by evidence of extraneous circumstances."

It is insisted by appellees that it is always competent to prove by parol the true consideration of a deed, and that it is impossible to give effect to this doctrine without permitting proof of the agreement as to consideration which preceded the execution of the deed. That under this rule the evidence of *Mrs. Case* as to the statements and agreements of the parties at the execution of the deeds was competent. This is a correct statement of the rule as declared in this state, except that such evidence is not competent to defeat the operation of a deed as a valid and effective grant. *Levering v. Shockey*, 100 Ind. 558, and cases on pages 560, 561. A deed absolute on its face, however, may be shown by parol evidence to have been executed only as a mortgage. *Hanlon v. Doherty*, 109 Ind. 37, 9 N. E. 782; *Ashton v. Shepherd*, 120 Ind. 69, 22 N. E. 98; *Bever v. Bever*, supra, and cases cited. It is also insisted by the appellees that the declarations of a party in possession of real estate, showing the character of his possession, and the title by which he held, are competent as evidence against those claiming under him; and that, therefore, the court did not err in permitting *Mrs. Klingenschmidt* to testify to the declarations made by *Margaret E. Case* when she was in possession of the real estate in controversy. This rule is cor-

rectly stated, except such declarations cannot be given in evidence to sustain or destroy the record title. *Steeple v. Downing*, 60 Ind. 473, and authorities cited on page 503; *Gibney v. Marchay*, 34 N. Y. 301; *Jackson v. Miller*, 6 Cow. 751; *Jackson v. McVey*, 15 Johns. 234.

Appellant next insists that by force of section 2 of the act of March 11, 1889 (Acts 1889, p. 430; Rev. St. 1894, section 2645), the deed to *Margaret E. Case* of September 19, 1884, had the effect to estop appellees from asserting that they took as her forced heirs the one-third interest in the property in controversy, which she inherited as the widow of *Jonas Case*. Appellees contend that section 1 of said act is unconstitutional, because it attempted to amend section 2 of the act of March 4, 1853 (Acts 1853, p. 55), which was repealed by the act of March 9, 1867 (Acts 1867, p. 304), and that an act amending a repealed act is void. *Boring v. State*, 141 Ind. 640, 41 N. E. 270, and cases cited. Appellees further contend that the entire act is unconstitutional, because it is in contravention of section 19, art. 4, of the constitution, which is as follows: "Every act shall embrace but one subject and matters properly connected therewith." We do not think the act contravenes the provision of the constitution quoted, as it embraces but one subject and matters properly connected therewith. If, however, the first section attempts to amend a statute which had no existence, it is unconstitutional for that reason, and it, and so much of the title as relates thereto, are to be disregarded, and the only inquiry is whether the other parts are so complete in themselves as to stand alone, and whether there is remaining in the title of the act sufficient description of the subject to which they relate. *City of Indianapolis v. Bleler*, 138 Ind. 30, 36 N. E. 857, and authorities cited on page 38, 138 Ind., and 860, 36 N. E.; *Penniman's Case*, 103 U. S. 714; *Presser v. Illinois*, 116 U. S. 252, 6 Sup. Ct. 580. It is apparent that, if all that is contained in the first section of the act, and all the title of the act which is the subject of the first section, were eliminated, the remaining sections 2, 3, and 4 would be a complete statute, and the subject of the same would be sufficiently expressed in the title to comply with the requirements of the constitution. Under sections 2 and 3 of said act, being sections 2645, 2646, Rev. St. 1894, if *William H. Case* and *Frances A. McClain* executed their deed for the purpose of conveying to *Margaret E. Case* the fee simple of the undivided one-third which she inherited from her husband, *Jonas Case*, and they have received full payment therefor, then appellees can claim no title to said one-third. Under these sections it was competent to prove whether there was any contract for the conveyance of the fee of said one-third part of the real estate affected by the widow's interest, and the consideration to be paid therefor, and whether full payment had been made. Appellant's title to

said one-third depends upon the conditions prescribed in said sections. If all the requirements of either section 2 or 3 of said act have not been complied with, he has no title to said one-third.

There was no conflict in the evidence, and the finding should have been that appellant was the owner in fee simple of the undivided two-thirds of said real estate and that appellees were the owners in fee simple of the undivided one-third thereof. The finding was, therefore, contrary to law. It follows that the court erred in overruling the motion for a new trial. Judgment reversed, with instructions to sustain the motion for a new trial, and for further proceedings not in conflict with this opinion.

(16 Ind. App. 224)

BRANDENBURG v. HITTEL et al.

(Appellate Court of Indiana. Oct. 15, 1896.)

**HIGHWAYS—VACATION—DAMAGES TO LANDOWNER
—APPEAL—REMONSTRANCE—STATUTORY
REQUIREMENTS.**

1. The failure of petitioners for the vacation of a highway to move the board of commissioners to set aside the report of reviewers assessing damages to a remonstrant does not waive objections to the report, since such report is not in issue in the case; but on appeal such report is vacated and set aside, as the direct effect of the appeal, and in the circuit court the question of damages is tried *de novo*.

2. That a highway proposed to be vacated intersects with another highway, on which an owner's lands abut, does not make him an abutting owner, within the meaning of Burns' Rev. St. 1894, § 6746 (Horner's Ann. St. 1896, § 5019), which provides that any person through whose land a highway passes may remonstrate against the action of the board of commissioners in vacating or changing it.

3. Where a landowner remonstrates against the vacation of a highway, as authorized by Burns' Rev. St. 1894, § 6746 (Horner's Ann. St. 1896, § 5019), it must appear on the face of the remonstrance that he is an abutting owner, as required by such statute.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Petition by George Hittel and others to the commissioners of Hancock county for the vacation of a highway. From a decree vacating the road and denying damages to the remonstrant, Lewis B. Brandenburg, remonstrant, appeals. Affirmed.

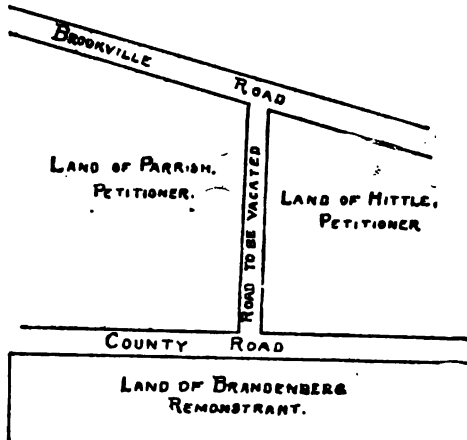
H. Warrum, for appellant. Affett & Black, for appellees.

LOTZ, J. This cause was transferred to this court by order of the supreme court. The appellees petitioned the board of commissioners of Hancock county to vacate a certain highway, said highway being situated wholly within that county. After the appointment of viewers, and the filing of their report favorable to such vacation, the appellant filed a remonstrance on the ground that the vacation would not be of public utility, and on the ground that he would sustain damages by such vacation. Reviewers were appointed, who reported in favor of the

utility of the proposed vacation, and of damages to appellant in the sum of \$150. The board entered a final order vacating the road, and requiring the appellees, the petitioners, to pay to the appellant the damages assessed. The petitioners appealed to the circuit court of Hancock county from the award of damages, and the remonstrant appealed from the order vacating the road. The venue was changed to the court below. A trial resulted in a finding and a judgment vacating the road, and without awarding the appellant any damages. The action of the Marion circuit court in overruling the appellant's motion to dismiss the appeal, and appellant's motion for a new trial, are the only errors assigned. The basis for appellant's motion to dismiss appellees' appeal is that the petitioners failed to move the board to set aside the report of the reviewers assessing damages for the purpose of having the board appoint a new set of reviewers to assess the damages. It is contended that the failure to make such motion was a waiver of all objections to the report, and that, therefore, no question could be properly presented as to the damages in the circuit court. Many authorities are cited to the effect that it is only such questions as were properly raised and put in issue before the board that can be tried and determined on appeal to the circuit court. It is insisted that, as no objection was made in the commissioners' court to the report of the reviewers assessing damages in favor of the remonstrant, none can be raised in the circuit court, and that it follows that appellant's motion to dismiss should have been sustained. While it is true that the board may, when it is made to appear that the damages are unreasonable, set aside the assessment and order another review (section 6746, Burns' Rev. St. 1894; section 5022, Horner's Ann. St. 1896), it is not contemplated that the aggrieved party must object to the assessment, and pray for another review. The authorities cited are not in point, because the report of the reviewers does not form any issue in the case; but upon appeal such report is vacated and set aside, as the direct effect of the appeal, and in the circuit court the question of damages is tried *de novo*. *Turley v. Oldham*, 68 Ind. 114; *Thayer v. Burger*, 100 Ind. 262; *Clift v. Brown*, 95 Ind. 53. The issue to be tried is made by the remonstrance, and not by the report of the reviewers, nor by any ruling the board might make in relation thereto. There was no error in overruling this motion.

On the trial of the cause in the circuit court the appellant proposed to prove the value of his lands with and without the road. The appellees objected to this evidence, stating as one of the grounds of their objection that the road did not pass through appellant's lands, and for that reason he was not entitled to damages. This objection was sustained, and a new trial was sought on account of such ruling. The road sought to be vacated did not pass through the appellant's lands, nor did his lands abut thereon. The accompanying plat shows

the relative position of the highway, and of appellant's lands.



The statute relating to the location, vacation, or change in a highway when the same is wholly within one county provides that, "if any person through whose land such highway or change may pass shall feel aggrieved thereby, such person may at any time before the final action of the board thereon set forth such grievances by way of remonstrance," etc. Burns' Rev. St. 1894, § 6746 (Horner's Ann. St. 1896, § 5019). This section relates to a remonstrance for damages only. A remonstrance for public utility is provided for in a subsequent section. It will be seen that the section quoted limits the remonstrance to the person through whose lands the highway passes. It is true, the highway proposed to be vacated intersects with another highway, upon which appellant's lands abut, but it is not proposed to vacate any part of the latter highway. The appellant's lands lie directly north of the highway proposed to be vacated, and a line projected north would pass over his lands, but this does not make him an abutting landowner. House v. City of Greensburg, 93 Ind. 533.

The appellant insists that the statute which provides for the change of a highway when it extends into two or more counties permits a remonstrance for damages by persons other than those over whose lands the highway passes, when they are affected by the change. Burns' Rev. St. 1894, § 6734 (Horner's Ann. St. 1896, § 5009). Whether or not such is the effect of that statute, we need not determine. The statute under which this proceeding was instituted is a separate and distinct enactment from that relative to changes in highways when they extend into two or more counties. The proceeding is strictly statutory, and only such persons as the statute has given the right, can remonstrate for damages. As the highway proposed to be changed did not pass over appellant's lands, and as his lands did not abut thereon, he was not entitled to any damages at all. There was therefore no error in excluding the proposed testimony. It also ap-

pears from undisputed testimony that the appellant had no right to remonstrate for damages, and therefore had no standing in court. It is essential that it should appear on the face of the remonstrance that the remonstrant has the statutory qualifications. "The reason is the same respecting things which do not appear as to those which do not exist." Wells v. Rhodes, 114 Ind. 487, 16 N. E. 830. It conclusively appears that appellant did not have the statutory qualifications as a remonstrator for damages. The judgment below was therefore right. Judgment affirmed.

(16 Ind. App. 328.)

ROBERTSON v. HAMILTON.

(Appellate Court of Indiana. Oct. 23, 1896.)

SLANDER—CHARGE OF IMMORALITY—EVIDENCE OF CONFESSION—PROOF OF CHARACTER.

1. In an action by a married woman for slander, based on statements by defendant that plaintiff had been criminally intimate with a certain man, evidence of a statement made by plaintiff's husband to a witness, that plaintiff had confessed such intimacy to him, is not admissible, where such statement was not made in the presence of the wife, though she had referred the witness to her husband for an explanation of why she was crying at the time about which the witness had inquired; it not appearing that such reference had any connection with the subject of the confession or with the conduct of the wife, and it not being shown when the statement showed the confession to have been made.

2. A defendant in an action for slander, brought against him by a woman, charging him with having stated that she was guilty of criminal intimacy with a certain man, can only attack the character of the plaintiff by proof of her general reputation; and evidence of specific acts of immorality, not connected with the act charged, is inadmissible.

Appeal from superior court, Vigo county; C. F. McNutt, Judge.

Action by Olive J. Hamilton against James Robertson. Judgment for plaintiff, and defendant appeals. Affirmed.

Lamb & Beasley, for appellant. Farris & Hamill, for appellee.

DAVIS, C. J. This was an action for slander. The gist of the complaint is that appellant falsely charged that appellee, a married woman, had illicit carnal intercourse with one Ed Cummings. The appellant answered in two paragraphs: First, justification,—that appellee had "illicit carnal intercourse with one Ed Cummings"; second, general denial. A trial by a jury resulted in a verdict and judgment for \$750 in favor of appellee. We have read the voluminous record, including all the evidence given on the trial, in the light of the argument of learned counsel, and find two questions properly and ably presented for our consideration on this appeal.

1. The fifth and twelfth reasons for a new trial relate to the action of the court in refusing to permit the appellant to prove by Sol Craig a conversation had by the witness with the husband of the appellee in her absence, in which the appellee's husband told the witness that appellee had confessed to her husband

that she had been guilty of having illicit carnal intercourse with Ed Cummings. It is not claimed that the statements or admissions of the husband to said Craig were at any time communicated to appellant, or that his charge against appellee was based on her alleged confession to her husband. The witness Craig testified that in the month of April, 1893, he met the appellee and her husband in the public highway in the vicinity of their residence; that her husband had been very sick with a severe attack of the grippe for several weeks prior thereto, and that he was then convalescing, but was not well, and that the witness then believed that he was slightly off mentally; and that the witness could not say that he did not know what he was saying; and the appellee was crying. The witness said to her, "What is the trouble, Ollie?" She replied, "Charley can tell you." In the same connection she said: "I don't know what is the matter; he acts so strange; and he is wanting to go to Mattoon, and I don't want him to go; and he says he is going to leave,"—and that he had tried to kill himself that morning. This conversation was in the afternoon or evening. In the course of the conversation her husband said to her, "Ollie, I want you to tell Sol now whether I am to blame for any of this trouble or not." Appellee answered that he was not. She asked the witness to take her husband home with him, and keep him all night. Appellee's husband got in the wagon with the witness, and they drove away. Appellant's counsel then asked the witness this question: "After he got in the wagon with you, tell the jury whether he made any statement as to the trouble, and what it was about,—whether he did or not?" An objection of counsel for appellee was sustained to the question. Counsel for appellant then offered to prove by the witness that, as soon as appellee's husband got in the wagon with the witness, he stated to the witness that his wife had confessed to him that she had betrayed him; that she had been too intimate with Ed Cummings,—and pointed out to the witness the place in the road where she had made the confession. The court excluded the evidence, to which ruling appellant at the time excepted. Counsel for appellant insist that the statements of appellee's husband were a part of the conversation begun with the appellee, and that they were admissible as part of the *res gestæ*. When the alleged confession was made by appellee—whether on that day, or on some previous day—is not disclosed. The statements of the husband to the witness in relation to the alleged confession of his wife were, in our opinion, no more than a mere narrative of a past occurrence, and therefore were not admissible on the trial, in behalf of appellant, as a part of the *res gestæ*. *Parker v. State*, 136 Ind. 284, 35 N. E. 1105; *Railroad Co. v. Stoddard*, 10 Ind. App. 278, 37 N. E. 723; *Railway Co. v. Sloan*, 11 Ind. App. 401, 39 N. E. 174. It is next insisted that she directed her husband to continue the conversation with the witness, and, therefore, that his statements to the witness

were admissible in evidence against her. The general rule is that the admissions of a third person are admissible in evidence against a party who has expressly referred another to him for information regarding a disputed or uncertain matter. In such cases there must be a disputed or uncertain matter which is the subject of inquiry, and there must be a clear and direct reference to the third person for the desired information. In order to bind the party by the admission of a third person, the reference must have been made by the person sought to be bound, with the definitely stated intent by the person making the reference that the person making the inquiry should secure of the third person the desired information regarding a disputed or uncertain matter. There is nothing in the conversation between appellee, her husband, and the witness indicating that there was any matter in dispute between any of the parties. The only indication of any trouble appears to have been the fact that appellee was crying. The inquiry of the witness was prompted by reason of the uncertainty as to the cause of the trouble. So far as shown, the witness had no interest in this uncertainty, and his inquiry appears to have been prompted solely by curiosity. The conversation in her presence, when considered as an entirety, strongly indicates that her crying was the result of the strange conduct of her husband, to which she referred, and that she was ignorant as to the cause of such conduct. She said in response to her husband's question that he was not to blame for the trouble. She did not, however, intimate to the witness that she was in any manner responsible for the trouble. In response to the question of the witness, she said, "I don't know what is the matter; he acts so strange," etc. Her reference of the witness to her husband for information was not in direct terms, with a definitely stated intent, but was permissive only in character. The substance of her statement to the witness was that she did not know what was the matter, but that her husband might explain the matter to the witness if he could. She did not intimate that she had made a confession to her husband, which he was at liberty to communicate to the witness, and she did not refer the witness to her husband for information on such subject. Whether such a confession, made by a wife in confidence to her husband, can in any case be proven in this manner, is a doubtful question. In any event, in our opinion, the rule relied upon by counsel for appellant is not applicable under the facts and circumstances as disclosed by the record.

2. The sixth, seventh, and eighth reasons for a new trial all relate to the refusal of the court to allow the appellant to prove that in 1887 the appellee said that she dearly loved one Black, and that she thought more of him than she did of her husband, and that on one occasion she threw her arms around his neck and kissed him. The witness was then a domestic in the service of appellee, and her husband and said Alf Black were then living in the family and working for

her husband. This was five or six years prior to appellee's alleged acquaintance and illicit intercourse with said Ed Cummings. Counsel for appellant insist that the evidence was admissible as tending to establish her character for chastity, and the probability that the appellee would have been guilty of the acts charged with Cummings. In other words, the contention is that in such cases the character of the woman for chastity may be attacked by proof of specific acts of lascivious or immoral conduct. Assuming that there may be cases in which specific acts of lascivious or immoral conduct may be proven, there was no error in the ruling under consideration. In deciding a similar question in *Newspaper Co. v. Pugh*, 6 Ind. App. 510, 33 N. E. 991, this court, by Reinhard, C. J., said: "We do not think there was any error in this ruling. True, the appellee's character was put in issue. But this can be proved only by general reputation, and not by specific acts of immorality, wholly disconnected from the acts charged in the publication." The fact that appellee may have had an undue affection for Alf Black in 1887, or that she was then guilty of unbecoming conduct with him in the presence of others, did not tend to prove that she had illicit carnal intercourse with Cummings in 1892 or 1893. The act with Black which appellant offered to prove was wholly disconnected from the conduct with Cummings.

On a careful reading of the evidence, we are not favorably impressed with the merits of this action, but we fail to find any error in the record that would justify a reversal of the judgment of the trial court. Judgment affirmed.

(17 Ind. App. 84)

POND v. SIMONS.¹

(Appellate Court of Indiana. Oct. 23, 1896.)

ACTION ON JUDGMENT OF ANOTHER STATE.

1. In an action based on a judgment of a court of another state the recitals of the record of such judgment are not conclusive as to facts affecting the jurisdiction of the court over the subject-matter or the person of the defendant, but all jurisdictional questions are open to inquiry.

2. A judgment of a court of Illinois, shown by the record to have been rendered by the judge in vacation, on a confession, is void, the judge having no power, under the statutes of that state, to render a judgment in vacation.

Appeal from circuit court, Cass county; U. Z. Wiley, Judge.

Action by Frederick L. Pond against Noah Simons. Judgment for defendant, and plaintiff appeals. Affirmed.

Winfield & Taber, for appellant. Frank Swigart and J. B. Smith, for appellee.

GAVIN, C. J. Appellant sued appellee upon a judgment rendered against him by confession in an Illinois city court. That judgment was based upon what is known as a "judgment note" containing this provision: "And I do hereby authorize any attorney of any court of record to appear for me in any such court of record and confess a judgment for the amount

due thereon, together with all costs, and fifteen dollars attorney's fees, at any time after maturity, either in term or vacation, and to agree that no writ of error or appeal shall be prosecuted on such judgment, nor any bill in equity filed to interfere therewith, and to release all errors and to consent to immediate execution thereon." The record set forth in the complaint discloses that a complaint on this note was duly filed; that Alschuler & Murphy, as attorneys for appellee, appeared, and filed an answer confessing the complaint, whereupon judgment was rendered and entered. The appellee filed various answers, setting up that he had always been a resident of the state of Indiana; that he was not served with any process, and had no knowledge of such proceedings, and did not appear thereto, nor authorize any one to appear for him; and that the instrument sued upon was executed without any consideration, under duress, etc. The court held the answers good. Appellant insists that the record shows a judgment regularly and duly rendered, and that appellee may not contradict the record nor defeat the judgment by the assertion of any matter which would have been properly pleaded as defense in that action. It is contended upon the authority of *Westcott v. Brown*, 13 Ind. 83, *Kingman v. Paulson*, 126 Ind. 507, 26 N. E. 393, and *Zepp v. Hager*, 70 Ill. 223, that the recitals of the record as to jurisdictional facts cannot be disputed. This is doubtless the correct rule where a domestic judgment is involved, as in *Bank v. Hanna*, 12 Ind. App. 240, 39 N. E. 1054; but the supreme court of the United States, to which we must look as the highest arbiter upon questions like this, involving the construction of the provisions of the United States constitution and statutes, has overthrown this earlier doctrine of our own and other states as applied to judgments rendered in other states. It declares that, "notwithstanding the averments in the record of the judgment itself, the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding; that the jurisdiction of a foreign court over the person of the subject-matter is always open to inquiry; that in this respect a court of another state is to be regarded as a foreign court." *Machine Co. v. Radcliffe*, 137 U. S. 287, 11 Sup. Ct. 94; *Brown, Jur.* § 26. It is claimed by counsel that judgments by confession are sustained by the presumption that they are regular unless the contrary appears upon the record. It is true that it is said in *Caley v. Morgan*, 114 Ind. 350, 16 N. E. 793, that "judgments by confession are supported by the same presumptions which sustain other judgments when collaterally called in question." This was said, however, when considering a domestic judgment rendered in open court. The doctrine ought not to be, and is not, applicable when considering a judgment such as this, not rendered by a judicial officer or by a court, but merely entered by a ministerial officer without the intervention of any judicial tribunal.

¹Rehearing denied, 46 N. E. 153.

If we were to give to the judgment, as claimed by appellant, the same force and effect which it would possess in Illinois, still no presumption would come to its relief. In *Matzenbaugh v. Doyle* (Ill. Sup.) 40 N. E. 935, it is said by the supreme court of that state, concerning such a judgment: "The entry of judgment having been made in vacation, before the clerk, a mere ministerial officer, it will be aided by none of those presumptions which prevail where judgments are entered in open court." That there was a clear distinction between such judgments entered in term time and those entered in vacation was early recognized in Illinois. "But a judgment confessed in vacation creates no such presumptions, as the same intendments are not indulged in to sustain ministerial as are in favor of judicial acts." *Roundy v. Hunt*, 24 Ill. 598. The statutes of Illinois do authorize judgments to be confessed by defendants in person or by attorney, either in term time or in vacation, "and judgments entered in vacation shall have like force and effect and from the date thereof become liens, in like manner and extent as judgments entered in term." Laws 1857, p. 29, § 2. The courts of Illinois sustain and give effect to such judgments, although in this state they cannot be entered except when rendered in open court. It is, however, held in Illinois, that "the confession of judgment in vacation is a statutory proceeding in derogation of the common law." *Gardner v. Bunn*, 132 Ill. 403, 23 N. E. 1073.

It is asserted by appellee that the judgment sued on is void because it appears upon its face to have been rendered by the court or judge in vacation, while appellant urges that it does not affirmatively appear that the judge rendered the judgment, and "that, in the absence of the contrary appearing on the face of the judgment, the presumption would be that it was entered according to law by the proper officers charged with the duty." That this presumption cannot be invoked, according to the decision of Illinois, we have already seen. In *Railway Co. v. Parish*, 6 Ind. App. 89, 33 N. E. 123, this court said: "If the exercise is one of special statutory powers, the record must show that the statutes have been complied with." The record of the proceedings in Illinois opens as follows: "Pleas before the Hon. Russell P. Goodwin, judge of the city court of Aurora, in vacation after the regular term of said court begun and held at the court room in the city of Aurora, in said county, on the third Monday, the 18th day of September, 1893, to wit, on the 4th day of November, 1893. Present: Hon. Russell P. Goodwin, judge of said court; Frank Joslyn, state's attorney for Kane county. Attest: James Shaw, Clerk. Be it remembered, that on said 4th day of November, 1893, there was filed in said court a certain narr. and cognovit, which read as follows." Here are set out a regular complaint, the note, and affidavit and confession by *Alschuler & Murphy*, as attorneys for the

defendant. Following these is the further entry: "Be it further remembered that thereupon, on the said 4th day of November, 1893, the said day being in vacation after the regular term of said city court of Aurora begun and held at the court room, in said county, the following proceedings were had and entered of record in said court, to wit: 'Frederick L. Pond v. Noah Simons. Confession. This day comes the plaintiff herein, by Bacon and Cassem, his attorneys, and files herein a plea of trespass on the case on promises; and thereupon comes the defendant herein, by Alschuler and Murphy, his attorneys in fact, who file herein his warrant of attorney, duly executed and proven, and also his cognovit, confessing the action aforesaid of the plaintiff against the said defendant, and that the said plaintiff has sustained damages by occasion of the premises to the sum of \$271.26, which includes \$15 attorney's fees.' It is therefore considered by the court that the plaintiff do have and recover," etc.

As we construe this record, it clearly shows a judgment rendered by the court through its judge, and not one merely entered up by the clerk upon the papers filed. The statements that the proceedings were before the Honorable Russell P. Goodwin, judge, and that he was present with all his officers necessary to constitute a court, and that "it is therefore considered by the court," etc.,—all these statements must be disregarded, and counted as meaningless, unless we construe this record to show that this judgment was one rendered by the judge of the court. Were such a record of a judgment of this state presented to us without the words "vacation" and "after the regular term," we do not believe that any one would pretend to argue that the judgment should be held void because it appeared upon its face to be a proceeding before the clerk merely, and was simply his act, and not the judgment of the court through the judge. Since, then, it purports to be the judgment rendered by the judge in vacation, we must hold it void, because the judge in vacation has no power to render the judgment. Such are the express adjudications of the supreme court of Illinois. "With us the judge has no power to make orders in vacation unless it be conferred by statute. The statutes giving powers to the judge in vacation do not include the power to order the entry of judgment by confession." *Conkling v. Ridgely*, 112 Ill. 36, 44. This is in harmony with the law as declared in our own state. *Pressley v. Harrison*, 102 Ind. 14, 1 N. E. 193, decides that "a judge in vacation exercises only limited statutory power, and in such cases it must affirmatively appear that such a state of facts existed as warranted the exercise of jurisdiction," and that "the power which a judge may exercise in vacation is such special statutory power as is prescribed. Whatever, it is asserted, may be done by him, except in term, authority therefor must be found in the statute." It

being our conclusion that the judgment is void for want of jurisdiction of the judge over the subject-matter of the action, we need not take up other questions argued. Judgment affirmed.

(163 Ill. 167)

WABASH R. CO. v. JONES.

(Supreme Court of Illinois. Nov. 10, 1896.)

RAILROAD COMPANIES — INJURIES TO TRESPASSERS ON TRACK.

A railroad company is not bound to keep a lookout for trespassers on the track, and such persons cannot recover unless the servants of the road have been negligent after becoming aware of their perilous position. *Magruder, C. J.*, dissenting.

Appeal from appellate court, Third district. Action by Charles Jones, by next friend, against the Wabash Railroad Company. There was a judgment for plaintiff, affirmed by the appellate court (53 Ill. App. 125), and defendant appeals. Reversed.

George B. Burnett, for appellant. Patton, Hamilton & Patton, for appellee.

CARTWRIGHT, J. Appellee recovered a judgment for personal injuries caused by appellant's passenger train when he was walking on the railroad track on appellant's right of way in front of the train. The appellate court affirmed the judgment. On the morning of December 31, 1891, the plaintiff, who was eight years and ten months old, went, with another boy, from his home, at Riverton, to Springfield, on one of appellant's trains, and returned to Riverton on the train which injured him. The train was going east, and his father's house was about 200 yards east of the depot where the train stopped. He got off the train at the platform, and started home. He walked east on the platform as far as it extended, and then walked upon the right of way beside the train, and past the engine, which was at the chute. About halfway between the depot and his father's house, a street crossed the railroad at right angles. A freight train stood on a side track north of the main track, and, when he reached the street crossing, he got on the main track, and walked between the rails. He testified that he took the main track because, when both trains would come along and pass him, he would become dizzy, and he therefore preferred the main track. He walked along upon the track towards his home, blowing a tin whistle or horn, until he was struck. He testified that he knew the track was a dangerous place, with the train likely to come along at any time, and that he looked back twice to see if it was coming, but it was not. The track was nearly straight, and there was nothing

between plaintiff and the engine to obstruct the vision.

On the trial, the court, against the objection of defendant, permitted the plaintiff to prove by several witnesses that people living along defendant's track at that place had been in the habit of using the track as a footpath, and a large part of the evidence for plaintiff was upon that question. By this evidence, it was proved that the occupants of several houses had been accustomed to use the track as a footpath for about 25 years. At the close of plaintiff's evidence, the court denied defendant's motion to exclude this testimony. There were three counts in the declaration, in each of which it was averred that the plaintiff, on account of his tender years, was incapable of exercising care for his own safety. The ground of the alleged liability of defendant set forth in the first count was that the engineer, by the exercise of ordinary care, could have seen plaintiff on the track in time to have avoided any injury to him, and that, through negligence in failing to see and observe him, the engine and train ran over him. By the second and third counts, it was charged, in effect, that the servants of defendant in charge of the train did see the plaintiff on the track, and, without giving any notice of the approach of the train, recklessly and wantonly ran over him. The avowed purpose in introducing the evidence in question was to charge defendant with a duty to exercise care to see whether any person was on the track. The rulings in its admission were upon the theory that, because people had been in the habit of using the track as a footpath, the defendant's relations to such persons had been affected in such a way as to create a new duty towards them to take precaution for their safety by keeping a lookout to ascertain if any of them were on the track. The only count in which it was attempted to allege a duty on the part of defendant to take precaution of that kind was the first. That count proceeded on the theory that there was such a duty, and it will be manifest that the evidence was admitted as tending to prove that count. Under the second and third counts, which charged that the engineer saw the plaintiff, and recklessly and wantonly ran over him, it was immaterial whether he had or had not reason to suppose that some person might be using the track as a path. In such case the plaintiff's right to recover for the injury would not depend upon or be affected by the circumstance that others had used the track for the same purpose. It was agreed that defendant came into possession of the road July 1, 1890, and had been operating it one year and six months prior to the accident. It had only been in possession or operation of the road for a comparatively short time; and it was not shown that it had done anything to aid, encourage, or invite the use made of the track. If such use, with the implied assent of defendant, did not create any right in plain-

tiff to so use the track, and imposed no duty on defendant different from its duty where there had been no such use, then the testimony did not tend to support the charge of such duty, and should not have been admitted.

The question whether the relation of the parties and their relative rights and duties were changed by such use, or the liability of defendant affected, has often been considered by this and other courts with uniform results. In *Railroad Co. v. Godfrey*, 71 Ill. 500, the court said: "This cause was tried in the court below, and submitted to the jury, as manifested by the instructions given and refused, upon an erroneous theory, which was that from the fact of the citizens of Decatur having been in the habit of passing and repassing over the portion of defendant's right of way, where the injury in question occurred, the plaintiff had acquired some right which affected the defendant's relation towards him, and that at the time of the accident he was in the exercise of a legal right. It very materially affects the question of the respective duties and liabilities of the parties whether, at such time, the plaintiff was in the exercise of a legal right or not. The right of way was the exclusive property of the company, upon which no unauthorized person had a right to be, for any purpose. The plaintiff was traveling upon defendant's right of way, not for any purpose of business connected with the railroad, but for his own mere convenience, as a footway, in reaching his home, on return from a search after his cow. There was nothing to exempt him from the character of a wrongdoer and trespasser in so doing, further than the supposed implied assent of the company, arising from their noninterference with a previous like practice by individuals. But, because the company did not see fit to enforce its rights, and keep people off its premises, no right of way over its ground was thereby acquired. It was not bound to protect or provide safeguards for persons so using its grounds for their own convenience. The place was one of danger, and such persons went there at their own risk, and enjoyed the supposed implied license subject to its attendant perils. At the most, there was here no more than a mere passive acquiescence in this use. A mere naked license or permission to enter or pass over an estate will not create a duty or impose an obligation on the part of the owner to provide against the danger of accident. *Sweeny v. Railway Co.*, 10 Allen, 373; *Hickey v. Railway Co.*, 14 Allen, 429; *Railroad Co. v. Hummell*, 44 Pa. St. 375; *Gillis v. Railway Co.*, 59 Pa. St. 129." The judgment was reversed. In the case of *Railroad Co. v. Hetherington*, 83 Ill. 510, a young lady was overtaken and killed by a train while walking on the right of way of the railroad company. A judgment for the plaintiff was reversed, and it was said: "The fact that persons residing in the locality where the accident occurred had been in the habit of traveling upon the right of way of the defendant, and no measures had been

taken to prevent it, did not change the relative rights or obligation of the deceased or the railroad company." And it was further said: "Where a person voluntarily, and without authority, undertakes to travel upon a railroad track, he ought not to recover damages for an injury received, unless it was wanton or willful." *Blanchard v. Railway Co.*, 126 Ill. 416, 18 N. E. 799, was a suit for the killing of a person who was trying to cross the railroad tracks in a diagonal direction, where there was no regular street crossing. Plaintiff introduced testimony that for a number of years the workmen in the freight houses had been in the habit of walking upon the tracks under the viaduct at the noon hour, to reach their homes, and that this custom had never been prohibited or interfered with by the railroad company. There was a verdict for defendant by direction of the court, and the judgment entered thereon was affirmed by this court. The foregoing decisions were referred to and approved, and it was held that there could be no recovery unless the death of the deceased was willfully or wantonly caused by defendant. In the case of *Railway Co. v. Bodemer*, 139 Ill. 596, 29 N. E. 692, the same doctrine was reiterated, and the above cases referred to as stating the true rule. In that case testimony was received that persons were in the habit of passing across the tracks at the place where the accident occurred, but, when that testimony was admitted, the evidence for plaintiff tended to show that the tracks at the point where the deceased was killed were laid in Clark street, a public street of the city of Chicago. The proof was held competent when admitted, for the reason that it had not then been shown that the tracks were on defendant's right of way, and, after the defendant had made such proof, there was no motion to exclude the testimony complained of. That case was submitted to the jury, upon a declaration which charged wanton and willful conduct; and, as it was held that the proof tended to show such a disregard for the rights of others as to justify the presumption of willfulness, the judgment was affirmed. The question was again considered in *Railroad Co. v. Noble*, 142 Ill. 578, 32 N. E. 684, which was a suit for injury to trespassing animals. The rule as to persons was there stated as in the above cases, and the same rule was applied in the case of animals. After referring to the decisions of this and other courts, it was said: "The doctrine announced in these decisions, that, where the persons or animals exposed to injury are mere trespassers, the duty to exercise care arises only upon discovery of their presence on the railway, seems to be strictly in accordance with the general current of authority. * * *

In a note to *McAllister v. Railway Co.* (Iowa) 19 Am. & Eng. Ry. Cas. 108, 20 N. W. 488, many authorities involving a discussion of the rule now under consideration are collected, in most of which, however, said rule is applied to persons trespassing on a railway track, the doctrine sustained by said authorities being that 'a railroad company is not bound to keep a lookout

for trespassers walking upon the track. When such parties are injured by a passing train, they have only themselves to blame, and cannot recover, unless the servants of the company have been negligent, after becoming aware of the trespasser's perilous position." See, also, *Thomp. Neg.* 448; *Cooley, Torts*, 660.

It may be conceded that there are cases where evidence of the character in question may be admissible for the purpose of determining the nature of an act. The fact of general use by the public of a track, so as to create a probability of their presence, might make an act which would otherwise be merely negligent so reckless as to indicate a disregard for life or a general disposition to do injury. As was held in the *Bodemer Case*, *supra*, the running of a train at a high and dangerous speed in a crowded city, along a portion of the track where persons are known to be passing every day, may show such a disregard for the safety of others as to justify a presumption of willfulness. But, if the evidence had gone to that extent, the plaintiff made no charge in his declaration under which it could have been properly admitted. The case was plainly tried upon the theory that defendant owed a duty to look out for persons using its track at the place in question. The engineer testified that he was in his place, and did not see plaintiff. If the jury believed him, they could not find for the plaintiff on the second or third count of the declaration; but there was uncontradicted evidence from which the jury might find that, by the exercise of care and diligence, he might have discovered the presence of plaintiff. The first count charged that the engineer, by the exercise of care, could have seen the plaintiff, and that he negligently failed to see and observe him. The evidence was admitted to show the existence of a duty to exercise such care, and the verdict was probably based on the failure to perform such duty. The error was material and harmful.

The trial court refused to instruct the jury to return a verdict for defendant. This is assigned as error, but as the case was tried on an erroneous theory of the rights of the parties, and must be submitted to another jury upon such evidence as the parties may then produce, we shall not discuss the evidence produced at the trial already had, or the inferences which the jury might justifiably draw from it. The judgments of the appellate and circuit courts are reversed, and the cause will be remanded to the latter court. Reversed and remanded.

MAGRUDER, C. J. (dissenting). I do not concur in all that is said in this opinion, or in the conclusion reached by it. To say that, where the engineer of a railroad company is charged with recklessly and wantonly running over a person whom he sees upon the track, it is immaterial whether such engineer "had or had not reason to suppose that some person might be using the track as a path," is to announce a doctrine which is as much opposed to sound principles of law as it is to enlightened sentiments of humanity.

(167 Mass. 87)

SMITH v. SMITH.

(Supreme Judicial Court of Massachusetts.
Franklin. Oct. 24, 1896.)

DIVORCE—EVIDENCE.

1. In an action by a wife for divorce on the ground of cruel and abusive treatment, the specifications of violence and personal injury to plaintiff were that they occurred in 1893, 1894, and the first half of, and on August 27, 1895. *Held*, that it was not error to allow plaintiff to be asked as to the disposition of her husband in the summer of 1892, how he manifested it, and whether any blows were struck.

2. It was not error to permit a witness to testify that in 1893 defendant called plaintiff "a lazy good-for-nothing," on the ground that this was not within specifications relating to cruel and abusive epithets, since the epithet was abusive, if not cruel.

3. It appeared that the acts of cruel treatment on which plaintiff relied were done within the house where she and her husband lived, and not in the presence of any witnesses. *Held*, that it was not error to exclude evidence of neighbors that they had seen plaintiff and defendant daily for several years, and they were or appeared to be living happily together.

4. Defendant testified that he objected some to his wife being in company with a certain man, and his sister testified to admissions of plaintiff showing a suspicious degree of intimacy between plaintiff and such man. *Held*, that it was not error to permit the man to testify that there never had been anything improper in his relations with plaintiff; that plaintiff and defendant dined at his house; and that he had a conversation with defendant, after the filing of the libel, in which defendant made no complaint of his attentions to his wife.

5. On a trial for divorce for cruelty there was evidence of cruel treatment by defendant, which was insufficient to authorize a divorce. *Held*, that it justified the court in finding that such cruel treatment revived previous acts of cruelty which entitled plaintiff to a divorce, but which had been condoned by her.

Exceptions from superior court, Franklin county; Ellisha B. Maynard, Judge.

Libel by Emma F. Smith against Austin D. Smith for divorce. There was a decree for libellant, and libelee excepts. Exceptions overruled.

Dana Malone, for libellant. William H. Brooks, for libelee.

LATHROP, J. This is a libel for divorce. The grounds alleged in the libel are cruel and abusive treatment and extreme cruelty on or about April 1, 1893, and on divers other days and times between that day and August 28, 1895, and also on the last-named day. Specifications were filed, which, omitting the first two, which were not sustained, were as follows: (3) Violence and personal injury to the libellant in March, April, and November, 1893; January, February, October, and November, 1894; January, February, April, May, July, and August, 1895; and at sundry other times. (4) Compelling the libellant to leave her home by threats and expulsion from same, on August 27, 1895, at a late hour at night. The justice who heard the case in the superior court granted the divorce on the ground of cruel and abusive treatment, and the case comes before us on exceptions taken

by the libelee. We proceed to consider these so far as they are now insisted upon.

1. In the early part of the libelant's testimony she was asked as to the disposition of her husband in the summer of 1892, and how he manifested it, and whether any blows were struck. These questions were allowed to be answered, against the libelee's exception. The last answer is the only one now objected to. This was to the effect that he kicked her on the body. We are of opinion that this exception should be overruled. It was merely preliminary matter, and was stated so to be by counsel when the first question was put. It was discretionary with the judge to admit it or exclude it, so far as it bore upon the question of animus. *Ford v. Ford*, 104 Mass. 198, 205; *Com. v. Holmes*, 157 Mass. 233, 32 N. E. 6.

2. Maria B. Melchior testified that in the summer of 1893 the libelee called the libelant "a lazy good-for-nothing." The libelee objects that this is not covered by the first specification, which relates to cruel and abusive epithets. The epithet was certainly abusive, if not cruel; and, if not covered by the specification, it seems to us of so little importance, especially in view of the subsequent ruling of the judge that no divorce could be granted under the first specification, that we are of opinion that the exception should be overruled.

3. George A. Childs, a witness for the libelee, testified that he lived across the way from the parties to this action, and had lived there since their marriage; that he had seen them daily for the past few years, and had been in and out of their house almost daily, and had seen them together a great deal. The libelee then offered to show by this witness that the parties, from day to day, as he had seen them, were, or appeared to be, living happily together. The libelee also offered to show through other neighbors, who saw them frequently in visiting at their house, and saw them at picnics and parties, from 1893 until the latter part of August, 1895, what their demeanor was,—their manner; that there were acts of affection between them, and that they appeared to be living in happiness. All of this evidence was excluded, and the libelee excepted. The acts of cruel and abusive treatment upon which the libelant relied to make out her case were all done within the house where she and her husband lived, and not in the presence of any of the persons offered as witnesses. The evidence offered would not, therefore, tend directly to contradict the witnesses for the libelant. If it had been admitted, its only legitimate use would have been to furnish ground for an argument that a husband who behaved well to his wife in public would not be likely to behave ill to her in private. Such an argument, however, would be entitled to but little weight, if any. Common experience teaches that acts of violence are seldom committed by a husband upon his

wife in public, and that his conduct in public is no criterion for his behavior towards her in the privacy of his own home. It seems to us that it was within the discretion of the justice who tried the case to admit or exclude the evidence offered.

4. William Nichols was called by the libelant in rebuttal, and was allowed to testify that there never had been anything improper in his relations with Mrs. Smith; that Mr. and Mrs. Smith dined at his house; that he had had a conversation once with Mr. Smith since the filing of the libel, in which Mr. Smith made no complaint of the attentions of the witness to his wife. The libelee had previously testified that he objected some to his wife being in company with Mr. Nichols, because it made trouble. Martha R. Ryther, a sister of the libelee, had also testified to admissions of the libelant, which tended to show a suspicious degree of intimacy on the part of Nichols and the libelant, which certainly called for explanation. We have no doubt that the evidence objected to was properly admitted.

5. The judge who heard the case found that all acts of the libelee prior to August 27, 1895, were condoned, and would not now support a libel unless revived by subsequent misconduct of the libelee; that the evidence relating to August 27, 1895, would warrant him in finding a breach of the conditions upon which the condonation was founded, and such breach would revive any right which the libelant had to maintain the libel for original misconduct. There was evidence in the case in behalf of the libelant tending to show that in April, 1893, the libelee struck her with his fist in the eye, knocking her down, and blacking her eye; that in November, 1893, he threw a book at her, hitting her in the breast; that in the same month he threw a lighted lamp at her, which hit her; that in the winter of 1893 and 1894, he threw cold water upon her while she was in bed, which caused her to take cold; that in January, 1894, he kicked her in the bowels; that in October, 1894, he slapped her face; that between January 1 and March 1, 1895, he pulled her out of bed, and dragged her around the floor by the hair; that in April, 1895, he threw an egg at her; and that on July 4, 1895, he threw a chair at her. While there was contradictory evidence on some of these matters, yet some were admitted to be true by the libelee, who said they were done in fun. In his own testimony he said: "I never struck her except in sport or fun. We used to play a good deal together, kick each other, hit each other, throw water at each other, and scuffle some." Later on he testified that on one occasion "I got a little mad, and slapped her in the face with my hand." He also admitted pulling her out of bed, but said it was in fun. How far the libelee's actions were mere bucolic pleasantries was for the judge who heard the evidence to say. We cannot revise his find-

ings on questions of fact. *Morrison v. Morrison*, 136 Mass. 310. The evidence as to what took place on August 27th is somewhat contradictory, but the judge had a right to believe the libellant's testimony, which was, in substance: That the family were invited to a neighbor's on the evening of that day. That only she and her daughter, six years old, went. That at 10 she and the neighbor's son came home together, leaving the daughter, because it had been raining. That she went upstairs, and kissed her husband, and this woke him up. That he got up, and went downstairs. That he came back, and attempted to throw the lamp at her,—a small hand lamp. That he called her vile names. That she was very much frightened. That he said: "You get out of the house this minute. I won't have you here." That he was very angry, and she was afraid of her life. That she begged for time to dress, and dressed herself, and he continued his threats. That he said: "You leave this house, and you need not bring a sheriff here to get your things. I will murder any one that harbors you. It is a wonder I don't shoot you." That it was half past 10 when he came upstairs. That she then left, and went to her mother's, where she has since remained. The law upon the subject of condonation is well settled by the decisions of this court. In *Gardner v. Gardner*, 2 Gray, 434, 441, 442, it is said: "But any condonation by the wife of cruelty to her on the part of her husband is upon the explicit condition that he will hereafter treat her with conjugal kindness, and any breach of this condition revives the right to maintain a libel for the original offense. * * * The breach of such condition may be shown, in cases of libel by the wife for cruelty, by evidence which would be insufficient to establish the principal charge." This case was affirmed in *Robbins v. Robbins*, 100 Mass. 150, and it was held that where a husband, for a period of six weeks, beginning only a fortnight after the last act of cruelty proved, while living in the same house with his wife, wholly and continuously refused to speak to her, warranted the wife or the court in inferring that his smothered anger would break out again into acts of cruelty. The case at bar is clearly within these cases. Exceptions overruled.

(167 Mass. 123)

JAQUITH v. FULLER, Judge, et al.
(Supreme Judicial Court of Massachusetts.
Suffolk. Oct. 28, 1896.)

**INSOLVENCY—INSOLVENT PARTNERSHIP—RIGHTS OF
INDIVIDUAL CREDITORS—TITLE OF ASSIGNEE
—WRIT OF PROHIBITION—WHEN LIES.**

1. The provisions of St. 1894, c. 30, § 1, declaring that when two or more persons, who are partners, become insolvent, a warrant may be issued by the judge of insolvency for the county in which the partnership has, or last had, a usual place of business, etc., on the petition of one of the partners or a creditor of the partners,

upon which all the joint stock and property of the company and the separate estate of each of the partners shall be taken, etc., do not prevent the individual creditors of one of the partners from commencing proceedings in insolvency against him, under Pub. St. c. 157, § 16, as amended by St. 1893, c. 405, § 1, relating to proceedings in insolvency against individual debtors.

2. The title of the assignee of an insolvent debtor to the property of such debtor, duly vested in him by proceedings in the court of insolvency, is not affected by subsequent proceedings against an assignee of the insolvent partnership of which such debtor is a member.

3. St. 1894, c. 30, pertaining to proceedings against insolvent partnerships, repealed St. 1893, c. 405, §§ 4, 5, so far as they applied to Pub. St. c. 157, § 120, relating to the same subject-matter.

4. Under Pub. St. c. 157, § 15, giving the supreme judicial court power in equity to revise or vacate the proceedings of courts of insolvency, a writ of prohibition will not lie at the suit of a creditor of a partnership to prevent the judge of the court of insolvency from entertaining proceedings in insolvency on the petition of a creditor of an individual member of such partnership.

Petition by Jaquith, assignee in insolvency of the joint and several estates of Henry A. Davis & Co., Henry A. Davis, and Henry C. Hathaway, for a writ of prohibition against the judge of insolvency of the county of Bristol, and Charles F. Worthen, assignee in insolvency of the estate of Henry C. Hathaway. Petition dismissed.

H. J. Jaquith and Wm. R. Bigelow, for petitioner. Hollis R. Bailey and John H. Appleton, for respondents.

LATHROP, J. This is a petition for a writ of prohibition against the judge of insolvency of the county of Bristol, and Charles F. Worthen, the assignee in insolvency of the estate of Henry C. Hathaway. The petitioner is the assignee in insolvency of the joint and separate estates of Henry A. Davis & Co., of Henry A. Davis, and of Henry C. Hathaway. The facts as they appear in the petition, so far as it is necessary to state them, are these: On April 22, 1896, an involuntary petition in insolvency was filed in the insolvency court for the county of Bristol against Henry C. Hathaway, of New Bedford, individually. The first publication of notice was made on the following day, and, on July 3d following, the respondent Worthen was appointed assignee; the judge refusing to dismiss the cause on a petition filed by the petitioner in this case, alleging want of jurisdiction. On April 25, 1896, an involuntary petition in insolvency was filed in the insolvency court for the county of Suffolk against Henry A. Davis, of Boston, doing business under the name of Henry A. Davis & Co. On May 15, 1896, an amendment was allowed to this petition, which alleged that Helen V. Taylor and Henry C. Hathaway were co-partners in the business carried on in the name of Henry A. Davis & Co. On June 16, 1896, it was adjudged by the court of insolvency of the county of

Suffolk that Davis and Hathaway composed the firm, and the petition was dismissed as to Taylor. On July 3, 1896, the petitioner was appointed assignee of the joint and separate estates of Davis and Hathaway. The first publication of notice was on June 17, 1896. The prayer of the petition is that a writ of prohibition issue against the first-named respondent, prohibiting him from further entertaining the proceeding in the insolvency court of the county of Bristol, and that the last-named respondent be enjoined to deliver to the petitioner the books and property of Hathaway, and also that he be prohibited from further interfering with the petitioner, by virtue of his alleged appointment as assignee. The respondents demurred to the petition, and the questions of law have been reserved for our determination.

The principal question involved in the case on the merits is as to the construction to be given to St. 1894, c. 30, § 1. This act provides, in substance, that, "when two or more persons who are partners become insolvent, a warrant may be issued [as provided in Pub. St. c. 157, § 120] by the judge for the county in which the partnership has last had a usual place of business for three months before the application, if the partnership has had a usual place of business for that time in any county, otherwise by the judge for the county in which the partnership has or last had a usual place of business before the application," either upon the petition of one or more of the partners, or upon the petition of a creditor of the partners, upon which warrant all the joint stock and property of the company and the separate estate of each of the partners shall be taken, except such parts as may be by law exempt from attachment; and all the creditors of the company and the separate creditors of each partner may prove their respective debts. Section 2 repeals section 120, c. 157, Pub. St., as amended by St. 1893, c. 405, § 4. The section of the Public Statutes which is thus repealed differs from section 1 of the act under consideration only in this respect: that, under the Public Statutes, the warrant might be issued by the judge for the county in which either of the partners had last resided for three consecutive months before the application, if he had resided for that time in any county; otherwise, by the judge of the county in which he resides. St. 1893, c. 405, § 4, amended the section in the Public Statutes by striking out the words "either of the partners has last resided for three consecutive months before the application, if he has resided for that time in any county, otherwise to the judge for the county within which he resides," and inserting in their place the words "the partnership has or last had a usual place of business before the application." The statute of 1894 makes some slight changes in the language of section 120 of the Public Statutes, as amended by the

statute of 1893, and is in a measure a perfecting statute. It is, however, to be construed in connection with the other provisions of Pub. St. c. 157, and is a substitute for section 120. The provision of St. 1894, c. 30, § 1, that upon the warrant "all the joint stock and property of the company and the separate estate of each of the partners shall be taken, except such parts as may be by law exempt from attachment," was enacted, in substance, in St. 1838, c. 163, § 21, and has since been in force. Gen. St. c. 118, § 108; Pub. St. c. 157, § 120; St. 1893, c. 405, § 4. This is therefore no new provision, and cannot have the effect of preventing the individual creditors of a person from commencing proceedings in insolvency against him, under Pub. St. c. 157, § 16, as amended by St. 1893, c. 405, § 1, although he may be a member of a partnership. It does not follow that a firm is insolvent because one of its partners is in that condition, for a firm is solvent so long as any one of its partners is solvent. Proceedings against individual members of a partnership are familiar. See *Hanson v. Paige*, 3 Gray, 239, 243; *Nutting v. Ashcroft*, 101 Mass. 300; *Wonson v. Pew*, 148 Mass. 299, 19 N. E. 522. We have no doubt that the judge of insolvency in the county of Bristol had jurisdiction of the proceedings in insolvency against Hathaway, and that his property vested in the assignee, under Pub. St. c. 157, § 46, as of the time of the first publication of notice, namely April 23, 1896.

It is, however, contended that when the warrant issued in the county of Suffolk, on June 10, 1896, against both Davis and Hathaway, it became the duty of the judge of insolvency in the county of Bristol to stop further proceedings there against Hathaway, and for his assignee to pay over to the assignee in the county of Suffolk any property which might be in his possession. There is certainly no express provision for this in the statutes relating to insolvency, and we are of opinion that this is not the fair intent of the language used. St. 1894, c. 30, § 1, applies to the case of an insolvent partnership, and provides that "a warrant may be issued," as provided in Pub. St. c. 157, § 120. This, in the case of an involuntary proceeding, is under section 114, and, by relation to section 46, vests in the assignee all the property of the debtor which he could have lawfully sold, assigned, or conveyed, or which might have been taken on execution against him at the time of the first publication of notice of the filing of the petition. The time of this publication, so far as Hathaway is concerned, under the proceedings in the county of Suffolk, was on June 17, 1896. The petition to join him as a partner with Davis was allowed on May 15, 1896, and an order of notice was issued, returnable on May 22, 1896. The warrant against Davis and Hathaway was issued on June 16th, and the first publication was made the next day. Some time, therefore, elapsed between the time when Hathaway's property vested in

his assignee in the county of Bristol, and when it is contended that it vested in the assignee appointed in the county of Suffolk. Between these times the debtor Hathaway may have contracted new debts, or have received new assets. These would come within the jurisdiction of the insolvency court of the county of Suffolk, and the words of the statute would be met. We find nothing in the statute which transfers to the assignee of an insolvent partnership property of an insolvent member of the firm which has already been taken from him by a court of competent jurisdiction. Since the passage of St. 1894, c. 30, a petition against the members of an insolvent partnership must, undoubtedly, be brought in the county in which the partnership has, or last had, a usual place of business for three consecutive months before the application, if the partnership has had a usual place of business for that time in any county; but the only section expressly repealed is Pub. St. c. 157, § 120, as amended by St. 1893, c. 405. This act, we have no doubt, repeals the whole of section 4 of St. 1893, c. 405, and, it may be, so much of section 5 as relates to Pub. St. c. 157, § 120. But it goes no further. As we are of opinion that the court in Bristol county had jurisdiction in the proceeding against Hathaway, it follows that, so far as his individual estate which passed to his assignee is concerned, it is without the jurisdiction of the insolvency court of Suffolk county, and that the petition must be dismissed.

While we have considered this case on its merits, we are of opinion that the petition should be dismissed on another ground. The power to issue a writ of prohibition is found in Pub. St. c. 150, § 3, which provides: "The court shall have general superintendence of all courts of inferior jurisdiction to correct and prevent errors and abuses therein, where no other remedy is expressly provided, and may issue writs of error, certiorari, mandamus, prohibition, quo warranto, and all other writs and processes to courts of inferior jurisdiction, corporations, and individuals, necessary to the furtherance of justice and the regular execution of the laws." The earlier statutes on the subject are stated by Chief Justice Gray in *Connecticut River R. Co. v. County Com'rs*, 127 Mass. 50. While this court is vested with ample power to issue writs of prohibition in proper cases, it is only where there is no other adequate remedy. *Washburn v. Phillips*, 2 Metc. (Mass.) 206 (per Shaw, C. J.); *Connecticut River R. Co. v. County Com'rs*, supra (per Gray, C. J.). Under Pub. St. c. 157, § 15, this court has full power in equity, except where special provision is otherwise made, to revise the proceedings of the insolvency court, or even to vacate them. *Hanson v. Paige*, 3 Gray, 239, 242; *Merriam v. Sewall*, 8 Gray, 316, 327; *Whittenton Mills v. Upton*, 10 Gray, 582; *Bank v. Stetson*, 145 Mass. 366, 14 N. E. 349; *Pelletier v. Couture*, 148 Mass. 269, 19 N. E. 400; *Binney v. Bank*, 150 Mass. 574, 23 N. E. 380; *Jordan v. Palmer*, 165 Mass. 317, 43 N. E. 122. There was therefore an adequate remedy, under

Pub. St. c. 157, § 15, for any party aggrieved by the proceedings in the insolvency court of the county of Bristol, and no occasion was presented for the issuance of a prerogative writ. Petition dismissed.

(55 Ohio St. 195)

STATE ex rel. MARK v. DAHL et al., Board of Deputy State Sup'rs of Elections.

(Supreme Court of Ohio. Oct. 20, 1896.)

DEATH OF ONE ELECTED TO OFFICE BEFORE TERM BEGINS—PROCEDURE.

Where one, elected to an office, dies before his term begins, no vacancy is thereby created in the office until the end of the term of the existing incumbent; and, if this falls within 30 days of the next proper election (section 11, Rev. St.), the vacancy cannot be filled by an election thereat.

(Syllabus by the Court.)

Mandamus by the state, on the relation of Joseph E. Mark, against V. G. Dahl and others, board of deputy state supervisors of elections, Fayette county. Petition dismissed.

John Logan, for plaintiff in error. J. J. Harper and Joseph Hidy, for defendant in error.

PER OURIAM. The object of this suit is to compel the board of elections in Fayette county to place the name of the relator on the official ballot of the county as nominee of the Republican party in that county for the office of county auditor. The defendants demur to the petition. The petition shows that Frank L. Nitterhouse was duly elected auditor of Fayette county at the November election, 1895; that he was afterwards duly commissioned by the governor, but died September 30, 1896. His term of office, had he lived, would have commenced October 19, 1896. Assuming that his death created a vacancy in the office of county auditor at the time thereof to be filled by election in November next, the Republican party, through its regularly constituted committee empowered to make nominations in such cases, nominated the relator, and requested the defendants to place his name on the official ballot for the office of auditor of the county, to be voted for as such at the coming election. This the board refused to do. The only question in the case is whether the death of Nitterhouse, on the 30th day of September last, created a vacancy in the office of auditor of the county. We think not. His term of office was not to begin until the 19th day of October following his death, which is less than 30 days of the November election. His death created no vacancy in the office, as it was then filled by a duly elected, qualified, and acting auditor, who would continue to be such until the end of his term, unless he should die or resign. Hence, as no vacancy could occur in the office by reason of the death of Nitterhouse, before the 19th day of October, it could not be filled by election at the following November election. Rev. St. § 11. The case of *State v. Hopkins*, 10 Ohio St. 509, when carefully considered, in

no way conflicts with this view. The holding there is that the death of one who had been elected treasurer of the county created a vacancy in the office that could be filled, by appointment, when, had he lived, his term would have commenced. This is not a holding that the vacancy was created at the time of his death, but a holding that, from the fact of his death, a vacancy accrued at the end of his predecessor's term. The vacancy occurred then, and not before, and authorized it to be filled by the commissioners of the county under the statutes there cited. Demurrer sustained, and petition dismissed.

WILLIAMS, C. J., not sitting in the case.

(55 Ohio St. 125)

YOUNG et al. v. STONE et al.

(Supreme Court of Ohio. Oct. 20, 1896.)

PARTITION PROCEEDINGS—FEE OF COUNSEL—ALLOWANCE BY COURT—WAIVER OF RIGHT.

1. Under section 5778, Rev. St., authorizing the court in partition proceedings to allow a reasonable fee to plaintiff's counsel, to be taxed as costs in the case, the power conferred is limited to such services as are rendered for the common benefit of all the parties. For services rendered in litigation between parties to the suit, no allowance can be made by the court under this section.

2. Where an attorney makes an agreement with the plaintiff in partition proceedings, whereby he is to receive a certain compensation for his services in the matter, he necessarily waives any right he might otherwise have had to be awarded compensation by the court under the statute. In such case the contract fixes his rights and the measure of the relief to which he may be entitled. Burket and Spear, JJ., dissenting. (Syllabus by the Court.)

Error to circuit court, Cuyahoga county.

Action by Silas M. Stone and others against Cornelia T. Young and others.

The object of this proceeding is to obtain the reversal of an order and judgment of the circuit court in a partition proceeding, making an allowance of \$2,500 to L. A. Russell for services as an attorney, under section 5778, Rev. St. Silas M. Stone, his brother Francis W. Stone, and their sister, the said Cornelia T. Young, as representatives of the brother of the whole blood of Silas S. Stone, deceased, brought an action in the court of common pleas of Cuyahoga county, in partition, claiming to be the owners of one-half of a large amount of land, described in the petition, formerly owned by Silas S. Stone. The brothers and sisters of Margaretta Stone were made defendants, and were conceded to own one-half of the land sought to be divided. The half brother and sisters of Silas S. Stone were on their motion made parties defendant, and claimed to be owners of the property as tenants in common with the plaintiffs. This claim was decided against them in 50 Ohio St. 495, 35 N. E. 208, and by that decision Silas M. Stone, Francis W. Stone, and Cornelia T. Young were each as-

certain to be the owner of an undivided one-sixth of the property. On the case being remanded to the circuit court, partition was made in accordance with the decision of this court; that is, one-sixth was divided to Silas M., one-sixth to Francis W., and one-sixth to Mrs. Young, her husband, William S. Young, and George L. Carlisle, to whom she had in the meantime conveyed an interest in her one-sixth. The other half was apportioned to the brothers and sisters of Margaretta Stone.

L. A. Russell was the attorney, originally and throughout, of Silas M. Stone, and Mr. Miller, of the city of New York, was the attorney of Francis W. Stone. Mr. George L. Carlisle, of New York, a plaintiff in error, was the original attorney of Mrs. Young. Carlisle had a contract with her for his services, which is as follows:

"This witnesseth that Cornelia T. Young has retained and employed, and does hereby retain and employ, George L. Carlisle, of No. 2 Wall street, New York City, to be her attorney, and to represent her in all matters relating in any way to the estates of Silas S. Stone and of his wife, Margaretta Stone, both deceased, or the settlement of either of them, and of any and whatever claim or other interest she now has or hereafter may have against her brother Francis W. Stone, arising from or by reason of any writing which she may have given to him, and relating in any way to either or both of said estates. The said Carlisle accepts said employment upon the terms hereafter set forth, and agrees to attend to the interest of said Young in said matters to the best of his ability. In consideration of the foregoing, and of one dollar, each to the other in hand paid, receipt whereof is acknowledged, it is mutually promised, understood, and agreed that the said Carlisle, for his services hereunder, shall be entitled to and shall receive an amount equal to one-fourth ($\frac{1}{4}$) of all and whatever shall be recovered by or paid to said Young, directly or indirectly, on account of any of said claims or interests, in lieu of any other fee therefor. And it is further understood that all necessary incidental expenses for the prosecution of said claims or interests shall be borne and paid by said Young. But it is asserted by said Carlisle, that, in his opinion, the amount thereof will not reach five hundred dollars (\$500.00). It is also understood and agreed that the said claims and interest shall not be settled or compromised without the consent of both parties hereto, and that this agreement, as a whole, binds said parties, their heirs, representatives, and assigns." (Signed by the parties.)

Carlisle then employed Mr. L. A. Russell as local attorney by an agreement in writing which is as follows:

"Whereas, George L. Carlisle is the attorney at law and in fact of Cornelia T. Young in all matters relating to her interests in the estate of Silas S. Stone and Margaretta Stone, both deceased; and whereas, it may become necessary or proper for him, in the discharge of his duties aforesaid, to have the assistance of an Ohio lawyer: Now, therefore, this shows

that L. A. Russell, of Cleveland, Ohio, has been and is hereby retained and employed by George L. Carlisle, of New York City, to appear for Cornelia T. Young in any partition or other suit or proceeding which may be commenced or taken with respect to the settlement of her interest in the estates of Silas S. Stone and Margaretta Stone, both deceased, either or both, and to do and perform all things necessary for the speedy and complete settlement of said interest. Said Russell accepts said employment, and it is mutually agreed as follows: (1) Said Carlisle shall be consulted as the principal or employing attorney herein in any such suit or proceeding hereunder (and as often as may be prior thereto) which said Russell shall commence or take, and (as near as may be) all papers necessary and of importance for the prosecution of said interest shall be first submitted to said Carlisle, and all payments on account or otherwise of said interest shall be made to said Carlisle as the attorney for said Young. (2) The compensation which said Russell may charge for such service shall in no event be more than he will charge and receive from either Silas S. Stone or his brother, Frank I. Stone, for like services, nor more than seven and one-half (7½) per cent. of the net amount of whatever recovery in cash shall be made through his efforts for said Cornelia T. Young during the continuance hereof; except that, if a suit in equity, other than in partition, or in law, for ejectment, shall be brought in the name of said Cornelia T. Young hereunder against the personal representatives, heirs, or next of kin of said Margaretta Stone or Silas S. Stone, deceased, or any other person or persons to recover any moneys or other property now in the possession of said personal representatives, heirs, next of kin, or any other person, under a claim of title thereto or interest therein, but in which said Young is entitled to share, or if such suit be brought against said Young, then and in any such event said Russell will charge and shall be entitled to receive for such services no more than ten (10) per cent. of the net final recovery therein to said Cornelia T. Young. It is also understood and agreed that, in event that any real or other property belonging to said estates, or either of them, be, in the settlement of the same, recovered by said Russell for said Cornelia T. Young during the continuance hereof, and which shall be set apart and accepted by said Young, either in common with her said brothers, or either of them, or in severalty, that said Russell, for the purpose of computing and collecting his compensation hereunder, shall be entitled to substitute the value of said Young's interest in such lands at the time as so much cash; and if dispute shall arise as to the value thereof, the same shall be finally determined by arbitration in the usual way. In witness whereof, we have hereunto set our hands and seals this 12th day of February, 1892. Signed, sealed, and delivered in the presence of James L. Barger,

George L. Carlisle.
"L. A. Russell."

At the conclusion of the services, Mr. Russell claimed of Mr. Carlisle upward of \$20,000 for services he had rendered under the contract; and, in the motion made by Silas Stone for the confirmation of the report of the commissioners, he "moved that the court fix and allow to said L. A. Russell, of the plaintiff's attorneys, as his counsel fee against Cornelia T. Young, William S. Young, and George L. Carlisle, as the owners in common of one-sixth of said estate, and fix the same as a lien upon said one-sixth set off in severalty to them by the partition herein, the sum of \$15,455.70 being as and for 7½ per cent. upon the value of their one-sixth of the said estate as found by the said commissioners in partition, being \$206,076,—said sum being the amount of said counsel fee as fixed by contract for said services in said cause between said parties and the said L. A. Russell,—and that the court order that, unless the said sum of \$15,455.70 be paid by said parties to said Russell, by a date to be fixed upon by said court, said one-sixth of the said estate so set off to said parties in partition, or so much thereof as may be necessary, be sold as upon execution at law, in order to pay the said counsel fee so allowed." After hearing the evidence the court found the facts and rendered judgment thereon as follows: "The court finds that, under the provisions of the statutes of Ohio, the court has jurisdiction and authority to make an allowance to counsel for services rendered 'for the common benefit of all the parties,' to be taxed in the costs in the case; that a reasonable fee for the services rendered by the several counsel in and about the said partition cause, in effecting and securing the partition of lands and tenements actually aperted and set off in severalty to the said owners, were of the value of \$15,000, one-sixth of which should be paid by Cornelia T. Young, William Shipman Young, and George L. Carlisle to L. A. Russell, for the services of the said Russell rendered in said cause, for said three parties last named, in securing the partition of the lands actually aperted and set off to them. The court also finds that the services for which the said Russell is allowed \$2,500 were embraced within the terms of the written contract signed by said L. A. Russell and said George L. Carlisle, and the court, in making this allowance, saves to said Russell all his rights under his said contract, except so far as the amount allowed him herein shall be taken as payment in part for a portion of the services he was to render under his said contract. It is therefore ordered, adjudged, and decreed that said sum of \$2,500, so allowed to said Russell as attorney fees, be taxed in the costs of said cause against the said George L. Carlisle and Cornelia T. Young and William Shipman Young, and that, unless, etc., * * * execution issue therefor." To this order and judgment the plaintiffs in error excepted, and now ask to have it reversed, and the motion on which it was made, overruled. Reversed.

Boynton & Howe, for plaintiffs in error. L. A. Russell, for defendants in error.

MINSHALL, J. (after stating the facts). The professional services for which an allowance was made by the circuit court to A. L. Russell, as an attorney in the case, were rendered under a written agreement by which he was employed by George L. Carlisle, the attorney at law and in fact of Mrs. Young. The agreement, as will appear from an examination of it, was between himself and Mr. Carlisle; the latter having an agreement in writing between himself and Mrs. Young, by which he was, for his services, to receive a definite part, one-fourth, of the property recovered, for "representing her in all matters relating in any way to the estate of Silas S. Stone and of his wife, Margaretta Stone, both deceased." The entire services rendered by Mr. Russell under his employment by Carlisle, aside from the partition of the estate, by proceedings for that purpose, were rendered in litigation between the children of a deceased and only brother of the whole blood of Silas S. Stone, deceased, and the brothers and sisters and representatives of those deceased, of his half blood. Mrs. Young and her two brothers, Silas M. Stone and Francis W. Stone, were the children of the deceased brother of the whole blood. Those of half blood claimed the right, under the statute of descent and distribution, to share equally with those of the whole blood. It was a controversy of much importance to these children, for, if the claim of the half bloods prevailed, the interest of each in the estate would be reduced from one-sixth to a much smaller aliquot part. But it concerned no one in the partition proceedings except the parties to it. It was finally determined by this court in favor of the children of the deceased brother of the whole blood of Silas S. Stone. *Stone v. Doster*, 50 Ohio St. 495, 35 N. E. 208. Two questions are presented by the record, either of which is decisive of the case: (1) Whether, regard being had to the character of the services, the court had power under section 5778, Rev. St., to make an allowance of any sum to the attorney for services in the litigation between the representatives of the whole blood and those of the half blood of Silas S. Stone, deceased; or (2) if so, had it power to make any allowance, when it appeared that the attorney and his clients had an express written agreement as to what his compensation should be for all services to be rendered in the matter.

1. The statute under which the allowance was made reads as follows: "The court, having regard to the interest of the parties and the benefit each may derive from a partition, and according to equity, shall tax the costs and expenses which accrue in the action including reasonable counsel fees which shall be paid to plaintiff's counsel unless the court award some part thereof to other counsel for services in the case for the common benefit of all the parties; and execution may issue therefor as in other cases." Rev. St. § 5778. Now it is evident, we think, from the language of this section, in connection with its history, that the services of "the

plaintiff's counsel" in partition proceedings, for which the court may make an allowance and cause the same to be taxed along with "the costs and expenses which may accrue in the action," are such services as are rendered "for the common benefit of all the parties" in the case. The statute as first enacted (29 Ohio Laws, p. 254, § 16) simply included the costs and expenses that may accrue in the action. These, of course, could not be otherwise than for the common benefit. It was afterwards, in 1880, so amended as to include "a reasonable counsel fee" to be paid the plaintiff's counsel, "unless the court award some part thereof to other counsel for services in the case for the common benefit of all the parties." Rev. St. 1880, § 5778. The latter clause, "for the common benefit of all the parties," is a controlling one in the construction of the statute. Services for which an allowance may be made to other counsel and taxed as part of the costs are required to be of like character with the costs, expenses, and the counsel fee authorized to be taxed in favor of the plaintiff's counsel in the case. So that no counsel fee, whether to the plaintiff's counsel or otherwise, can be allowed by the court and taxed as costs in the case, under this section, unless the services were rendered for the common benefit of all the parties. The services rendered are to be such as may be taxed as costs and expenses, and apportioned to the parties according to their respective interest. The allowance made in this case, and taxed to the one-sixth interest owned by Mrs. Young, her husband, and Carlisle, was not for such services. They in no way benefited or affected the next of kin of Margaretta Stone, deceased.

But it is claimed that the language, "The court having regard to the interest of the parties and the benefit each may derive from a partition, and according to equity," conferred power on the court to make the allowance it did, and to charge it upon the interest of Mrs. Young, her husband, and Mr. Carlisle, in the property as partitioned, as the equitable contribution they should make to the services rendered by Mr. Russell in defeating the claim made by the half bloods. The statute does not warrant this construction. Without doubt the court may determine the proportion of the costs, expenses, and counsel fees, of the character above stated, that should be taxed to each party, regard being had to the interest of each in the subject of partition; but the costs, expenses, and counsel fees so apportioned, must have been made for the common benefit of all the parties to the action, and must not include compensation for services rendered by counsel in litigation between some of the parties to the suit and others who are adversaries in interest. Compensation for such services is a matter of agreement between the counsel and his clients, express or implied; and the court, in such case, has no

more power to fix the compensation the plaintiff should pay his counsel than it has in an ordinary civil action. Such has been the construction placed by the courts of other states on their own statutes, similar to ours, and also conforms to the rule observed in equity. In *Grubbs' Appeals*, 82 Pa. St. 29, it was held that it was "indispensable aid only that was contemplated,—such usual and accustomed services as the exigencies of such case should render necessary. The compensation of counsel for services in the trial of contested cases was not the end in view." In *Fidelity Ins., Trust & Safe Deposit Co.'s Appeal*, 108 Pa. St. 342, it was held that "the fees should be graduated according to the circumstances of each case, the nature and extent of the services necessarily rendered for the common benefit of all the parties in the case. It [the compensation] does not include the expenses of adversary proceedings resulting from a defense to the demand for partition, or from any other cause." See, also, the following cases: *Kilgour v. Crawford*, 51 Ill. 249; *Stempel v. Thomas*, 89 Ill. 147; *Luzerne Bldg. & Sav. Ass'n v. People's Bank*, 142 Pa. St. 121, 21 Atl. 806; *Coles v. Coles*, 13 N. J. Eq. 365.

2. As to the second question: It appeared from the motion of the counsel, as well as from the evidence, that he had a written agreement with Mr. Carlisle, whereby he was to be compensated for all services rendered in the matter. Carlisle was the attorney in fact of Mrs. Young, and he was to perform all the services in and about the matter for a fourth interest in the property claimed by Mrs. Young. By the agreement between Carlisle and Russell, the rights of the latter to compensation for services rendered in his employment must be measured and determined. He cannot have the right given him by statute for a reasonable compensation, and also a right to compensation secured by contract for the same services. By the contract he waived his right under the statute, and must rely on it for such compensation as he is entitled to, be it much or little. This is in analogy to the principle that where there is an express contract none can be implied. To insist on compensation under the statute would be to repudiate the contract, which he certainly cannot do. It is entirely competent to parties to make such a contract, as it contravenes no principle of public policy. The statute is designed for cases in which there has been no contract. The fact that his rights under the contract were greater than they would be under the statute, and that the court did not assume to measure his rights under the contract, but, simply made an allowance under the statute, and directed it to be used as a credit on any sum that might be due him under the contract, is of no consequence. The contract precluded the court from taking any action in the matter. It in a summary way had no right to assume that anything would be due the attorney under the contract. The services may not have been fully performed according to contract, or

may have been in part or fully paid. In fact, it was admitted that some \$4,500 had been paid on it. Under such circumstances the court should have overruled the motion of the counsel for compensation under the statute. Where there is a contract, and the client refuses to pay what is due under it, the remedy of the attorney is in an ordinary suit upon the contract for damages, in which suit, on any issue of fact, either party is entitled to a jury. For these reasons, the order of the circuit court making an allowance to Mr. Russell for services rendered in the proceeding is reversed, and his motion for such allowance is overruled. Reversed.

BURKET and SPEAR, JJ., dissent from the second proposition of the syllabus.

(146 Ind. 135)

BOARD OF COM'RS OF JACKSON COUNTY v. BOARD OF COM'RS OF WASHINGTON COUNTY.

(Supreme Court of Indiana. Oct. 21, 1896.)

COUNTIES — CONSTRUCTION OF BRIDGES BETWEEN.

Sp. Sess. 1869, p. 27, § 1, provides for building bridges across streams forming the boundary of two counties where the public convenience shall require the bridge, and the board of commissioners of one county on application declares its willingness to aid in building the bridge, and, after notice to the other county, both boards by joint resolution express such willingness, and cause a survey to be made. Act 1893, p. 46, provides that when the requirements of the above section have been complied with, and one of the interested counties refuses to join in the construction, the other may construct the bridge, and recover from the one refusing its proportion of the cost. *Held* that, to authorize one county to construct such bridge at the joint expense of the other county, it was necessary that the requirements of the first section as to the concurrent resolution, survey, etc., should have been complied with.

Appeal from circuit court, Washington county; S. B. Voyles, Judge.

Action by the board of commissioners of county of Jackson against the board of commissioners of county of Washington. There was a judgment for defendant, and plaintiff appeals. Affirmed.

D. A. Kochenour, for appellant. James H. Masterson, for appellee.

HACKNEY, J. The appellant sued to recover the alleged proportion chargeable to the appellee of the costs of constructing a bridge across the Muscattatuck river at a point where said river forms the boundary line between the counties of Washington, Jackson, and Scott. The complaint alleged: "That on the 24th day of July, 1893, the said board of commissioners of the county of Jackson, state of Indiana, being duly convened in special term at Brownstown, in said Jackson county, being duly petitioned by divers citizens and taxpayers of said county for the erection of a bridge across said Muscattatuck river at the point above mentioned, considered said petition, and, after hearing evidence touching the same, and being sufficiently advised in the premises, then and there

made an order, which was duly entered of record, reciting therein that said board of commissioners are of opinion that public convenience requires a bridge across the Muscattatuck river at said point, and that it would be expedient to erect the same. That the willingness of the board of commissioners of Jackson county is hereby announced and declared to make and pass with the boards of commissioners of the counties of Washington and Scott a concurrent resolution and order to cause a survey and estimates to be made with plans and specifications prepared by some competent person to be presented to said boards at some specified time and place near the site of the bridge proposed to be erected, when and where such boards may meet in joint session to estimate and determine the kind of bridge which shall be erected, and the manner of paying for the same, and the part that each county shall be required to pay under the law. Said board of commissioners of the county of Jackson then and there, in said order, fixed Friday, the 11th day of August, 1893, at 10 o'clock a. m., as the time of meeting the boards of commissioners of the counties of Scott and Washington at the site of the proposed bridge in joint session, and that a certified copy of this order and proceedings be served upon the auditor of Scott county and the auditor of Washington county, by the sheriff of Jackson county. That the board of commissioners of the county of Washington was duly notified of the foregoing action of the board of commissioners of the county of Jackson, as above set out. That afterwards, to wit, on the said 11th day of August, 1893, the said boards of commissioners of Jackson, Washington, and Scott counties, pursuant to the foregoing orders of the board of commissioners of the county of Jackson, and on call of the auditors of said counties, met in joint session near Blunt's Ferry and the site of the proposed bridge. That a joint session of the boards of said three counties was then and there duly convened, organized, and held. A vote was taken by counties on the advisability of building said proposed bridge. Scott and Washington counties voted against the erection of said bridge, and Jackson county voted for its erection. That Scott and Washington counties refused to join in the construction of said bridge, and said joint session was duly adjourned." The facts were further alleged as to the publication of notice for bids, the awarding of contracts, the construction of the bridge, the payment therefor by the appellant, and the amount sought to be charged against the appellee. The court sustained the appellee's demurrer to said complaint, and that ruling constitutes the basis of the only assignment of error in this court.

The following are the statutory provisions under which the appellant asserts the liability of the appellee:

"Whenever public convenience shall require the erection or repair of any bridge across any stream forming the boundary line between two counties within this state, upon application therefor to the board of county commissioners

of either county, such board of county commissioners may, if they think it expedient, declare their willingness to aid in the erection or repair of such bridge by resolution or order, and shall cause notice thereof to be given to the board of county commissioners of the other county interested therein. And whenever it may be ascertained that the board of county commissioners of both counties have made such order or resolution, such board of county commissioners shall, by concurrent resolution, cause a survey and estimate to be made, submitting plans and specifications therewith, by some competent person, to be presented to their respective boards of commissioners at some specified time and place at or near the site of such contemplated bridge, when such boards of county commissioners shall meet in joint session to estimate and determine the kind of bridge which shall be erected, and the manner and time when payments shall be made for the erection or repair of such bridge: provided, that whenever the board of county commissioners of any county shall have notified the board of county commissioners of any county interested in the erection or repair of any bridge, as specified in this section, and such board of county commissioners so notified, shall fail or refuse, for the period of thirty days, to accept or to act on the same by joining in the building or repair of such bridge, then, in that event, the board of county commissioners of such county, passing such order, may, if in their opinion public convenience requires the same, build or repair such bridge, under the same rules and regulations as are now or may be in force for the building and repair of bridges wholly within the county, after first having obtained the consent and permit of the land-owner in the adjoining county, whose land will be occupied by such bridge, to the building of the same." Rev. St. 1881, § 2880 (Burns' Rev. St. 1894, § 3251).

"Section 1. Be it enacted by the general assembly of the state of Indiana, that section 2 of the above entitled act, the same being section 2882 of the Revised Statutes of 1881 of the state of Indiana, be amended to read as follows: Section 2. It shall be the duty of such boards of county commissioners, in joint session, to make such appropriation for their respective counties as will make an equitable proportion to each county of the whole cost of construction or repairs of such bridge; and such appropriation shall be in proportion to the taxable property of the two or more counties, and all taxes hereafter levied for the erection, repair or purchase of any such bridge so situated shall be levied in accordance with this act; and when the requirements of the first section of this act have been complied with, and one of the counties which will be affected by the erection, repairing or purchasing of said bridge refuses to join in the construction, repairing or purchasing of such bridge, the county desiring such improvement may construct, repair or purchase such bridge, as provided in said first section of this act, and when the cost of such bridge or repairs does not exceed

\$3,500 the county making such improvement shall be entitled to recover from the adjoining county affected by such improvement the amount that said county should have paid had she joined in the said improvement, said claim to be enforced as other claims are enforced against counties in this state; and when such claim is litigated the judgment shall include a reasonable attorney fee for the plaintiff's attorney." Acts 1893, p. 46, § 1; Burns' Rev. St. 1894, § 3253.

The constitutionality of the section quoted from the Acts of 1893 is denied by the appellee in support of the ruling of the lower court. It is urged that this section violates section 10, art. 6, of the state constitution, which is that "the general assembly may confer upon the boards doing county business in the several counties, powers of a local administrative power." The argument is that this provision of the constitution must be construed as if it withheld from the general assembly all authority upon the subject not within the limits of that granted; that the authority given is to grant power to the boards to act within and for their respective counties and for local purposes, and that the negative implied from the constitution is against the granting of powers to be exercised without, and affecting interests beyond the limits of, such counties respectively. The section of the act in question, it is claimed, permits the board of one county to arbitrarily judge of the interests of another county, transact business with relation to bridges affecting such other county, and charge the latter with the cost thereof, thus exercising extraterritorial powers. It will be seen that the section of the act of 1893 above quoted is an amendatory section, and that its reference to the section of the act of 1869, which it seeks to amend, as section 2 of said act, "being section 2882 of the Revised Statutes of 1881," raises a conflict as to the law intended to be amended. Section 2882, Rev. St. 1881, was section 3 of the act of 1869. This conflict, it is urged, renders the act of 1893 void for uncertainty.

It is the generally recognized rule of the courts that the validity of an act of the general assembly will never be passed upon where the merits of the litigation may be passed upon without doing so. While we do not assert the absence of constitutional authority in the general assembly to grant to the board of one county the power to make improvements for another county or counties, and charge the latter with the same, against the judgment and consistent protest of such other county or counties, we do maintain that a construction which would lead to results so dangerous to the public welfare will be avoided if possible. It will not readily be believed that the general assembly intended to invest one minor governmental subdivision of the state with power to construct public improvements for others of such subdivisions, regardless of majorities in numbers of counties and numbers of population, regardless of the financial condi-

tion of such other subdivision, and regardless of the reasonable privilege of each county to judge for itself of the wisdom of a step affecting its interests and of its ability to meet the expense of such step. If, therefore, the section of the act in question will bear a construction which will obviate the arbitrary and unreasonable power contended for by the appellant, that construction must be adopted. It will be observed that the two statutory provisions above quoted are now parts of a system provided for the construction, by counties, of bridges over streams which form the boundary line between such counties. The provisions of the latter section, by express reference to the former, are made to depend upon it. By the latter section it is provided that, "when the requirements of the first section of this act have been complied with, and one of the counties which will be affected by the erection * * * of such bridge refuses to join in the construction," the county desiring the improvement may proceed with it, and, upon conditions named, collect a part of the cost from the county so refusing. The complaint in this case, to withstand the appellee's demurrer, should have shown that the "requirements of the first section" had been complied with. This it did not do. The first of the sections above quoted, as originally passed (Acts Sp. Sess. 1869, p. 27), was, in effect, that part now preceding the proviso, and, before its amendment in 1881 (Acts 1881, p. 87), no authority existed in one county to build a bridge across a boundary stream. That authority came with the amendment of 1881. Board of Com'rs of Fountain Co. v. Board of Com'rs of Warren Co., 128 Ind. 295, 27 N. E. 133. The requirements of that section, as originally passed and as it now stands, where more than one county is to be charged with the costs of such bridge, are (1) that public convenience shall require the bridge; (2) that the application therefor be made to one of the boards interested; (3) that such board shall declare, by order or resolution, its willingness to aid in building the bridge; (4) that said board shall give notice thereof to the board of the other interested county; (5) that both boards interested shall, by resolution, express such willingness; and (6) where such boards, by concurrent resolution, cause a survey to be made, and plans and specifications to be prepared, to be considered at a joint meeting to be held to determine upon the kind of bridge to be built, and how it shall be paid for. These requirements complied with, a basis exists upon which the counties unite in making the improvement. The act of 1893, as we have seen, provides that one county may build a bridge at the joint expense of several counties "when the requirements of the first section," above pointed out, "have been complied with, and one of the counties which will be affected * * * refuses to join in the construction." This implies that when two counties, after notice, concur in the question of the public convenience of the bridge, when they incur the expense of

survey, plans, and specifications, when they exercise a judgment and discretion as to the character of bridge required, and as to the time and manner of meeting the expense, and when they have expressed a willingness to aid in making the improvement, neither may, by then refusing to join, defeat the improvement at such joint expense. One county may not build a bridge at the joint expense of several counties under the same conditions that it may build such bridge at its own expense. By section 2880, Rev. St. 1881 (section 3251, Rev. St. 1894), only one of several counties interested may build a bridge at its own expense in the event of the failure or refusal for 30 days of another county to join, and that is the county giving the notice. By the act of 1893, where it is sought to charge any county refusing to join, it is provided that the county desiring the improvement may proceed without regard to the question as to which county gave the notice or which made the refusal. It is clear, therefore, that the legislature intended to provide a different rule where one county should build at its own expense from that provided where a part of the expense might be enforced against another county. The complaint before us fails to aver facts disclosing any concurrent action by the several boards expressing a willingness to join in the improvement, and it does not appear that the several boards considered a survey or plans and specifications with a view to the exercise of any judgment upon the character of the bridge necessary. It is apparent, therefore, that the requirements of section 2880, Rev. St. 1881 (section 3251, Rev. St. 1894), were not complied with so as to permit the appellant to construct the bridge and charge the appellee with a part of the cost thereof. The judgment of the circuit court is affirmed.

(146 Ind. 186)

FISH v. BLASSER et al.

(Supreme Court of Indiana. Nov. 6, 1896.)

EJECTMENT—IMPROVEMENTS—PRESUMPTIONS—APPEAL—OBJECTIONS NOT RAISED BELOW—
STATUTE OF LIMITATIONS.

1. Where one claiming land under a tax deed makes permanent improvements, it will be presumed, in the absence of evidence to the contrary, that they were made in good faith.

2. The objection that one asserting the rights of an occupying claimant ought not to recover, because his claim was set up by cross complaint in the action of ejectment against him, cannot be made for the first time on appeal.

3. The statute of limitations relating to the foreclosure of a lien for taxes does not apply to a defendant seeking to recover, as an occupying claimant, under Rev. St. 1894, § 1087 (Rev. St. 1881, § 1074), the taxes paid, and the value of permanent improvements made by him on the land for the possession of which he is being sued; his right to proceed under said act only accruing when he is found not to be the owner of the land.

Appeal from circuit court, Pulaski county; George Burson, Judge.

Ejectment by John W. Fish against Jacob J. Blasser and others, in which defendant Blasser

sought by cross complaint to recover, as an occupying claimant, taxes paid by him and the value of permanent improvements. From a judgment for plaintiff on his complaint, and for said defendant on his cross complaint, plaintiff appeals. Affirmed.

Borders & Borders, for appellant. Steis & Hathaway, for appellee.

JORDAN, J. Appellant prosecuted this action in the lower court to recover possession of certain described real estate and to quiet title. Appellee filed an answer and cross complaint. By the latter he set up and sought to recover, as an occupying claimant, under the Code, taxes paid and the value of permanent improvements made by him upon the land in dispute subsequent to its purchase. A trial resulted in favor of the appellant upon his complaint, and in favor of the appellee upon the matters set up in his cross complaint. Counsel for appellant insist upon two alleged errors, which are predicated upon the court's conclusion of law upon the special finding of facts, and upon its action in overruling the motion to modify the judgment. An outline of the material facts as found by the court is substantially as follows: On March 2, 1878, the auditor of Pulaski county, wherein the land in controversy is situated, executed to one Sedgwick a tax deed "in due form" for said real estate upon a previous sale of the same to him for delinquent taxes. On October 15, 1883, Sedgwick and wife executed a quitclaim deed for the same land to the appellee. Both of these deeds were properly recorded. At the time appellee acquired his claim to the land, it was not under fence, and was "uncultivated, unimproved," and covered by water during the greater portion of the year. After receiving his deed from Sedgwick, appellee took possession thereunder in 1884, and each year he would harvest the grass which grew wild thereon, and, while occupying it under color of title, he paid the taxes, and made permanent and valuable improvements, such as fencing, grading, and ditching said land, and was still in possession at the commencement of this action. On July 11, 1895, the appellant obtained a deed to the land from Lyle E. Ripley, and before the commencement of this action demanded possession of appellee. The court found, as a conclusion of law, that appellee obtained no title to the land through the deed from Sedgwick, but that such conveyance was sufficient to and did give him color of title, and that he was entitled to recover for taxes paid and improvements made under the provisions of the law relative to occupying claimants.

Appellant insists that the tax deed to Sedgwick did not give color of title sufficient to entitle appellee to recover the taxes paid and the value of the permanent improvements. Section 1093, Rev. St. 1894 (section 1080, Rev. St. 1881), of the statute applicable to the rights of an occupant of land under color of title, provides as follows: "The purchaser in good faith at any judicial or tax sale made by the proper

person or officer, has color of title within the meaning of this act, whether such person or officer had authority to sell or not, unless the want of authority was known to the purchaser at the time of the sale; and the right of the purchaser shall pass to his assignees or representatives." There is nothing in the finding of facts tending to show that Sedgwick, through whom appellee claimed title, at the time he purchased the land at the sale for delinquent tax, had any knowledge of the absence of authority for the sale of the land in satisfaction of such tax, or that he was not a purchaser in good faith. Bad faith is the opposite of good faith. It is a species of fraud, and therefore is never presumed, but must be proven by the party who asserts that it exists in a particular instance. It follows, as a necessary sequence under the facts, when applied to the above section of the statute, that appellee had a colorable title to the realty in controversy, and under it having made the permanent improvements in question, we must presume that they were made in good faith until the contrary is made to appear. *Hilgenberg v. Northup*, 134 Ind. 92, 33 N. E. 796. Consequently, when it was judicially found that he was not the rightful owner of the land, he was entitled to avail himself, under the law, of the rights of an occupying claimant.

It is further contended by appellant that appellee ought not to recover in this action as such claimant for the reason that he exercised his right so to do under a cross complaint in the main action. It is a sufficient answer to this contention to say that this procedure was not questioned in the court below, and appellant cannot be heard to complain of it for the first time in this court.

The next insistence is that appellee's right to recover was barred by the limitation statute of 15 years, applicable to the foreclosure of a lien for taxes. But he did not seek a foreclosure of any such lien. His right to proceed under the act relative to occupying claimants accrued when he was found, as in this action, not to be the rightful owner of the land, and its recovery awarded to the appellant. *Rev. St. 1894, § 1087 (Rev. St. 1831, § 1074); Westfield v. Williams*, 59 Ind. 221.

Appellant filed a motion requesting the court to modify its judgment, so as to award a recovery only for taxes paid by the appellee, and not for the value of the improvements. Under the facts in the case, the court did not err in denying this motion. There being no available error in the record, the judgment is affirmed.

(146 Ind. 176)

BIG FOUR BUILDING & LOAN ASS'N v. OLCOTT et al.

(Supreme Court of Indiana. Nov. 5, 1896.)

ASSIGNMENT OF ERRORS — NAMES OF PARTIES — DISMISSAL.

Under rule 6 of the supreme court, which requires that "the assignment of errors shall contain the full names of all the parties," in an

action where there are several defendants, and the assignment is entitled plaintiff against "Charles A. Olcott et al.," the appeal will be dismissed.

Appeal from superior court, Marion county; J. M. Winter, Judge.

Action by the Big Four Building & Loan Association against Charles A. Olcott and others. From a judgment in favor of defendants, plaintiff appeals. Dismissed.

Beckett & Doan, for appellant. Geo. Carter, for appellees.

MONKS, C. J. This action was brought by appellant against Charles A. Olcott and six others. From the judgment of the court below appellant appeals. In the assignment of errors the parties are thus designated: "Big Four Building & Loan Association v. Charles A. Olcott et al." The sixth rule of this court requires that "the assignment of errors shall contain the full names of all the parties." Appellant has not complied with this rule. The assignment of errors is his complaint in this court, and the only parties over whom it acquires jurisdiction are those named therein. *Thornton's Ind. Prac. Code, § 655, note 1; Bozeman v. Cale*, 139 Ind. 187, 190, 35 N. E. 828, and cases cited; *Elllott, App. Proc. §§ 186, 322*. The parties to the judgment appealed from not being before this court, the cause is not in a condition to be determined upon its merits. *Gourley v. Embree*, 137 Ind. 82, 36 N. E. 846; *State v. East*, 88 Ind. 602. The appeal is therefore dismissed.

(146 Ind. 189)

CENTRAL UNION TEL. CO. v. FEHRING.

(Supreme Court of Indiana. Nov. 6, 1896.)

STATUTES—TITLE OF ACT—CONSTITUTIONAL LAW—TELEPHONE COMPANIES—DISCRIMINATION—VERDICT—UNCERTAINTY—VENIRE DE NOVO—APPEAL—PRESUMPTION.

1. *Rev. St. 1894, § 5529 (Acts 1885, p. 151, § 2)*, entitled "An act to prescribe certain duties of telegraph and telephone companies," etc., relates to such companies as common carriers of news, and hence is not obnoxious to *Const. art. 4, § 19*, providing that every act shall embrace but one subject.

2. Under *Rev. St. 1894, § 5529 (Acts 1885, p. 151, § 2)*, providing that every telephone company shall, within the local limits of its business, supply all applicants with connections and facilities without discrimination, a company must not only furnish an applicant with an instrument, and connect it with the exchange, but must also, when requested, make such connection as will enable the subscriber to converse with a person named, without partiality; and for refusal so to do it becomes liable to the penalty provided in said act.

3. A motion for a venire de novo will not be sustained unless the verdict, whether general or special, is so defective and uncertain on its face that no judgment can be rendered thereon.

4. In an action against a telephone company to recover the penalty prescribed by *Rev. St. 1894, § 5529 (Acts 1885, p. 151, § 2)*, for failure to supply plaintiff with telephone connection and facilities without discrimination (a penalty of \$100 being imposed for each offense), the complaint was in two paragraphs, substantially the same, except that the offense was alleged on

different days, and the verdict was: "We, the jury, find for plaintiff, and assess his damages at \$100." *Held*, that the verdict was not defective as failing to find on all issues.

5. A finding in favor of a plaintiff on one paragraph of the complaint, without noticing the other, is equivalent to a finding against him on the latter.

6. All reasonable presumptions and intentions will be made to sustain a general verdict.

Appeal from circuit court, Bartholomew county; Francis T. Hord, Judge.

Action by August H. Fehring against the Central Union Telephone Company to recover a statutory penalty. Judgment for plaintiff, and defendant appeals. Affirmed.

Hacker & Remy, for appellant. Cooper & Cooper, for appellee.

MONKS, C. J. This action was brought by appellee against appellant to recover the statutory penalty under section 5529, Rev. St. 1894 (section 2, p. 151, Acts 1885), for failure and refusal on the part of appellant to supply appellee with "telephone connection and facilities without discrimination or partiality." The complaint was in two paragraphs, which were substantially the same except the offense was alleged on different days. Appellant's separate demurrer for want of facts to each paragraph of complaint was overruled. An answer in three paragraphs was filed, to which a reply of general denial was filed. The cause was tried by jury, and a general verdict rendered in favor of appellee, and his damages assessed at \$100; and, over a motion for a venire de novo and a motion for a new trial, judgment was rendered in favor of appellee.

The first objection urged to the complaint is that the act upon which the cause of action is based embraces more than one subject,—telegraph companies and telephone companies,—and is therefore unconstitutional, under the provisions of section 19 of article 4 of the constitution. Rev. St. 1881, § 115 (Rev. St. 1894, § 115). The act in question is entitled "An act to prescribe certain duties of telegraph and telephone companies, providing penalties therefor, and providing an emergency." Acts 1885, p. 151, § 2 (Rev. St. 1894, § 5529). This court has held that a telephone company doing a general telephone business is a common carrier of news, in the sense a telegraph company is a common carrier; and that section 2, p. 151, Acts 1885 (section 5529, Rev. St. 1894), prescribes the duties of telegraph and telephone companies as such common carriers. Telephone Co. v. Bradbury, 106 Ind. 1, 5 N. E. 721, and cases cited; Telephone Co. v. Fallay, 118 Ind. 194, 206, 19 N. E. 604. The subject of the act is neither telegraph nor telephone companies, but is prescribing the duties of such companies as common carriers. It was proper to name in the title the common carriers covered by the provisions of the act. This act, therefore, embraces but one subject, that of regulating a certain

class of common carriers and matters properly connected therewith, and is not invalid for the reason urged.

It is next insisted that the complaint does not state a cause of action, within the meaning of said section 2, p. 151, Acts 1885 (section 5529, Rev. St. 1894). The allegations show, among other things, that appellant at the time stated owned and operated a general system of telephone lines in the city of Columbus, Ind.; that appellee had one of the appellant's telephones in his drug store, and, desiring to converse with another patron of appellant, called upon the exchange, and asked to be connected with said other patron, which connection was refused by appellant. Appellant urges that the section upon which appellee predicates this action applies to discrimination between applicants for telephones, not to discriminations between patrons of a telephone company. In other words, appellant's contention is that the act requires telephone companies to furnish an instrument, and connect it with its exchange, when applied for, without discrimination, but, when this is done, the duty of the company to such person under the act ceases, and that no penalty can be recovered under said act for a refusal to furnish the connection and facilities by which he can use the instrument. We think it clear that, under the provisions of the section in controversy, telephone companies are not only required to furnish an applicant the instrument, and properly connect the same with its exchange, but it is also their duty to supply all the connections and facilities necessary to the use of such instrument. The section provides that "every telephone company * * * shall, within the local limits of said telephone company's business supply all applicants for telephone connections and facilities with such connections and facilities, without discrimination or partiality. * * * Merely furnishing an applicant with an instrument, and connecting the same with the exchange, is not a compliance with this statute. This alone would not enable such person to use the telephone instrument. After the telephone instrument was furnished appellee, and connected with the exchange, it was the duty of appellant each time, when requested by appellee, to make such connection as would enable him to converse with the person named, without discrimination or partiality; and, for a refusal so to do, appellant became liable to appellee, as provided in said act. The court did not err, therefore, in overruling the demurrer to each paragraph of the complaint.

Appellant contends that, if the jury found for appellee on both paragraphs of the complaint, they should have assessed the damages at \$200, and that, only having assessed the damages at \$100, it is evident they only found for him upon one paragraph. That the verdict did not cover all the issues is defective, and the court there-

fore erred in overruling the motion for a venire de novo. The jury returned the following verdict: "We, the jury, find for the plaintiff, and assess his damages at \$100." The statute provides that any person or company violating any of the provisions of the act shall be liable to any party aggrieved in a penalty of \$100 for each offense. The rule in this state is that a motion for a venire de novo will not be sustained unless the verdict, whether general or special, is so defective and uncertain upon its face that no judgment can be rendered upon it. *Bartley v. Phillips*, 114 Ind. 189, 16 N. E. 508, and cases cited on page 192, 114 Ind., and page 510, 16 N. E.; *Board v. Pearson*, 120 Ind. 426, 22 N. E. 134. A verdict, however informal, is good if the court can understand it. *Daniels v. McGinnis*, 97 Ind. 549. The verdict in this case is not informal or defective, even if appellant's contention that it only finds for appellee upon one paragraph is correct, for the reason that a finding in favor of appellee upon one paragraph of his complaint, without noticing the other, would be equivalent to a finding against him on such other paragraph. *Shaw v. Barnhart*, 17 Ind. 183, on pages 184, 185. The verdict in this case, being general, found all the essential facts and issues in favor of appellee, and all reasonable presumptions and inferences must be made to sustain it. *Railroad Co. v. Summers*, 131 Ind. 241, 30 N. E. 873. If it were conceded that the jury should have assessed the damages at \$200, that was an error in favor of, and not against, appellant, and of which only appellee could complain.

What we have said disposes of the other error assigned. Judgment affirmed.

(146 Ind. 177)

WINER et al. v. MAST.

(Supreme Court of Indiana. Nov. 5, 1896.)

QUIETING TITLE—PLEA IN BAR—JUDGMENT—SURPLUSAGE—COLLATERAL ATTACK—SUIT BY MINOR.

1. Where a default judgment has been opened up on motion, that it may be set aside if the defense thereto should prove good, and that defense is sustained, and a judgment is entered thereon, the first judgment is in effect abrogated, though not in terms set aside by the second.

2. In an action to quiet title, the court found specially that defendant in a foreclosure action was a minor at the date of giving the mortgage sued on; that, on his motion, a default was set aside, and the judgment opened; that defendant filed an answer "in said original cause in two paragraphs"; that the finding and judgment were that, the cause being at issue "on the answer of said defendant in abatement, * * * the court finds for the defendant," and it was adjudged "that the plaintiffs recover nothing by this action, and that the same do abate." Held that, since the only defense shown in the findings was that defendant had executed the mortgage while an infant, it must be presumed that it was found that the answer set up defendant's infancy, and hence was a plea in bar, though inadvertently called an "answer in abatement."

3. The decree that "the plaintiffs recover

nothing by this action" is a complete judgment against plaintiffs in the original action in foreclosure; and the added words "and that the same do abate" are surplusage, which may be disregarded.

4. A decree of foreclosure which has never been appealed from or set aside cannot be collaterally attacked in a subsequent action to quiet title to the premises, which were covered by the mortgage sued on in the original action.

5. Rev. St. 1894, § 297 (Rev. St. 1881, § 296), by which infants are given two years after becoming of age in which to bring suit for a cause of action accruing during their minority, does not prevent a minor from bringing such action before he becomes of age.

Appeal from circuit court, Elkhart county; Henry D. Wilson, Judge.

Action by Sanford D. Mast against Samuel D. Winer and others to quiet title. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Henry C. Dodge, for appellants. Orin M. Conley, for appellee.

HOWARD, J. This was an action brought by appellee to quiet his title to certain real estate. The appellants answered the complaint by general denial, and also filed their cross complaint, asking that their title to the same land be quieted. An answer in general denial was filed to the cross complaint. The case being submitted for trial, there was a finding in favor of the appellee, with judgment quieting his title. On a new trial, granted as of right under the statute, the finding and judgment were again for the appellee. On the last trial the facts were found specially by the court, and the correctness of the conclusions of law on the facts so found is submitted for decision on this appeal. The court found: (1) That the title to the land in dispute was on the 5th day of April, 1890, in one James N. Dygart, from whom both parties trace title. (2) That on April 16, 1890, the said Dygart, being at the time a minor, mortgaged said real estate to the appellants, to secure a promissory note for \$250, executed to them on that day. (3) That on the 8th day of December, 1890, suit was brought by appellants to foreclose the mortgage. Summons was served upon Dygart, but he did not appear, and judgment of foreclosure was taken against him on default. On January 17, 1891, the land was sold to appellants on order of sale, and a sheriff's certificate was issued to them. No redemption has been had from said sale. (4) That at the ensuing term of court, on March 17, 1891, the said Dygart, being still a minor, by his complaint, moved to set aside the default and judgment taken against him on December 8, 1890. Appellants appeared, and filed their demurrer to Dygart's said complaint, and also filed counter affidavits. Afterwards, on July 14, 1892, Dygart arrived at the age of 21 years. At the October term, 1892, on October 10, 1892, the action to set aside the default was, by order of court, stricken from the docket; but thereafter, at the same term, on November 9, 1892, on motion of Dygart, said action was reinstated, and he filed an amended complaint or petition, sup-

ported by affidavits, to set aside the default, and vacate the judgment; and at the same term, on November 17, 1892, all the parties being present, the court entered the following decree: "Come now the parties, and the court now, upon due consideration, orders that the default heretofore made herein be, and the same is now, set aside, and the judgment opened, [but] not set aside, and the defendant is allowed to make defense herein." Thereafter, at the December term, 1892, on December 19, 1892, in compliance with the order so made, Dygart filed his answer to appellants' complaint for foreclosure, in two paragraphs, and on December 22, 1892, he moved for judgment on his answer; and the court, on hearing the evidence, appellants' attorney being present, entered the following decree: "Comes the defendant, James N. Dygart, and by counsel moves for judgment on the answer. Plaintiffs, being three times called, come not, but therein make default. The cause, being at issue on the answer of said defendant in abatement, is submitted to the court for trial thereon; and, being well advised in the premises, the court, on the facts adduced, finds for the defendant on said issue. It is therefore considered, ordered, and adjudged by the court that the plaintiffs recover nothing by this action, and that the same do abate." Thereafter, the appellants, appearing specially, asked leave to have said last-mentioned judgment and decree stricken out, which motion was overruled. From said decree no appeal has ever been taken, and the same is still in full force and effect. Further findings show that appellants received a deed from the sheriff upon their certificate of sale, which deed has never been annulled, except as in the foregoing order and decree; that James N. Dygart, after becoming of age, made his deed for the land to the remote grantor of appellee, in which deed he disaffirmed all contracts, deeds, and mortgages executed by him before arriving at full age; and that appellee is in peaceable possession of said property, claiming title to the same under his deed in fee simple, through mesne conveyances from said Dygart. The conclusions of law were in favor of appellee, and a decree was entered confirming his title to the land.

The questions discussed by counsel on this appeal have relation to the force and effect of the order setting aside the default and the succeeding decree in favor of James N. Dygart, as both are set out in the special findings. "Appellate courts," as said in Elliott's General Practice (section 1032), "are much more reluctant to interfere where a default is set aside than in cases where the application is denied, as evidenced by many decisions. The rule is analogous to that which prevails where new trials are granted; for, as is well known, appellate courts very seldom interfere with an order granting a new trial." Here we do not inquire whether the default was rightly set aside. The default in fact was set aside, and the order setting it aside cannot be attacked collaterally.

The contention of counsel for appellants is that as the order first made did not vacate the judgment of foreclosure taken against Dygart, but only opened up that judgment, set aside the default, and permitted Dygart to make his defense, and as the final decree did not, in terms, annul the judgment, the same still remains in force, notwithstanding the decree in favor of Dygart on his answer filed in the original action; in other words, that although the court permitted Dygart to answer, and made its finding and decree in his favor on such answer, yet that the judgment, which had been opened for no other object than that this defense might be made, closed at once against him as soon as his defense was successful, and so as to defeat the sole purpose for which it had been opened. We cannot think this contention tenable. "The last judgment," as said in *Van Fleet, Coll. Attack, § 862*, "is always conclusive that no cause existed why it should not be rendered." It may be conceded that the last judgment in this case should have formally set aside the first; but, even if this be so, the error is but an irregularity. The first judgment having been opened up that it might be set aside if the defense should prove good, and that defense having been sustained, and a judgment thereon entered, the first judgment is, in effect, abrogated. At most, the first judgment would be but an opened-up judgment, with all proceedings thereunder stayed, and it could be no basis to sustain any action. Its life was suspended, and has never been restored. It is functus officio, and another judgment has taken its place. It has been held, too, that the setting aside of a decree, when the order should have been that it be merely opened up to allow a party to defend, although an irregularity, yet does not render the action of the court void. *Van Fleet, Coll. Attack, § 660*, citing *Bank v. Humphreys*, 47 Ill. 227. It is also clear that, when a judgment is opened, the plaintiff is put to his proof, as if no judgment had ever been entered. 12 Am. & Eng. Enc. Law, 138. The only difference between setting aside a decree, and opening it up in order to let a party in to defend, is that in the former case the decree is at once annulled, while in the latter it is permitted to stand with all the proceedings thereunder stayed, until the court may determine whether the defense is good or not. If the defense fails, the judgment is confirmed; if the defense succeeds, a new judgment takes the place of the original. In making the order setting aside the default, and permitting Dygart to come in and defend, the court seems to have been guided by the ruling in *Pierson v. Holman*, 5 Blackf. 482, and *Wiley v. Pratt*, 23 Ind. 628. In the latter case it was said: "Where the party was within the reach of the process of the court, although not served with notice, and an appearance has been entered for him by an attorney, the court may well require him to aver, in his proceedings to obtain relief from the judgment, that he has a defense to the action; and, if no rights of bona fide purchasers have intervened,

the court will stay proceedings under the judgment, while it preserves its lien, and permit the party to make his defense to the original action, and, to the extent he may succeed in that defense, relieve him from the effect of the judgment."

In the case before us, Dygart was served with process, and judgment taken against him on default. The court finds that the defendant was a minor at the date of giving the note and mortgage sued on. He had, therefore, a good defense to that action,—the defense of infancy. As the court granted his prayer to set aside the default, and permit him to make his defense, we must presume that it was found that he had averred, "in his proceedings to obtain relief from the judgment, that he had a defense to the action,"—the defense of infancy. Following, however, the spirit of the precedents in the cases which we have cited, the court did not, in that order, set aside the judgment, but preserved its lien, while at the same time the defendant was let in to make his defense. The finding and judgment, as shown in the special findings, were: "The cause, being at issue on the answer of said defendant in abatement, is submitted to the court for trial thereon; and, being well advised in the premises, the court, on the facts adduced, finds for the defendant on said issue. It is therefore considered, ordered, and adjudged by the court that the plaintiffs recover nothing by this action, and that the same do abate." No appeal was ever taken from this decree. There was evidently some confusion of ideas in the making up, or in the entry, of the decree so made. A plea in abatement is a dilatory plea, and not a plea to the merits. If interposed in defense, it is a tacit admission that a right of action is shown in the complaint, but sets up matter which tends to defeat or suspend the action, "but which does not debar the plaintiff from recommencing at some other time or in some other way." *Needham v. Wright*, 140 Ind. 190, 39 N. E. 510; 1 Enc. Pl. & Prac. 1. It is true that infancy may be pleaded either in abatement or in bar, depending on the facts shown. In case the facts pleaded show, or do not deny, a good cause of action, but merely disclose that the party is a minor, and therefore cannot maintain or defend the action, then the plea, if made, would be in abatement. Doubtless, however, the court, in such case, would appoint a guardian ad litem for a minor defendant, and the trial would proceed; and, even if judgment should be entered without such appointment, the error would be but an irregularity, and the judgment, if not attacked on its merits, would stand. *Cohoe v. Baer*, 134 Ind. 275, 32 N. E. 920. In case, however, the facts should show that the party against whom the action is brought was a minor at the time of executing the note or other obligation sued on, then it is plain that no cause of action would be shown against him. The minor having been incapable of en-

tering into the alleged contract, there would, in fact, be no contract; and the answer setting up such a state of facts would be a plea in bar, and not in abatement.

In the case before us, the findings do not set out the answer filed by Dygart. It is simply stated that "said James N. Dygart filed answer in said original cause, in two paragraphs." As, however, there was a finding for Dygart, and a decree entered in his favor on such answer, we must presume that the court found the answer sufficient,—that it was such as the law required in the case. But, in a proceeding to vacate a judgment, the answer must be to the merits, and not merely in abatement. *Bristol v. Galvin*, 62 Ind. 352. As said in *Elliott's General Practice* (section 1032): "A meritorious defense must be shown by the party who seeks relief from the default. * * * The defense must be one of a substantial nature affecting the merits of the case." The only such defense shown in the findings was that Dygart had executed the note and mortgage sued on while he was an infant. There was therefore no cause of action against him; and the answer setting up such facts, by whatever name it may have been inadvertently called, was a plea in bar, and not in abatement. Unless as to necessities, infancy is a complete defense in such an action. *Zerger v. Flattery*, 83 Ind. 399; *Miller v. Hart*, 135 Ind. 201, 34 N. E. 1003. The form of the finding, as showing the answer to have been one in abatement, is irregular, but in substance it is sufficient. The facts found show the answer to have been in bar. The essential matter, moreover, is the decree. That reads: "It is therefore considered, ordered, and adjudged by the court that the plaintiffs recover nothing by this action." That is a complete judgment against the appellants in the original action in foreclosure, and sweeps away, not only the judgment which had been opened up to allow a rehearing, but also the sheriff's sale, certificate, and deed which had been based upon the judgment. The addition to the decree of the words "and that the same do abate" is but surplusage, and may be disregarded. "In some cases," it is said in 12 Am. & Eng. Enc. Law (1st Ed.) 122, citing numerous authorities, "the judgment entered is so clearly not the judgment which the law would have pronounced on the facts established by the record that the court will presume a clerical misprision, and amend the entry." In the case before us the findings show that a defense in bar was established, while the decree erroneously made use of words which might indicate a judgment in abatement. There is, however, sufficient to show that the decree, while irregular in form, was in substance one in bar. This decree, besides, has never been appealed from or set aside, but is still in full force and effect; the court, also, having expressly refused to strike it out. Whether the decree would be held good on appeal we need not say.

What we decide is that it cannot be overthrown on this collateral attack.

Neither do we think that error is shown by reason of the fact that Dygart brought this action to set aside the default and judgment before attaining the age of 21 years. He brought this action at the term next after that at which the judgment had been entered. He was then a minor, although the decision on his petition was not taken until after he was of full age. The petition to set aside a default, moreover, is not the foundation of a new action, but a continuation of the original action. Besides, while it is true that under section 297, Rev. St. 1894 (section 296, Rev. St. 1881), infants have two years after becoming of age to bring suit for cause of action accruing during their minority (*Lehman v. Scott*, 113 Ind. 76, 14 N. E. 914), yet this statute does not prevent a minor from bringing his action before he becomes of age, as well as within the two years after he arrives at age. *Edwards v. Beall*, 75 Ind. 401. The judgment is affirmed.

HARTWIG et al. v. SCHIEFER.¹

(Supreme Court of Indiana. Nov. 6, 1896.)

APPEAL—PARTIES.

1. An appeal from the judgment in a proceeding to construe a will, and to require payment thereunder to be made to plaintiff, is governed by the Civil Code; and though a part of several co-defendants may appeal, as provided by Rev. St. 1894, § 647 (Rev. St. 1881, § 635), it is necessary that all parties to the judgment be made parties to the appeal in the assignment of errors.

2. A joinder in error on the part of one appellee will not extend the jurisdiction of the court to those not made parties to the appeal.

Appeal from circuit court, Allen county; E. O'Rourke, Judge.

Action by Caroline S. Schiefer against Herman H. Hartwig, administrator of the estate of George F. W. Schiefer, deceased, and others, to construe a will. From a judgment for plaintiff, a part of the defendants appeal. Dismissed.

Breen & Morris, for appellants. T. E. Ellison and O. K. Kuhne, for appellee.

HOWARD, J. This was an action to construe a will, and to compel distribution in accordance therewith. An examination of the record shows, as we think, that the court reached a just and equitable conclusion as to the respective rights of the parties. See note to *Loring v. Craft*, 16 Ind. 111. At the outset, however, we are met with the contention by appellee that this court has no jurisdiction of the case, for the reason, as stated, that all the parties to the judgment have not been made parties to the appeal. The appeal in this case, being from a proceeding to construe a will, and to require payment thereunder made to the appellee, is governed by the provisions of the

Civil Code. *Simmons v. Beazel*, 125 Ind. 362, 25 N. E. 344. And see *Koons v. Mellett*, 121 Ind. 585, 23 N. E. 95; *Railway Co. v. Etzler*, 4 Ind. App. 31, 34 N. E. 669. The record discloses that Caroline Habercorn, Charles W. Schiefer, and Lorenz Schiefer appeared as parties defendant at the trial. Judgment was rendered directly against Caroline Habercorn and Charles W. Schiefer, with other defendants; while the interest claimed for Lorenz Schiefer was also disposed of, although he was not himself specifically mentioned in the decree. These three defendants did not join in the appeal, neither were they made parties in the assignment of errors.

While it is true that a part of several co-parties may appeal, as provided in section 647, Rev. St. 1894 (section 635, Rev. St. 1881), yet it is always necessary that all the parties to the judgment be made parties to the appeal in the assignment of errors. Rev. St. 1894, § 647 (Rev. St. 1881, § 635); rule 6 of this court; *Lang v. Cox*, 35 Ind. 470; *Darnall v. Hurt*, 55 Ind. 275; *Snyder v. State*, 124 Ind. 335, 24 N. E. 891; *Gourley v. Embree*, 137 Ind. 82, 36 N. E. 846; *Gregory v. Smith*, 139 Ind. 48, 38 N. E. 395; *Bozeman v. Cale*, 139 Ind. 187, 35 N. E. 828; *State v. Hodgins*, 139 Ind. 498, 39 N. E. 161; *Benbow v. Garrard*, 139 Ind. 571, 39 N. E. 162; *Inman v. Vogel*, 141 Ind. 133, 40 N. E. 665; *Vordermark v. Wilkinson*, 142 Ind. 142, 39 N. E. 441; *Elliot*, App. Proc. §§ 133, 322, 323. Neither will a joinder in error on the part of an appellee extend the jurisdiction of the court over those that are not parties to the appeal. *Garside v. Wolf*, 135 Ind. 42, 34 N. E. 810; *Gregory v. Smith*, supra. In the case before us, it would, besides, be most inequitable to allow the judgment to stand as to those defendants not made parties, and to reverse it as to the others. The principle is much the same as that which guides in the granting of a new trial. Unless in exceptional cases, the reopening of the judgment should be as to the whole case and all the parties. *Bennett v. Closson*, 138 Ind. 542, 38 N. E. 46. The only safe rule is to make all parties to the judgment parties to the appeal. The names of those who then decline to join, or who are found to be unnecessary parties, may be stricken out. The appeal is dismissed.

(146 Ind. 169)

ASHCRAFT v. KNOBLOCK.

(Supreme Court of Indiana. Nov. 5, 1896.)

TRESPASS—JOINT ACTION—SEPARATE JUDGMENTS—PAYMENT—EFFECT AS DISCHARGE.

1. In trespass against several joint defendants, on proof of separate trespasses committed by each defendant, separate judgments against each are not authorized.

2. In trespass against joint defendants, where defendants sever, and separate judgments are rendered against each on proof of separate trespasses, the payment of one judgment is nevertheless the payment of a joint liability, so as to discharge the other judgments.

¹ Superseded by opinion, 46 N. E. 75.

3. One court may enjoin the enforcement of a judgment, rendered by another court of concurrent jurisdiction, which has been satisfied.

Appeal from circuit court, St. Joseph county; John H. Bradley, Special Judge.

Action by John C. Knoblock against Sarah A. Ashcraft and another. There was a judgment for plaintiff, and defendants appeal. Affirmed.

Baker & Miller and F. J. Lewis Meyer, for appellants. Andrew Anderson, for appellee.

HACKNEY, C. J. This was a suit by the appellee, Knoblock, against the appellants, Ashcraft and Ward, to enjoin the enforcement of an execution from the Elkhart circuit court in favor of Ashcraft, and held by Ward as the sheriff of St. Joseph county. The amended complaint was drawn upon the theory that the judgment upon which such execution had issued had been rendered in an action of trespass against Knoblock, Weaver, and Hagan jointly, in which they had defended jointly, and in which the damages had been awarded and judgment rendered for one sum against Knoblock and for another sum against Weaver and Hagan, upon a finding that such three defendants were guilty of a joint trespass, and, further, that Weaver and Hagan had paid the judgment so rendered against them, thereby compensating for the joint trespass, and in legal effect discharging the entire liability, including that against Knoblock. To the amended complaint a demurrer of the appellants for the want of sufficient facts was overruled, and the appellants answered in two paragraphs,—the first being a general denial, and the second setting up the pleadings in the action for trespass (including a complaint, an answer in two paragraphs, and a reply in denial), and also the instructions of the court, the verdict of the jury, and certain facts, seeking to show that the trespass was upon separate pieces of property; that the alleged trespassers had, upon the trial, severed in their defense; that the court had tried the case, by the admission of evidence and its instructions to the jury, upon the theory that it embraced several trespasses defended separately and by the defendants severally. Facts were pleaded, also, to the effect that the defendants had not, by motion or other means, objected or excepted to the severance of the damages by the instructions of the court, the verdict of the jury, and the judgment rendered. The appellee replied in denial of the answer, and upon a trial a decree was rendered in favor of the appellee, enjoining the enforcement of said execution, and the appellant Ashcraft was directed to cause the judgment against the appellee to be receipted as satisfied.

Two errors are assigned in this court,—the action of the court in overruling the demurrer to the complaint, and the overruling of a motion for a new trial. The pleadings in the action for trespass, as set out in the answer in this case, showed an action against Knob-

lock, Hagan, and Weaver jointly, charging them with breaking and entering the Reynolds House, an hotel occupied by Sarah A. Ashcraft, and in ejecting her from said hotel, by removing her furniture and fixtures therefrom, and in breaking and injuring certain of such furniture; that said hotel consisted of Nos. 114 and 116 South Michigan street, in the city of South Bend, and which No. 114 it was alleged Mrs. Ashcraft held as Knoblock's tenant. The answer was joint as to all of the defendants to said action, and the second paragraph denied the tenancy of Mrs. Ashcraft, and justified the entry of No. 114, and the removal of the furniture and fixtures therefrom, under a writ of restitution, in the hands of Hagan as constable and Weaver as his deputy, issued upon a judgment in favor of Knoblock and against Chauncey E. Ashcraft, husband of the appellant. The acts alleged to have constituted the trespass, it was averred, were committed on the 17th, 18th, and 19th days of March, 1892, without severance, as to parties, with reference to the two members; and the answer did not seek to distinguish, as to time, between those acts affecting the furniture in No. 114 and that in No. 116. In our opinion, there was no possibility, upon the pleadings in that case, of regarding the action or the defense as separate with reference to parties, time, or property. Upon the trial of this case the court admitted evidence tending to show that, in the trespass case, the court had admitted evidence and had instructed the jury upon the theory that the trespass was upon different pieces of property, at different times, and that Knoblock was not a participant, so far as the trespass upon No. 116 was concerned. But it is manifest from the result of the trial in this case that the court was not controlled by such evidence.

Counsel for the appellant say: "We admit that, where a suit is against several joint wrongdoers as to one wrong, the judgment must be for a single sum, assessed against all of the parties found responsible, and, further, that the principle of severance does not apply to the award of damages, and no apportionment of damages can be made, although all of the defendants may not be equally culpable, and we are aware of the fact that hundreds of decisions can be found in support of this doctrine; but we insist that no case can be found, where distinct and separate trespasses are committed by different defendants at different times, that damages cannot be assessed against the defendant separately, and the amount of the plaintiff's damages apportioned." Besides the concession in this statement, appellants' counsel do not controvert the proposition of the appellee that the payment by one of several joint tortfeasors of all or such portion of the damages as will discharge him who makes the payment will work the discharge from liability of all who may have been so jointly liable. One ques-

tion, therefore, and the most important question, in this case, is as to whether the payment of the several judgment against Weaver and Hagan was the payment of a joint liability as to the three trespassers. This question turns, principally, upon the inquiry as to whether separate judgments were authorized. Upon the pleadings, as we have seen, they were not authorized. The theory of a case must be determined from the pleadings. *Bremmerman v. Jennings*, 101 Ind. 253; *Hasselmann v. Carroll*, 102 Ind. 153, 26 N. E. 202; *Brown v. Will*, 103 Ind. 71, 2 N. E. 283; *Armstrong v. Lindley*, 116 Ind. 297, 19 N. E. 138; *Shirk v. Mitchell*, 137 Ind. 185, 36 N. E. 850; *Railroad Co. v. McCorkle* (Ind. Sup.) 40 N. E. 64. Whatever may be the rule as to several recoveries where the issue presents several liabilities, it cannot be admissible to present the issue of a joint liability against a number, and to recover against them severally. This does not, of course, deny the statutory rule that, where a number are sued, a recovery may be had against one, or against some jointly, when others may be found not guilty. *Everroad v. Gabbert*, 83 Ind. 489. But the appellant, having presented the issue that Knoblock, Hagan, and Weaver, by joint trespass, had become liable to her in damages, and that form of the issue not having been changed or modified by a severance in the answers, she had no right to any other than a joint recovery unless her action had failed as to some two of the defendants. It cannot be that, upon a joint issue as to a single trespass, the questions may be tried as to numerous trespasses by the defendants severally. If such inquiries could be made, the office of the pleadings would fail, and one injured by several trespasses, committed at various times, by persons having no connection therein, could unite such trespassers in one suit, as for one trespass; and they, defending that alleged trespass jointly, could be severally mulct for the trespasses by them so severally committed. Surely no such procedure could be tolerated under our Code. It is quite enough to say that, if several are sued, some may be acquitted, and a judgment rendered against the one or more found guilty, unless, possibly, the principle of severance is authorized by some pleading on behalf of the defendants. In this case it is clear that the issue raised by the pleadings was joint as to parties, and related to an alleged single trespass. But the appellants' learned counsel urge that they were permitted to prove separate trespasses,—one of which Knoblock was guilty of, and one of which Hagan and Weaver were guilty of,—and that, therefore, no different verdict and judgment were possible. If this were true, it would not prove that the appellant's unauthorized procedure should place her in a better situation than if her recovery had been authorized by the issues. See *Cooley, Torts*, p. 136; 2 *Hill Torts*, 267; *Everroad v. Gabbert*, 83 Ind. 489; *Prichard v. Campbell*, 5 Ind. 494; *Carney v. Reed*, 11 Ind. 417. At most

it can only be said that, in a suit against joint tortfeasors, the plaintiff obtained several judgments, and that, having done so, she then received from some of such joint tortfeasors the full satisfaction of their liability. It is the settled law that there can be but one satisfaction from joint tortfeasors. *Blann v. Crocheron*, 20 Ala. 320; *Fields v. Law*, 2 Root, 320; *Snider v. Croy*, 2 Johns. 227; *Gunther v. Lee*, 45 Md. 60; *Breslin v. Peck*, 38 Hun, 623; *Livingston v. Bishop*, 1 Johns. 290; *Thomas v. Rumsey*, 6 Johns. 26; *Mitchell v. Allen*, 25 Hun, 545; 26 Am. & Eng. Enc. Law, pp. 682, 683, and notes; *Fleming v. McDonald*, 50 Ind. 278.

The rule sustained by the holdings in this and other states is that, having obtained several judgments for joint trespasses, the plaintiff can have but one execution, and such execution, or an order for it, discharges all others. *Allen v. Wheatley*, 3 Blackf. 332; *Davis v. Scott*, 1 Blackf. 169; *Fitzgerald v. Smith*, 1 Ind. 310; *Prichard v. Campbell*, supra; *Snodgrass v. Hunt*, 15 Ind. 274; *Fleming v. McDonald*, supra; *Everroad v. Gabbert*, supra. In the last-cited case the following is quoted with approval: "If however, a jury should return a joint verdict of guilty against more than one defendant, and assess several damages, it is not such an irregularity as will necessarily avoid the verdict. It is optional with the plaintiff to have a venire de novo, or to cure the irregularity by entering a nolle prosequi against all but one of the defendants, whom he may elect to charge with the damages assessed by the jury against that defendant." See *Layman v. Hendrix*, 1 Ala. 212; *Halsey v. Woodruff*, 9 Pick. 555; *Beal v. Finch*, 11 N. Y. 128; *Fleming v. McDonald*, supra; *Prichard v. Campbell*, supra. It will be seen, therefore, that it was for the appellant to take some action to avoid the severance of the damages, and that, having failed to do so, and having accepted payment from Hagan and Weaver, she elected to waive the liability of Knoblock. She could not thereafter enforce, by execution, the judgment against Knoblock. The question here is not whether injunction may issue to restrain the irregular judgment, but it is as to whether the enforcement of a judgment which, in legal contemplation, has been satisfied can be enjoined. Of course it can.

One question suggested by appellants' learned counsel is that the St. Joseph circuit court has no jurisdiction to restrain the process of the Elkhart circuit court. The jurisdiction here exercised is in enjoining the officer of St. Joseph county and a citizen of St. Joseph county from enforcing against a citizen of St. Joseph county a judgment debt which has been satisfied. That this may be done is not in doubt. In our opinion there is no available error in the record, and the judgment of the circuit court is affirmed.

HOWARD, J., did not participate in the decision of this case.

(147 Ind. 395)

WATSON et al. v. LECKLIDER.¹

(Supreme Court of Indiana. Nov. 5, 1896.)

APPEAL—RULINGS ON DEMURRER—HARMLESS ERROR—TAX TITLES—LIEN FOR TAXES.

1. Error in sustaining a demurrer to a paragraph of the answer which sets up a defense which was provable under the general denial, which was also pleaded, is harmless.

2. The recovery of a judgment quieting the title of the holder of a tax title as against the life tenant does not defeat his right to assert his lien for taxes afterwards paid against the owners of the reversionary interest, where it does not appear by the findings on what grounds the action in which the title was quieted was based.

Appeal from superior court, Marion county; Lawson M. Harvey, Judge.

Action by Mayhew Watson and others against Daniel W. Lecklider. There was a judgment for defendant, and plaintiffs appeal. Affirmed.

Denny & Taylor and Chambers, Pickens & Moores, for appellants. J. T. Lecklider, for appellee.

JORDAN, J. On November 7, 1893, appellee instituted this action against the appellants, Mayhew, Allus, Hugh, Winona P., Harry, Caroline, Edith, Harriett, and Robert Watson, the two latter being husband and wife, and the father and mother of their co-appellants. The first paragraph of the complaint alleges that the plaintiff is the owner in fee simple, by virtue of certain tax deeds and other conveyances, of lot 6 in Mayhew's Heirs' addition to the city of Indianapolis; that he and his immediate grantors have been in open, notorious, undisputed, and peaceable possession thereof for more than 20 years; that he has paid taxes thereon to the amount of \$1,500, etc.; and that all the defendants are and have been nonresidents of this state for over 15 years prior to the filing of the complaint. The prayer of the complaint is in the alternative, that plaintiff's title to the premises be quieted, or, in the event he is found not to be entitled to this relief, that a lien be declared in his favor for the taxes paid, with the interest thereon, and that the realty be ordered sold in satisfaction of the amount found to be due. The second paragraph is similar to the first, and demands the same relief. All of the defendants, except Robert Watson, who was defaulted, filed an answer in general denial, and those, other than Harriett Watson, set up affirmative matter in their answers, and sought to quiet their title by way of cross complaint. Upon the issues joined on the pleadings there was trial, and a special finding of facts by the court, and conclusions of law thereon. The finding was against the plaintiff upon his demand to have his title quieted, but in his favor as to a lien for the taxes paid, with the interest, and judgment was rendered accordingly. The questions presented and argued

by the appellants other than Harriett and Robert Watson arise upon the action of the court in sustaining a demurrer to the third paragraph of the answer, and upon the conclusions of law upon the special finding.

This third paragraph alleged that the cause of action did not accrue within 15 years. The suit being to quiet title, under the provisions of the Code all matters of defense, including the statute of limitations, were admissible under the general denial. *Brown v. Fodder*, 81 Ind. 491. The general denial having been pleaded in answer, the error, if any, in sustaining the demurrer to this special paragraph, was harmless. *West v. West*, 89 Ind. 529.

A synopsis of the finding of facts by the court is as follows: Lucia Mayhew died November 25, 1867, the owner in fee of the real estate in controversy. By her last will and testament, she devised said real estate to three trustees, directing them to convey the use, income, and profits thereof to the appellant Harriett Watson for life, and at her death to convey the fee to her (Harriett's) surviving children, and, in the event she left no children, then to convey it to the heirs of said Lucia Mayhew. On April 22, 1868, these trustees made the conveyance as directed by Mrs. Mayhew's will to appellant Harriett Watson. She and her said husband are still living, and co-appellants are their children. All of the appellants are and have been nonresidents of this state since 1867. Taxes upon this real estate being due and delinquent for the years 1869, 1870, and 1871, it was sold at a sale of lands delinquent for taxes, on February 5, 1872, to one Martin, for delinquent taxes. On March 30, 1875, Martin assigned his certificate of purchase to Henry D. Pierce, and thereupon, on the same day, the auditor of Marion county, Ind., executed a tax deed to Pierce for the said premises. January 5, 1876, Pierce sold and conveyed this lot 6 to one Kilvent, who on October 29, 1879, sold and conveyed it to Frank McWhinney. Prior to this, June 4, 1875, McWhinney had, at private sale, purchased the lot for taxes delinquent for the years of 1872, 1873, and the current year of 1874, and on February 12, 1877, the auditor, upon this sale, executed a deed to said McWhinney for the lot in question. After the purchase of this real estate by McWhinney, he paid the subsequent taxes. On October 28, 1879, McWhinney purchased the lot at private sale, in satisfaction of delinquent taxes thereon, due to the city of Indianapolis, and subsequent to this purchase he paid city taxes accruing on the lot. On October 20, 1892, McWhinney assigned the certificate upon this last sale to the plaintiff Daniel W. Lecklider; and on November 20, 1894, the county auditor executed a deed thereon to the plaintiff (now appellee) to said real estate. On October 20, 1892, McWhinney conveyed, by a special warranty deed, the lot in dispute to the appellee, who paid the sub-

¹ Rehearing denied.

sequent taxes thereon. In January, 1876, the lot was sold in the name of the appellant Harriett Watson, for delinquent taxes due the city of Indianapolis; and the certificate issued upon said sale was assigned by the purchaser to said Harriett Watson, and on January 9, 1877, the city of Indianapolis executed to her a street-improvement deed, conveying to her said lot. On November 5, 1870, in an action pending in the superior court of Marion county, Ind., wherein said Frank McWhinney was plaintiff, and said Harriett and Robert Watson, her husband, were defendants, that court, by its decree, quieted the title to said lot 6 in the plaintiff, as against said defendants and all persons claiming title by or through them, and in said cause no other proceedings were had or orders made. All of the deeds herein mentioned were, within the time provided by the statute, duly recorded. The lot in question is unimproved, and the taxes paid by the plaintiff and those through whom he claims have not been paid by any of the appellants herein.

The insistence of counsel for the appellants is that the conclusions of law upon the special finding of facts, awarding a lien upon the real estate in controversy for the taxes paid, were erroneous, for the reason, as they contend and say, "that McWhinney, plaintiff's grantor in another action, elected to satisfy his claim for taxes paid, against Harriett and Robert Watson, out of the life estate of Harriett in said real estate, and therefore he has no right in this action to assert a lien upon the real estate as against the reversionary interest of appellants." Their specific contention is that from the facts that McWhinney, after he had obtained the tax title to the lot in question, and before his conveyance to the appellee, instituted an action against Harriett Watson, the life tenant, and on November 5, 1870, quieted his title to the real estate in controversy, he, by virtue of the decree, became the owner of the life estate held by Mrs. Watson, and from that time forward all the duties as to the payment of taxes, etc., which the law enjoined upon her as such tenant, were cast upon McWhinney, and upon the appellee whom as they contend claims through the former. They further say that, by reason of the judgment quieting title in the suit in question, all right of action on account of tax sales and taxes paid subsequent thereto was merged therein. We are of the opinion that appellants, under the special findings, are not in a position to present these questions for our determination. The special finding of facts does not disclose upon what grounds McWhinney based his action wherein he obtained the decree quieting his title. Neither are we informed or does it appear what was embraced, or might have been fairly embraced, within the issues in that cause. We cannot presume that the gravamen in that

action was the same or had any relation to the one upon which the appellee succeeded in the case at bar. The court declared by its conclusions of law that the title of the appellee was invalid, but that he was entitled to the statutory lien upon the land for the taxes paid, and rendered a judgment foreclosing such lien.

Under the facts as found by the trial court, we cannot hold that the matter as to McWhinney's lien for taxes paid was or might have been adjudicated under the issues in the action in controversy. Neither is appellant's contention tenable that, by the decree, the life estate of Mrs. Watson was transferred to McWhinney. The special finding does not show that the decree contained anything to that effect, but the finding tends to establish the contrary, as it appears that "no further proceedings were had or orders made." It cannot be said that McWhinney derived title under this decree from Mrs. Watson. An action to quiet title is prosecuted for the purpose of determining and quieting plaintiff's title. Burns' Rev. St. § 1082 (Rev. St. 1881, § 1070). The theory upon which such an action is instituted is that the defendant asserts or sets up some title, right, interest, or claim in the lands adverse to plaintiff, and the ultimate purpose or object of the suit is to forever settle and put at rest such claims or title, of whatever character. A judgment in favor of the plaintiff has the effect to conclusively adjudicate and settle his title as against the defendant, and forever bars the latter from asserting any claim, interest, or title which he did or might have presented at the time the judgment was rendered. To succeed in an action to quiet title, the plaintiff, under the law, must do so upon the strength of his own title. The above principles are well settled by numerous authorities. Green v. Glynn, 71 Ind. 336; Farrar v. Clark, 97 Ind. 447; Railway Co. v. Allen, 113 Ind. 581, 15 N. E. 446, and cases cited; Davis v. Lennen, 125 Ind. 185, 24 N. E. 885.

Appellants further insist that the facts show that appellee's cause of action is barred by the statute of limitation. But it appears from the finding that all of the defendants, from the time that the cause of action accrued, to the beginning of the suit, were nonresidents of this state. By section 298, Burns' Rev. St. 1894 (section 297, Rev. St. 1881), "the time during which the defendant is a nonresident of the state is not computed in any of the periods of limitation." The appellants are therefore not in a position to invoke as a defense the statute of limitation. Lagow v. Neilson, 10 Ind. 183; Association v. Whitacre, 92 Ind. 547; Wood v. Bissell, 108 Ind. 229, 9 N. E. 425. The damages are said to be excessive. The evidence is not in the record; hence we cannot determine this question. Judgment affirmed.

(146 Ind. 194)

MANLEY v. FELTY.

(Supreme Court of Indiana. Nov. 6, 1896.)

MORTGAGE FORECLOSURE—PLEADING—CONTRACT WITH ATTORNEY—FRAUDULENT REPRESENTATIONS—STATEMENTS AS TO VALUE.

1. In an action to recover on a note, and to foreclose the mortgage security, an answer alleging that "all the notes and items charged and mentioned in the complaint" were fully paid before suit is sufficient to cover the liability on both note and mortgage.

2. A contracting party may rely on the express statement of an existing fact, the truth of which is unknown to him and which is not manifestly false, but is asserted by the other party, as a basis for the contract.

3. Mere representations as to value are not ordinarily sufficient to support a charge of fraud.

4. False representations by an attorney to an inexperienced client, as to the value of certain land which the attorney undertakes to recover for his client, whereby the latter is induced to execute a note for an exorbitant fee for the attorney's services, constitute positive fraud.

5. False representations made by an attorney to an inexperienced client, as a basis for an extravagant overcharge for services in securing certain property for the client, that the other claimant to such property had employed all the attorneys in the place, will support an action for fraud.

6. Evidence cannot be considered on appeal where the clerk's certificate shows that the long-hand manuscript was not filed before it was incorporated in the bill of exceptions by the signature of the judge to such bill.

Appeal from circuit court, Jay county; D. D. Heller, Judge.

Action by Peter B. Manley against Thomas Felty to recover on a note, and to foreclose a mortgage securing the same. From a decree in favor of plaintiff for a part only of the sum sued for, and foreclosing the mortgage as to that amount, plaintiff appeals. Affirmed.

Headington & La Follette and P. B. Manley, for appellant. La Follette & Adair and France & Merryman, for appellee.

HACKNEY, J. Suit by the appellant upon a note by the appellee for \$1,000, with a credit of \$522, and to foreclose a realty mortgage securing the same. Answer in four paragraphs: (1) No consideration. (2) That all of the balance sued for, excepting \$100 principal and \$10 attorney's fees, was promised without consideration. (3) Answering as to all but \$110, alleges: That one Felty died, intestate, in Adams county, the owner of a large amount of real and personal property. That appellee was his only heir at law, and entitled, by descent, to all of said property. That a Mrs. Beerbower claimed to be the lawful widow of the decedent, and had procured herself to be appointed administratrix of the estate. That she claimed the whole of said estate, and denied that the appellee was an heir of the decedent. That the appellant, a practicing attorney in Adams county, was aware of the condition of said estate, and the contention about the heirship and ownership thereof. That the appel-

lee was a farmer, uneducated in business affairs generally, and unable to read or write, and had had no experience in business or in legal controversies, and no knowledge of the extent or value of attorney's services, all of which was known to the appellant when he went to the appellee, and told him that he was the rightful owner of all of said property; that it would require a lawsuit to obtain it from Mrs. Beerbower, whose sons were shrewd and experienced business men, and were assisting her to maintain her claim to the property, and had employed all the lawyers in Decatur to represent her; that it would take a great deal of work and expense to fight the case and recover the property from her; that he could and would recover for appellee all of said property; that the attorney's fees therefor would be reasonably \$1,000; and that no lawyer could be employed for less. It was alleged that all of the statements by the appellant were false, and were made fraudulently, and for the wrongful purpose of inducing the appellee to execute a note and mortgage for \$1,000. It was further alleged that the appellant had falsely and fraudulently represented the value of said real estate to be \$4,000, when it was worth but \$2,000; that the appellee was unacquainted with the value of real estate in the locality of that in question, and fully relied upon the appellant's statement; that he relied upon and believed all of the appellant's statements, and, in reliance thereon, did execute the note and mortgage in suit; that no litigation was had, but, instead, the case was compromised by the appellant, Mrs. Beerbower receiving half the real estate and all of the personal, and executing her note for a difference of \$500, and the appellee receiving real estate of the value of \$1,000; that the appellant obtained and appropriated from said note \$350; and that the services rendered were worth but \$50, to which should be added \$5, as an attorney's fee on said amount. The fourth answer was that appellee had "fully paid said plaintiff all the notes and items charged and mentioned in the complaint long before suit." The appellee filed also a cross complaint, alleging the same facts alleged in the third answer, and seeking a cancellation of the note and mortgage, and the quieting of his title against the appellant. Demurrers were overruled as to each answer, and as to the cross complaint. Issue was joined, and a trial resulted in a finding and decree in favor of the appellant for \$141.24, and the foreclosure of the mortgage. A motion for a new trial was overruled; exceptions were reserved; and the several rulings mentioned are here assigned as error.

The sufficiency of the first answer is not questioned; that of the second is expressly conceded; that of the third involves the same questions presented as against the cross complaint; and the fourth is objected

to as not broad enough to cover the entire cause of action sued upon. The allegation "All the notes and items charged and mentioned in the complaint" was sufficient, in our opinion, to cover the obligations of both the note and the mortgage, as pleaded in the complaint, and was not objectionable upon demurrer. The sufficiency of the third answer and of the cross complaint is attacked by counsel for the appellant as not alleging positive fraud, since, as claimed, the allegations consist in mere opinions and predictions as to the extent of service necessary, the value of lands, and the extent of resistance by Mrs. Beerbower, and since no allegation was made as to diligence on the part of the appellee to learn and act upon the truth of any of the matters in which he alleges he was deceived by the appellant. Their sufficiency is attacked also as not alleging facts constituting constructive fraud. Counsel for the appellee do not seek to uphold the ruling of the lower court upon the first proposition,—that as to positive fraud. It is neither claimed that allegation of diligence was made, nor that it was unnecessary, but it is urged that the relation of attorney and client existed, and required from the appellant the utmost good faith, and permitted the appellee, without investigation, to rely upon the statements and representations of the appellant, and that the burden rested upon the appellant to prove the truth and good faith of his statements and representations. In other words, the contention of counsel for the appellee is that each of the pleadings in question alleges constructive fraud in procuring the note and mortgage for an excessive sum.

Though counsel should not give the correct reason supporting the ruling of the trial court, if it is apparent that the ruling was correct this court will not reverse the ruling; otherwise, the value of a decision as authority would depend, not upon the allegations of the pleading upheld or condemned, nor upon the reasoning of the court in its decision, but upon the strength of the reasons given by counsel for or against the pleading. Upon the question of diligence, it has been settled that a contracting party may rely on the express statements of an existing fact, the truth of which is unknown to him, but which is asserted by the other contracting party, as a basis for mutual agreement. *Kramer v. Williamson*, 135 Ind. 655, 35 N. E. 388; *Jones v. Hathaway*, 77 Ind. 14; *Insurance Co. v. Huyck*, 5 Ind. App. 474, 32 N. E. 580; *Frenzel v. Miller*, 37 Ind. 1. Of course, this proposition must be regarded in the light of another, which is equally well settled, that one may not rely upon the truth of a statement which he knows to be untrue, or which is manifestly false. It is true that, ordinarily, mere representations as to value are not sufficient to support the charge of fraud. *Shade v. Creviston*, 93 Ind. 591; *Hartman v. Flaherty*, 80 Ind. 472; *Cagney v. Cuson*, 77 Ind. 494; *Neldefer v. Chastain*, 71

Ind. 363; *Kennedy v. Richardson*, 70 Ind. 524. But, as said in *Bigelow on Frauds* (volume 1, p. 496): "The rule, however, that representations of value will not be considered by the courts, is not universal. We have elsewhere seen that, if a fiduciary or confidential relation exists between the parties, representations of value made by the party holding the position of trust or confidence have the same effect as ordinary representations of fact. And these, probably, are not the only cases in which the law will take notice of such representations. If one of the parties to a sale assumes to have special knowledge of the value of the property, in regard to which the other, being known to be ignorant, trusts entirely to the good faith of the former, to the former's knowledge, it may be very proper to treat representations of value as standing upon the same ground as representations of fact." To the latter propositions are cited *Stover's Adm'rs v. Wood*, 26 N. J. Eq. 417; *Bradbury v. Haines*, 60 N. H. 123; *Estell v. Myers*, 54 Miss. 174; *Picard v. McCormick*, 11 Mich. 68; *Simar v. Canaday*, 53 N. Y. 298; *Cruess v. Fessler*, 39 Cal. 336; and others cases. We have examined the cases cited, and find that they support the text. In *Picard v. McCormick*, supra, it was said: "In the case before us, the alleged fraud consisted of false statements by a jeweler to an unskilled purchaser of the value of articles which none but an expert could be reasonably supposed to understand. The dealer knew of the purchaser's ignorance, and deliberately and designedly availed himself of it to defraud him. We think it cannot be laid down as a matter of law that value is never a material fact, and we think the circumstances of this case illustrate the impropriety of any such rule." In the present case, as to the services required, and their value, the appellant, by reason of his profession, must be held to possess special knowledge and skill, and the appellee alleges his dense ignorance, the appellant's knowledge of that fact, his own reliance upon the appellant, who designed to deceive the appellee. These allegations would bring the case within the rules quoted from *Bigelow*. We are not prepared to say in this case that the false representation of the value of the land, as alleged, falls within the general rule that the mere exaggerations of value, in puffing one's goods which he desires to sell, must be expected from the vendor, and cannot be relied upon by the vendee. Here a false statement is alleged with reference to the value of an estate, not for the purpose of inducing the appellee to purchase, but to excite his interest, to magnify the stake for which the litigation must be waged, to induce the impression that Mrs. Beerbower, in whose behalf all of the attorneys of Decatur had been employed, would make a vigorous defense against his claim, and altogether excuse a charge of \$1,000, where, as alleged, the service was worth but \$50. The false representation that all of the attorneys of Decatur had been employed was a repre-

sentation as to an existing fact. It was not a mere prediction, nor a simple opinion, but was made as the basis of an extravagant overcharge for services.

The argument of counsel includes a discussion of the question as to whether the rule does not apply here that, where the relation of attorney and client exists, it must appear that the advantage gained by the attorney was consonable, and altogether fair. If this rule applies, it is apparent that the alleged false statements of the appellant not only tended to induce the exorbitant obligation of the appellee, but actually did overreach him. It is not necessary to our decision that we pass upon this question, and we only cite some of the cases which hold that the relation of attorney and client arises concurrently with the execution of the contract of employment, and requires good faith on the part of the attorney in disclosing the facts within his knowledge upon which the compensation may properly be measured. *White v. Whaley*, 40 How. Prac. 353; *Ryan v. Ashton*, 42 Iowa, 365.

The pleadings, in our opinion, were sufficient in charging positive fraud.

Other questions are discussed upon the motion for a new trial, all depending upon the evidence, but the appellee's objection to a consideration of the evidence must prevail. It is certified by the clerk "that on the 31st day of May, 1895, the official shorthand reporter, who took down the evidence in said cause, filed in my office his longhand transcript and manuscript thereof, and the plaintiff at the same time filed his bill of exceptions, which longhand manuscript was made a part thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions." In the recent case of *Carlson v. State* (Ind. Sup.) 44 N. E. 660, it was said: "It is settled by the decisions of this court that the filing of the longhand evidence must be antecedent to its being incorporated into a bill of exceptions by the signature of the judge to such bill." To the same effect are the cases of *Marvin v. Sager* (Ind. Sup.) 44 N. E. 310; *Holt v. Rockhill* (Ind. Sup.) 40 N. E. 1090; *Smith v. State* (Ind. Sup.) 42 N. E. 1019; *De Hart v. Board*, 143 Ind. 363, 41 N. E. 825; *Beatty v. Miller* (Ind. Sup.) 44 N. E. 8. The most favorable construction of this record for the appellant is that the longhand manuscript and the bill of exceptions were filed at the same time, and that the former had not been filed before it was incorporated in the bill. The judgment of the circuit court is affirmed.

(17 Ind. App. 22)

CHICAGO & E. R. CO. v. WAGNER.¹

(Appellate Court of Indiana. Nov. 5, 1896.)

MASTER AND SERVANT — ACTION FOR NEGLIGENT KILLING OF SERVANT — PLEADING — BURDEN OF PROOF — ASSUMPTION OF RISK — DEFECTIVE APPLIANCES — PRACTICE ON APPEAL.

1. In an action against a master for the death of a servant, the general averments of negli-

¹ For opinion on rehearing, see 45 N. E. 1121

gence, want of contributory negligence, or knowledge of dangerous defects are sufficient as against a demurrer, unless the facts specifically stated clearly show the contrary.

2. In an action against a master for the death of a servant, the general averment of knowledge or want of knowledge by decedent of defects in the appliances includes both actual and imputed knowledge.

3. Rev. St. 1894, § 1476 (Rev. St. 1881, § 1410), requiring the longhand manuscript copy of the evidence as taken down by the shorthand reporter to be filed in the clerk's office before it is incorporated in the bill of exceptions, is mandatory.

4. In an action against a railroad company for the death of a brakeman while coupling cars, the burden is on plaintiff to show that deceased had no knowledge of any defect in the appliances, and that no facts existed which, by the exercise of reasonable care, would have acquainted him with the danger.

5. No recovery can be had for the death of a brakeman caught between cars while coupling, by reason of defective aprons, which projected from the cars so as to leave but an inch of space between them after a coupling was made, it appearing that there was nothing to prevent deceased from seeing the aprons, and that his attention had been expressly directed to them, and to the necessity of keeping out from between them.

Appeal from circuit court, Huntington county.

Action by Henry H. Wagner, as administrator, against the Chicago & Erie Railroad Company, for the death of plaintiff's decedent. From a judgment for plaintiff, defendant appeals. Reversed.

W. O. Johnson and Kenner & Lesh, for appellant. Spencer & Branyan, for appellee.

GAVIN, J. Appellee sued to recover for the death of his decedent, appellant's servant, who lost his life through its negligence. It is charged in the complaint that the decedent was, when employed by appellant, without experience or training as a brakeman, of which fact appellant was informed; that appellant operated a gravel train, the cars of which were provided with aprons at each end, consisting of a plank platform, being really an extension of the floor of the car, by means of which, when the cars were coupled, there was formed a continuous floor, without any open space between the cars; that these aprons ought to have been, and were usually, put on with hinges, so that they could be folded back, thus leaving the space between the cars open, but appellant's cars were negligently and carelessly constructed, without any hinges for the aprons, which were thereby fixed and fast to the end of the car, thus making them unsafe and dangerous, as appellant knew, but that decedent was ignorant of the unsafe and dangerous construction of such cars; that without any notice of their character, and without any instruction from appellant as to how such cars should be coupled, he, without fault or negligence, undertook to make a coupling of such cars, and was caught by the aprons, and crushed to death.

The correlative rights and duties of master and servant are considered, and authorities

cited, in *Pennsylvania Co. v. Witte* (Ind. App.) 43 N. E. 319, and *Railway Co. v. Quinn* (Ind. App.) 43 N. E. 240. We do not deem it necessary to again review them. It is well settled that it is the duty of the master to exercise reasonable care to furnish reasonably safe places in which, and appliances with which, the servants are to work, and to exercise the same care to keep them in such condition. It is also true that the servant assumes all the risks ordinarily incident to the work in which he engages, but the servant does not assume the hazards occasioned by the master's negligent breach of his duty, unless, with knowledge thereof, he continues in the master's service, when, as a general rule (subject to some exceptions with which we have not now to deal), the servant is, in Indiana, held to assume these added hazards. In actions such as this, the general averments of negligence or want of contributory negligence or knowledge of dangerous defects will be deemed sufficient as against a demurrer, unless the facts specifically stated clearly show the contrary. *Railway Co. v. Malott*, 13 Ind. App. 289, 41 N. E. 549; *Coal Co. v. Bridgewater*, 13 Ind. App. 333, 40 N. E. 1101. The general averment of knowledge or want of knowledge includes both actual and imputed knowledge. *Pennsylvania Co. v. Witte*, supra.

It is urged by counsel that the facts set forth show that the deceased must have known the condition of these cars, because it was open and obvious. It is sufficient answer to this to say that, for aught that appears, this coupling may have been undertaken in the dark, or in such a storm or under such circumstances, requiring haste or speed, as that he may not have had the opportunity to learn their character. The specific facts are not sufficient to overthrow the general allegations.

When we take up the consideration of the questions presented by the motion for new trial, we are confronted with the contention of counsel for appellee that the evidence is not in the record, because it does not appear that the reporter's manuscript, which is embodied in the transcript without copying, was filed with the clerk before it was incorporated in the bill of exceptions. In *Hull v. Louth*, 109 Ind. 315, 10 N. E. 270, the supreme court held it to be sufficient compliance with the statute that the evidence should be filed with and as a part of the bill of exceptions. In *Holt v. Rockhill*, 143 Ind. 530, 40 N. E. 1091, however, that court stated: "A strict compliance with the statute, therefore, requires that such longhand manuscript be filed in the clerk's office before it is incorporated in the bill of exceptions, and that fact must be shown in the transcript in the bill of exceptions, or in some other appropriate way." Whether or not, however, this strict construction should be given, and the statute enforced as mandatory, the court did not absolutely decide. In *De Hart v. Board*, 143 Ind. 363, 41 N. E. 826, that court did, however, authoritatively de-

clare the rule to be as intimated in the decision first quoted, saying: "There is nothing to show that the longhand manuscript was ever filed in the clerk's office before it was incorporated in the bill of exceptions. This the statute requires to be done. Rev. St. 1894, § 1476 (Rev. St. 1881, § 1410)." *Horner's Rev. St. 1896*, § 1410. These cases are followed and approved in *Smith v. State* (Ind. Sup.) 42 N. E. 1019, and *Hull v. Louth* is there declared to have been overruled by them, the court announcing that "it is the rule, as required by said statute, and as firmly fixed by the decisions of this court, that the longhand manuscript copy of the evidence as taken down by the shorthand reporter shall be filed in the clerk's office before it is incorporated in the bill of exceptions." The rule established by these cases is reaffirmed in *Railway Co. v. Lynch* (Ind. Sup.) 43 N. E. 934; *Beatty v. Miller* (Ind. Sup.) 44 N. E. 8; *Thrash v. Starbuck* (Ind. Sup.) 44 N. E. 543. In this case the bill of exceptions certifies, upon its first page, that the evidence, etc., was duly taken down by the official reporter, "of which evidence, rulings, objections, and exceptions so made and taken, the following is the original longhand manuscript, as the same was made and filed." In *Holt v. Rockhill*, supra, it will be observed that the court expressly recognizes the bill of exceptions as one of the appropriate sources from which this court may learn that the manuscript was filed before it was incorporated in the bill of exceptions. This fact is by the bill in this case satisfactorily established.

From the evidence it appears that the deceased had been in appellant's employ as an extra brakeman for several months; that the conductors under whom he worked had reported him to be awkward, clumsy, and careless, and not able to think and act quick enough to make a competent brakeman, and refused to take him out with them; that for this reason the train master, desiring to furnish him employment, directed him to report to Mr. Firman, the foreman in charge of work in a cut, and he would set him to work. The train master, after conferring with Firman, directed him to transfer a switchman to the work of braking, and to give deceased his place. Upon the next day, deceased went out to the cut, and reported to the conductor of the train, who set him to braking, supposing that was what he was sent for. The conductor testifies that, while he was fixing a brake upon a car which was then coupled to another, he called deceased's attention to the aprons, and told him he must keep away from between them, and must stoop down under, and use a stick to make a coupling. The day was clear and bright. About 8 o'clock in the morning, deceased undertook to make his first coupling, and was caught by the aprons while standing between the cars, and was crushed to death. The cars were eight or ten feet or a car length apart when he gave the signal to

shove them together. There was nothing to require unusual haste. There was no unusual speed of the approaching car, and nothing to distract his attention from his work, so far as the evidence discloses. The aprons projected on each car about twelve inches, leaving only an inch between them when the cars were shoved up together. The apron extended across the full width of the car, and beyond and over the pin which held the link in place. When he raised the pin, he could not help but see the apron, if he looked at all. So far as appears, there was nothing whatever to prevent his seeing the apron upon the coming car. The evidence is absolutely without contradiction that these aprons were in plain view, clearly to be seen; that he had abundant opportunity to see them; and that his attention was expressly directed to them, and to the necessity of keeping out from between them. The averment that he was ignorant of the character of the cars is therefore necessarily wholly unproved. In our state the burden is upon the plaintiff to show, in such actions as this, that he did not assume the risk of the danger. Knowledge of the danger or the existence of such facts as that, by the exercise of reasonable care, he might have known thereof, ordinarily constitutes an assumption of the risk. *Railway Co. v. Quinn*, supra, and authorities there cited. As we said in *Pennsylvania Co. v. Witte*, assumption of the risk is an independent element or factor, the nonexistence of which must be specifically denied in the complaint, and satisfactorily proved upon the trial; and "although the servant may not have actual knowledge of the existence of the dangerous defect, if the defect is open and obvious, so that, in the exercise of reasonable care in the discharge of his duties, he ought to have known it, then he will be deemed to have known that which he should have learned. *Pulp Co. v. Jones*, 11 Ind. App. 110, 38 N. E. 547; *Lynch v. Railroad Co.*, 8 Ind. App. 516, 36 N. E. 44."

We have endeavored to give to this case that attention and consideration asked for by the earnest appeals of counsel, but are compelled to conclude that the appellee failed to establish this essential element of his case. Judgment reversed, with instructions to sustain the motion for a new trial.

(17 Ind. App. 119)

HOUK v. BRANSON.¹

(Appellate Court of Indiana. Nov. 5, 1896.)

ASSAULT—WEIGHT OF EVIDENCE—WITNESS—REPUTATION FOR VERACITY—STENOGRAPHER—COMPETENCY—EXTENT OF CROSS-EXAMINATION—MISCONDUCT OF COUNSEL.

1. Where there is evidence to support the verdict, conflicting evidence will not be reviewed.

2. Error cannot be predicated on a refusal to give an instruction where it is not shown that it was signed by counsel.

3. Instructions which considered as an entire-

¹ Rehearing denied.

ty are not unfavorable to the appellant are not a ground for reversal.

4. Where several witnesses had testified that a party's general reputation for veracity was bad at the time of the trial in C., where he then lived, it was competent to prove that his general reputation for veracity was bad in the neighborhood from which he moved to C., several years before the trial, by witnesses who had familiarly and continuously known him during all of those years.

5. The official shorthand reporter of the court may testify from her recollection, as refreshed by her notes made on a former trial, whether at that trial a witness made a certain statement.

6. The extent to which a cross-examination may be carried to test the credibility of a witness is within the discretion of the court.

7. In order to save a question in relation to the misconduct of counsel, the trial court must be called upon by the aggrieved party in some manner to correct the injury.

Appeal from circuit court, Montgomery county; J. F. Harvey, Judge.

Action by Wilbur G. Houk against Enoch Branson for an alleged assault. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

M. W. Bruner and W. G. Houk, for appellant. Thomas & Whittington, for appellee.

DAVIS, C. J. This was an action to recover damages for an alleged assault on the appellant by the appellee. On issues joined, a verdict was returned by a jury in favor of appellee, on which judgment was rendered. The only error assigned is the overruling of appellant's motion for a new trial.

The first question discussed is that the verdict of the jury is not supported by the evidence. On this proposition it will suffice to say there is ample evidence in the record to sustain the verdict. It is true the evidence is conflicting, but it is not our province to weigh the evidence or to reconcile conflicts therein. *Campbell v. Conner* (Ind. App.) 42 N. E. 688, 43 N. E. 453; *Haines v. Porch*, 9 Ind. App. 413, 36 N. E. 926; *Miles v. De Wolf*, 8 Ind. App. 153, 34 N. E. 114; *Zimmerman v. Snyder*, 6 Ind. App. 178, 33 N. E. 217.

The next question discussed relates to the refusal of the court to give to the jury an instruction asked by appellant. It is not shown that the instruction asked and refused was signed by counsel, and therefore there was no error in refusing to give it. *Railway Co. v. Gobin* (Ind. App.) 42 N. E. 1116.

It is next urged that the court erred in giving certain instructions asked by appellee. The instructions were applicable to the evidence, and correctly state the law, and therefore there was no error in giving them. It may be true they were not in all respects correct statements of the law applicable to appellant's version of the occurrence, but they were correct statements of the law applicable to appellee's version of the occurrence. Moreover, the instructions given to the jury by the court, when considered as an entirety, were not unfavorable to appellant.

The next question discussed relates to the

testimony of the witness Hanna as to the general reputation of appellant for truth and veracity in the community in which he lived. An objection was made because the question did not apply to the general reputation of appellant for truth and veracity "where he now lives," but no exception was reserved to the ruling of the court. Moreover, it appears that several witnesses testified that his general reputation for truth and veracity was bad at the time of the trial in Crawfordsville, where he then lived; and in this connection it was competent to prove that his general reputation for truth and veracity was bad in the neighborhood, in that county, from which he moved to Crawfordsville, several years before the trial, by witnesses who had familiarly and continuously known him during all of those years. He and his wife owned real estate in that neighborhood. He was frequently there, and the difficulty out of which this lawsuit arose occurred in that neighborhood. *Packet Co. v. McCool*, 83 Ind. 392; *Sage v. State*, 127 Ind. 15, 27, 26 N. E. 667, 671; *Pape v. Wright*, 116 Ind. 502, 510, 19 N. E. 459, 463.

It is next urged that the court erred in permitting the stenographer to testify from her shorthand notes as to statements made by appellant on a former trial. The witness testified that she was the official shorthand reporter of said court; that her notes of the testimony of appellant were taken by her at the time he testified on the former trial; and that they were correct. The witness was then asked on her original examination in chief whether appellant, on the former trial, made a certain statement. An objection was made to the question, on the ground that she could not testify from her shorthand notes. The question, however, did not purport to elicit an answer from her shorthand notes. The objection was overruled, and the witness answered, "Yes, sir." It was afterwards developed on cross-examination and re-examination that she was testifying from her recollection as refreshed by her notes, but that independently of her notes she had no distinct remembrance of his testimony. Assuming that the question is properly presented for our consideration, we are of the opinion that her testimony was competent. *Bass v. State*, 136 Ind. 165, 36 N. E. 124.

The action of the trial court in refusing to allow counsel for appellant to continue the

cross-examination of the witness Elbert Randall was not such an abuse of discretion as to authorize a reversal of the judgment of the trial court. The examination in chief covers three pages, and the cross-examination nine pages. The witness was a boy 14 years of age, and his examination in chief was confined exclusively to a description of what he saw of the encounter between appellant and his father. A reading of the cross-examination convinces us that the court was justified in refusing to allow counsel to further prolong it. It is a well-recognized rule that any fact tending to impair the credibility of the witness by showing his interest, bias, ignorance, motives, or that he is depraved in character, may be elicited on cross-examination; but the extent to which such cross-examination may be carried is within the sound discretion of the court, and, unless there is manifest abuse of such discretion, its exercise by the trial court will afford no sufficient ground for the reversal of the judgment. *Hinchcliffe v. Koontz*, 121 Ind. 422, 23 N. E. 271; *Staser v. Hogan*, 120 Ind. 207, 220, 21 N. E. 911, and 22 N. E. 990; *Ledford v. Ledford*, 95 Ind. 283; *Wachstetter v. State*, 99 Ind. 290.

Counsel insist that the motion for a new trial should have been sustained, because of alleged misconduct of counsel for appellee in argument. No objection was made in behalf of appellant in relation to the argument. No ruling was made by the court concerning such argument. No exception was reserved at the trial by appellant on this question. The contention is that, without objection or exception on the part of appellant, during the argument, he is entitled to a new trial, because of the alleged improper statements made by counsel for appellee in his argument to the jury. It is well settled that, in order to save any question in relation to the misconduct of counsel, the trial court must be called upon by the aggrieved party in some manner to correct the injury. *Railway Co. v. Welch* (Ind. App.) 40 N. E. 650; *Maybin v. Webster*, 8 Ind. App. 547, 35 N. E. 194, and 36 N. E. 373; *Railroad Co. v. Champion*, 9 Ind. App. 510, 36 N. E. 221, and 37 N. E. 21. We have fully discussed this question on former occasions, in the authorities cited, and especially in the opinion on petition for rehearing in *Maybin v. Webster*, supra. We find no reversible error in the record. Judgment affirmed.

(16 Ind. App. 324)

LAKE ERIE & W. R. CO. v. RINKER.

(Appellate Court of Indiana. Nov. 5, 1896.)

STOCK-KILLING CASE—COMPLAINT—AVERMENTS AS TO PLACE—HARMLESS ERROR.

1. A complaint alleging that defendant operated a railroad in a certain county between two places therein, and that, while plaintiff's animal was on defendant's track, it was struck by its train, and killed, sufficiently avers the killing within the county.

2. Error, if any, in allowing a witness to state that a cattle guard was not sufficient, is harmless, several other witnesses having testified to facts conclusively showing its insecure and unsafe condition, and there being no evidence to the contrary.

Appeal from circuit court, Delaware county.

Action by John Rinker against the Lake Erie & Western Railroad Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John B. Cockrum and Warner & Brady, for appellant. Edward M. White and Leffler & Bale, for appellee.

REINHARD, J. The appellee brought this action against the appellant to recover damages for the alleged killing of a Jersey cow upon appellant's railroad track, said cow having entered upon the track at a point where the same was not securely fenced. There was a jury trial, and a verdict in appellee's favor for \$65. From the judgment rendered upon such verdict this appeal is prosecuted. The following errors are assigned: (1) The complaint does not state facts sufficient to constitute a cause of action. (2) The court had not jurisdiction over the subject of the action. (3) The court erred in overruling appellant's demurrer to the first and second paragraphs of the complaint, and each of them. (4) The court erred in overruling appellant's motion for a new trial. (5) The court erred in overruling appellant's motion in arrest of judgment. Originally the complaint was in two paragraphs. At the trial the second paragraph of the complaint was dismissed, thus leaving the first paragraph alone in the record. The cause of action as stated in the complaint is based upon an alleged failure of the appellant to comply with the requirements of the act of 1877. Rev. St. 1894, §§ 5312-5318 (Rev. St. 1881, §§ 4025-4031). This is not controverted by appellee.

It is insisted that the complaint is fatally defective in failing to aver that the animal was killed in the county of Delaware. Under the statute upon which this action is based, the complaint must show the animal was killed in the county in which the action was instituted. *Railway Co. v. Johnson*, 11 Ind. App. 328, 38 N. E. 766, and cases cited. The question as to such omission may be

raised by demurrer, or assignment of error for the want of jurisdiction, or by motion in arrest of judgment (*Railway Co. v. Johnson*, supra), but not by a demurrer for want of sufficient facts to constitute a cause of action (*Railway Co. v. Fishback*, 5 Ind. App. 403, 32 N. E. 346; *Railway Co. v. Wheeler* [Ind. App.] 42 N. E. 489). In the present case the question is properly raised by the motion in arrest, and by the assignment of error that the court below did not possess jurisdiction of the subject of the action. We think, however, the complaint sufficiently shows the appellee's cow was killed in Delaware county. It is averred in the complaint, in substance, that the appellant operated a railroad in Delaware county, Ind., between Muncie and Oakville, in said county, and that, while said cow was on said corporation's right of way and railroad track (having entered the same at a point where said line of road and right of way was insecurely fenced and insufficient to keep out stock, etc.), she was struck and hit by the appellant's locomotive and train of cars, was thrown from said railroad track, and killed. It thus appears, by the clearest implication, that the animal was killed in Delaware county. If the appellant's road was in that county, as is averred, and the animal was killed upon said road or track, it must have been run down and killed in the county also.

It is further contended that the court erred in permitting a witness to testify that a certain cattle guard maintained by the appellant was not a sufficient cattle guard to turn and keep stock off of appellant's right of way. The objection to such testimony is that it is only the opinion of the witness, and that, too, upon a matter to be determined by the jury. *Railway Co. v. Hale*, 93 Ind. 79; *Railroad Co. v. Modesitt*, 124 Ind. 212, 24 N. E. 986; *Railroad Co. v. Jackson*, 5 Ind. App. 547, 32 N. E. 793. It would certainly not have been error, had the court excluded the testimony, even if we concede that the witness was an expert. Was it error to admit it? Besides this witness, five other witnesses testified to facts conclusively showing the insecure and unsafe condition of the cattle guard, and there was no conflict in their testimony upon this point. The appellant introduced no evidence to the contrary. The evidence was, therefore, uncontradicted, and but one inference could have been drawn from it, viz. that the cattle guard was insufficient to keep out stock. Granting, therefore, that the opinion of the witness referred to should not have been allowed to be given, we do not perceive how the appellant could have been harmed by the ruling.

Some complaint is also made of the instructions given, but upon examination we find them correct. Judgment affirmed.

(167 Mass. 157)

TODD v. KEENE.(Supreme Judicial Court of Massachusetts.
Hampshire. Nov. 24, 1896.)**DAMAGES—BREACH OF CONTRACT—EVIDENCE.**

In an action for breach of contract, it appeared that the contract provided for a theatrical performance for a single night, in which plaintiff should bear the principal expense; that defendant was to furnish certain stage scenery, the costumes, and the players; and that plaintiff was to have 75 per cent., and defendant 25 per cent., of the gross receipts. Plaintiff was at no expense, and had not sold any tickets. The only evidence as to damages was that defendant was an actor of high repute; that during previous years he had played in the same building to large houses; that the city is the seat of a college, the students of which insured a crowded house. *Held*, that the court properly excluded evidence by plaintiff based on his own experience in the management of such house, and the knowledge of the cash receipts of similar plays at the same place under the same auspices, to show what his share of the receipts under the contract would have amounted to if defendant had fulfilled his agreement.

Exceptions from superior court, Hampshire county.

Action by William H. Todd against Thomas Keene for breach of contract. There was a verdict directed by the court in favor of plaintiff for nominal damages, and he excepts. Exceptions overruled.

B. O. Dwight, for plaintiff. A. L. Green, for defendant.

FIELD, C. J. The contract set out in the papers before us appears to be under seal, and to have been entered into between Edwin Arden, of the first part, and William H. Todd, of the second part. The party of the first part "hereby engages to play Mr. Thomas Keene and his supporting company at Northampton, Mass., for a period of one night," etc. The point seems not to have been taken that, as this is a contract under seal, only the parties who signed and sealed it can sue or be sued upon it. The exceptions relate only to the rule of damages. The contract contemplated a theatrical performance for a single night, in which the plaintiff should bear the principal expenses of furnishing the place of entertainment, which was the Northampton Academy of Music, and of furnishing the music, the necessary stage hands, the advertising in the daily and weekly newspapers, the bill posting, and the "perishable and imperishable properties and scenic and mechanical effects called for in scenes and other plots furnished." The defendant was to furnish certain stage scenery, the costumes, and the actors and actresses. The party of the first part was to have 75 per cent. of the gross receipts, and the party of the second part 25 per cent. There are other stipulations, concerning the price of tickets, the free list, etc. The defendant failed to play as had been agreed upon. The plaintiff "had been at no expense, and had not engaged or sold any tickets or seats to the play so as aforesaid contracted for." The name of the play is not given in the contract, but, from the exceptions, it seems to have been understood

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that it should be one of Shakespeare's tragedies. The exceptions recite, "The plaintiff then offered to prove by his own testimony, based upon his experience in the management of the said Academy of Music, and knowledge of the cash receipts of similar plays at the Academy under the same auspices, what the attendance would have been, and what his share of the receipts under the contract in suit would have amounted to, if defendant had fulfilled his agreement." The court excluded the testimony, and ordered a verdict for the plaintiff for nominal damages. The plaintiff's only other evidence on the subject of damages was to the effect that the defendant is an actor "of high repute and popularity, especially in rendering the tragedies of Shakespeare; that during the previous year the defendant had played in said Academy of Music to a large house"; and "that Northampton is the seat of Smith College, an institution attended by many hundred women students, who largely patronize representations of Shakespearian plays as a means of education, and, by their attendance, insure a crowded house." The facts put in evidence seem to us to afford no satisfactory basis of comparison on which to reckon the profits, if any, which might have been received by the plaintiff if the defendant had kept the contract. There are too many elements of uncertainty and conjecture to make it safe to rely upon opinions such as the plaintiff offered to give. The performance was to be for a single night. If a comparison was to be made, it naturally would be with the defendant's performance of the year before; but it does not appear that the supporting company was the same, and nothing appears, except that the year before the defendant played "to a large house." We are of the opinion that the ruling was right. *Noble v. Hand*, 163 Mass. 289, 30 N. E. 1020; *Brown v. Smith*, 12 Cush. 366; *Bernstein v. Meech*, 130 N. Y. 354, 29 N. E. 255; *Moss v. Tompkins*, 69 Hun, 238, 23 N. Y. Supp. 623; *Id.*, 144 N. Y. 659, 30 N. E. 858. Exceptions overruled.

(167 Mass. 154)

KEET v. MASON.(Supreme Judicial Court of Massachusetts.
Franklin. Nov. 24, 1896.)**NEW TRIAL—DISCRETION OF COURT—TRIAL WITHOUT JURY—NEWLY-DISCOVERED EVIDENCE.**

Where a case is tried by the court without a jury, it has discretion to set aside its finding, and order a new trial, on a showing of newly-discovered evidence, if of opinion that such evidence would materially change the finding, though the evidence is cumulative, and might have been discovered by due diligence.

Exceptions from superior court, Franklin county; Elisha B. Maynard, Judge.

Action by Newton W. Keet against Abbott M. Mason for the seduction of plaintiff's wife. On motion of plaintiff a finding by the court was set aside, and defendant brings exceptions. Exceptions overruled.

Conant & Conant, for plaintiff. W. G. Bassett and T. G. Spaulding, for defendant.

MORTON, J. This case was tried by the court without a jury. The defendant asked a ruling "that the motion and affidavits do not make a case in law for a new trial." The court did not rule as thus requested, but, having been influenced in its finding by the testimony of one Robbins in reference to an alleged cohabitation by the plaintiff with his wife after her seduction by the defendant, and "being of opinion that the evidence, as outlined by the affidavits, if given and believed, would materially change the finding, set the finding aside, and ordered a new trial." The defendant contends that the evidence disclosed by the affidavits was cumulative, and might have been discovered by due diligence before or during the trial. But, assuming that to be so, it would not follow, as matter of law, that the court had not the power to set aside the finding, and grant a new trial, if satisfied that justice required it to be done. The court did not rule that newly-discovered evidence, which was cumulative, and which might have been discovered by due diligence, would justify setting aside the verdict as matter of law, and was not asked in terms so to rule. What it did was to decline to rule that, as matter of law, the motion and affidavits did not make out a case for a new trial, and then to set aside the verdict because, having tried the case itself, it was convinced that the evidence, if believed, would have materially changed the result. This it had the right to do, in the exercise of a sound discretion, even though the evidence was cumulative, and might have been discovered by due diligence (*Ellis v. Ginsburg*, 163 Mass. 143, 39 N. E. 800); and, as we interpret the bill of exceptions, this is what it did do; and we cannot say that there was an abuse of its discretion. Whether, in all cases where a new trial is sought for newly-discovered evidence which is merely cumulative, and might have been discovered by due diligence, and there is no exercise of the discretionary power, it should be refused, no matter how convincing such evidence may be, is a matter which we do not find it necessary to consider in this case, and on which we express no opinion. Exceptions overruled.

(167 Mass. 176)

COMMONWEALTH v. HAYES.

(Supreme Judicial Court of Massachusetts.
Plymouth. Nov. 24, 1896.)

INTOXICATING LIQUORS—UNLAWFUL USE OF PREMISES BY TENANT—LIABILITY OF OWNER.

Where the owner of a tenement, with full knowledge, permits the tenant to use a portion of the premises not leased by him for the illegal sale or keeping of intoxicating liquors, he is liable for maintaining a nuisance, irrespective of the fact that he has no interest in the liquors himself.

Exceptions from superior court, Plymouth county; Albert Mason, C. J.

John Hayes was found guilty of maintaining a common nuisance by keeping and maintaining a tenement used for the illegal sale of

intoxicating liquors, and excepted. Exceptions overruled.

This was a complaint charging the defendant with maintaining a liquor nuisance in Brockton, between January 1, 1895, and September 26, 1895. There was evidence tending to show that between the dates in said complaint large numbers of men were seen to go to the premises, which consisted of a house with a large barn attached thereto, the barn facing the street, and standing from 60 to 70 feet distant from it; that men were seen to go to the barn and into the yard sober, and come away intoxicated; that the defendant was often in the driveway between the street and the barn, talking to the people as they went and came to and from the barn. There was also evidence tending to show that on several occasions in January and February, 1895, one Goodall had gone into the barn, found the defendant and one Campbell there, called for liquor, received it from and paid the money for it to Campbell, and came away. Upon the service of a search warrant on September 25, 1895, liquors were found in the barn, in the harness room, under the floor of the shed or kitchen. There was no dispute but that the defendant owned the premises, and lived in the house from January to May, 1895. There was also evidence tending to show that between May 1st and September 26th defendant was living at his summer home at Onset, but came to his house in Brockton every two or three weeks, coming on Saturday evenings, and remaining until Monday morning; that on such Sundays he was about the place, seeing and talking to the people going and coming to and from the barn. The defendant offered Campbell as a witness, who testified that he hired of the defendant two rooms in the second story of the barn, a stall for his horse, with privileges of keeping his hay, grain, and carriage in said barn, in common with others to whom defendant also let stall room, and the privilege of using the harness room that was connected with the barn; that for these rooms and privileges he was to take care of defendant's horse, and do the chores about the barn; that this arrangement continued until May 1st, when defendant went to Onset, after which time he paid to the defendant one dollar per week in addition to the work he did, and also took care of the barn. Campbell also testified that soon after he took possession of the rooms he commenced to sell liquor, keeping it in the cellar of the barn, the harness room, under the floor of the shed or kitchen, and under the eaves in the back part of the second story of the barn; that he made frequent sales in said barn and harness room; that defendant knew that he kept liquor on the premises, and sold it there, but had no interest or ownership in the liquors, or in the business of selling them; that defendant never made any of the sales. The defendant requested the court to give the following instruction: "If the jury find that the defendant had no interest in and no ownership of the intoxicating liquors sold by Camp-

bell, they must return a verdict of not guilty, under the form of complaint." The court refused to give this instruction, but gave the jury this instruction: "That, if the jury should find that the defendant kept or maintained said premises, and that any part thereof which was not let to or hired by said Campbell was, with the assent of the defendant, used for the illegal sale or keeping for sale of intoxicating liquors, and that was one of the purposes for which said premises were kept by the defendant, he should be convicted." The defendant alleged exceptions to the refusal to rule as requested and to this instruction given. The jury returned a verdict of guilty.

R. O. Harris, Dist. Atty., for the commonwealth. H. Kingman, for defendant.

MORTON, J. The complaint alleged, in substance, that the defendant kept and maintained a common nuisance by keeping and maintaining a tenement which was used by him for the illegal keeping and sale of intoxicating liquors. The instruction requested would, if given, have required the jury to acquit the defendant, unless they found that he had an interest in or was an owner of the liquor sold by Campbell. But the assent of the defendant to the use of his premises by Campbell for illegal sales would, if proved, have justified a verdict against him for keeping and maintaining a common nuisance. The jury could have found upon the evidence that he not only assented to such a use, but assisted in the use, as a proprietor; and, if he did, he used his premises for the illegal keeping and selling of intoxicating liquor. The instruction which was requested was therefore rightly refused, and that which was given was correct. *Com. v. Reed*, 162 Mass. 215, 38 N. E. 364; *Com. v. Lynch*, 160 Mass. 298, 35 N. E. 854; *Com. v. Churchill*, 136 Mass. 148. Exceptions overruled.

(167 Mass. 170)

LA FORTUNE v. JOLLY et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Nov. 24, 1896.)

MASTER AND SERVANT—ASSUMPTION OF RISK —EVIDENCE.

1. In an action for personal injuries, there was evidence that defendant's son told plaintiff, a helper, to kindle a fire on Sunday morning under a boiler; that plaintiff objected because he had never performed that work before; that, about half an hour after he had kindled the fire, an explosion occurred, which blew open the fire-box door and burned plaintiff, the explosion being caused by his putting too many shavings in at once; that the furnace and boiler were used to furnish power only on Sunday, being utilized on week days to burn waste shavings; that plaintiff had been there on Sundays but twice before, and during his service had never seen the door blow open, though it had done so twice before the accident, to defendant's knowledge; and that it was a helper's duty to obey defendant's son. *Held*, that plaintiff did not, as a matter of law, assume the risk.

2. In an action by a factory helper to recover for injuries caused by an explosion occurring after he had lighted a fire in the furnace by di-

rection of defendant's son, evidence that defendant had told his son to kindle the fire himself on this occasion is not admissible, defendant having previously testified that it was a helper's duty to do what the son told him.

Exceptions from superior court, Hampden county; E. B. Maynard, Judge.

Action by Jean Baptiste La Fortune against James Jolly and others to recover for personal injuries. There was a verdict for plaintiff, and defendants bring exceptions. Exceptions overruled.

Hilton F. Druce and Carroll & McClintock, for plaintiff. Brooks & Hamilton and Dickson & Knowles, for defendants.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff while in the employ of the defendants. The jury found for the plaintiff, and the case comes before us on the defendants' exceptions. Under the ruling of the court, the only questions which are now before us arise under the first and third counts of the declaration, which are at common law. The first count alleges negligence on the part of the defendants in failing to instruct the plaintiff in his duties, and to warn him as to the dangers thereof. The third count alleges that the defendants negligently failed to furnish the plaintiff with a reasonably safe and suitable place in which to work. The plaintiff was a chipper and helper in the defendants' factory; and his general duty was to chip and file off the rough edges of castings, and to assist the other men when called upon to do so. On June 8, 1895, the plaintiff was told by John Jolly, a son of one of the defendants, to kindle a fire under one of the boilers on the morning of the next day, which was a Sunday. He objected on the ground that he was afraid to do it, as he had never done it before. Jolly, however, insisted upon the plaintiff's obeying him; and the next morning the plaintiff put shavings in the furnace, lighted them, continued to stuff in more shavings, and, more than an hour after the fire was started, there was an explosion inside, the door of the fire-box flew open, and the plaintiff was seriously burned. There was evidence to show that the cause of the explosion was that too many shavings were put in at once, thereby stopping the draft, and preventing the gas formed by the combustion from passing off by the chimney. The defendants contend that it was not within the scope of the plaintiff's duties to light the fire under the boiler. But there was certainly evidence for the jury on this point. James Jolly, one of the defendants, testified that "it was the helpers' business to do what John Jolly told them," and that "it was a part of the helpers' business to light this fire." While it appears in evidence that the plaintiff was reluctant to build the fire, because, as he said, he had never done so before, and was afraid of danger from an explosion, or from being burned, yet it does

not appear that he knew anything about any risk from the door of the fire box blowing open. On the contrary, he testified that he never saw the door blow open before, although he had worked there for two years and two months. The risk was not an obvious one, nor can it be said, as matter of law, that, if he did not know it, he ought to have known it. The furnace and boiler were not used on week days to furnish power. The furnace was then used to burn the waste shavings. On Sundays the furnace and boiler were used for power. The plaintiff testified that he had been there on Sundays only twice before. The plaintiff had never before been called upon to make the fire and get up steam; this work being generally done by one Kelley, who was ill at the time of the accident. We are of opinion that, under these circumstances, it cannot be said, that, as matter of law, the plaintiff took the risk. One of the defendants, at least, knew that the door of the fire box had blown open several times before the accident, and the danger was obvious if the door should blow open. While this defendant testified that he spoke on Saturday to his son John to start up the fire, and that he gave no instruction to his son with reference to the plaintiff starting the fire, yet, as he also testified that it was the helpers' duty to do what John told them, we are of the opinion that, if John directed a helper who did not know the danger to build the fire, and failed to give him proper instructions, he represented for this purpose the defendants, and they are liable for his neglect. *Bjbjian v. Rubber Co.*, 164 Mass. 214, 220, 41 N. E. 265.

On the third count the defendants asked the court to instruct the jury as follows: "There is no sufficient evidence that the defendants negligently failed to furnish the plaintiff with a reasonably safe and suitable place in which to work, and there can be no recovery on that ground." We are of opinion that this request was rightly refused. If we assume, in favor of the defendants, that there was no evidence that the furnace or boiler was defective or dangerous when a fire was properly made therein, yet if there was danger when a fire was made in the furnace by an inexperienced employé, who was ordered to make it, and this danger was known to the employer and not to the employé, and no instructions were given to the employé, it may properly be said that he is set to work in a dangerous place. *Coombs v. Cordage Co.*, 102 Mass. 572. There was evidence for the jury upon all of these points.

The defendants offered to show that James Jolly gave instructions to his son John to start up the fire himself. Evidence of this was excluded, and the defendants excepted. We have already recited the testimony of James Jolly as to the authority of John to call upon the helpers to make the fire. If John had this general authority, evidence that this

authority was secretly withdrawn on the particular occasion in controversy was incompetent, and was properly excluded. Exceptions overruled.

(167 Mass. 123)

RILEY v. BOEHM.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 24, 1896.)

EVIDENCE—BOOK OF ACCOUNT.

1. It is not error to refuse to admit in evidence, as a book of account, a vest-pocket book, used for making memoranda in regard to any matter of which the owner wished to make note.

2. A book of account is inadmissible to prove, from the absence of an entry therein, that certain money was not paid.

Exceptions from superior court, Bristol county; Robert R. Bishop, Judge.

Action by Michael Riley against Max S. Boehm. There was a verdict for plaintiff, and defendant excepts. Overruled.

J. W. Cummings, E. Higginson, and C. R. Cummings, for plaintiff. Swift & Grime, for defendant.

MORTON, J. The mere fact that an entry is made contemporaneously with the transaction which it purports to record does not of itself entitle it to admission as a piece of substantive evidence. It must also appear to have been made in the regular course of business, under such circumstances as to import trustworthiness. *Donovan v. Railroad*, 158 Mass. 451, 33 N. E. 583. It is for the presiding justice to say, in the first instance, whether the record is of such a character, and his decision will not be interfered with unless clearly wrong. *Cogswell v. Doliver*, 2 Mass. 217, 222; *Hawks v. Inhabitants of Charlemont*, 110 Mass. 110; *Com. v. Coe*, 115 Mass. 481, 504, 505; *Com. v. Morgan*, 159 Mass. 375, 34 N. E. 458; 1 *Greenl. Ev.* (10th Ed.) § 118, note 1. In the present case the entry which was relied on was contained in a small book, such as is usually carried in a vest or side pocket, and was used for making memoranda in regard to any matter which for any reason the defendant desired to note. We cannot say that the court was not justified in holding that the character of the book gave it no standing. Moreover, the book was offered, not as containing an entry relating to the cash in question, but as showing, from the absence of an entry, that the money was not paid as the plaintiff said that it was; that is, the argument was that, if the defendant had received the money, he would have entered it in the book, and, because there was no entry, he did not receive it. This was inadmissible. *Morse v. Potter*, 4 Gray, 292.

Neither of the two letters which were offered by the defendant, and excluded, was competent. The first was by the firm of which the defendant was a member, to the plaintiff, and contained no reference to the

subject-matter of the suit. It is difficult to conceive on what ground it was offered, and the defendant has not argued that it was admissible. The other letter was from the defendant to his partners, and also contained no reference to the subject-matter of the suit. It was entirely *res inter alios*.

If the testimony of Murphy was incompetent, as the defendant contends, it did him no harm. But we think that it was admissible to corroborate Paquin. It tended to fix the date which was in dispute,—when Paquin said the plaintiff gave the defendant money. Exceptions overruled.

(167 Mass. 198)

DAMON et al. v. CARROL et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Nov. 24, 1896.)

NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.

On a motion for a new trial on the ground of newly-discovered evidence, it appeared that such evidence was an amendment of the record of proceedings in a municipal court; that the facts on which the amendment was founded were known at least to one of defendants before the action was brought; that no effort was made at the original trial to have the report amended, and no request was made to have the case postponed in order that the record might be so amended. At the original trial, defendants filed their bill of exceptions to rulings, and waited more than 14 months after the trial, until such exception had been overruled by the supreme judicial court, before making their motion for a new trial. *Held* properly denied.

Exceptions from superior court, Suffolk county; Daniel W. Bond, Judge.

Action by Gustavus A. Damon and others against Edward Carrol and others, in which there was a verdict for plaintiffs. A motion for a new trial on the ground of newly-discovered evidence was denied, and defendants except. Exceptions overruled.

Sherman L. Whipple and Robert W. Frost, for plaintiffs. H. Dunham and Henry Austin, for defendants.

KNOWLTON, J. The defendants moved for a new trial on the ground of newly-discovered evidence, and filed an affidavit in support of their motion. The new evidence which they sought to introduce was an amendment of the record of proceedings in one of the municipal courts of Boston. The facts on which the amendments were founded were known at least to one of the defendants, and probably to both of them, before the action was brought. The judge found as a fact at the hearing upon the motion "that no effort was made at the original trial of the action to have the report amended, and no request was preferred to have the case postponed in order that the record might be so amended." It further appears that the defendants filed their bill of exceptions to rulings at the original trial of the action, and waited more than 14 months after the trial, until the exceptions had been overruled by this court, before making their motion for a new trial. They failed utterly to use proper diligence to obtain the

evidence before the trial, and before the plaintiffs had been put to the delay and expense of a hearing in this court upon the exceptions. The motion was rightly overruled. *Gardner v. Gardner*, 2 Gray, 434-444. Exceptions overruled, with double costs.

(167 Mass. 159)

WASON v. RANNEY.

(Supreme Judicial Court of Massachusetts.
Hampden. Nov. 24, 1896.)

DEED—CONSTRUCTION—VESTED REMAINDER.

A quitclaim deed, after reciting the parties, consideration, and description of the property conveyed, continued, in terms: "Reserving to myself [grantor] the right to occupy said premises for myself and my family so long as I shall desire so to do. To have and to hold the aforegranted premises to the said grantee for the full term of his natural life, and after his death to the heirs of my body; to have and to hold to their use and behoof forever, so that neither I, the said [grantor], nor my heirs, nor any other person or persons claiming from or under or in the name, right, or stead of me or them by any way or means, have any estate, right, title, or interest of, in, and to the aforesaid premises, with the appurtenances." *Held*, that on the death of the grantor before the death of the grantee the heirs of the body of the grantor would take the remainder as of the death of the grantee.

Report from superior court, Hampden county; Francis A. Gaskill, Judge.

Writ of entry by Cecil W. Wason, by next friend, against Ambrose Ranney, to recover a tract of land. There was a finding for demandant, and the case was reported for the determination of the supreme judicial court. Judgment for demandant.

An agreed statement of facts and the habendum of the deed under which demandant claims follow:

Agreed statement of facts: "(1) Cecil W. Wason, the demandant, is a minor under the age of 21 years, and was born August 29, 1886, and Alice S. Timayenis is his guardian and next friend. (2) Said Cecil W. Wason is the son and only child of George E. W. Wason, deceased. Said George E. W. Wason was born in 1867, and died February 11, 1893. (3) Said George E. W. Wason was the son and only child of George T. Wason. Said George T. Wason died November 15, 1880, intestate. (4) Said George T. Wason, in 1871, March 13th, then about 25 years of age, his wife living, conveyed to his said son, George E. W. Wason, then about 4 years of age, by deed, a copy of which is hereto annexed, marked 'A,' and made part of these agreed facts, the parcel of land with the buildings thereon described in said deed, situated in said Springfield, being the demanded premises. At the time of said conveyance he was the owner in fee simple of said estate. His title thereto was derived as the heir of Thomas W. Wason, his father, and by deed from the other heirs and the widow. Said Thomas W. Wason died August 21, 1870, and said deed from the other heirs was dated January 25, 1871. (5) Said George

T. Wason retained possession, or had the rents and profits, of said estate up to the time of his death, in 1880. After his death, said George E. W. Wason had possession of said premises and the rents and profits thereof. (6) November 12, 1888, George E. W. Wason mortgaged said estate to Jerome W. Hyde to secure his note of \$3,000, and this mortgage was duly assigned by said Hyde to Charles G. White, May 13, 1889, and by said White to Ambrose A. Ranney, May 15, 1889. December 19, 1889, said George E. W. Wason conveyed said estate to said Ambrose A. Ranney, the tenant in said writ, by warranty deed in the usual form, purporting to convey said estate in fee simple. Since said deed to said Ranney, he has had possession, and collected the rents and profits, of said estate, which have been wholly used in making necessary repairs thereon. (7) At the time of the death of said George T. Wason, the only heir of his body was the said George E. W. Wason. At the time of the death of said George E. W. Wason, the only heir of his body and the body of the said George T. Wason was the said Cecil W. Wason, the demandant. It is agreed that no damages are to be awarded to either party, and the question to be determined is, upon the foregoing facts, whether the title to the premises in question is in Ambrose A. Ranney, under his mortgage and deed from George E. W. Wason, or in Cecil W. Wason, depending upon the construction of the said deed from George T. Wason to George E. W. Wason in the light of the other facts above set forth."

Habendum of deed: "To have and to hold the afore-granted premises to the said George E. W. Wason for the full term of his natural life, and after his death to the heirs of my body; to have and to hold to their use and behoof forever, so that neither I, the said George T. Wason, nor my heirs, nor any other person or persons claiming from or under or in the name, right, or stead of me or them by any way or means, have any estate, right, title, or interest of, in, and to the aforesaid premises, with the appurtenances."

F. Ranney, for tenant. W. S. Slocum, for demandant.

FIELD, C. J. The effect of the delivery of the deed of George T. Wason to George E. W. Wason was to vest in George E. W. Wason an estate for his life in the land. The remainder, when the deed was delivered, was contingent, for it, on the death of George E. W. Wason, George T. Wason was alive, there could be no heirs of his body to take it, and it must revert to him. If George T. Wason died before the death of George E. W. Wason, the heirs of the body of George T. Wason would take the remainder; and the principal question is whether such heirs would take as of the death of George T. Wason or of George E. W. Wason. A majority of the court are of opinion that they

would take as of the death of George E. W. Wason. Such is the meaning of the language of the habendum of the deed, interpreted in the ordinary way, and there are no technical rules of law which prevent the deed from taking effect according to its meaning. *Knowlton v. Sanderson*, 141 Mass. 323, 6 N. E. 228; *Fargo v. Miller*, 150 Mass. 225, 22 N. E. 1003; *Wood v. Bullard*, 151 Mass. 324, 25 N. E. 67; *Peck v. Carlton*, 154 Mass. 231, 28 N. E. 166. Judgment for the demandant.

(167 Mass. 161)

KNEELAND v. BRAINTREE ST. RY. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Nov. 24, 1896.)

CORPORATIONS — POWER TO ISSUE PROMISSORY NOTES—RIGHTS OF BONA FIDE INDORSEES.

A corporation has the power to issue notes when authorized by its board of directors; and a negotiable note of a railroad corporation, executed by authority of its board of directors, is not ultra vires, and the corporation cannot defend against it in the hands of a bona fide indorsee for value before maturity, though it may have a defense against the payee, and the directors may have abused their authority in directing its execution.

Report from superior court, Suffolk county; J. B. Richardson, Judge.

Action by Frank E. Kneeland against the Braintree Street-Railway Company on a promissory note executed by defendant corporation to one Thayer, who was one of its directors, as compensation for services in procuring its franchise, being one of several similar notes given to defendant's officers. Verdict for plaintiff, and case reported. Judgment on the verdict.

Robert F. Herrick and Guy Cunningham, for plaintiff. Charles G. Chick and Simon Davis, for defendant.

ALLEN, J. The defendant, by common law, had the power to incur debts, to contract for the payment of them, and to give promissory notes. *Com. v. Smith*, 10 Allen, 448, 455; *Richards v. Railroad Co.*, 44 N. H. 127, 135. There is no statute which annulled or limited this power. To give such notes was not ultra vires. *Monument Nat. Bank v. Globe Works*, 101 Mass. 57. By Pub. St. c. 113, § 9, the immediate government and direction of the affairs of the defendant company were vested in the board of directors. The board of directors, therefore, was the proper body to authorize the giving of promissory notes in the name of the corporation. *Sargent v. Webster*, 13 Metc. (Mass.) 497, 503; *Williams v. Cheney*, 3 Gray, 215; *Lester v. Webb*, 1 Allen, 34; *Hendee v. Pinkerton*, 14 Allen, 381, 387; *Sherman v. Fitch*, 98 Mass. 59, 64; *Saltmarsh v. Spaulding*, 147 Mass. 224, 228, 17 N. E. 316; *Cook, Stock, Stockh. & Corp. Law*, § 712. In the present case the action of the board of directors may have been an abuse of authority, and, as against the payee, the defendant may have had a defense. This it is unneces-

sary to determine. The jury found that the plaintiff became the owner of the note before maturity, for value, and without notice of what it was given for, or how it was given. It was given in pursuance of a vote of the board of directors. It was, therefore, the note of the corporation, not *ultra vires*, made negotiable by its terms; and the plaintiff, as indorsee, may recover upon it. *Monument Nat. Bank v. Globe Works*, 101 Mass. 57; *Merchants' Nat. Bank v. Citizens Gaslight Co.*, 159 Mass. 505, 34 N. E. 1083; *Genesee Co. Sav. Bank v. Michigan Barge Co.*, 52 Mich. 438, 17 N. W. 790, and 18 N. W. 206. Judgment on the verdict.

(167 Mass. 178)

DONAGHY v. MACY et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 24, 1896.)

**MUNICIPAL CORPORATIONS—POWER TO ABOLISH
OFFICE—TENURE OF OFFICER.**

A municipal corporation has power to abolish an office during the term of an incumbent by a repeal of the ordinance creating it, and by the repealing ordinance to create a similar office, and provide for the immediate election of an officer to fill it; and such power is not affected by a provision in the former ordinance that the incumbent should be removable for cause.

Report from supreme judicial court, Bristol county; Marcus P. Knowlton, Judge.

Petition by James J. Donaghy against Frederick Macy and others for a writ of mandamus. Heard on report of Knowlton, J. Petition denied.

T. F. Desmond, for petitioner. E. D. Stetson, for respondent.

HOLMES, J. This is a petition for a writ of mandamus. It prays that the respondents may be compelled to permit the petitioner to discharge the duties of second assistant engineer of the fire department of the city of New Bedford until the end of his term of office, and that the respondent Dahill may be ordered to refrain from acting as second assistant engineer. On January 1, 1894, the petitioner was duly elected to his office, under the ordinances then in force, for the term of four years, ending in January, 1898. Ordinances of 1882, c. 11, § 4. In 1896 this ordinance was repealed, and a new ordinance was adopted, which, so far as it affects the present case, is like the old one, except that the time of election is April instead of January, and the first election under it is for two years, ending in 1898. After that, the elections are for four years. The petitioner suggests a doubt whether the powers of the city council were not exhausted by one exercise, so that the second ordinance is void; and argues that, however that may be, inasmuch as by section 5 of the earlier ordinances he was removable for cause, he could not be removed otherwise, but had a contract with the city, which no more could be avoided by a repeal of the ordinance than by a more direct attempt to remove him without cause.

We have no doubt that the city council had

power to pass the second ordinance. St. 1852, c. 177. It is not necessary to resort to the words "from time to time," in section 1, to convince us that the powers given by that section were not exhausted by a single exercise. This being so, we think that the respondent Dahill lawfully fills the office created by the later ordinances; and, even if it were true that the petitioner has a contract which binds the city, we should hesitate long before requiring the city to keep the earlier created office open for the purpose of specifically performing it. We should be much more likely to leave the petitioner to his remedy by action.

But we know of no decision in this commonwealth that the petitioner has a contract which binds or purports to bind the city to keep him in his office after the office shall have been abolished lawfully except for the contract. It is going a long way to say that there was any contract, however qualified, to continue the petitioner in office during his term, or to accept the corollary that the petitioner had not a right to resign whenever he saw fit. But the notion that an appointment for a term under an ordinance providing that the officer shall be removable for cause, without more, is a contract that the office shall be kept up for the term irrespective of the public welfare, seems to us to go beyond any possible view, and to be contrary to such decisions as we have seen which bear upon the point. *Butcher v. City of Camden*, 20 N. J. Eq. 478, 480, 481; *Love v. Mayor*, etc., 40 N. J. Law, 456; *City of Hoboken v. Gear*, 27 N. J. Law, 265; *City Council of Augusta v. Sweeney*, 44 Ga. 463; *Waldraven v. Mayor*, etc., 4 Coldw. 431; *Marden v. Portsmouth*, 59 N. H. 18; *City of Brazil v. McBride*, 69 Ind. 244, 256; *Conner v. Mayor*, etc., 2 Sandf. 355; *Id.*, 5 N. Y. 285; 1 Dill. Mun. Corp. (4th Ed.) § 231. See *Id.* § 232, note 1.

It is not to be presumed that the repeal of the ordinance was a mere device to get rid of the petitioner, and the petition does not allege such a case.

Petition denied.

(167 Mass. 167)

DOLPHIN v. PLUMLEY et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Nov. 24, 1896.)

MASTER AND SERVANT—PERSONAL INJURY—QUESTIONS FOR JURY.

Where, in an action by an employé against his master to recover for an injury, there was evidence that plaintiff, in going from one part of the mill, where he worked, to another, took the way ordinarily used for such purpose, and was injured by reason of a defect therein, due to the negligence of the master, the questions of negligence and contributory negligence should have been submitted to the jury.

Exceptions from superior court, Hampden county; Justin Dewey, Judge.

Action by Charles Dolphin against Charles Plumley and others. The court directed a verdict for defendants, and plaintiff brings exceptions. Reversed.

H. Fuller and F. A. Balkou, for plaintiff. Ely Bros. and A. S. Knell, for defendants.

LATHROP, J. This is an action of tort for personal injuries sustained by the plaintiff while in the employ of the defendants, who were the owners of a sawmill. At the close of the evidence for the plaintiff, the presiding justice directed a verdict for the defendants, and the case comes before us on the plaintiff's exceptions. There is nothing to show upon what ground the ruling below was given. We have before us what apparently is a stenographic report of the evidence, with much immaterial matter not stricken out, and with much left in that is not intelligible, owing to the manner in which the examination was conducted when a plan was exhibited to a witness and he was asked concerning it. For example, if the witness is asked where he stood at a given time, the answer is, "Here [showing]"; or if he is asked, "Which way did you go?" the witness' answer is taken down, "Right across here [showing]." This method of taking down the evidence continually appears, and there is nothing on the plan to show to what the evidence refers. It is therefore with some hesitation that we have concluded to consider the case without sending back the exceptions for amendment.

The declaration contains two counts,—one at common law, and one under St. 1887, c. 270, § 1, cl. 1. There was evidence, which the jury might have believed, which would tend to show the following facts: The plaintiff was a man 50 years old, who had had experience in similar mills, and had been in this mill about two months, and was well acquainted with it. He sustained the injury complained of by attempting to pass from one end of the mill to the other, through a space, about two feet wide, between a circular saw four feet in diameter and the handle bar which controlled the speed of the saw. To go by the saw, it was necessary for him to pass over a movable platform or apron, the purpose of which was to prevent splinters and chips thrown off by the saw from falling below and clogging the machinery. While crossing the apron it sank down a little, he fell, and his hand struck the saw, and he lost some of his fingers. It appeared that the first-named defendant, about 20 minutes before, had taken up the apron for the purpose of getting at the machinery below, and the jury might have found that he did not restore it to its place, and that this was negligence on the part of the defendants, if they allowed this apron to be used as a way for passing from one end of the mill to the other.

The principal difficulty in the case is in regard to the question of due care on the part of the plaintiff. To pass in such close proximity to the saw was obviously dangerous, and if other ways had been provided we should hesitate to reverse the ruling below. The defendants' counsel asserts in his brief that there were other ways, and this may have been the fact. The evidence as to another way inside of the building came from the plaintiff on cross-examination,

but he testified that this way was occupied by the carriage upon which a log is carried, and that the head blocks on this would cut a man's legs off; that, when there was a 6-inch log in, there would be a foot in which to walk; and that the log on the carriage at the time of the accident was 18 or 20 inches thick. The only other way of which there was any evidence was to go around on the outside of the mill. As to this the plaintiff testified that there was a pile of slabs, over 60 cords, and lumber, from the end of the mill, around which he would have to go, and that Plumley had forbidden his going that way. There was evidence that the way the plaintiff took was the way ordinarily used, not only by the workmen, but by the first-named defendant. In *Willets v. Watt* [1892] 2 Q. B. 92, 98, Lord Esher, M. R., said: "The course which a workman would in ordinary circumstances take in order to go from one part of a shop, where a part of the business is done, to another part, where business is done, when the business of the employer requires him to do so, must be regarded as a 'way,' within the meaning of the statute." It is obvious that the risk which the plaintiff took was the risk in crossing when the platform was in position, and not the risk of crossing when the platform was negligently out of position, unless it should appear that it was liable to be out of position, and he knew it or ought to have known it.

In deciding this case we have not laid stress upon the fact that the plaintiff had been ordered on previous occasions to use this way, as it appears that he was not so ordered on this occasion. See *Haley v. Case*, 142 Mass. 316, 7 N. E. 877, and cases cited. We are of opinion, therefore, that there was evidence, which should have been submitted to the jury, bearing upon the question of due care on the part of the plaintiff and negligence on the part of the defendants. While no question of pleading was raised at the trial below, yet, as the case must be tried again, it may be well to point out that it is not clear that the cause of the accident falls within the declaration in St. 1887, c. 270, § 1, cl. 1. See *Willets v. Watt* [1892] 2 Q. B. 92, 98. Exceptions sustained.

(167 Mass. 190)

HANLON v. THOMPSON.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 24, 1896.)

MASTER AND SERVANT—EMPLOYMENT—DANGEROUS PREMISES—SUFFICIENCY OF EVIDENCE
—QUESTION FOR JURY.

1. It appeared that plaintiff was injured while employed about an ice house, that one C. held a lease of the premises, that he had sold his business to defendant, and that plaintiff was not hired by defendant personally. C. and defendant testified that C. had agreed to fill the ice house, and that the men were employed by C. to do the work. C.'s testimony was qualified on cross-examination, and defendant, on cross-examination, admitted that he employed one or two teamsters to haul ice from the pond to the ice house; and another witness testified that he worked for defendant in delivering ice to customers. There was also evidence that defendant owned all the teams and other personal

property used in the business, and that the men were paid at his office by his agent. *Held*, that the evidence warranted a finding that plaintiff was in defendant's employ.

2. It appeared that the lease to C. embraced "sheds"; that C. sold his business to defendant about February 14th, and he assumed payment of the rent from January 1st; and that the accident occurred February 27th by the giving way of a shed on the premises leased to C. Defendant testified that he had an assignment of the lease. The evidence showed that it was understood that he was to succeed C. as tenant, that he had bought C.'s ice house and teams, and that he was aiding in filling the ice house and delivering ice to customers. *Held* to warrant a finding that defendant was in possession of the shed as well as the other buildings.

3. It appeared that plaintiff, when injured, was passing through such shed on his way from dinner to his work. Several witnesses testified that the men working in the ice house were in the habit of going through the shed on their way to and from their work. *Held*, that the question of an implied invitation or permission by defendant for the men to pass through the shed, on their way to and from work, was for the jury.

Exceptions from superior court, Essex county.

Action by Daniel F. Hanlon against William O. Thompson for personal injuries received while employed at a certain ice house situated at the corner of Mill and Water streets in the city of Haverhill. There was a verdict for plaintiff, and defendant excepts. Exceptions overruled.

It appeared from the evidence that there were two sheds on the premises in question; that the shed designated in the bill of exceptions as "A" had a cellar 10 feet deep; that there was a ladder from the bottom of an open shed to the southerly doorway in shed A; that there was a walk of boards from the top of the ladder across the shed to the northerly side; that these boards rested on timbers which looked to be large timbers; that on February 27, 1894, plaintiff and others, on the way from their dinners to their work went up such ladder; that plaintiff got off the ladder, and had gone a short distance, when he "felt something give way, and I fell, and the floor went with me"; that he fell 10 or 12 feet; that one Charles H. Cushman had a lease of the premises in question dated November 20, 1888; and that in February, 1894, he sold his business to defendant.

Boyd B. Jones and Mellen A. Pingree, for plaintiff. William H. Moody, Horace E. Bartlett, and Joseph H. Pearl, for defendant.

ALLEN, J. 1. There was evidence sufficient to warrant a finding that the plaintiff was in the employment of the defendant. It is true that the plaintiff was not hired by the defendant personally, and that both Cushman and the defendant testified that Cushman had agreed to fill the ice houses, and that the men were employed by Cushman to do the work. But from the other testimony the jury might think that these statements ought not to be taken as literally accurate. Cushman's testimony was somewhat qualified by his cross-examination. And the defendant, on cross-examination, admitted that he employed one or

two teamsters to haul ice from the pond to the ice house, and another witness testified that he worked for the defendant in delivering ice from the ice house to customers. There was also evidence that the defendant owned all the teams and other personal property used in the business, and that the men were paid at his office by his agent.

2. The jury might also find that the shed where the accident occurred was occupied by the defendant. The lease to Cushman embraced "sheds," in the plural; and the jury might find that this shed was included in it. The accident was not till February 27th. Cushman sold out his business and property on or about February 14th, and the defendant assumed payment of the rent from January 1st. The defendant at first testified that he had an assignment in writing of the lease, but he afterwards qualified this statement by saying that he would not be positive. The jury might believe that he had such an assignment. Certainly the evidence tended to show that it was well understood that he was to succeed Cushman as tenant of the leased premises, that he had bought Cushman's ice business and teams, and that he was engaged in carrying on that business by aiding at least in filling the ice house and by delivering ice to customers. The jury might find that he was in possession as tenant of the shed in question, as well as of the other buildings included in the lease.

3. There was also some evidence, the weight of which was for the jury, of an implied invitation or permission by the defendant for the men to pass through the shed on their way to and from their work. The situation of the premises might be taken into account. Several witnesses testified that the men were in the habit of going that way. If the way through the shed was commonly used by men in the defendant's employment, it might be inferred that he knew of this practice; and that is some evidence of an implied invitation or permission for the plaintiff also to use it, if he also was in the defendant's employment, and was at work with the others. See *Dolphin v. Plumley* (Mass.) 45 N. E. 87.

4. The question of the plaintiff's due care was also for the jury. It cannot be held, as matter of law, that he was bound to look underneath, to see if the timbers were sound and strong. Upon all the evidence, the case was properly submitted to the jury. Exceptions overruled.

(167 Mass. 188)

WALKER v. JOHN HANCOCK MUT. LIFE INS. CO.

(Supreme Judicial Court of Massachusetts.
Essex. Nov. 24, 1896.)

INSURANCE—POLICY—CONSTRUCTION—TIME—COMPUTATION.

A life insurance policy provided that the full amount of the policy should only be paid in the event insured died "after one year from the date of the policy." The policy took effect

on the day of its date. *Held*, that in computing the year the day of the date of the policy should be excluded.

Appeal from superior court, Essex county.

Action by Jeannette Walker against the John Hancock Mutual Life Insurance Company. There was a judgment for plaintiff, and defendant appeals. Modified.

F. L. Hayes, for appellant. N. N. Jones, for appellee.

MORTON, J. The defendant promised to pay to the beneficiary "the amount named in the schedule below," subject to certain conditions not now material. The amount was \$75, and the schedule was as follows: "This policy is in immediate benefit from its date as stated in this schedule. In the event of the death of the insured within six calendar months from the date hereof, only one-fourth of this sum shall be paid. In the event of such death after six months and within one year, one-half of this sum shall be paid. After one year from date, policy will be in force for full amount." It was also provided that "the company shall not be liable for any loss before noon of the date hereof." The policy was dated July 25, 1894, and the insured died at 6 o'clock and 45 minutes a. m., July 25, 1895. The question is whether he died "after one year from the date of the policy," and the answer depends on whether the day of the date of the policy is to be included in the year or excluded. In the absence of anything tending to show a contrary intention, the words "from the date," exclude the day of date. See *Seward v. Hayden*, 150 Mass. 158, 22 N. E. 629; *Kendall v. Kingsley*, 120 Mass. 94; *Bemis v. Leonard*, 118 Mass. 502; *Fuller v. Russell*, 6 Gray, 128; *Buttrick v. Holden*, 8 Cush. 233; *Inhabitants of Seekonk v. Inhabitants of Rehoboth*, Id. 371; *Bigelow v. Willson*, 1 Pick. 485; *Isaacs v. Insurance Co.*, L. R. 5 Exch. 296. The plaintiff contends, in substance, that the policy took effect on the day of its date, and that, therefore, the words "from the date" are to be construed inclusively, rather than exclusively, and that such must have been the intention of the parties. But the fact that the policy took effect on one date and not on another has of itself no tendency to show that it is to be paid on one date and not on another. The operative words are those which relate to the payment of the insurance, and not to its attachment. Those provide that the full amount is not to be paid till after one year from the date of the policy. The time of payment is fixed by providing not only that it shall be one year from the date of the policy, but also that it shall be one year after that date, excluding, as it seems to us, the date of the policy. We think, therefore, that in accordance with the terms of the report, judgment should be entered for \$32.50, with interest from the date of the writ, that being the amount to be paid

in the event of the death of the insured after six months and within one year from the date of the policy; and it is so ordered.

(167 Mass. 181)

LAWTON et al. v. ESTES.

(Supreme Judicial Court of Massachusetts.
Bristol. Nov. 24, 1896.)

EQUITY — PARTY TO FRAUDULENT TRANSACTION —
ESTOPPEL TO RECOVER FROM JOINT
WRONGDOER.

An heir, who was part owner of property left by his deceased father, subject to the life estate of his mother as dowress, who knew of and acquiesced in a scheme by his brother to acquire the entire title, as against the other heirs, by the purchase of the property at tax sale, has no standing in a court of equity to recover his share of the property from the brother after the death of their mother.

Appeal from superior court, Bristol county.

Bill in equity by John W. Lawton and others against John H. Estes. From a decree dismissing the bill as to Joseph D. Estes, one of the plaintiffs, he appeals. Affirmed.

Phillips & Fuller, for appellant. M. Reed, for appellees.

MORTON, J. There was a decree in favor of all of the plaintiffs except Joseph and Benjamin. As to them the bill was dismissed, with costs. Joseph appealed, and the question is now whether, upon the special findings of fact, which it is agreed are to be treated as in the nature of a report, the decree was right as to him. A valid sale for taxes to a stranger creates a paramount title in this state, after the period for redemption has expired. *Langley v. Chapin*, 134 Mass. 82. There is nothing here to show that the sale was not valid, and the period for redemption expired several years ago. The sale was not, however, to a stranger. The defendant was a co-owner of the reversion with the appellant and the other plaintiffs. And the appellant contends that the purchase by the defendant at the tax sale constituted him a trustee for his co-tenants, with the right of redemption in them. The prayer of the bill is that he may be declared a trustee, and ordered to convey. But we think that the appellant is not in a position to take advantage of this contention. It is found as a fact that he knew of and assented to the proceedings in regard to the tax sale, and to the purchase by the defendant, and that he and Benjamin joined in the scheme to defraud the other co-tenants. Now that the scheme has failed, he seeks the aid of a court of equity to compel his partner in the attempted fraud to restore to him property which he had suffered him to acquire for the purpose of promoting and carrying out the contemplated fraud. To obtain the relief which he seeks, he is obliged to rely upon the fraud to which he was a party. In such a case it is plain that equity will not aid him to recover what he has lost, and, as between him and the defendant, will not disturb the possession of the latter. *Wall v. Institution*,

3 Allen, 96; Wheeler v. Sage, 1 Wall. 518; Goddard v. Putnam, 22 Me. 363; Osborne v. Moss, 7 Johns. 161. It may be, as the counsel for the appellant suggests,—though we do not find it necessary to decide the question,—that if he had seasonably repudiated the attempted fraud, and notified his co-tenants, he could have recovered from the defendant. Taylor v. Bowers, 1 Q. B. Div. 291. But he did not do that. He was willing that the scheme should succeed, and expected to be benefited by it if it did. Decree affirmed.

(187 Mass. 163)

COMMONWEALTH v. SEELEY et al.

(Supreme Judicial Court of Massachusetts.
Berkshire. Nov. 24, 1896.)

JOINT TRIAL OF DEFENDANTS SEPARATELY INDICTED—INDICTMENT—VARIANCE.

1. It is within the sound discretion of the court to direct that two defendants, who have been indicted separately, each for adultery with the other at the same time and place, shall be tried together without their consent; the mere fact that a joint trial may prejudice the defendants somewhat in the exercise of their right of challenge not being sufficient reason for directing separate trials.

2. Evidence that the accused is commonly called, and is as well known, by the name under which he was indicted, is sufficient to warrant a conviction.

William Seeley and Carrie Hall were convicted of adultery, and bring exceptions. *Exceptions overruled.*

C. L. Gardner, Dist. Atty., for the Commonwealth. H. C. Joyner, for defendants.

MORTON, J. In *Com. v. Bickum*, 153 Mass. 386, 26 N. E. 1003, it was held that two complaints against the same defendant, charging him with two distinct offenses, cannot be tried together against his objection. This case presents a different question, namely, whether the court could, in its discretion, direct that the two defendants, who had been indicted separately, each for adultery with the other, at the same time and place, should be tried together without their consent. The power of the court to regulate the conduct of causes before it, with a view to the proper dispatch of business, and the interest of parties and others, is undoubted, and is not, we think, abridged because, in a case like the present, the grand jury, for some reason, has seen fit to indict the defendants separately, unless its exercise will interfere with substantive rights belonging to one or both of the defendants.

It is objected that, by trying the two cases together, the commonwealth would have four challenges out of one panel, whereas, if the two cases were tried separately, it would have only two out of one panel. But the defendants also would have four challenges out of one panel (*Com. v. Walsh*, 124 Mass. 32, 38); and if they were not able to argue upon the challenge, or if one challenged where the other would prefer not to, they would be sub-

jected to no greater disadvantage than they would have been liable to be subjected to if they had been jointly indicted, and had been refused separate trials. It is settled that in such a case the mere fact that a joint trial may prejudice the defendants somewhat in the exercise of their rights of challenge is not a sufficient reason for directing separate trials. *Com. v. James*, 99 Mass. 438; *U. S. v. Marchant*, 12 Wheat. 480; *Reg. v. Blackburn*, 6 Cox, Cr. Cas. 333. It does not appear whether the commonwealth or the defendants challenged any jurors, and, if so, how many, or whether, if the defendants challenged any jurors, there was any disagreement between them in respect to the challenges.

It is also objected that the defendants, having been indicted separately, had a right to expect that they would be tried separately, and to prepare their cases accordingly; that, in a joint trial, evidence admissible against one, but not against the other, might cause harm to the party against whom it was inadmissible; that the manner in which one defense was conducted might prejudice the other party's defense; and that in other respects the consolidation of the two cases might interfere with a full and fair trial on the part of one defendant or the other. These are considerations which properly might have influenced the court to refuse to order the two cases to be tried together, but do not, we think, show that its direction that they should be so tried was wrong. Where, for instance, parties have been jointly indicted, it has been held that the fact that there was evidence which was competent against one or more, but not against others, did not require that the trials should be separated. *Com. v. Bingham*, 158 Mass. 169, 33 N. E. 341; *Com. v. Miller*, 150 Mass. 69, 22 N. E. 434. In civil actions the court may direct cases depending on substantially the same facts to be consolidated, notwithstanding that there are different plaintiffs or different defendants, and that there may be some evidence which is not applicable to all of the cases, and may also direct one to be made a test case, and suspend the other to await its determination. *Com. v. Miller*, supra; *Bennett v. Bury*, 5 C. P. Div. 339; *Amos v. Chadwick*, 4 Ch. Div. 869, 9 Ch. Div. 459. If there is any danger that evidence admissible for one purpose, or against one or more parties, but not against others, will be perverted to another purpose, or will operate to the prejudice of another party, or that a joint trial will interfere with a full and fair presentation of their case on the part of any of the defendants, it is within the power of the court to correct this, or to sever the trials; and it is to be presumed that it will do so. In the present case the court stated "that if, at any time, it appeared that either defendant would be prejudiced by being tried with the other, at the request of counsel it would order the cases to be separated." No such request was made, either it may be inferred because nothing occurred which counsel deemed sufficient to jus-

tify them in making it, or because they preferred to rest on their exception to the order that the two cases should be tried together.

The commonwealth has produced no precedent in this state for the course that was pursued, though there are precedents elsewhere, which were referred to in *Com. v. Bickum*, supra, and were not approved, which go further than would be necessary to sustain the course that was adopted here. The reasons which led the court to order the two causes to be tried together are not before us. It is to be presumed that they were sufficient, and that the discretion of the court was properly exercised. We cannot say that the order was not, as matter of law, within its power.

It sufficiently appears, we think, that the parties in both instances are the same, and that the offense with which each is charged was committed at the same time and place.

The evidence that both defendants were each commonly called and as well known by the names in the indictments as by their true or full names was sufficient to warrant their conviction. *Com. v. Warren* (Mass.) 44 N. E. 1073; *Com. v. Trainor*, 123 Mass. 414; *Com. v. Desmarteau*, 16 Gray, 17. Exceptions overruled.

(187 Mass. 178)

COMMONWEALTH v. MATTHEWS.

(Supreme Judicial Court of Massachusetts.
Plymouth. Nov. 24, 1896.)

INTOXICATING LIQUORS—ILLEGAL SALE—PROSECUTION—VENUE.

Pub. St. c. 213, § 19, which provides that "an offence committed on the boundary line of two counties, or within one hundred rods of such line, may be alleged to have been committed, and may be prosecuted and punished, in either county," in a case where defendant is indicted for the local offense of keeping a liquor nuisance, has the effect of extending, not only the county line, but also the town line, for the purposes of allegation, prosecution, and punishment, into the county and town adjoining.

Exceptions from superior court, Plymouth county; Henry K. Braley, Judge.

Presbrey Matthews was tried and convicted under an indictment charging him with keeping and maintaining a liquor nuisance, and brings exceptions. Overruled.

Hosea Kingman, for defendant. Robert O. Harris, Dist. Atty., for the Commonwealth.

LATHROP, J. The defendant was indicted in Plymouth county for keeping and maintaining at Brockton, in that county, a common nuisance, namely, a tenement used for the illegal sale, and illegal keeping for sale, of intoxicating liquors. At the trial there was no evidence tending to show the keeping of any tenement by the defendant in Brockton, but there was evidence tending to show the keeping of a tenement by him, for the illegal purposes alleged, in Easton, in the county of Bristol, but within 100 rods of the boundary line between said counties. The defendant excepted to the admission of the evidence, and

also to the refusal of the court to instruct the jury to return a verdict of not guilty, by reason of a variance; and the case comes before us on these exceptions, the defendant having been found guilty.

The precise question presented in this case has not been decided. There is no doubt that the offense charged in the indictment is a local offense, and ordinarily the place must be proved as laid. Thus, if such offense is alleged to have been committed at a town named, and the entire tenement is shown to have been in another town, both towns being in the same county, there is a variance, and the defendant cannot be convicted. *Com. v. Heffron*, 102 Mass. 148; *Com. v. Bacon*, 103 Mass. 26; *Com. v. Hersey*, 144 Mass. 297, 11 N. E. 116. The question then arises how far is this rule affected by the provisions of the Public Statutes (chapter 213, § 19), which are as follows: "An offence committed on the boundary line of two counties, or within one hundred rods of such line, may be alleged to have been committed, and may be prosecuted and punished, in either county." In *Com. v. Gillon*, 2 Allen, 502, the defendant was convicted before the police court of Milford on a complaint which charged him with a single sale of intoxicating liquor at Milford, in the county of Worcester. On appeal it appeared that the sale was in fact made at Holliston, in the county of Middlesex, but within 100 rods of the boundary line between the two counties. It was held that the police court of Milford had jurisdiction of the offense charged, and that the complaint need not set forth, as the place of the commission of the offense, that it was on the boundary line of the counties of Worcester and Middlesex, and within 100 rods of the dividing line between them. It is to be noticed that in the case last cited the offense was not a local offense, and it was not necessary to prove that it was committed in the place named. It was only necessary to show that it was committed in some place in the county. *Com. v. Kern*, 147 Mass. 595, 18 N. E. 566; *Com. v. Ryan*, 160 Mass. 172, 35 N. E. 673. In *Com. v. Costley*, 118 Mass. 1, 25, it was said by Chief Justice Gray in regard to the General Statutes (chapter 171, § 17), in which the language is similar to that contained in the Public Statutes (chapter 213, § 19): "The manifest intent and effect of this enactment are that the boundary line between two counties, and a strip one hundred rods wide on each side of that line, may be treated, for the purposes of allegation, prosecution, and punishment, as being in either county, or, in other words, that each county, for these purposes, may be deemed to extend one hundred rods into the county adjoining." The indictment in the case last cited was for murder, and therefore the offense was not a local one. If, then, a local offense is committed within 100 rods of the boundary line between two counties, which is also the boundary line between two towns, where must the offense be alleged to have been committed? Must the

place of the offense be alleged to be on the boundary line of the two counties and of the two towns, and within 100 rods of the dividing line between them? Such a description was held to be unnecessary, as has been already stated, in *Com. v. Gillon*, ubi supra, so far as county lines are concerned, and we see no good reason for adopting this form where the offense is local. It seems to us that the better rule is to say that the statute under consideration has the effect, in a case like the one before us, of extending, not only the county line, but also the town line, "for the purposes of allegation, prosecution and punishment," into the county and town adjoining. Exceptions overruled.

(167 Mass. 199)

MURPHY v. ARMSTRONG TRANSFER CO.

(Supreme Judicial Court of Massachusetts. Suffolk. Nov. 24, 1896.)

NEGLIGENCE—ACCIDENT AT STREET CROSSING.

1. Mere failure of a pedestrian to look and listen for approaching teams as he passes a crossing at a junction of two streets is not necessarily such negligence as will prevent recovery if he is run over by a passing team.

2. Where plaintiff was crossing the street in the usual way, it is a question for the jury whether, in so crossing, he was in the exercise of due care.

Exceptions from superior court, Suffolk county; Caleb Blodgett, Judge.

Action by Mary A. Murphy against the Armstrong Transfer Company for personal injuries, caused by the negligence of defendant's driver. There was a verdict in favor of plaintiff, and defendant excepts. Exceptions overruled.

Hanny F. Napfen and William J. Miller, for plaintiff. M. F. Dickinson, Jr., and Moses Holbrook, for defendant.

KNOWLTON, J. In this case the evidence of negligence on the part of the defendant's driver is inconsiderable, and the evidence of due care on the part of the plaintiff is still less. From the printed report of the evidence in the bill of exceptions, it seems probable that the negligence of the plaintiff contributed more largely to the accident than negligence of the defendant's servant; but we cannot say, as a matter of law, that there was no evidence that the driver was negligent. He testified that he did not see the plaintiff until the collision occurred. He was driving a hack drawn by two horses, at a slow trot, at a little after 6 o'clock in the evening of October 4, 1893, southward, along Hudson street, in Boston, across Harvard street. He testified that the lanterns on his hack were lighted, and there was evidence tending to show that there were lights in grocery stores on both corners of Hudson and Harvard streets, on the northerly side of Harvard street. The plaintiff was crossing Hudson street on the crosswalk on the south-

erly side of Harvard street. The evidence tended to show that there was no other team in the vicinity, and the jury might have found that he was negligent in not looking before him before he crossed Harvard street, so carefully as to discover the plaintiff before his horses struck her. The plaintiff testified that she was going westward, along the southerly side of Harvard street, in the usual way, looking before her; and that, when she got a little more than one-half way across Hudson street, she was struck, and thrown down on the crossing, and, when she recovered her consciousness, she was under the feet of the horses, on the right-hand side,—that is, on the westerly side of the pole. There was evidence tending to show that she was mistaken in regard to the place where she found herself, in her account of the collision; but whether she was or not was a question of fact for the jury. If they believed her testimony, it indicated that she had passed beyond the center of the line of travel of the team before the collision, and that the horse at the right of the driver ran against her.

It has repeatedly been held that the mere failure of a pedestrian to look and listen for approaching teams as he passes over a crosswalk at the junction of two streets is not necessarily such negligence as will prevent recovery if he is run over by a passing team. *Shapleigh v. Wyman*, 134 Mass. 118; *Purtell v. Jordan*, 156 Mass. 573-577, 31 N. E. 652; *Benjamin v. Railway Co.*, 160 Mass. 3, 35 N. E. 95. If it appears that a plaintiff was walking along in the usual way, where persons are accustomed to walk, it is ordinarily a question of fact for the jury whether, in so walking at the time of the accident, he was in the exercise of due care. *Purtell v. Jordan*, ubi supra; *Williams v. Grealy*, 112 Mass. 79; *Bowser v. Wellington*, 126 Mass. 391; *Rand v. Syms*, 162 Mass. 193, 38 N. E. 196; *Robbins v. Railway Co.*, 165 Mass. 32, 42 N. E. 334. We are of opinion that in the present case there was evidence proper for the consideration of the jury in support of the proposition that the plaintiff was in the exercise of due care. Exceptions overruled.

(146 Ind. 235)

ROGERS et al. v. EICH.

(Supreme Court of Indiana. Nov. 13, 1896.)

DEED—DELIVERY—APPEAL—RECORD.

1. A parol agreement to convey land, followed by the execution of a deed which is never delivered, vests no title in the grantee.

2. The evidence is not properly in the record unless it affirmatively appears that the long-hand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions.

Appeal from circuit court, Rush county; John D. Miller, Judge.

Action by Hubert Eich against Patrick Rogers and others to foreclose mortgages. From a judgment for plaintiff, defendants appeal. Affirmed.

Ewing & Wilson, for appellants. Bonner, Lockett & Bennett, for appellee.

JORDAN, J. Appellee commenced this action to foreclose certain mortgages executed by the appellants upon the real estate therein described. Appellant Patrick Rogers filed his answer in four paragraphs, the first being a general denial. The second averred payment, and the third alleged that the defendant had sold and conveyed to the plaintiff the mortgaged premises for the sum of \$4,250, which amount it was alleged was due and unpaid; and he sought to set off this amount against plaintiff's demand, and prayed judgment over for the remainder due. The fourth paragraph was by the way of cross complaint, and it averred a sale and conveyance of the mortgaged realty by the defendant Rogers to the plaintiff for the agreed price of \$4,250, which it alleged he had failed to pay, and a vendor's lien was sought to be enforced against the land for the said purchase money. A trial resulted in a special finding of facts and conclusions of law in favor of appellee, upon which he was awarded a judgment foreclosing the mortgages in controversy. After finding the facts necessary to entitle appellee to recover upon his notes and mortgages in suit, the special finding proceeds as follows: "(3) That on or about the 18th day of October, 1894, said Patrick Rogers proposed to the plaintiff to sell him the real estate above described for the sum of \$4,250; the land to be taken subject to the taxes on the same for the last half of 1894; possession to be given October 1, 1895; grantors to have the right to remove crops raised and matured on the land during the year 1895, but the grantee to have the right to sow small grain on the farm in the fall of 1895. The notes held by plaintiff against said Patrick Rogers, including a note for \$60, dated May 31, 1892, 7 per cent. interest, to be taken at their amounts in cash by said plaintiff. That said proposition was accepted by plaintiff, but that no writing or memorandum was made or signed by either of the parties embodying the terms of said contract, but that the same rested wholly in parol. That afterwards, on said day, a deed of conveyance embodying the terms of said contract was drawn, signed, and acknowledged by said Patrick Rogers and Annie Rogers, his wife. That, at the time of the pending of said negotiations for the sale of the land, there was a misunderstanding and disagreement between the parties as to the amounts due on said notes sued on in this action, amounting to the sum of \$560, of which disagreement the plaintiff had at the time no knowledge. (4) That the said deed of Patrick Rogers was never delivered."

The theory of both the third and fourth paragraphs of the answer, under which appellant Patrick Rogers sought to secure affirmative relief, was that prior to the commencement of the action there had been a sale and conveyance by deed of the lands embraced in the

mortgages mentioned in the complaint, by him to the appellee, and that the title to the real estate in dispute had been, by means of this deed of conveyance, vested in the latter. The burden rested upon appellant to establish these essential facts before he was entitled to a recovery under either of the aforesaid mentioned paragraphs of his answer. The special finding discloses that on October 18, 1894, a proposition was made to sell the real estate to appellee for \$4,250, which proposition was accepted by the latter; that the said proposition to sell the land upon the part of appellant, and the acceptance thereof upon appellee's part, "rested wholly in parol"; that subsequently to said date a deed of conveyance embracing the terms of the contract was signed by the appellants, but never delivered. Under the issues, it is evident that these facts would not warrant a conclusion of law in favor of appellants. A delivery of a deed is essential to complete its execution, and, in the absence of a delivery, it has no valid existence as a deed of conveyance, and therefore does not serve to vest title in the grantee. *Freeland v. Charnley*, 80 Ind. 132; *Anderson v. Anderson*, 128 Ind. 62, 24 N. E. 1036. As the finding discloses that the alleged agreement to sell and convey the realty was not carried into effect by the execution of a deed conveying the title to appellee, it is manifest, we think, that under the issues there could be no recovery of the alleged purchase price. The court did not err in its conclusions of law.

The evidence introduced upon the trial was taken down by an official reporter, and it is sought to have the original longhand manuscript certified to this court. It does not affirmatively appear that the longhand manuscript was first filed in the office of the clerk before it was incorporated into the bill of exceptions; and under the holding of this court in *Carlson v. State*, 44 N. E. 660, and in *Manley v. Feity*, 45 N. E. 74, at this term, the evidence cannot be considered as properly in the record. But, disregarding this question, we have read and considered the evidence, and are of the opinion that it sustains the finding of the court, and that it would not have authorized a finding of facts in favor of the appellants' right of recovery. Judgment affirmed.

(147 Ind. 308)

BAUGHER v. WOOLLEN et al.¹

(Supreme Court of Indiana. Nov. 10, 1896.)

MORTGAGES — FORECLOSURE — NOTICE — NAME OF SECOND MORTGAGEE — LACHES.

1. Notice by publication of foreclosure of first mortgage given to second mortgagee "Baugher" under the name of "Banger" is sufficient, his name appearing nowhere in the mortgage record correctly spelled, but in the caption therein and in the index being "Banger," and in the mortgage as recorded being "Bauger" or "Banger," and the name of the payee of the note as given in the recorded mortgage being "Baugher" or "Bungher"; *Rev. St. 1894, § 1108 (Rev. St. 1881, § 1094)*, providing that in a suit to foreclose a mortgage it shall be sufficient to make

¹ Rehearing denied.

"the mortgagee, or the assignee shown by the record" to hold an interest therein, a defendant.

2. As against innocent purchasers at first mortgage sale, it is too late for a second mortgagee, 5 years after the sale and 15 years after taking of his mortgage, to seek for relief by correction of the record of the second mortgage, which gives his name incorrectly.

Appeal from superior court, Marion county; J. W. Harper, Judge.

Action by Henry L. Baugher against Greenly V. Woollen and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Knefler & Berryhill, for appellant. Woollen & Woollen and Ewbank & Watson, for appellees.

HOWARD, J. This action was brought by the appellant to foreclose a mortgage upon certain real estate, and to redeem from a sale of such real estate on foreclosure of a prior mortgage. The appellee Greenly V. Woollen claims title to the land under the sale so made on foreclosure of the first mortgage. The other appellees make no claim to any interest in the controversy. Greenly V. Woollen filed his answer to the complaint, and also filed a cross complaint, setting up his title under such former foreclosure proceedings, and asking to have his title quieted. The court made a special finding of the facts in the case, finding for the appellee Woollen, substantially as the facts are alleged in his cross complaint.

The appellant contends that the court erred in overruling his demurrer to the answer, and also in its conclusions of law on the facts found. There is, in reality, but one question made in these two contentions, namely, whether due notice by publication was given to appellant in the foreclosure proceedings through which appellee claims title. The facts from which this question may be answered are stated most strongly for appellant in the special findings of the court. On June 15, 1876, one of the remote grantors of the appellee Woollen obtained a first mortgage on the land in controversy, and on November 20, 1876, the appellant, a non-resident, was given a second mortgage on the same land. On January 17, 1878, the holder of the first mortgage brought suit to foreclose the same, making Henry L. Banger and others defendants thereto, and giving due notice by publication to the said Banger as nonresident holder of the second mortgage. Judgment was rendered against the said Banger on default. The appellant's correct name is Henry L. Baugher, and the question for decision is whether, under the facts found, the notice to him under the name of Henry L. Banger was sufficient. The appellee Woollen, before purchasing the land, and his remote grantor before bringing the original foreclosure suit, made diligent examination of the county records by careful and skilled attorneys, who found that the name of the holder of the second mortgage, as there recorded, was Henry L. Banger. In its third special finding of facts in this case the court finds: "That the deputy recorder who spread

said [second] mortgage upon said mortgage record read the mortgagee's name in the original mortgage as Henry L. Banger, and so intended to record it; that the caption to said mortgage in said mortgage record reads, 'Eli H. Weiland to Henry L. Banger'; that, as recorded, the name of the mortgagee in said mortgage could be read either as Henry L. Bauger or as Henry L. Banger, and that the name of the payee of the note described in said mortgage as recorded was so written as to be read Henry L. Buagher or Henry L. Bungher; that said mortgage was indexed in said mortgage as 'Eli Weiland to Henry L. Banger.'" Appellant's correct name does not appear anywhere in the record, and the court finds that "the defendant Greenly V. Woollen had no actual knowledge of any claims of the plaintiff [appellant here] to or upon the said real estate until the beginning of this suit." No want of care is shown on appellees' part. See 1 Jones, *Mortg.* (4th Ed.) § 592. Section 1108, Rev. St. 1894 (section 1094, Rev. St. 1881), in force at the date of bringing the action to foreclose the first mortgage, provides that in a suit to foreclose a mortgage "it shall be sufficient to make the mortgagee, or the assignee shown by said record to hold an interest therein, defendants." The cases in this court cited to show that when a mortgage is given to secure notes held by different persons the holders of the several notes should be made parties to the foreclosure proceedings, were all cases decided before the enactment of the foregoing statute, and must be understood as modified thereby. It is still true that the assignment of a note secured by mortgage operates pro tanto as an assignment of the mortgage itself. *Parkhurst v. Steam-Engine Co.*, 107 Ind. 594, 8 N. E. 635. But, in order that the holder of a note so assigned should be protected in his lien against a good-faith mortgagee or an innocent purchaser of the mortgaged premises, it is necessary that such assignment should be placed upon record, as provided by the statute. *Insurance Co. v. Talbot*, 113 Ind. 373, 14 N. E. 586. The record, therefore, showing no assignment of the note secured by the second mortgage, the assumption must be that the note was owned by the mortgagee himself. He took in his own name, as the record shows, a mortgage to secure the note. The note might have been originally given to some one else, and transferred to the mortgagee; or it might have been originally given to the mortgagee himself, and his name incorrectly copied in the description of the note. However that may be, there is nothing in the record to show that the note ever belonged to any one but the mortgagee. There being no assignee shown, it was, therefore, sufficient, in the words of the statute, to make the mortgagee defendant in the suit to foreclose the mortgage. In any event, we are unable to see how the appellant can complain of the fact that he was made a defendant under the name of Banger, instead of Bauger, Buagher, or Bungher. It is not pretended that one of these forms is any more his correct name than another. If, indeed, the appellant's correct

name were one of the forms found in the record of the mortgage, then it may be that the plaintiff in the first foreclosure suit would have acted at his peril in omitting to notify appellant by his correct name as so entered on the mortgage record. But what difference it could make to appellant whether he was notified under one incorrect name rather than another, we fail to understand. The notice was given to him by the name which appeared in the record; that which stood at the head of the page in the title and in the index, which the recorder intended to copy, and did copy, as the true name of the mortgagee. If that name was incorrect, appellant himself was to blame. Appellees' remote grantor, in bringing the suit, had a right to rely upon the record in the recorder's office; and that record showed the mortgagee's name to be Henry L. Banger, the name by which he was notified of the action against him.

We think also that appellant is shown to have been guilty of inexcusable laches in not sooner discovering and correcting the error in the recording of his name. The court finds that he held the mortgage off the record, with his name incorrectly spelled, for the period of 54 days, and then filed it without change. It is further found that the note secured by the mortgage was executed January 1, 1876; that the interest for the first three-quarters of that year only had been paid before the giving of the mortgage, and nothing has since been paid; that from the date of the mortgage, November 20, 1876, until the bringing of this suit, October 27, 1891, the appellant did nothing to correct his mortgage record, and made no effort to collect principal or interest of his debt. Indeed, from the facts shown, it would seem that he had utterly abandoned, if not quite forgotten, both mortgage and debt for the whole period of 15 years. It might perhaps be proper, with due explanation, even after so long a delay as 15 years, to ask for a reformation of the mortgage, provided only the original parties remained, and the rights of innocent third persons had not intervened. But when we remember that the lands here had long since passed into the hands of those who purchased in good faith, after first making careful examination of the public records left by appellant himself, and who have made valuable improvements upon the lands, it is very clear that the appellant can have no standing here, as he had none in the court below. Judgment affirmed.

(146 Ind. 202)

TERRE HAUTE & I. R. CO. v. BECKER.

(Supreme Court of Indiana. Nov. 10, 1896.)

RAILROAD COLLISION—INJURY TO EMPLOYE—NEGLIGENCE.

In case of death of an employé on a regular train, running on time, caused by collision with a train "working wild," the company is not negligent in failing to notify the regular train of the wild train, or to have a rule requiring such notice; all trainmen being furnished with time cards of regular trains, on which is a

rule requiring wild trains to keep out of the way, and off the time, of regular trains.

Appeal from circuit court, Cass county; D. B. McConnell, Judge.

Action by Mary A. Becker, administratrix, against the Terre Haute & Indianapolis Railroad Company. Judgment for plaintiff. Defendant appeals. Reversed.

McConnell & Jenkines and Bayless & Guenther, for appellant. Chase & Fickle, for appellee.

JORDAN, J. Mary A. Becker, as the administratrix of her deceased husband, Martin Becker, sued appellant to recover damages on account of its alleged wrongful act, which resulted in the death of the decedent while in the service of appellant, serving as a fireman upon one of its freight trains. There was a special verdict returned by the jury, and upon it the court rendered judgment in favor of appellant upon the second paragraph of the complaint, and in favor of appellee upon the third paragraph, for \$6,000, the sum awarded by the jury. This latter paragraph, after setting out the character and surroundings of appellant's railroad, especially that part of it lying between Crawfordsville Junction and Rockville, and after further averring that its road was "a single-track railroad," and operated by "telegraph orders" from the company's main office, at the city of Terre Haute, and that the death of Martin Becker was occasioned by the train upon which he was firing colliding with a certain train, which on the day of the fatal accident had been, by appellant's train dispatcher, ordered to "work wild," etc., then apparently proceeds upon the theory that said accident was due to the neglect of the appellant to notify decedent, and those in charge of the train upon which he was at the time at work, of the "whereabouts" of the train which had been ordered to "work wild." The sufficiency of the paragraph upon which the special verdict is founded is assailed, but, as the questions involved are better presented under the special verdict, we may address our consideration to it, without directly passing upon the sufficiency of the paragraph in controversy. Omitting the facts found by the jury which are not essential to the determination of the principal legal propositions at issue in this appeal, we may properly set out the remainder of the special verdict, which is as follows:

"(2) That said railroad, between said cities of Terre Haute and Logansport, on and before said date consisted of but one main track, with switches and side tracks at intervening stations, and was a single-track railroad, having a line of telegraph along said main track from said city of Terre Haute to said city of Logansport, and had telegraph offices at all the principal stations on said railroad, including the stations of Judson and Waveland, but had none at Dooley, with the principal telegraph office in the city of Terre Haute, at which point the chief train

dispatcher for said defendant had his headquarters and offices, and from which point said defendant controlled the movements of its trains on said railroad by orders through the use of its said lines of telegraph.

"(3) That on and before said 10th day of December, 1889, the defendant was operating and running four regular trains, two of which were passenger and two were freight, daily, south bound, and four regular trains, two of which were passenger and two were freight, daily, north bound, over said railroad between the said cities of Terre Haute and Logansport. The times of the departure and arrival of said trains at the different stations on said railroad were fixed by said defendant, and printed in printed time-tables, and issued to all its servants engaged then and there in operating and running said trains. That on the backs of said time-tables were printed rules made by said defendant for the direction and government of all its servants engaged in running and operating said trains, all of which rules were in force on and before said 10th day of December, 1889. That by said rules of the defendant it was the duty of conductors and enginemen of all work and wild trains to keep their trains out of the way, and off the time, of all regular passenger and freight trains of the defendant, and in no case to occupy the main track within ten minutes of the time of any regular train. That said rule 61 on said time-table was as follows, to wit: 'All work and wild trains will keep out of the way, and off the time, of all regular passenger and freight trains, and in no case occupy the main track within ten minutes of the time of any regular train.' That, by the said rules of the defendant, it was the duty of conductors of all wood and work trains of defendant at the close of each day to report to the dispatching office of said defendant, by telegraph, the limits of the main track they intend to occupy the following day with their trains, and to never exceed the limits specified, without special telegraph or written authority. That rule 82 on said time-table was as follows, to wit: 'Conductors of all wood and work trains must, at the close of each day, report to the dispatching office, by telegraph, the limits of the main track they intend to occupy the following day, and must never exceed the limits specified, without special telegraph or written authority.' That, by the said rules of the defendant, enginemen were held accountable for the speed of their trains, and the due observance of signals ahead, and were equally responsible with the conductors of their trains for keeping off the time of other trains. That rule 101 on said time-table was as follows, to wit: 'The enginemen will be held accountable for the speed of the train, and due observance of signals ahead, and will be equally responsible with the conductor for keeping off the time of other trains.' That, by the rules of the defendant, telegraph orders from the dispatching office of the defendant to its con-

ductors and enginemen were to be sent by defendant's train dispatchers personally; and said train dispatchers, in giving and sending such orders in the line of duty, represented the superintendent of the defendant, and had authority to act and direct the conductors and enginemen of the defendant in respect to the movements of trains under their care and control. That rule 118 on said time-table was as follows, to wit: 'Train dispatchers shall themselves send all messages involving the movements of the trains, and must not permit another person to do it for them.' That rule on said time-table, No. 119, was as follows, to wit: 'All special orders by telegraph for the movements of trains will be numbered consecutively, commencing with No. 1 on the first day of each month, and must be sent to all trains named in the order, at the same time addressed to the conductors of the trains for which they are intended, and signed by the train dispatchers, who, in the line of their duty, represent the superintendent.' That, by the said rules of the defendant, all trains were to be run under the direction of the conductors, except when their directions conflicted with the defendant's rules, or involved risk or hazard, in which case the enginemen were declared to be equally responsible with the conductors. That rule 80 on said time-table was as follows, to wit: 'All trains must run under the direction of the conductor, except when his directions conflict with these rules, or involve risk or hazard, in which case the enginemen will be held equally responsible with the conductor. Conductors will be held responsible for the safe management of their trains, and for the proper behavior and performance of duty by their trainmen. They must not allow any person to ride in the baggage, mail, or express cars, whether connected with the road or not, except those whose duties require them to be there.'

"(4) That on and before the 10th day of December, 1889, the stations of defendant's railroad, going north from the station of Rockville, were situated in the following order and distance north from said Rockville, to wit: Sand Creek, four and two-tenths miles; Judson, seven and six-tenths miles; Dooley, eleven and two-tenths miles; Waveland, fourteen and seven-tenths miles. That Crawfordsville Junction was twenty-nine miles and five-tenths north of said Rockville.

"(5) That on and before the said 10th day of December, 1889, the main track of said defendant railroad between the stations of Crawfordsville Junction and Rockville was crooked, and full of short and sharp curves, and between the stations of Waveland and Judson the said main track followed the general course and crooked windings of Little Raccoon creek for a distance of about eight miles, and was full of short curves, where the approach of trains in either direction on said track was hidden from the view of defendant's servants on trains coming from the opposite direction by bluffs, hills, woods, and brush; and between

the stations of Waveland and Dooley, and for the distance of four miles on said track, there were six or seven short and sharp curves in said track, and also a reverse curve of very short radii, with high banks of earth and trees on the side of said track, and particularly dangerous to servants of said defendant running and operating its trains of cars thereon, by reason of their inability to see trains approaching from the opposite direction, on account of said curves, banks of earth, trees, and brush, in time to prevent collisions and accidents to said trains and to themselves.

"(6) That on and before the said 10th day of December, 1889, the plaintiff's decedent, Martin Becker, was a servant of the defendant, and then and there employed and engaged in the service of the defendant as a fireman on defendant's locomotive engine No. 117, which engine on said date, and at the time of the collision hereinafter found, was attached to and hauling one of the defendant's regular freight trains, known as 'Local No. 60,' and north bound, and was then and there between the stations of Dooley and Waveland, on the defendant's main track, and then and there on time, according to the time-tables and rules of the defendant, and having then and there the right of way and track against all wood, work, and wild trains of the defendant, and running then and there at a speed not exceeding 20 miles per hour, in accordance with the rules of the defendant. The said engine No. 117, upon which the plaintiff's decedent, Martin Becker, was then and there engaged in his duties as fireman aforesaid, was run into and collided with another of defendant's engines, to wit, No. 111, which was then and there attached to, and engaged in hauling, a work and wild train of the defendant south bound, and on defendant's main track; and the plaintiff's decedent, Martin Becker, was then and there, by means of said collision, crushed and injured by and between said colliding engines and their tenders, and then and thereby instantly killed. That said Martin Becker did not in any way contribute to his said injuries or death, nor did he see said colliding engine No. 111 in time to save his life, nor was he guilty of any negligence in causing or occasioning the said collision wherein he lost his life as aforesaid, and was at the time of his death in the performance of his duties as fireman aforesaid; and the plaintiff was not guilty of any negligence, nor did she contribute in any way in causing the injuries or death of said Martin Becker, her decedent.

"(7) That on said 10th day of December, 1889, the said local (or No. 60) train was in charge of one James H. Hardesty, as conductor, and said engine No. 117, upon which said Martin Becker was fireman, was in charge of one William Widgeon, as engineman, and that both of said persons were servants of the defendant at the time said local (No. 60) train left its terminal point, to wit, Terre Haute, and also at the time said Becker was killed. That said local train left Terre Haute, north bound,

at 4 o'clock a. m. on said date, on time, and arrived at said station at 7:55 a. m., and on time, on said date, going north. That defendant had then and there at said station of Judson a telegraph office, and telegraph line in order, and an operator. That said local train stopped at said station of Judson on its arrival there, and the said conductor, Hardesty, reported for orders to the defendant's telegrapher at said station, but received none concerning the said work or wild train, or its whereabouts, whatever.

"(8) The said conductor, Hardesty, and said engineman, Widgeon, and said decedent, Martin Becker, were ignorant of the whereabouts of said work or wild train on said 10th day of December, 1889, and previous to the time of said collision, and that said defendant had not given them or either of them any information or notice whatever thereof, and that they nor either of them had any information or knowledge of the fact that said work train was on said date working wild on said main track, between the stations of Crawfordsville Junction and Rockville, on said date.

"(9) That on said 10th day of December, 1889, the defendant's said engine No. 111, which collided with said engine No. 117, was in charge of Edward J. Tritt, as engineman, and the said work or wild train to which the said engine No. 111 was attached to and engaged in hauling at the time of the collision hereinbefore found was in charge of Frank L. Campbell, as conductor, and that both of said persons were then and there servants in the service of the defendant.

"(10) That on the 10th day of December, 1889, and before the collision hereinbefore found, the said Frank L. Campbell, as the conductor of the defendant's work or wild train aforesaid, at Crawfordsville Junction, a station on said defendant's railroad, received telegraphic orders from the train dispatching office at Terre Haute, signed by the train dispatcher of said defendant, in respect to the movement of said work or wild train for said 10th day of December, 1889, wherein and whereby the said conductor was ordered and directed 'to work wild to-day between Crawfordsville Junction and Rockville,' and was so working wild with his said train at the time of said collision, and running at the rate of 20 miles per hour with his said train.

"(11) That it was the duty of said Conductor Campbell and Engineman Tritt, on said 10th day of December, 1889, to slide-track the said work train of the defendant then and there in their charge at the said station of Waveland, and then and there await the arrival and passage at said point of said local No. 60, going north, before pulling out with the said work train going south on the main track of said defendant's railroad.

"(12) That said local No. 60 was due at the station of Dooley at 8:27 a. m., and at the station of Waveland at 8:52 a. m., on said 10th day of December, 1889, and was on time at said station of Dooley. That notwithstanding

said facts, and their duty in that regard, the said conductor, Campbell, and said engineman, Tritt, recklessly, carelessly, and negligently pulled out from the station of Waveland on said date with the said work train on the main track of defendant's railroad, south bound, and before the arrival of said local, or No. 60, and on the time of said local, without taking any precaution to prevent a collision with the said local No. 60, north bound, as aforesaid, and ran said engine No. 111 at a speed of 20 miles per hour, and collided with the said engine No. 117 at and on the reverse curve on said main track between said stations of Waveland and Dooley, on said 10th day of December, 1889, at 8:40 a. m. of said day, and then and there and thereby, by means of said collision, instantly killed the plaintiff's decedent, Martin Becker, who was then and there engaged in his duties as fireman on said engine No. 117, and not in any way at fault in respect to said collision.

"(13) That the defendant, in failing to notify the decedent, Martin Becker, the conductor, Hardesty, and engineman, Widgeon, in charge, respectively, of said local (or No. 60) train, and engine No. 117, hauling said train, on said 10th day of December, 1889, at or before said train and engine arrived at the said station of Judson, on defendant's said railroad, and before the said collision, of the whereabouts of said work train and engine No. 111, hauling the same on said date, caused the collision aforesaid, and the death of said Martin Becker, and was guilty of negligence in failing to notify said Becker, Hardesty, and Widgeon of the whereabouts of said train and engine No. 111 on said day, before said collision.

"(14) That it was the duty of the defendant, considering the many short curves and reverse curves of its main track, and the inability of its servants operating its trains to see approaching trains coming from the opposite direction thereon, on account of the many short curves and reverse curves on its main track, and the bluffs, banks of earth, hills, trees, and brush on the side of the main track, existing between said stations of Crawfordsville Junction and Rockville on and before said 10th day of December, 1889, to have notified the servants of said defendant then and there in charge of said local (or No. 60) train, and said engine No. 117 hauling the same, including the decedent, Martin Becker, of the order given by said defendant's train dispatcher to said conductor, Campbell, in charge of said work or wild train on said 10th day of December, 1889, to work wild on that day with his said train between said stations of Crawfordsville Junction and Rockville.

"(15) That the defendant for more than one year prior to the said 10th day of December, 1889, had knowledge of the many short and sharp curves and reverse curves on its main track, and of the inability of its servants to see approaching trains coming from an opposite direction on said main track, on account of said curves and reverse curves, high banks of

earth, hills, trees, and brush on the side of said track, and existing between said stations of Crawfordsville Junction and Rockville, and of the danger to its servants operating its trains from collision with wild trains at or near reverse curves between said stations, and negligently failed to make any rule requiring its train dispatcher to notify regular train crews that wood or work trains were working wild between said stations in time to prevent collisions or accidents at or near said reverse curves, as it was in duty bound to do for the protection of its servants operating its trains between said stations."

It will be seen that, among others, the following facts are disclosed by the special verdict: That appellant's road was a single-track railroad, leading from Logansport to Terre Haute, consisting of a main track, with switches and side tracks, and had a line of telegraph along its entire road. That on and before December 10, 1889 (being the day on which the fatal collision occurred), the company was operating and running daily, south bound, over its road, four regular trains,—two passenger and two freight,—and also a like number running north. The time of the arrival and departure of each of these trains at the respective stations along the road was fixed by the appellant, and printed in time-schedules or time-tables, and these were issued and delivered to all of its servants then engaged in operating said trains. On the inverse sides of these time-tables were printed rules adopted by appellant for the direction and government of all of its servants engaged in operating trains. That under these rules conductors and enginemen of all work and wild trains were required to keep the same out of the way, and off of the time, of all regular passenger and freight trains, and in no case to occupy the main track of the road within 10 minutes of the time of any regular train. That by these rules the enginemen and conductors were equally responsible for keeping off of the time of other trains. On said 10th day of December, appellee's decedent was in the service of appellant as a fireman on engine No. 117, which on that day was attached to and hauling a regular freight train, known as "Local No. 60," which was on said day north bound, and at the time of the collision was running on time between the stations of Dooley and Waveland, and was entitled to the right of way, as against all work and wild trains. That on said date, and before the accident in question, the appellant, through its train dispatcher (the latter, under the rules, in giving and sending orders in the line of duty represented the superintendent of the company), sent an order to the conductor in charge of the work train which was being drawn by engine No. 111 to work wild with his train on that day between Crawfordsville Junction and Rockville. That the conductor and engineman of said work train were the servants of appellant. That local No. 60 was due at the station of Dooley at

8:27 a. m., and at Waveland at 8:52 a. m. That it was the duty of Conductor Campbell and Engineman Tritt, in charge of said work train, to have side-tracked their train at Waveland, and there remained until the arrival and passage of No. 60, upon which Becker was fireman, but, disregarding their duty in this respect, these servants of appellant "carelessly" and "negligently" pulled out from the station at Waveland on the main track, and started south before the arrival at this station of No. 60, "and on its time," without taking any precaution to prevent a collision with No. 60; and, while running between said stations of Dooley and Waveland at a speed of 20 miles per hour, said work train met and collided with the north-bound local No. 60, on the reverse curve of the track, at 8:40 a. m. on said 10th day, and thereby killed said Martin Becker. That previous to this collision the appellant gave no notice to the deceased, nor to its servants in charge of said local No. 60, of the whereabouts of this work train on that morning, and that neither he nor they had any knowledge that said train on that day was working wild between Crawfordville Junction and Rockville. The principal insistence of counsel for appellee in answer to the contention of counsel for appellant is that, under all the circumstances, negligence resulting in the death of the deceased servant must be imputed to the appellant, for the following reasons: First. In ordering the work train to work wild between Crawfordville Junction and Rockville, over a part of its road which they insist, under the facts, is shown to be dangerous; second, failure to notify Becker and the servants in charge of the train upon which he was at work of the whereabouts of the wild train on the morning in question, previous to the accident; third, failure to adopt a rule requiring notice to be given to its regular trains of the whereabouts of wild trains. These facts, in connection with the negligence of the employees in charge of the work train, they contend, constitute the proximate cause of the fatal collision. It may be conceded, under certain circumstances, that a railroad company would be guilty of actionable negligence in ordering a train to work wild, in the absence of notice to its servants along its line of the fact, in the event the injury or death of one of the latter was due to the failure, in whole or in part, to give such notice. But in the case at bar, under the facts and circumstances as they are shown, we are of the opinion that it cannot be affirmed, as a legal proposition, that the death of appellee's decedent was due to, or resulted from, any negligence of the appellant. The reasons for this conclusion, we think, are obvious. The time at which all of the regular passenger or freight trains on appellant's road were due to arrive at and depart from each station had been fixed and published in printed schedules or time-tables, and these had been delivered to all of its servants engaged in operating its trains. It had also adopted,

and caused to be printed and delivered to such servants, a series of rules and regulations for their guidance and control in conducting and running trains under their charge. One of these rules expressly required of and enjoined upon conductors, or others of its employees in the charge of work and wild trains, the duty to keep such trains out of the way of all regular passenger and freight trains, and under no event were they to occupy the main track within 10 minutes of the time of any regular train, etc. On the morning of the accident in question the jury find, in effect, that the conductor and engineman in charge of the work train which had been ordered to work wild disregarded, or rather neglected to discharge, their required duty, in failing to side-track their train at Waveland, and there remain until the arrival and departure from said station of the local freight upon which Becker at the time was serving as fireman; that, notwithstanding their duty in that respect, they "recklessly," "carelessly," and negligently left said station with their train before the arrival of local No. 60, and on the time of the latter, without taking any precaution to prevent the collision whereby Becker was killed.

The conclusion that the death of appellee's decedent was wholly due to the negligence of the conductor and engineman in control of the work train, in leaving with their train the station as they did, before the arrival of No. 60, and in running on its time, cannot be successfully controverted, and is the only reasonable and legitimate conclusion that can be deducted from the facts in the case. Appellee admits that the employees in charge of this work train were the fellow servants of the deceased. Hence, under a well-settled rule, there can be no recovery, as against appellant, on account of his death; resulting, as it did, under the facts, from their negligence. It clearly appears, we think, from the finding of the jury, that the death of the servant in question must be attributed solely to the negligence of his fellow servants, and, under the facts, this precludes a recovery. It cannot be said that ordering the train in question to work wild, under the circumstances, was an act of negligence; and when, in this connection, we consider the rules of appellant relative to the duty required of those in the control of wild trains, the law will not authorize us in holding that, in addition to these, it was also incumbent upon the company to notify Becker and the other servants in control of his train of the fact that the train in controversy was working wild, and at what point on the road it was, previous to the collision. This duty, under the facts, was not required of the appellant, and its omission to give the notice cannot be said to render it guilty of negligence. It had the right to presume that its servants in charge of the work train would discharge their duty as provided by the rules, and would keep out of the way of all regular trains, and not run upon the time of any of the latter. Neither does it appear that, if such a notice

had been given, the fatal accident would have been avoided. Those in charge of the local freight were not required by the rules to look out for the wild train, but the employes in charge of the latter were expressly required to keep out of the way, and off of the time, of the former. Hence, under the circumstances, we fail to recognize what purpose, if any, the notice for which appellee contends would have served. Having adopted and promulgated these rules and time schedules, appellant, when it gave the order to work wild, had the right to presume that they would be obeyed by its servants in control of the work train. In *Rose v. Railroad Co.*, 53 N. Y. 217, it is said: "It may be conceded that it is the duty of a railroad corporation to prescribe, either by means of time-tables, or by other suitable modes, regulations for running their trains with a view to safety; but it is obvious that obedience to these regulations must be intrusted to the employes having charge of the trains. Such obedience is a matter of executive detail, which, in the nature of things, no corporation, or any general agent of a corporation, can personally oversee, and as to which employes must be relied upon." While it is the duty of the master, engaged in such complex business as operating a railroad, to adopt and enforce definite and suitable rules or regulations for the protection of his servants, when, however, this duty has been discharged, he is exempt from liability for injuries resulting from a violation of the rules by an employe, when the injury is the direct or proximate cause of such violation. 3 Wood, R. R. § 382; *Patt. Ry. Acc. Law*, § 296; *Bailey, Mast. Liab.* p. 72; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212, 12 N. E. 380; *Railway Co. v. Lang*, 118 Ind. 579, 21 N. E. 317; *Railroad Co. v. Tohill*, 143 Ind. 49, 41 N. E. 709, and 42 N. E. 352. We are of the opinion that in the adoption and promulgation of the time schedules, and the rules and regulations in respect to irregular trains upon its road, appellant exercised ordinary care and diligence to secure the safety of its employes engaged in operating its regularly scheduled trains, and protection from any supposed danger that might be reasonably due to the operation upon its road of irregular trains. Consequently, it was not bound to notify servants on its regular trains to be prepared for such irregular trains as the one in controversy. Under the circumstances in this case, the peril which the decedent was subjected to by reason of such irregular trains was a risk incident to the service which he had entered, and one which he assumed under his contract of employment. We do not consider that the fifth finding of the jury, relative to the curves in appellant's road between Waveland and Dooley, and its surroundings, under the circumstances, can serve to exert any influence over the question of appellant's negligence. In *Tuttle v. Railway Co.*, 122 U. S. 189, 7 Sup. Ct. 1166, it is said: "The interest of railroad companies themselves is so strongly in favor of easy

curves, as a means of facilitating the movement of their cars, that it may well be left to the discretion of their officers and engineers in what manner to construct them for the proper transaction of their business in yards, etc. It must be a very extraordinary case, indeed, in which their discretion in this matter should be interfered with, in determining their obligations to their employes. The brakemen and others employed to work in such situations must decide for themselves whether they will encounter the hazards incidental thereto, and, if they decide to do so, they must be content to assume the risks." The thirteenth and fourteenth findings may properly be considered as being of the character of legal conclusions, and hence can serve no purpose in a special verdict, and must therefore be disregarded. 2 Elliott, Gen. Prac. § 931, and authorities there cited. The fifteenth finding is not within the issue of the third paragraph of the complaint. No reasons are urged in support of the cross errors assigned by appellee. Hence they must be deemed as waived. The court erred in awarding judgment upon the special verdict in favor of appellee, for which error the judgment is reversed, and the cause is remanded with instructions to the lower court to render its judgment upon the special verdict in favor of appellant.

(146 Ind. 227)

GINGRICH et al. v. GINGRICH.

(Supreme Court of Indiana. Nov. 12, 1896.)

TRIAL—RULING ON DEMURRER—REVISAL—WILL—CONSTRUCTION—VESTED REMAINDER.

1. That demurrers were informal is not available to reverse a judgment in favor of demurrant, if the pleadings to which they were addressed were insufficient.

2. At any time during the term in which its ruling upon a demurrer was rendered, the court may revise its ruling, and incidentally set aside the judgment rendered thereon.

3. After devising to his wife a life estate in 40 acres of land, the testator devised the remainder to his son P., "on condition that he takes care of my said wife, his mother, and provides for her a good and comfortable support so long as she may live." The testator survived his wife, but no alterations were made in his will. *Held*, that P. took a vested remainder, and not an estate contingent on his support of his mother.

Appeal from circuit court, Daviess county; D. J. Hefron, Judge.

Action by Daniel Gingrich and others against Peter Gingrich for the construction of a will. From a judgment in favor of defendant, plaintiffs appeal. Affirmed.

Gardiner & Gardiner and J. D. Laughlin, for appellants. Heffernan & Mattingly and O'Neill & O'Neill, for appellee.

HACKNEY, J. The lower court sustained demurrers to a cross complaint and an answer of the appellants, and overruled their motions to modify the judgment and for a new trial. Previously the court had overruled such de-

murrers, but, at the same term of the court, had set aside its judgment upon such rulings, and, as above stated, sustained them. All of such rulings, and the action of the court in setting aside its first judgment, are assigned as errors, and the discussion includes the question as to the form of said demurrers. The demurrers were informal, but, if the pleadings to which they were addressed were insufficient, that fact is not available to reverse the judgment. *Blue v. Bank* (present term) 43 N. E. 655. It was not error for the court, at any time during the term in which its ruling upon demurrer was rendered, to revise its ruling, and incidentally to set aside the judgment entered upon such ruling. *Ryon v. Thomas*, 104 Ind. 59, 3 N. E. 653; *Richardson v. Howk*, 45 Ind. 451; *Burnside v. Ennis*, 43 Ind. 411.

All other questions in the case depend upon the construction which must be given to the last will of Christian Gingrich, the father of all of the parties to this suit. By the second item of the will he devised to his wife a life estate in 40 acres of land, and the third item was as follows: "I also give and bequeath to my son Peter the land above and last described, willed to my wife during her lifetime, at her death to my son Peter, on condition that he takes care of my said wife, his mother, and provides for her a good and comfortable support so long as she may live; and, in case he should fail to provide such comfort, said land at her death shall be sold, and the proceeds divided equally among all my children." It was provided, also, by the fifth item, that the executors should run the testator's farm "for the benefit of Peter Gingrich and Anna Gingrich," testator's wife, "until the said Peter" should become 21 years of age, when he should have possession of certain lands conveyed to him by the testator on the day of the execution of the will. Anna Gingrich died before the testator's death. The position assumed by the appellants is that Peter Gingrich did not take a vested remainder, but that he was given a contingent remainder, which should vest only upon the condition or contingency of his surviving his mother, and having furnished her a comfortable support to the end of her life. The law favors the earliest possible vesting of estates, and will construe the estate given as vesting in present, unless an intention to postpone the event is made clear. *Petro v. Cassidy*, 13 Ind. 289; *Miller v. Keegan*, 14 Ind. 502; *Davidson v. Koehler*, 76 Ind. 398; *Harris v. Carpenter*, 109 Ind. 540, 10 N. E. 422; *Davidson v. Bates*, 111 Ind. 391, 12 N. E. 687; *Davidson v. Hutchins*, 112 Ind. 322, 13 N. E. 106; *Amos v. Amos*, 117 Ind. 19, 19 N. E. 539; *Id.*, 117 Ind. 37, 19 N. E. 543; *Bruce v. Bissell*, 119 Ind. 525, 22 N. E. 4; *Hellman v. Hellman*, 129 Ind. 59, 28 N. E. 310; *Wright v. Charley*, 129 Ind. 257, 28 N. E. 706; *Borgner v. Brown*, 133 Ind. 391, 33 N. E. 92; *Fowler v. Duhme*, 143 Ind. 248, 42 N. E. 623. In several of the cases just cited, and in *Hoover v. Hoover*, 116 Ind. 498, 19 N. E. 468, devises similar to that here in question were held to create vested remainders,

and that words of postponement should be construed consistently with the beginning of the enjoyment of the remainder, rather than as deferring the vesting of the estate, if such construction were not forbidden by the clearly apparent intention of the testator. The words of the third item of the will, "at her death," cannot, therefore, be held, in and of themselves, to postpone the vesting of the estate in fee simple, or to convert the estate devised to Peter into a contingent remainder. That the devise was subject to a condition is plainly expressed, namely, that he should provide a comfortable support for his mother for the remainder of her life. Such conditions, however, are not regarded as precedent to the vesting of the estate, but have uniformly been accepted as conditions subsequent, the violation of which would forfeit the estate. *Petro v. Cassidy*, 13 Ind. 289; *Boone v. Tipton*, 15 Ind. 270; *Rush v. Rush*, 40 Ind. 83; *Lindsey v. Lindsey*, 45 Ind. 532; *Hoss v. Hoss*, 140 Ind. 551, 39 N. E. 255. In the latter case it was held that, where the title vests subject to a condition which becomes impossible of performance, the condition is not to be regarded as broken, or the title forfeited. See cases there cited. We find nothing in the will manifesting an intention that these rules of construction should not prevail. Indeed, the intention to give Peter the land in question, notwithstanding the condition expressed should become impossible of performance, seems to be supported by the fact that after Mrs. Gingrich died there would otherwise have been no apparent purpose to maintain the will, and the testator would have destroyed or otherwise revoked it. Another fact consistent with that intention was that Peter was the youngest child, and was yet a minor, and that his father expressly charged his farm with Peter's support. Finding no error in the record, the judgment of the circuit court is affirmed.

(146 Ind. 221)

KESSLER v. STATE ex rel. CLARK et al.
(Supreme Court of Indiana. Nov. 12, 1896.)

**SCHOOLS—RELOCATION OF SCHOOL BUILDING—
POWER OF TRUSTEE.**

Rev. St. 1894, § 5920a, providing that when it becomes necessary for the trustee in any township to change and re-establish the site of any school building, and remove the building to a new site or location, he shall present to the county superintendent a petition signed by himself and a majority of the patrons of said school where the building is then located, etc., must be construed as applying as well to cases where it is desired to build a new schoolhouse in the new location, as to the mere removal of a school building to a different location.

Appeal from superior court, Tippecanoe county; F. B. Everett, Judge.

Application, on the relation of Lester Clark and others, for a writ of mandamus to compel John A. Kessler, school trustee, etc., to employ a teacher, and to maintain a school, in schoolhouse No. 1 in the village of Conroe. From an order granting the writ, the respondent appeals. Affirmed.

Geo. B. Haywood and Chas. A. Burnett, for appellant. Davidson & Storms and Chas. E. Thompson, for appellees.

HOWARD, J. This action was brought by the relators for a writ of mandate to require the appellant school trustee to employ a teacher for and to take charge of and maintain a school in schoolhouse No. 1, located in the village of Conroe, in said township. A demurrer to the complaint and to the alternative writ issued thereon having been overruled, the appellant filed his return to the writ in five paragraphs, the first being a general denial, and the remaining paragraphs special pleas, setting out a history of the trustee's action in relation to the school in question. The court sustained demurrers to the several special paragraphs of answer, whereupon the appellant withdrew his answer in general denial, and elected to stand upon the court's rulings upon the demurrers. Judgment was then entered in accordance with the prayer of the complaint, and the mandate made peremptory. The facts as recited in the complaint do not differ essentially from those stated in the answer. If, therefore, the action of the court in overruling the demurrer to the complaint was correct, the judgment should be affirmed; otherwise, it should be reversed. From the allegations of the complaint and alternative writ it appears that, for over 50 years prior to the beginning of this action, the school in question, located in said village of Conroe, and designated as "Schoolhouse No. 1," had been maintained by the successive school trustees of Lauramie township as a public school therein, under authority of law, and in connection with the other schools of said township. But, at the beginning of the current school year of 1895-96, the said trustee, it is alleged, neglected and refused, and still neglects and refuses, to employ a teacher for said school. He has caused the seats and desks to be taken therefrom, and refuses to take care of or exercise any control over said schoolhouse, and proposes to allow the same to go to waste, and fall into disuse and ruin, and has suffered the building to be occupied and detained from the township by a person who is using it as a residence. It is further alleged "that the relators have unanimously requested said Kessler, as such trustee, to employ a teacher for said school; but he refused, and still refuses, to do so, and assigns as a reason for such refusal that one James Fickle, his immediate predecessor as such school trustee of said township, in the year 1895, after the close of the school year of 1894-95, changed and relocated the site of said schoolhouse No. 1 at another place, about three-fourths or seven-eighths of a mile distant from said schoolhouse at Conroe, and had there erected another schoolhouse; but the relators aver that no such change of site or location of said schoolhouse had been made by his said predecessor, nor by any predecessor, nor had the location of said schoolhouse been in any way disturbed; that said predecessor had not at any time presented to the county school

superintendent of schools a petition pursuant to the statute asking to change and re-establish the site of said school building; nor was any such petition signed by said trustee or any trustee, and by a majority or any number of the patrons of said school; nor had said trustee or any trustee attempted in any respect to comply with said statute relating to the change of the location of schoolhouses."

It is provided in our school law (section 5920, Rev. St. 1894; section 4444, Rev. St. 1881) that "the trustees shall take charge of the educational affairs of their respective townships, towns and cities. They shall employ teachers; establish and locate, conveniently, a sufficient number of schools for the education of the white children therein; and build, or otherwise provide, suitable houses, furniture, apparatus and other articles and educational appliances necessary for the thorough organization and efficient management of said schools." Appellant contends that, under the foregoing statute, he had full authority, as school trustee of Lauramie township, to do all the acts of which complaint is made by the appellee's relators; that, by the provisions of said statute, he was sole judge as to the employment of teachers, and the location or removal of schools, subject only to appeal to the county superintendent, as provided in section 6023, Rev. St. 1894 (section 4537, Rev. St. 1881). *Trager v. State*, 21 Ind. 317; *Knight v. Woods*, 129 Ind. 101, 28 N. E. 306. It is true that, under said statute, it was formerly held by this court that, subject to appeal to the county superintendent, the discretion of the school trustee in relation to matters specified in the statute could not be controlled, save only, perhaps, in case of a clear abuse of such discretion. *Crist v. Brownsville Tp.*, 10 Ind. 461; *Braden v. McNutt*, 114 Ind. 214, 16 N. E. 170.

Counsel for appellee, however, earnestly insists that the statute cited, and the decisions of this court in relation thereto, are not applicable to the facts shown in the case at bar, and that this case is governed by the act approved February 7, 1893 (Acts 1893, p. 17; Rev. St. 1894, §§ 5920a-5920c). Section 1 of said act (section 5920a, Rev. St. 1894) provides "that whenever it becomes necessary for the trustee of any township in this state to change and re-establish the site of any school building, and remove said building to a new site and location therefor, such trustee shall first present to the county superintendent of schools of the county in which township it is situated a petition setting forth therein the place and particular point to where it is desired to change and relocate the site of any such building, and to remove the same thereto, together with a brief statement of the purposes and reasons for such proposed change of location of said school building, and upon such petition shall first procure an order from such county superintendent authorizing him to change the site and location of such school building, and remove said building to its new site and location: provided, that said petition shall be signed by said trustee and the

majority of the patrons of the school where said building is located, and satisfactory proof shall be made to said county superintendent that the persons signing said petition constitute a majority of the patrons of said school." In section 2 of said act, provision is made for notice by the trustee to the patrons of the school of his intention to present such petition to the county superintendent. It is confessed by the demurrer to the complaint that, in the attempted change and relocation of the site of school No. 1, the trustee proceeded without any regard to the provisions of the foregoing statute. Counsel argue, however, that the statute has application only to cases where it is proposed to remove the school building itself from one place to another in the district, and not to cases where it is desired to change the site of the school; so that, it is contended, the action of a trustee who simply wishes to erect a new school building at a place different from the location of the old one is not controlled by the statute. This, it seems to us, is a narrow view to take of the purpose and meaning of the act of the legislature. It is certainly a rare circumstance that it should be desired to send a house mover to change the location of a school building. And why, in such a rare case, it should be judged necessary to have the trustee and a majority of the patrons of a school petition the county superintendent for leave to take the building from one place to another, while in the much more frequent case, when it is desired to erect a new building at another place, the trustee should be allowed to proceed at his own discretion, does not seem clear. But we do not think that the language of the act admits of any such limited interpretation. The undoubted purpose of the legislature was to take away the discretion hitherto exercised by township trustees in so important a matter as the removal and relocation of the site of a school building. The language of the act shows that the intention was to give the majority of the patrons of the school a controlling voice in the removal of their school from the place where it had been once located. The judgment of the trustee and that of the county superintendent must also be united to that of the majority of the school patrons before such removal shall be allowed. The evident purpose of the legislature was that the reasons in favor of removal should be so conclusive that all persons concerned, including a majority of those most interested, namely, the patrons of the school, should unite in favor of such removal before it could lawfully be carried out. Neither the school trustee by himself, therefore, nor even the trustee and the county superintendent together, on appeal from the former to the latter, have power, without the concurrence of the majority of the patrons of the school, to change the location of a school when once fixed. The legislature saw fit to take this matter from the arbitrary control of the school officers, and to restore it to those to whom it originally belonged,—the people of the school district itself. For a case much like the case at bar, and de-

cided under a statute similar to our own, see *State v. Marshall* (Mont.) 32 Pac. 648. The judgment is affirmed.

(147 Ind. 234.)

HEISEN v. BINZ.¹

(Supreme Court of Indiana. Nov. 13, 1896.)

RECEIVERS—EXPENSES OF RECEIVERSHIP.

In a suit to foreclose a mortgage on mining property, B. was appointed receiver on petition of plaintiff. H., a defendant, holding a junior mortgage, filed a cross complaint, asking for a receiver until the year for redemption expired. An order appointing B. receiver on said cross complaint provided that he should create no indebtedness except as authorized by the court on notice to the other lienholders, such order being made after a decree ordering a sale to satisfy all liens, subject to expenses and costs. Thereafter the receiver obtained an order to borrow money from H., who was the purchaser at the sale, for the purchase of machinery and the payment of labor, and to issue certificates therefor; and, during the receivership, the receiver incurred liabilities for labor and for repairs necessary for the proper operation of the mine, rendering periodical reports to the court and to H. *Held*, that H. could not, after the receiver had resigned and turned over the property in its improved condition, avoid liability for the receiver's expenses, on the ground that they were made without order of court.

Appeal from circuit court, Sullivan county; W. W. Moffett, Judge.

Exceptions by Charles O. Heisen to the final report of Frank Binz, receiver of the Shelburn Coal Company. From a judgment for said receiver, exceptor appeals. Modified.

John T. Hays, for appellant. John S. Bays, for appellee.

MONKS, C. J. Appellant filed exceptions to the final report of Binz, receiver of the Shelburn Coal Company. The cause was tried by the court, and, at request of appellant, a special finding of facts was made, and conclusions of law stated thereon. Appellant excepted to each conclusion of law. Judgment was rendered in favor of the receiver, which appellant filed a motion to modify, and the same was overruled by the court. The assignment of errors calls in question the action of the court in overruling the motion to modify the judgment, as well as each conclusion of law.

It appears from the special finding: That on September 9, 1893, one Richards was appointed, by the court below, receiver of the Shelburn Coal Company, in the action of Kirkman et al. v. Shelburn Coal Company, No. 7,605. That he continued to act as such until May 31, 1894, when he filed a partial report, and was discharged. On April 24, 1894, Mary McClure and another commenced an action (No. 7,820) in the court below, to foreclose the first mortgage on the property of said coal company. Appellant, Heisen, held the second mortgage on said property, for about \$21,000, and he and the coal company, Richards, receiver, and other junior lienholders, were made defendants to said action. On the 29th of

¹ Rehearing denied.

May, appellant appeared to said action; and, on May 31st, McClure et al., the plaintiffs below in this action, filed a petition for the appointment of a receiver, and appellee, Binz, was appointed receiver, and ordered to operate said coal mine, in compliance with said petition. That appellant, a defendant in said action, was present in open court in person and by attorney when said appointment was made, and took no exception thereto. On June 13th, causes 7,605 and 7,820 were consolidated, under the number 7,820, and all prior orders and entries were ordered continued in force. That, when said causes were consolidated, and orders made, appellant, Heisen, was present by attorney, and made no objections thereto. On the same day, appellant filed a cross complaint in said action, making defendants thereto said plaintiffs McClure et al. and all his co-defendants. The defendants to said cross complaint all appeared, and filed answers thereto. Appellant, in his cross complaint, asked the court to appoint a receiver for said Shelburn Coal Company during the time said action was pending, and until the sale, and during the year of redemption; and on June 29th the court appointed appellee, Binz, receiver, and ordered him to operate said coal mine, as prayed for in said cross complaint. On June 27, 1894, the court rendered final judgment and decree of foreclosure in said cause in favor of each mortgagee, and personal judgments were rendered against the coal company, and the property of said company was ordered sold by the sheriff on said decree, to satisfy said liens, subject to all the equities, rights, and liabilities, if any, for the expense and cost made by the receivers, Richards and Binz. That all the property of said coal company was sold under said decree on July 28, 1894, for the full amount of appellant's judgment and decree, and all liens senior thereto, including the costs, to appellant, by the sheriff, and a certificate of such sale executed to him. The order appointing said Binz receiver on said cross complaint was made and entered after said decree of foreclosure, and provided that said receiver should create no indebtedness against the property in his hands as such receiver, except such as was authorized by the court or judge thereof upon notice given to or on application of the attorneys representing the lienholders or the purchaser at sheriff's sale. On July 14th the receiver obtained an order of court to borrow money of appellant, and issue receiver's certificates therefor, which should be a first lien on said property, the same to be used to purchase certain machinery to be used in said mine, and to pay the pay roll then due for wages earned during the month of June, 1894. That the same was used to pay the wages of employes for the month of June, 1894. That on March 29, 1895, the Shelburn Coal Company filed a written waiver of the right to redeem from said sale to appellant; and Binz, receiver, appellee, filed his final report and resignation, and said property in the hands of such receiver, including the uncol-

lected accounts due him as receiver, amounting to \$1,124.23, was surrendered and delivered to appellant, by order of the court. That before appellee, Binz, was appointed receiver, there had been an explosion in said mine, and the air shaft to said mine filled up to within 20 feet of the top; and, to successfully and lawfully repair said air shaft, it was necessary to remove the debris therein from the bottom to its top, a depth of 230 feet. That said Binz, receiver, received while acting as such, from all sources, \$13,972.45, and expended \$13,762.20, leaving a balance in his hands of \$210.25. That there is due for wages, at contract price, \$1,502.94; for items of merchandise purchased for and used in said coal mine, \$1,381.40; and for borrowed money, due appellant, \$1,852.17,—evidenced by receivers' certificates issued by order of court. That all the expenditures made by said receiver during his receivership, including the unpaid liabilities, were made for the preservation and operation of said mine, and were for labor and material in operating said mine, and in cleaning up and repairing the same, so that it could be lawfully operated, and for machinery and the repairs thereof, and the necessary appliances in the operation of said mine; and that all of said expenditures were made and liabilities incurred in good faith, with the knowledge of appellant, and the same were reasonable and necessary. Appellee, on request and demand of appellant, made daily reports in writing to appellant of daily doings as such receiver, and filed monthly reports thereof with the clerk of the court below. That when appellee, Binz, was appointed receiver, the judge appointing him directed him to employ an attorney, naming him, and the receiver employed the attorney named. The attorney acted as such for two months, when the receiver employed another attorney, who rendered services from September 1, 1894, until said receiver resigned. That the reasonable value of the services of said receiver was \$110 per month, and \$400 thereof, allowed thereon by the court, has been paid. The court, in its conclusions of law, held that all the unpaid indebtedness, with the exception of some reductions made by the court, was valid and legal; and that there was yet due Binz, receiver, appellee, \$810, less \$37.50, for services; and that all of said liabilities, together with the amount of the receiver's attorneys' fees, were adjudged as a first lien and charge on the property purchased by appellant at sheriff's sale, and turned over by the receiver to him; and that said report be approved. Appellant insists "that the court erred in approving the receiver's report, and declaring said indebtedness lawful, and a lien on the property held by appellant as purchaser at the sale under the decree of foreclosure of his mortgage, for the following reasons: First. The purchaser bought on the existence of an order denying the receiver such right, and the debts are in disobedience to that order. Second. The court could not have made such an order pending the time allowed

for redemption except upon the consent of the purchaser and mortgage creditors."

It will be observed that when the decree of foreclosure was rendered, on June 27, 1896, in favor of appellant, it was expressly stipulated in the decree that the mortgaged property should be sold subject to all the equities, rights, and liabilities, if any, for the cost and expense made by the receivers, Richards and Binz; and that, on June 29th, appellee, Binz, was appointed receiver, on motion of appellant. Said property was sold under this decree, subject to all the rights and liabilities, if any, for the cost and expense made by Binz as receiver. The application to the court to borrow money, filed July 14 and August 21, 1894, as shown by the special findings, was to procure money to pay indebtedness for labor; so that the court below knew, and appellant knew, that the receiver was and had been from the date of his appointment, on appellant's application, creating indebtedness. Appellant had full knowledge of what the receiver was doing. He demanded and received from the receiver each day a written report of his acts as such receiver. Appellee, as receiver, also made monthly reports to the court of his doings as such receiver; and the court below and appellant had full knowledge from these reports that the receiver was creating indebtedness for machinery, supplies, repairs, labor, and other expenses. Appellant stood by, and allowed large sums of money to be expended and liabilities incurred in improving the property, in purchasing and repairing necessary machinery, which added largely to the value of the property, and, when the receiver resigned, took possession of said property with its added value, and received from the receiver accounts for coal sold by him amounting to \$1,124.23, at the time of making the final report. He procured the appointment of the receiver, and had the right at any time to interpose and ask the court to order that the receiver take no further steps in operating the mine, or in putting it in condition to be lawfully operated. The appellant, the receiver, and the court below do not seem from their conduct during the receivership to have understood said order as directing the receiver not to incur indebtedness for labor and other expense in repairing and operating said mine and preserving the property, but only as requiring an order of court before the receiver could create an indebtedness by borrowing money. Indeed, it was hardly possible to have operated the mine, and not become indebted for labor and other expenses from one pay day to another, at least. Under the provisions of section 779, Rev. St. 1894 (section 767, Rev. St. 1881; Horner's Rev. St. 1896), the Shelburn Coal Company, the owner of the real estate purchased by appellant, was entitled to the possession and profits thereof for one year from

July 28, 1894, the day of sale; and the only theory upon which appellant would be entitled to receive the said accounts, amounting to \$1,124.33, was that, the property being liable for said indebtedness incurred by the receiver, appellant was therefore entitled to receive and collect said accounts, and apply the same on the said indebtedness. Under all the circumstances in the case, we do not think appellant is in a position to assert the propositions urged by him, even if their correctness were conceded. He should have acted promptly, and not waited until the débris was removed from the mine, and the machinery put in repair, and the property was in good condition to be operated as a mine, and then, after receiving the same, as well as the uncollected accounts due the receiver, and the benefit of all the labor and expense, attempt to avoid the liabilities incurred for such purpose. This, equity and good conscience will not permit.

The fact that the first attorney was discharged by the receiver, and another employed, did not increase the expense of attorney's fees, but the amount that would have been allowed to one if he had rendered all the services was divided between the two. Appellant's burdens were not therefore increased, and he has no just grounds to complain of the conclusion of law as to the compensation of the attorney employed in September. If the trial court had refused to ratify the act of the receiver in discharging the first attorney, and employing the second, a different question would have been presented.

It appears from the special finding that Binz, receiver, appellee, served as such receiver 10 months less two days, and that his services were worth \$110 per month, and that he had been paid \$400. The balance due, after deducting \$400, appellant insists, would be \$692.67, from which appellant insists \$210 (the balance on hand, as shown by the special finding) should be deducted, and then would remain \$482.67. It is stated in one of the conclusions of law that the balance due Binz, appellee, for services as receiver, is \$810, less \$37.50. The court erred in this conclusion of law. It should have been stated that the balance due Binz, appellee, for services as receiver, was \$482.67 less \$37.50, leaving the amount due \$445.17.

The judgment is affirmed, at the cost of appellee in this court, on condition that appellee enters in the court below a remittitur of all the allowance and judgment in his favor in excess of \$445.17, within 30 days; otherwise, the judgment as to the amount due the appellee for services as receiver is reversed, with instructions to the lower court to restate the fifth conclusion of law so as to show \$445.17 as the balance due appellee for services as receiver, after deducting all credits, and render judgment accordingly.

(147 Ind. 229)

HAMRICK v. LORING et al.¹

(Supreme Court of Indiana. Nov. 11, 1896.)

ASSIGNMENT FOR CREDITORS — MORTGAGED CHATTELS — PREFERENCE — FINAL JUDGMENT — EVIDENCE — RECORD — PRESUMPTION.

1. Where there has been an assignment for creditors, and a preference has been sought over general creditors by reason of a prior chattel mortgage on part of the assigned property, a judgment declaring a priority, and directing the trustee to pay from the funds arising from the sale of the mortgaged chattels a specified sum on such preferred claims, and that he take from said funds no part thereof on account of his services or those of his attorneys till all of the specified claims are fully paid, is final and appealable.

2. Where it is sought to make the original longhand manuscript of the shorthand report of the evidence a part of the record, the record must show that the manuscript was filed in the clerk's office before it was incorporated in the bill of exceptions.

3. To save for review the ruling of the trial court on a motion to modify the judgment, the motion must be brought into the record by a bill of exceptions.

4. Where a trustee for creditors sells mortgaged property which has come to him by the assignment, the lien of the mortgage is transferred to the fund arising from the sale; and, on the petition of parties claiming under the mortgage, the court may direct the application of the proceeds to the payment of claims according to their priority.

5. Where the evidence on which the court has directed the distribution of certain funds is not in the record, it will be presumed that the action of the court was correct.

Appeal from circuit court, Marion county; Edgar A. Brown, Judge.

Petition by William Loring and others for allowances against the estate of Lawrence A. Nageleison, assigned to Jesse D. Hamrick, for the benefit of creditors, and for a preference as against general creditors. From a judgment in favor of petitioners, the trustee appeals. Affirmed.

Newton M. Taylor, for appellant. Kealing & Hugg, Claypool & Claypool, Morris, Newberger & Curtis, and W. A. Pickens, for appellees.

HACKNEY, J. The appellant was the trustee of the estate of Lawrence A. Nageleison by the voluntary assignment of the latter for the benefit of his creditors. The appellees, William Loring and others, by original and amended petitions, sought, in the lower court in which such assignment was pending, allowances against said estate, and, as to the proceeds of the sale of certain chattels, a preference as against general creditors, and as against the trustee, for the services of himself and his attorneys in said trust. The preference was claimed to arise in favor of the appellees and others by reason of a chattel mortgage executed by the assignor to Loring, securing his claim, and indemnifying and saving him from the payment of claims owing by the assignor and Loring to the appellees and such others. The appellant also sought an allowance for himself and his attorneys on account of serv-

ices rendered in the execution of said trust. Issues were formed upon the various petitions, and, by agreement of all parties, the matters at issue upon the several petitions were consolidated and submitted to the court for trial, finding, and judgment upon one hearing. A trial resulted in a finding and judgment declaring the several sums due the appellees and others from said estate, declaring the priority of such claims, and directing the appellant to pay into the clerk's office, from the funds arising from the sale of the mortgaged chattels, a specified sum for the payment of such preferred claims. It was adjudged, also, that said trustee take from said funds no part thereof on account of his services or those of his attorneys until all of said preferred claims were fully paid. Five of seven specifications of appellant's motion to modify the judgment were overruled, and his motion for a new trial was overruled. These are the only rulings of the trial court assigned as error.

Appellees have moved this court to dismiss the appeal, for the alleged reason that it is not from a final judgment or an interlocutory order from which an appeal lies. The arguments turn upon the question as to whether the record discloses an appeal from a mere order of distribution upon a current report, or from a judgment finally determining the rights of claimants. We have sufficiently stated the questions presented to the trial court to show that the appellees are in error in their contention upon this question, and the motion cannot prevail.

Another contention on behalf of the appellees is that the evidence is not properly in the record, and that no question involving it can be considered. The transcript contains a bill of exceptions, signed by the trial judge, and filed in the clerk's office on a day named. This bill contains what purports to be the original longhand manuscript of the shorthand report of the evidence, but the record in no manner discloses the filing of this manuscript in the clerk's office before it was incorporated in such bill, nor otherwise than as a part of the bill. This failure violates the statutory requirement, where the evidence is not copied by the clerk, and where the original is sought to be made a part of the record. Rev. St. 1894, § 1476 (Rev. St. 1881, § 1410); De Hart v. Board, 143 Ind. 363, 41 N. E. 825; Beatty v. Miller (Ind. Sup.) 44 N. E. 8; Carlson v. State (Ind. Sup.) 44 N. E. 660; Marvin v. Sager (Ind. Sup.) 44 N. E. 310; Smith v. State (Ind. Sup.) 42 N. E. 1019; Holt v. Rockhill (Ind. Sup.) 40 N. E. 1000. It is true that within the bill of exceptions there is a certificate of the clerk of the trial court to the effect that on a day named, being the same day upon which the bill of exceptions was filed, the longhand manuscript of the evidence was filed in his office, and is the same which is embodied in the bill of exceptions. This certificate, if we observe it as a proper method

¹ Rehearing denied.

of disclosing the fact of a filing, does not advise us whether such filing was as a part of the bill, was separate from it, or was before or after the filing of the bill. All that the clerk certifies may be true, and the manuscript may have been filed after the bill of exceptions was filed. From the facts disclosed, the clerk may have judged that the filing of the bill, including the manuscript, was a filing of the manuscript. We must hold, therefore, that the appellees' contention in this respect shall prevail.

It is insisted, also, for the appellees, that no question arises for consideration in this court upon the action of the trial court in overruling the appellant's motion to modify the judgment, for the reason, as urged, that neither the motion nor the reasons therefor have been brought into the record by a bill of exceptions. This insistence, under our practice, must prevail. *Russ v. Russ*, 142 Ind. 471, 41 N. E. 941; *Quill v. Gallivan*, 108 Ind. 235, 9 N. E. 99; *Forsythe v. Kreuter*, 100 Ind. 27; *Whipple v. Shewalter*, 91 Ind. 114; *Railroad Co. v. Frank*, 3 Ind. App. 96, 29 N. E. 419; *Elliott*, App. Proc. § 817. In the transcript we find a motion to modify the judgment, but it does not form a part of the record by order of court or by bill of exceptions.

The questions submitted by counsel for the appellant as causes for the reversal of the judgment of the trial court are: (1) The admission of certain evidence; (2) the allowance of certain claims without petitions or complaints by the holders of such claims; (3) the allowance of such as preferred claims; (4) the allowance of certain claims for which petitions were filed; (5) the allowance of such as preferred claims; (6) holding that the claims allowed were paramount to appellant's claim for services; (7) "that the court erred in its judgment and decree that the appellant should pay out of his own private funds any deficit that there might be between the amount of said claims and the amount in his hands as trustee, and that he should pay the costs of the assignment out of his own private funds." The decree finds that the mortgaged property sold for \$2,412.75; that there was a prior mortgage for \$1,201.25, or a difference of \$1,211.50; and that \$985.03 should be paid to the clerk for the adjustment of the claims of those whose claims were secured by and indemnified against in the mortgage to Loring. A balance of \$226.47 from this fund would remain in the hands of the trustee, together with any funds derived from other sources, for the payment of the costs of administering the trust and the general creditors. Without resorting to the evidence, we cannot know that this balance would not be abundant for all such purposes, and we cannot learn of the force of the objection that certain evidence was admitted. There was no express direction to the trustee to pay any sum, for any purpose, from his private funds; and

we cannot know that such was the effect of the order made, without looking to the evidence to learn what, if any, funds have been expended by him, and what balance remains from which to comply with the order made.

The appellant does not dissent from the proposition that his sale of the mortgaged property, freed from the lien of the mortgage, transferred the lien to the fund arising from the sale. On the contrary, he expressly agrees to that proposition, and we have no doubt it is correct. *Stix v. Sadler*, 109 Ind. 254, 9 N. E. 905; *Gifford v. Black*, 22 Ind. 444. In *Hasseld v. Seyfort*, 105 Ind. 534, 5 N. E. 675, 677, in speaking of the purpose and effect of the voluntary assignment statutes, this court said that their "purpose is to carry into the trust all of the assignors' property, and that when a person takes advantage of its provisions, and makes an assignment for the benefit of his creditors, he thereby places his property in the custody of the court, to be disposed of by the assignee, under the direction and control of the court." See, also, *Grubbs v. Morris*, 103 Ind. 166. The equities are strongly in favor of the court's action in requiring the special fund to be first applied to special claims, and since that equity was, primarily, in favor of Loring, whose pleading was broad enough to enlighten the court as to the claims of those entitled, upon his theory, to preference, it may have been proper to direct the distribution of such special fund to the payment of such special claims. It was not the decree of the court that Loring should recover the amount of the several claims against which he had been indemnified; and the contention of the appellant that one indemnified cannot, in the absence of an express promise on the part of the mortgagor to pay, recover in his own behalf until he has discharged the debt, has not been violated by the action of the court. Having the whole subject before it, and being empowered to direct the manner of expending the special fund, and equity having apparently been done by the court, we do not observe that the appellant has been harmed by the decree. We cannot resort to the evidence to determine that he has been injured, or that general creditors will suffer, and we must presume in favor of the action of the court. The judgment is affirmed.

(146 Ind. 564)

LOUISVILLE, N. A. & C. RY. CO. v.
BATES. 1

(Supreme Court of Indiana. Nov. 11, 1896.)

RAILROAD COMPANY—FOREIGN CAR—HIDDEN DEFECT—INSPECTION—INJURY TO EMPLOYEE—SPECIAL VERDICT—INSUFFICIENT FACTS—COMPLAINT—DEMURRER—MOTION TO MAKE SPECIFIC.

1. In personal injury cases, a general allegation of negligence is sufficient to withstand a demurrer for want of facts, unless the contrary appears from the facts pleaded; and hence, un-

¹ Rehearing denied.

der such allegation, the facts constituting the negligence may be given in evidence.

2. The same rule applies to the averment that the injured party was without negligence.

3. In personal injury cases, defendant's right to have the complaint state the specific acts or omissions of defendant which constitute the negligence relied on, and all the surroundings and existing conditions, and what occurred at the time of the injury, is waived by its failure to require, by motion, that the complaint be made more specific.

4. A railroad company is bound to exercise ordinary care in furnishing reasonably safe cars and other appliances, and, by inspection and repair, to keep them in a reasonably safe condition.

5. A railroad company is not liable for injuries to its employees caused by a car's hidden defects, of which it had no knowledge, and of which it could not have known by the exercise of ordinary care.

6. Where the inspection of a car has been performed with ordinary care, and a defect then existing has not been discovered, the company is not liable for an injury caused thereby to an employé, unless it had knowledge of such defect.

7. In receiving foreign cars for transportation in the regular course of business, a railroad company is bound to exercise ordinary care in inspecting them, and, if found to be out of repair, to put them in a reasonably safe condition of repair, or to notify its employees of the condition of such cars.

8. The inspection must be such as the time, place, means, and opportunity, and the requirements and exigencies of commerce will permit.

9. A railroad company receiving a foreign car for transportation over its line may assume that all parts of the car which, from an ordinary examination, appear to be in good condition, are in such condition.

10. A railroad company is not negligent in receiving and passing over its lines cars different in construction from those used by itself, if they are not so out of repair but that defects can be discovered by ordinary care.

11. In an action for the death of plaintiff's intestate, it appeared that the deceased was injured by reason of an unknown defect in the drawbar of a foreign car, which he was attempting to couple to defendant's engine. A special verdict further found that defendant maintained a resident car inspector to inspect all cars before placing them in the trains of defendant; that he inspected said car hurriedly, without tools, occupying not to exceed 5 minutes in said inspection, and failing to discover the condition of the drawbar; that to have made an efficient inspection would have required 15 minutes; and, with no other inspection, said car was ordered into said train. The defective condition of said drawbar could have easily been discovered by a reasonable inspection, but said inspector did not make the same, and it has not been shown by the evidence that said inspector was sufficiently skilled and competent to make the same. *Held*, that the facts recited failed to show that the inspection was not all that the requirements and exigencies of the traffic would permit.

12. Defendant was not required to prove that the car inspector was "sufficiently skilled and competent" to act as inspector at the station where he was employed, this being the presumption till the contrary was shown.

Appeal from circuit court, White county; A. W. Reynolds, Judge.

Action by Alonzo G. Bates, administrator, against the Louisville, New Albany & Chicago Railway Company, for the death of his intestate. From a judgment in favor of plaintiff, defendant appeals. Reversed.

E. C. Field and W. S. Kinman, for appellant. Davidson & Storms and Artman & Lewis, for appellee.

MONKS, C. J. Appellee's intestate, while in appellant's service as brakeman, was killed when in the act of coupling cars upon appellant's road, and this action was brought to recover damages therefor, upon the ground that his death was caused by appellant's negligence. Appellant's demurrer for want of facts to the amended complaint was overruled. After issue was joined, the cause was tried by a jury, and a special verdict returned. Appellant moved the court to render judgment in its favor on said verdict, which motion the court overruled, and rendered judgment in favor of appellee. These rulings of the court are severally assigned as error. The objections urged against the complaint are such as could only be presented by a motion to make more specific.

It has been uniformly held in this state that a general allegation of negligence is sufficient to withstand a demurrer for want of facts, unless the contrary appears from the facts pleaded, and that, under such allegation, the facts constituting the negligence may be given in evidence. The same rule applies to the averment that the injured party was without fault or negligence. *Railway Co. v. Adams*, 105 Ind. 151, 155, 5 N. E. 187, 188; *City of Elkhart v. Witman*, 122 Ind. 538, 23 N. E. 796; *Railway Co. v. Wynant*, 100 Ind. 160; *Hammond v. Schweitzer*, 112 Ind. 246, 247, 13 N. E. 869, 870; *Railway Co. v. Jones*, 108 Ind. 551, 557, 9 N. E. 476, 484, and cases cited; *Town of Rushville v. Adams*, 107 Ind. 475, 478, 8 N. E. 292, 293. It is equally well settled that a defendant in an action for personal injuries is entitled to have the complaint state the specific acts or omissions of the defendant which constitute the negligence relied upon, as well as all the surroundings and existing conditions and what occurred at the time of the injury. *Stone Co. v. Wray*, 143 Ind. 578, 42 N. E. 927; *Railway Co. v. Adams*, supra; *Railway Co. v. Hixon*, 110 Ind. 225, 11 N. E. 285; *Railway Co. v. Gaines*, 104 Ind. 526, 4 N. E. 34, and 5 N. E. 746; *Town of Rushville v. Adams*, supra; *Railway Co. v. Shanklin*, 94 Ind. 297, 298; *Railway Co. v. Kriming*, 87 Ind. 351, 352. While this is true, it requires a motion to make more specific to obtain such relief; and unless such motion has been made and overruled, and proper exception saved, no question can be presented here as to such matter. The court did not err in overruling the demurrer to the amended complaint.

The special verdict shows that appellant received a car from another company at Frankfort, Ind., for transportation over its lines, and that appellee was injured while attempting to couple the same to a locomotive on appellant's road. The first question presented by the motion for a judgment on the special verdict in favor of appellant is as to the liability of railroad companies to employees for injuries occasioned by a defect in foreign cars, received only

for transportation over its lines. It is the duty of a railroad company to exercise ordinary care in furnishing reasonably safe cars and other appliances, and also to exercise ordinary care, by inspection and repair, to keep them in reasonably safe condition, so as not to unreasonably expose its employes to unknown and extraordinary hazards. *Railway Co. v. McCormick*, 74 Ind. 440; *Railroad Co. v. Orr*, 84 Ind. 50; *Railway Co. v. Buck*, 116 Ind. 566, 19 N. E. 453; *Railway Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Stone Co. v. McCain*, 133 Ind. 231, 31 N. E. 956. The railroad company is not required to furnish cars or appliances that are absolutely safe, or to maintain them in that condition. The company is not an insurer of the safety of the employe against injury. *Car Co. v. Parker*, 100 Ind. 181; *Railway Co. v. Roesch*, 126 Ind. 445, 26 N. E. 171; *Titus v. Railroad Co.*, 136 Pa. St. 618, 20 Atl. 517; *Railroad Co. v. McDade*, 135 U. S. 554, 570, 10 Sup. Ct. 1044, 1049, and cases cited. The company is not liable for injuries caused by hidden defects of which it had no knowledge, and of which it could not have known by the exercise of ordinary care. The master is only charged with knowledge of that which, by the exercise of ordinary care, he would have discovered. He is not required to resort to tests that are impracticable, or unreasonable and oppressive, or which would be incompatible with the proper furtherance of business, and which are only required to insure absolute safety. *Smith v. Railway Co.*, 42 Wis. 520; *Railway Co. v. Huntley*, 38 Mich. 546, and cases cited; *De Graff v. Railway Co.*, 76 N. Y. 125; *Laffin v. Railway Co.*, 106 N. Y. 140, 12 N. E. 599; *Flood v. Telegraph Co.*, 131 N. Y. 604, 30 N. E. 196; *Railroad Co. v. Hughes*, 119 Pa. St. 301, 13 Atl. 286; s. c., 33 Am. & Eng. R. Cas. 348, and note; *Whart. Neg.* 213. If the duty of inspection has been performed with ordinary care, and a defect is found afterwards to exist, but not discovered at the time, the master is not liable for an injury caused thereby, unless he had knowledge of such defect. *Hull v. Hall*, 78 Me. 114, 3 Atl. 38; *Nason v. West*, 78 Me. 253, 3 Atl. 911; *Baldwin v. Railroad Co.*, 68 Iowa, 37, 25 N. W. 918. The duty of a railroad company as to foreign cars received in regular course of business for transportation over its lines is that of exercising ordinary care in inspecting the same, to see if they are in reasonably safe condition of repair, and, if found to be out of repair, to put them in a reasonably safe condition of repair, or notify its employes of the condition of such cars. Appellant, therefore, owed its employes the duty of making proper inspection of the car in question, and either repairing or giving notice of its defects, if any were found. *Railroad Co. v. Fry*, 131 Ind. 319, 28 N. E. 989; *Railroad Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Railway Co. v. Sears*, 136 Ind. 460, 469, 34 N. E. 15, 17, and 36 N. E. 353; *Railway Co. v. Adams*, 105 Ind. 151, 165, 5 N. E. 187, 193; *Railway Co. v. Wright*, 115 Ind. 378, 385, 387, 16 N. E. 145, 148, 149, and 17 N. E. 584; *Stone Co. v. Griffin*, 139 Ind. 141, 149, 38 N. E. 411. The

inspection which a company is required to make of such a car is not merely a formal one, but should be made with ordinary care; that is, the inspection should be such as the time, place, means, and opportunity, and the requirements and exigencies of commerce will permit. If the company has used ordinary care to secure competent inspectors, and inspection is made with ordinary care, under the circumstances, taking into consideration the time, place, means, and opportunity for inspection, and the defects, if any are discovered, are repaired, or due notice thereof given to the employe, the duty resting upon the company is discharged. It is not liable for injuries caused by hidden defects, which could not be discovered by such inspection as the exigencies of the traffic will permit. *Railway Co. v. Fry*, supra. The company receiving such foreign car is not bound to repeat the tests which are proper to be used in the original construction of the car, but may assume that all parts of the car which appear upon ordinary examination to be in good condition are in such condition. *Ballou v. Railway Co.*, 54 Wis. 257, 11 N. W. 559. It would seem that, if such car were old, dilapidated, or obviously defective, ordinary care would require a more careful inspection than if there was nothing unusual in its appearance. *Railroad Co. v. Fry*, 131 Ind. 327, 28 N. E. 991. A railroad company is not negligent in receiving and passing over its lines cars different in construction from those owned and used by itself, if the same are not so out of repair or in such a defective condition as can be discovered by ordinary care. *Baldwin v. Railway Co.*, 50 Iowa, 680; *Railroad Co. v. Flanigan*, 77 Ill. 365; *Kohn v. McNulta*, 147 U. S. 238, 13 Sup. Ct. 298, and cases cited.

It is insisted, however, by appellant, that "the court held in *Neutz v. Coke Co.*, 139 Ind. 411, 38 N. E. 324, and 39 N. E. 147, that inspectors of a foreign car received for transportation are fellow servants of those operating the train." The cars in that case were delivered to the Jackson Hill Coal & Coke Company, the appellee, on its switch, by a railroad company, for the purpose of permitting said Jackson Hill Coal & Coke Company, the appellee, to load them with coal. Said appellee did not receive cars for transportation over any line of railroad, and was not engaged in any such business. The rule applicable to railroad companies in regard to inspecting foreign cars did not, therefore, apply to the appellee in that case. *McMullen v. Carnegie*, 158 Pa. St. 518, 27 Atl. 1043.

Appellant insists that the special verdict does not find facts from which the court can say that the inspection made was not such as is usually made by ordinarily careful and prudent inspectors, under like circumstances; and that, therefore, as there is no finding of facts showing the want of ordinary care on the part of appellant, the judgment should have been rendered on the verdict in favor of appellant. The purpose of a special verdict is that the jury may find the facts within the issues made by the pleadings, and the court

then declares the law thereon. If the special verdict includes findings of evidentiary facts, conclusions of law, and matters without the issues, the same are to be disregarded by the court in applying the law to the facts found. That part of the special verdict essential to the determination of this question is as follows: "Thirteenth. When standing upon the track, the drawbar and couplings of said oil-tank car were apparently in proper position, and in good repair, and the defects and lack of repair were not observable to said Douglas, nor did he have any notice or reason to think that said drawbar or couplings were in any way insufficient or out of repair. They could only have been ascertained by close inspection under the car. * * * Fourteenth. At said station, Frankfort, the defendant maintained a resident car inspector, whose duty it was to inspect all cars of defendant and of other companies before placing them in the trains of defendant at said station. That said inspector did inspect said car, but only superficially and hurriedly, by looking it over, without tools or other manual tests, occupying not to exceed five (5) minutes in said inspection, and failing to discover the condition and need of repair of said drawbar and attachments. That to have made an efficient and proper inspection and examination thereof would have required not less than fifteen minutes; and, with no other inspection, said car was ordered into said train. The defective condition of said drawbar and attachments could have easily been discovered by a reasonable and ordinary inspection thereof by said inspector if competent to make the same, but said inspector did not make the same, and it has not been shown by the evidence that said inspector was sufficiently skilled and competent to make the same." This court cannot say, as a matter of law, that the car could not have been inspected properly in less than five minutes, or that it was necessary to use "tools or other manual tests." Neither are there any facts found from which we can determine whether the standard of inspection designated as an "efficient and proper inspection and examination thereof," and "a reasonable and ordinary inspection thereof," is the one required by the law. In making an inspection, it is the duty of the inspector to use the usual and ordinary tests, and such tools as persons of ordinary prudence use, if any, under like circumstances. No man is held to a higher degree of skill or care than a fair average of his trade or profession, and the standard of due care is the conduct of the average prudent man. If the inspection is made in the usual and ordinary way, the way commonly adopted by those in like business, it cannot be said that it was done negligently. It determining whether an inspection was made with ordinary care, a jury can only find facts showing whether the same was made in the usual and ordinary

manner, the one commonly adopted by men of ordinary care and prudence, engaged in the same business, under like circumstances. If it was so performed, it was made with due care, and a jury cannot be permitted to say that it was negligent. They cannot be allowed to set up a standard which shall, in effect, dictate the customs or control the business of a community. *Titus v. Railway Co.*, supra; *Ship-Building Co. v. Nuttall*, 119 Pa. St. 149, 13 Atl. 65; *Tuttle v. Railway*, 122 U. S. 194, 7 Sup. Ct. 1166. The finding "that to have made an efficient and proper inspection and examination thereof would have taken fifteen minutes" is a mere conclusion. The standard thus fixed by the jury may be predicated upon the proposition that such searching and critical inspection must be made as would insure absolute safety to the employes. This, as we have shown, is not required. Facts, not conclusions, must be stated. The special verdict should state such facts as would show whether the inspection made was such as is usually made under like circumstances by inspectors of ordinary care and prudence, and this would include all facts showing whether the inspection was such as the time, place, means, opportunity, and the requirements and exigencies of the traffic will permit.

The special verdict does not state any facts showing that the car inspector was incompetent. Appellant was not required to prove that the car inspector was "sufficiently skilled and competent" to act as inspector at Frankfort. The presumption in this case is that he was competent until the contrary is shown. *Railroad Co. v. Tohill*, 143 Ind. 49, 56, 41 N. E. 709, 711, and 42 N. E. 352; *Railroad Co. v. Duel*, 134 Ind. 156, 160, 33 N. E. 355, 356, and cases cited. The presumption is that appellant exercised ordinary care in the selection of the car inspector, with reference to fitness and competency, and that the car was inspected with ordinary care; that is, the inspection was such as the time, place, means, and opportunity, and requirements and exigencies of commerce would reasonably permit. Disregarding the improper matters contained in the special verdict, the facts set forth do not overcome or contradict this presumption. It follows that the court erred in rendering judgment in favor of appellee.

It is claimed by appellant that the case made by the verdict does not correspond with the allegation or theory of the complaint. As the cause must be reversed for other reasons, and the complaint may be amended before another trial, it is not necessary for us to determine this question.

We think justice requires that, instead of directing a judgment upon the verdict, a new trial be awarded. Judgment reversed, with instructions to award a new trial, with leave to amend the complaint, and for further proceedings not inconsistent with this opinion.

(163 Ill. 552)

WOLFE v. LARISON.

(Supreme Court of Illinois. Nov. 10, 1896.)

DOWER — SETTING ASIDE FUND — INTEREST — ENCROACHMENT ON PRINCIPAL.

Where a widow consents that a fund equivalent to the value of one-third of the decedent's estate shall be set aside for her use as dowress, she must treat that fund as real estate, and cannot encroach on the principal, though altered conditions may afterwards compel a reduction of the rate of interest. 60 Ill. App. 47, affirmed.

Appeal from appellate court, Third district.

Action by Sarah Wolfe against Thomas J. Larison in reference to her claim as dowress. From a judgment of the appellate court reversing a judgment in favor of plaintiff (60 Ill. App. 47), plaintiff appeals. Affirmed.

Beach & Hodnett, for appellant. Oscar Allen, for appellee.

PER CURIAM. We have carefully examined and considered the record and the briefs and arguments of counsel in this case, and have arrived at the same conclusion as that reached by the appellate court, and are satisfied with the reasons given therefor in the opinion of Mr. Presiding Justice Wall. That opinion is therefore here adopted. It is as follows:

"This is an appeal from an order of the circuit court made upon application of the appellee in reference to her claim as dowress. The facts necessary to be stated are that in 1866 one Gessner filed a bill for partition and assignment of dower, to which bill the appellee, then the widow of Dawson Frakes, who was tenant in common of part of the real estate, was a defendant. Pursuant to decree of partition, the premises in which the widow had dower were sold by the master for the sum of \$7,527. The appellant was a purchaser at the sale to the amount of \$5,745. The sale having been made free of dower, the yearly value of that interest was assessed by a jury at \$250.90, which was precisely 10 per cent. per annum of one-third of the purchase money of the premises in which she had dower; and from the verdict of the jury it appears that such was the basis on which the assessment was made. Thereupon a decree was entered as follows: 'It is ordered that Sarah Frakes have and receive from the estate of her said husband, sold as aforesaid, each and every year during her natural life, the sum of \$250.90, the same being the yearly value of her dower in said premises, as assessed by the jury aforesaid. It is further ordered and decreed by the court that the master in chancery place a sufficient amount of the proceeds of said sale (belonging to the estate of said Dawson Frakes) at interest at ten per cent. per annum, as fast as the same shall be collected, as shall be sufficient to realize said sum of \$250.90 annually, and that he pay the same to said Sarah Frakes as fast as collected, taking receipt for the same;' that he loan it on security, etc., and distribute, etc. In pursuance thereof, the master loaned the sum of \$2,509, at the rate of ten per cent. per annum. The court approved

the reports of the master showing the loan of this money, and ordered the remainder of the purchase money to be distributed. Of the amount thus set aside for the benefit of the dowress, the appellant was assessed, and, under such assessment, contributed the sum of \$639.33, and to that extent he is interested in the preservation of the principal. It appears that the master collected the interest regularly, and paid it over to the widow until 1879, a period of some 10 years, when he reported to the court that the money could no longer be loaned at over 8 per cent. interest, and the court then made an order that he loan at that rate, which was done, and the interest was collected and paid to the widow accordingly, from November, 1879, to November, 1892, a period of 13 years. At the May term, 1894, a petition was filed in her behalf, setting up, in substance, the foregoing facts as to the payments made to her, and that since November, 1892, nothing had been paid to her; that she had assigned all her claim in that behalf to her attorneys, as collateral security, etc.; and asking that she be allowed out of the fund in the master's hands a sum sufficient to make up the full \$250.90 per annum during the entire period from November, 1879, when the rate of interest was reduced to 8 per cent. On the hearing of the application, the files and record of the cause were presented, and oral proof showing the payments as alleged in the petition; and the court made an order requiring the master to pay to Beach & Hodnett, the attorneys of petitioner, the sum of \$1,214.24, out of the first money coming to his hands. This sum includes \$75 for attorney's fees in an action on the bond of a former master in chancery, who had defaulted. The appeal questions the propriety of this order. It is insisted on behalf of the appellee that the original order was unconditional; that the sum of \$250.90 should be paid to the widow annually. This was the assessed value of her dower, as found by the jury, upon the basis of 10 per cent. per annum upon one-third of the purchase money, as already noticed; but coupled with and forming a part of it was the further order of the court by which the payment of the sum so assessed was to be obtained from a particular fund, which was to be loaned by the master at 10 per cent., and the interest to be paid over to her; and, the master having reported the loan of \$2,509 at 10 per cent., the court, approving his action, ordered a distribution of the balance of the moneys derived from the sale, including the sum contributed by appellant.

"Now, when all the orders of the court are considered, they amount to the setting aside of \$2,509 (which was one-third of the value of the estate in which the widow had dower) for the use of the widow, and this was, in substance, equivalent to the assignment of that much of the estate for her use. Had she desired, she might, no doubt, have obtained an order for the annual payment of the \$250.90, without conditions of any sort; but she acquiesced in the special provision by which her claim was

to be enforced in an especial and particular way,—i. e. by setting aside enough money to produce, at 10 per cent. per annum, the sum required, and by subsequent action, which was approved, the sum of \$2,509 was so invested and set apart for her use. In effect, this was to relieve the estate from the payment of the annuity, and to rely wholly upon the sum so set aside for that purpose. The widow accepted these provisions for her benefit, and presumably was content therewith. In view of the then situation, the arrangement was, doubtless, very favorable to her. Had the rate of interest in that vicinity been maintained, she would have made no complaint; and, after the receipt of the 10 per cent. for 10 years or more, she acquiesced in an order made by the court authorizing the master to loan at 8. It is to be presumed that she was content with this change, for she made no objection, and accepted the sum arising from the reduced rate for some 13 years. Having thus consented to a decree by which a certain fund equivalent to the value of one-third of the estate was set aside for her use as dowress, she must treat that fund as she would treat so much of the real estate itself had it been set apart for her use. She could not have wasted or sold such part of the real estate, and could only have enjoyed whatever it might produce, either by her personal occupation of it or by way of rents. So as to this fund; if altered conditions have compelled a reduction of interest, it is her misfortune, but she cannot encroach upon the principal. It is not competent by such an order as here made, after such lapse of time, to modify the original decree, nor is it equitable to do so. In our opinion, the decree appealed from is erroneous. It will therefore be reversed, and the cause remanded."

The judgment of the appellate court is affirmed. Judgment affirmed.

(163 Ill. 494)

BURNS v. EDWARDS et al.

(Supreme Court of Illinois. Nov. 11, 1895.)

ADVERSE POSSESSION—PROOF OF POSSESSION AND PAYMENT OF TAXES—EJECTMENT—TAX DEED AS COLOR OF TITLE—ILLEGAL SALE—PARTNERSHIP AS GRANTEE.

1. To sustain a plea of ownership based on possession and payment of taxes for seven successive years under claim and color of title, the proof of payment of taxes must cover the land in controversy, and a tax receipt which does not correctly describe the land, without other evidence to identify it, is insufficient, and one for taxes paid on the "N. End" of a tract, without explanation, cannot be held to cover any particular part or quantity of such tract.

2. A claim of continuous possession of land for the period necessary to establish title by adverse possession is not sustained where, for a year or more during such time, neither actual occupancy nor any act of dominion over the land is shown.

3. Under 1 Starr & C. Ann. St. p. 986, where a plaintiff in ejectment makes affidavit that both he and defendant claim title through a common source named, he is not compelled to trace his title back of such source unless the affidavit is denied by defendant under oath.

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4. A tax deed executed to a partnership on a sale of lands to the firm by one of its members as deputy county collector is invalid, and does not constitute, in the hands of the firm or either member, "claim and color of title made in good faith," on which they could base a claim of adverse possession.

5. A tax deed to a partnership in its firm name, being to a grantee incapable of taking title, does not, on its face, purport to convey the legal title, and a subsequent purchaser from the partners cannot make it the foundation of a claim of color of title to support his possession.

Error to circuit court, Clay county; E. D. Youngblood, Judge.

Action in ejectment by Nathaniel M. Burns against William Edwards, Young Edwards, and Edward H. Hawkins. Judgment for defendants, and plaintiff brings error. Reversed.

R. S. C. Reaugh, for plaintiff in error. Barnes & Rose and Nagle & Shriner, for defendants in error.

MAGRUDER, C. J. This is an action brought by plaintiff in error against defendants in error for the recovery of certain lands in Clay county, which are thus described in the declaration: "E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, Sec. 4, and all that part of E. $\frac{1}{2}$, S. E. $\frac{1}{4}$, Sec. 4, that lies north of the middle of the Little Wabash river, all in town 3 N., R. 7 E. of 3 P. M.; containing 100 acres." Plea of not guilty was filed. The case was tried before a jury, who found the defendants not guilty. Motion for a new trial was overruled, and judgment for defendants was rendered upon the verdict. The present writ of error is sued out for the purpose of reviewing such judgment.

Plaintiff's attorney filed an affidavit under the statute that plaintiff claimed title through a common source of title with the defendants, namely, from Martin R. M. Wallace. The plaintiff then introduced in evidence a quitclaim deed, dated October 2, 1894, and recorded October 4, 1894, executed by Wallace and his wife to plaintiff, conveying E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, and E. $\frac{1}{2}$, S. E. $\frac{1}{4}$, of said section 4, containing 160 acres; and also a deed dated May 22, 1865, and recorded May 31, 1865, executed by a master in chancery to Wallace, in pursuance of a sale under a decree of foreclosure, rendered by the circuit court of Clay county in the case of Martin R. M. Wallace against Benjamin W. Edwards and Sarah A. Edwards. The defense of the defendants was possession and payment of taxes for seven successive years under claim and color of title, etc. The deed introduced as color of title was a quitclaim deed, dated June 5, 1885, recorded June 10, 1885, executed by William I. Clifton, clerk of the county court, to "Burns & Hawkins," conveying E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, containing 78.36 acres, and E. $\frac{1}{2}$, S. E. $\frac{1}{4}$, containing 80 acres, of said section 4, and reciting sale on June 4, 1883, for non-payment of taxes. Defendants also introduced in evidence a deed dated December

24, 1891, and recorded December 26, 1891, executed by Richard J. Burns and wife to Edward H. Hawkins, conveying all that part of E. $\frac{1}{2}$, S. E. $\frac{1}{4}$, that lies north of the center of the Little Wabash river, 20 acres, and also E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, 80 acres, of said section 4; also a deed dated and recorded December 26, 1891, executed by Hawkins and wife to the appellees William Edwards and Young Edwards. The defendants introduced tax receipts for the purpose of showing payment of taxes for the years from 1885 to 1893, inclusive, and examined witnesses upon the question of possession.

The judgment must be reversed. There was not proof of such payment of taxes as the law requires. "Inasmuch as the payment of taxes under color of title operates to defeat the paramount and all other titles, when relied on, the proof must be clear and convincing." *Hurlbut v. Bradford*, 109 Ill. 397; *Perry v. Burton*, 111 Ill. 138. The tax receipt introduced to show the payment of taxes for the year 1889 describes the property as the "E. $\frac{1}{2}$, N. E. $\frac{1}{4}$, N. side E. $\frac{1}{2}$, N. E. $\frac{1}{4}$." This receipt does not show the payment of taxes on any part of the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of the section. The tax receipt itself was the only evidence of the payment of the taxes for 1889, and no oral or documentary evidence was introduced to show that the words "N. side E. $\frac{1}{2}$, N. E. $\frac{1}{4}$ " were a mistake for "N. side E. $\frac{1}{2}$, S. E. $\frac{1}{4}$." There was thus a break in the chain of payments on that part of the premises which was in the S. E. $\frac{1}{4}$ of the section. If the year 1889 be taken out, there was not payment of taxes for seven successive years upon the land in the S. E. $\frac{1}{4}$ of the section; and yet the judgment was for the land in the S. E. $\frac{1}{4}$ as well as for that in the N. E. $\frac{1}{4}$. Again, the tax receipt for the year 1888 describes the land in the S. E. $\frac{1}{4}$ as follows: "N. end E. $\frac{1}{2}$, S. E. $\frac{1}{4}$." The receipts for the years 1890, 1891, and 1892 describe said land as follows: "N. side E. $\frac{1}{2}$, S. E. $\frac{1}{4}$," and the receipt for 1893 describes it as "N. side S. E. $\frac{1}{4}$." No evidence was introduced to show that the north end, or north side, of the S. E. $\frac{1}{4}$, or of the E. $\frac{1}{2}$, S. E. $\frac{1}{4}$, was the same as "all that part of E. $\frac{1}{2}$, S. E. $\frac{1}{4}$, that lies north of the middle of the Little Wabash river." "Tax receipts for the taxes on a part of the survey, without showing what part, are not sufficient of themselves, unexplained, to prove the payment of taxes." *Stumpp v. Osterhage*, 111 Ill. 82. Again, possession of the premises for a full period of seven years is not shown. It appears from the testimony that no one was in possession from October, 1890, to December, 1891. There was a hiatus in the possession for a period of more than one year. *Schenck v. White*, 53 Ill. 358. Before protection can be afforded under the limitation act of 1839, the possession must be continuous, as well as adverse, visible, and notorious. *Medley v. Elliott*, 82 Ill. 532. If there is no actual inclosure or residence,

there must be a continuous dominion, manifested by continuous acts of ownership. *Downing v. Mayes*, 153 Ill. 330, 38 N. E. 620; *Johns v. McKibben*, 156 Ill. 71, 40 N. E. 449. Here there were no acts of ownership, nor was there any other manifestation of dominion during the period above named.

The plaintiff asked, and the court refused, an instruction to the effect that, where a plaintiff states on oath upon the trial that he claims title through a common source with the defendant, it is sufficient for him to show title from such common source. We see no reason why this instruction should not have been given. Plaintiff made the affidavit that he claimed title in fee simple to the lands in question through Wallace, as a common source of title with defendants, in accordance with the statute. 1 Starr & C. Ann. St. p. 986. Neither of the defendants, nor any agent or attorney for them, denied on oath that they claimed title through such source, or that they claimed through some other source. Where the plaintiff in ejectment swears that both parties claim title through a common source, he is not obliged to go back of the common source, and trace his title from the government, unless the defendant denies under oath that he claims title under such source, or swears that he claims title under some other source. *Railway Co. v. Hardt*, 138 Ill. 120, 27 N. E. 910; *Railroad Co. v. Parrott*, 92 Ill. 194; *Smith v. Laatsch*, 114 Ill. 271, 2 N. E. 59. But, in our view of the case, there is a more serious objection to the defense set up by the defendants than any which has yet been referred to. The tax deed relied upon as color of title was executed in pursuance of a sale made on June 4 or June 5, 1883, for nonpayment of taxes. This sale was made by Edward H. Hawkins, acting as clerk or auctioneer for the county treasurer and collector. Hawkins was at that time clerk and deputy of the county collector. The revenue act (sections 152, 153) provides that collectors may appoint deputies, and for warrants to such deputies. 2 Starr & C. Ann. St. pp. 2073, 2074. It also provides (section 201) that the collector shall attend at the courthouse and offer for sale the delinquent lands, either in person or by deputy. *Id.* p. 2094. At the sale so made by Hawkins, the land in question was bought by the firm of Burns & Hawkins, engaged in the business of making abstracts of title and handling real estate, of which firm Edward H. Hawkins was a member. In other words, Hawkins, acting as deputy collector, sold the land to himself, or to a firm of which he was a member. It is a well-settled rule that a trustee or agent to purchase or sell property is forbidden to purchase from or sell to himself. Equity will not allow any one to profit by a violation of his own duty. A design on the part of such a trustee or agent to purchase or sell on his own account creates an interest which is opposed to his duty to another. "The rule applies to sales made at public auction, and to

judicial sales as well as private sales. It extends not only to the agent himself, but to those in his immediate employ, who are engaged in the transaction of his business, which is, necessarily, the business of the agent's principal." 1 Beach, Eq. Jur. §§ 127, 133; *Laggar v. Association*, 148 Ill. 283, 33 N. E. 946. In the present case, when Hawkins permitted Burns, his partner, to buy this property for the firm of which they were both members, at a tax sale made by Hawkins as a public official, he did what he had no right to do; and he was bound to know that such a transaction was against the law. Therefore the tax deed issued to the firm in pursuance of the sale so made cannot be regarded as "claim and color of title made in good faith" within the meaning of section 6 of the limitation act. 2 Starr & C. Ann. St. p. 1539. To permit public officers thus to buy at public sales made by themselves would be fraught with serious danger to the interests of the public and of property owners. It has been said that the good faith required by the statute in the creation or acquisition of color of title is a freedom from a design to defraud the person having the better title. *McCagg v. Heacock*, 34 Ill. 476. When a public official sells the property of the person having the better title to himself, such act is in itself evidence of a design to defraud. It follows that neither the firm of Burns & Hawkins, nor either member of it, could set up the tax deed in question as color of title made in good faith under the limitation law. Whether or not a purchaser from the firm, or either of its members, before the period of seven years had run, would be affected by such want of good faith, may be a question. It has been held that, where there is such a fraud upon the owner of the land as to take from the defense the statutory element of good faith, a purchaser from the grantee in the tax deed would not be affected by it. *Morrison v. Norman*, 47 Ill. 477; *Bowman v. Wettig*, 39 Ill. 416; *Dalton v. Lucas*, 63 Ill. 337. But this rule only applies where the grantee in the deed is the holder of the legal title, and where, by consequence, the purchaser from such grantee is also the holder of the legal title. The instrument which can be used as color of title must be one which has a grantor and grantee, and purports on its face to convey the legal title. *Cole v. Pennoyer*, 14 Ill. 158; *Dickenson v. Breeden*, 30 Ill. 279; *Morrison v. Norman*, supra; *Hinkley v. Greene*, 52 Ill. 223; *Foster v. Letz*, 86 Ill. 412. A certificate of purchase at a tax sale is not color of title. An executory contract for a conveyance is not color of title. *Dickenson v. Breeden*, supra. A bond for a deed is not color of title. *Rigor v. Frye*, 62 Ill. 507. The vendee in a contract to convey has a mere equitable title. The tax deed in this case was a deed to Burns & Hawkins. Upon its face it purported to be a deed to a firm or partnership. We have recently said: "A partnership is not a legal person, either

natural or artificial. Hence a conveyance to a partnership in the partnership name is insufficient to convey the legal title, and is valid only as a contract to convey, and vests only an equitable title in the partnership. * * * In such a deed there is * * * no legal grantee." *Silverman v. Kristufek*, 162 Ill. 222, 44 N. E. 433. The same doctrine is announced in 1 Bates, Partn. § 296, and in 17 Am. & Eng. Enc. Law, p. 959, and cases cited. The deed here set up as color of title, being a deed to a partnership, is nothing more than a contract to convey, and vested only an equitable title in Burns & Hawkins, whose deeds to appellee vested in them only an equitable title. The tax deed, being an instrument which on its face amounts only to a contract to convey, is not such an instrument as amounts to color of title under the limitation act. Therefore, even if the appellees could not be affected by the circumstance already referred to, as indicating the absence of good faith on the part of Burns & Hawkins, they are not purchasers from grantees holding a legal title, but purchasers of a mere equitable title, or assignees of a contract to convey. The tax deed is equally unavailable, when invoked by them as color of title, as it would be in the hands of the firm named therein. For the reasons here stated, the judgment of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views here expressed. Reversed and remanded.

(163 Ill. 508)

DEXTER et al. v. McAFEE et al.

(Supreme Court of Illinois. Nov. 11, 1896.)

CANCELLATION OF DEED—FRAUD—PLEADING.

A bill to set aside a deed for fraud alleged that the complainant contracted with R. to convey the land to him upon certain conditions; that subsequently a verbal arrangement was made, by which it was agreed that R. should convey the lots to A. in exchange for a stock of merchandise, and that R. should give his note to complainant, secured by a valid first lien upon the merchandise, for the balance due under the original contract; that R. contracted with A. for the exchange of the lots for the goods, and complainant thereupon conveyed to R., who in turn conveyed to J., a brother of A., at A.'s request. The bill further alleged that R. failed to get possession of the stock of merchandise, but that A. delivered it to other parties, and placed it beyond his control; that J. afterwards conveyed the land by deed to S., who was not an innocent purchaser for value; and that such conveyance was made for the purpose of aiding A. in defrauding the complainant. *Held*, that in the absence of any allegation as to confederation between R. and A., or any conspiracy or misrepresentation on the part of R., the facts alleged were insufficient to show fraud.

Appeal from circuit court, St. Clair county; A. S. Wilderman, Judge.

Bill in equity brought by Wyllian K. Dexter and Charles Dexter, her husband, against John A. McAfee and others. From an order sustaining a demurrer to the bill, the complainants appeal. Affirmed.

This was a bill in equity, filed for the purpose of setting aside certain deeds for a number of lots situated in a place called "Alta Sita Park," in St. Clair county. The bill alleges the facts in the case as follows: The lots described were in the first place owned by Mrs. Dexter, one of the complainants. In the year 1893 she entered into a contract with one Elza R. Roe, by which she agreed to convey the same to him upon certain conditions, and upon the payment of certain sums of money mentioned in the contract. This contract for a deed was afterwards duly assigned by Roe to his wife. After that time a verbal arrangement was made between Mrs. Dexter and Mrs. Roe that Mrs. Dexter should convey the said lots to Mrs. Roe, and that Mrs. Roe should convey them to John A. McAfee, in exchange for a stock of merchandise located at Holden, Mo., and that Mrs. Roe should give her note to Mrs. Dexter, secured by a valid first lien upon said goods and chattels, for the balance due for said lots, according to the terms of the first contract. Thereupon Mrs. Roe entered into a contract in writing with said John A. McAfee for the exchange of these lots for the goods. Afterwards Mrs. Dexter conveyed to Mrs. Roe, and she to one James T. McAfee; both deeds being duly executed, acknowledged, delivered, and recorded. The bill alleges that the conveyance was made to James T. McAfee at the special instance and request of said John A. McAfee, who then and there stated that James was his brother, and that he had no interest in the transaction, and had no knowledge that it was made to him as grantee, and that he would hold the same in trust for the use of him, the said John A. McAfee. It is next alleged that Mrs. Roe failed to get possession of the stock of merchandise, and that John A. McAfee delivered it to other parties and placed it beyond his control, and that afterwards said James T. McAfee and wife conveyed the same, by a deed duly recorded, to one S. W. Jurden, who was not an innocent purchaser for value, and that such conveyance was made for the purpose of aiding John A. McAfee in defrauding the complainants. A general demurrer was interposed by John A. McAfee, James T. McAfee, and S. W. Jurden; the other two defendants, Mr. and Mrs. Roe, having defaulted. The court below sustained the demurrer. The complainants standing by their bill, the same was dismissed. The appeal questions the ruling upon the demurrer.

J. M. Freels, for appellants. R. D. W. Holder, for appellees.

WILKIN, J. (after stating the facts). It is a fundamental principle that fraud is not to be presumed, and that, where an act may be traced to an honest intent as well as to a corrupt one, the former should be preferred. Fraud being a conclusion of law, it is incumbent upon the party who alleges it to state the facts which constitute it, and to state them specifically. So far as the defendants who in-

terposed the demurrer are concerned, no relationship or dealing whatever with the complainants is shown to have existed. Mrs. Dexter dealt with Mrs. Roe. Mrs. Roe dealt with John A. McAfee. There is no allegation of any confederation between Mrs. Roe and John A. McAfee, or of any conspiracy on their part to defraud her. Neither was there any misrepresentation on the part of Mrs. Roe to Mrs. Dexter. The arrangement between them was that Mrs. Roe should pay for the lots she had a contract for, by giving her note secured by a lien on a stock of goods in Holden, Mo., which she expected to buy of John A. McAfee. Accordingly deeds were passed from Mrs. Dexter to Mrs. Roe, and from the latter to James T. McAfee. But, in some way not specifically disclosed by the bill, there was a failure on the part of John A. McAfee to deliver to Mrs. Roe the stock of merchandise according to her contract with him. In the first place, the bill nowhere alleges that Mrs. Roe obtained the deed for the lots from Mrs. Dexter by means of any misrepresentations amounting to fraud, nor do the facts which are set up in the bill warrant any such deduction. The fact that Mrs. Roe failed to obtain the stock of goods from John A. McAfee, and therefore was unable to give any lien upon it to Mrs. Dexter, does not imply that it was her intention to defraud Mrs. Dexter in the transaction. In the second place, the bill fails to connect either John A. McAfee, James T. McAfee, or S. W. Jurden therewith, if such an inference could be drawn. Again, it does not appear from the allegations of the bill that James T. McAfee was not an innocent purchaser for value. The statement of John A. McAfee to that effect, in the absence of a direct averment in the bill that the facts so stated were true, is manifestly an insufficient averment, especially in a case charging fraud. There are other grounds of objection to the bill, but any one of these was sufficient to justify the court in sustaining the demurrer. The judgment is affirmed. Affirmed.

(163 Ill. 112)

RIDGLEY v. PEOPLE ex rel. RICHARDS.

(Supreme Court of Illinois. Nov. 10, 1896.)

EXECUTORS — DUTIES — NOT AFFECTED BY BEING ALSO LEGATEE.

The fact that the widow and executrix of a testator was also, by his will, made residuary devisee and legatee, with power to use and dispose of his residuary estate during her life as she might see fit, without being required to account to any one therefor, does not relieve her from any of her duties as executrix; and she is required to make reports to the court, and to close up the administration as provided by statute, the same as any other representative. 63 Ill. App. 556, affirmed.

Appeal from appellate court, Third district. Proceedings on relation of John R. Richards against Mary A. Ridgley, as executrix of the will of Richard Ridgley, deceased. From the judgment of the appellate court (63 Ill. App. 556), defendant appeals. Affirmed.

E. W. Hayes and Rinaker & Rinaker, for appellant. Charles E. Richards, A. N. Yancy, and Anderson & Bell, for appellee.

CARTWRIGHT, J. John R. Richards filed his petition in the county court of Macoupin county for a citation to the appellant, Mary A. Ridgley, as executrix of the last will and testament of Richard Ridgley, deceased, to compel her to make a report to said court of her accounts as such executrix. A citation was issued and served, and there was a hearing. The county court granted the petition, and ordered appellant to file her report as executrix within 30 days. On appeal the circuit court dismissed the petition, and a further appeal was taken to the appellate court, where the order of the circuit court was reversed, and the cause was remanded, with directions to enter an order requiring appellant to report as executrix in compliance with the order of the county court. The hearing was had upon a stipulation as to the facts, in connection with the will of Richard Ridgley. By the first two clauses of the will, specific bequests were made to Mary G. True and the Congregational Society of Bunker Hill, and the third clause was as follows: "I give and bequeath to my wife, Mary Ann Ridgley, all the rest, residue, and remainder of my estate, both real and personal, of every name and nature, during her natural life; and I further hereby empower my said wife, Mary Ann Ridgley, to sell and convey, and make good and sufficient deeds of conveyances to, any or all of the real estate which I may own at the time of my death, and to sell and dispose of all or any of my personal property which I may own at the time of my death. And it is my will that my said wife use or invest the proceeds of such sales as she may see fit. And it is my will that she shall not be required to account to any one for the use of the same." Said Mary Ann Ridgley was appointed sole executrix of the will, with the direction that no bond should be required of her; and it was provided that, after her death, what should remain of the estate should be equally divided between the heirs of the testator's two sisters, Rhoda Bird and Eliza Richards, and that the petitioner, John R. Richards, after the death of said wife, should take charge of, and finish the settlement of, the estate. The agreed facts were that Richard Ridgley died in March, 1887; that his widow, the appellant, in April, 1887, qualified as executrix of the will; that on June 22, 1887, she filed an inventory of the estate, showing the assets to be a number of town lots in Bunker Hill, and notes and accounts amounting to \$20,540, and household furniture, etc., of the appraised value of \$618.95, which was taken on the widow's award; that no other report had ever been made by the executrix to the county court; and that the relator, John R. Richards, is the same John R. Richards mentioned in the will.

The statute requires all executors to make report of their accounts to the county court at the first term after the expiration of 1 year from the date of their letters, and, in like manner, every 12 months thereafter, or sooner, if required, until their duties are fully completed, and the court is required to enforce settlements. Appellant has not complied with that statute. It was her duty, as executrix, to pay and discharge the just claims proved against the estate, to pay the specific bequests mentioned in the will, and to turn over to herself, as legatee, the residue, under the third clause of the will. It was the duty of the county court to see that the estate was so settled and administered in accordance with the provisions of the will. The relator has such an interest as entitles him to enforce compliance with the law. The will provided for a further disposition of whatever might remain after the death of appellant, and he was appointed to take upon himself the execution of that part of the will. He has a right to see that the estate is closed up, and that reports are made showing what appellant receives as legatee, so as to enable the beneficiaries under the will after her death to distinguish what may remain of that estate from other estate of appellant in which they would have no interest. It is by the reports that the amount and character of the estate subject to the further provision may be known, and the rights of such beneficiaries be protected. It is argued in behalf of appellant that the third clause above quoted relieved her from the duty of making any report of her accounts as executrix. This idea results apparently from some confusion in the minds of counsel, arising from the fact that the executrix and the legatee under that clause are the same person. But the law is not different on that account. If the legatee were a different person, there would be no color for the claim that, under the clause, the testator had attempted to exempt the executrix from the duty of making reports. She occupies a dual relation to the administration: First, she is executrix,—bound to administer the estate and perform the functions of executrix; and, secondly, she is legatee,—entitled to receive the remainder of the estate after the payment of debts and specific bequests. The petition further charged that appellant had so handled the estate that the income had been decreased more than one-half, and that she had been guilty of gross and willful waste of the estate, by giving away large sums of money, and, by deed, unlawfully disposing of lands and equities, to the injury of the petitioner and the other parties in interest. If the alleged acts were done as legatee and owner of the estate for life, with power of disposition, the county court would have no control of the question; and if the petitioner, or those who would be entitled to what might remain after her death, had any right to an account of waste of the estate, for an appropriation by her as legatee, the

remedy could not be found in that court. When the estate in the hands of the executrix shall be administered, and the residue delivered to the legatee, the county court will cease to have control over such estate. She will then have a life estate, as legatee, with full power to sell, convey, and dispose of the property at her pleasure, and to use and invest the proceeds as she may see fit. The power of control by the county court over appellant is only as executrix, and, when she shall have performed all her duties as such, she will be entitled to a discharge, and its jurisdiction will cease. She should, however, be required to report as executrix, and to complete the duties imposed upon her by the will and the statute, under the supervision of the court. The judgment of the appellate court will therefore be affirmed. Judgment affirmed.

(163 Ill. 611)

BOYD et al. v. BOYD et al.

(Supreme Court of Illinois. Nov. 11, 1896.)

RESULTING TRUST—WITNESS—COMPETENCY—LACHES—POSSESSION.

1. In a bill by the widow to establish a resulting trust in lands nominally owned by her deceased husband, where the adverse parties defend as the heirs of their deceased father, the widow is not a competent witness in her own behalf, under Starr & C. Ann. St. c. 51, § 2, which provides that in any civil action no party shall testify in his own behalf when any adverse party sues or defends as the heir of any deceased person.

2. The interest of her prospective heirs in the establishment of the trust in favor of the cross complainant is too remote to render them incompetent witnesses in her behalf.

3. On the issue of a resulting trust in lands, the testimony of the grantors in relation to the negotiations leading up to the purchase of the property is competent.

4. The doctrine of laches cannot be invoked to defeat a resulting trust in favor of one who has been in continuous possession of the property in which it is sought to establish the trust.

Error to circuit court, Crawford county; S. Z. Landes, Judge.

Bill by Sarah Boyd and others against Anna Boyd and others for partition. From a judgment establishing a resulting trust in favor of Anna Boyd on a cross bill, plaintiffs bring error. Affirmed.

E. Callahan, for plaintiffs in error. Parker & Crowley, for defendants in error.

BAKER, J. This is a bill for partition filed by Sarah Boyd, William Boyd, and Elizabeth Clark, heirs at law of James Boyd, deceased, against Anna Boyd, his widow, and the other heirs at law of said deceased. The bill alleges that James Boyd died seised in fee of the undivided one-half, as tenant in common with Anna Boyd, his widow, of a certain tract of land in Crawford county, and prays partition of the same between the parties interested. Anna Boyd filed her cross bill, alleging, among other things, that on the 13th day of May, 1865, she, with her own separate money, pur-

chased from one Charles Biggs the land described in the bill for partition; that James Boyd, then her husband, in violation of her rights, and without her knowledge and consent, procured the deed to the same to be made to himself and to her jointly; that, upon the return of her husband with the deed, she remained in ignorance of the fact that it had been made to him and her jointly; that long after the deed had been executed she learned of the fact that it had been so made, and she refused to receive it, but that her husband retained possession of the deed for a considerable time, and that the same is now in her possession; that she has had possession and control of said real estate ever since the execution of the said deed, and still has possession and control thereof, and has always paid the taxes thereon, from the time of the purchase of the land until the filing of her cross bill; and that her husband disclaimed any interest whatever in said land. It further alleges that she is the owner in fee of an undivided one-half of said real estate, and the equitable owner of the other half; that the legal title to the undivided one-half of the land taken to James Boyd was taken to him as her trustee; and prays that the one-half so held by James Boyd be declared to be held in trust for her, and that the title to the entirety of the land sought to be partitioned be declared to be vested in her in fee simple. The cause was heard before the chancellor, in the Crawford circuit court, upon the original and cross bills, answers and replications, and the report of the master in chancery. The court found the allegations of the cross bill to be true, entered a decree in accordance with its prayer, and dismissed the bill for partition. This writ of error is sued out to reverse that decree.

It is contended that Anna Boyd, Alexander Boyd, Wilson M. Boyd, and Charles and Jane Biggs, who testified in the cause, were not competent witnesses against the plaintiffs in error. It is manifest that Anna Boyd was not a competent witness to establish the trust set up in the cross bill, for she is the complainant therein, and plaintiffs in error defend as the heirs of their deceased father. Starr & C. Ann. St. c. 51, § 2;¹ Michael v. Mace, 137 Ill. 485, 27 N. E. 694; Holderman v. Gray, 130 Ill. 442, 22 N. E. 592; Kelsey v. Snyder, 118 Ill. 544, 9 N. E. 195.

Alexander Boyd and Wilson M. Boyd are the sons of James Boyd, deceased, and of Anna Boyd, and Jane Biggs is the daughter of Anna Boyd by a former husband. The claim is that they were not competent witnesses, for the same reason that their mother was incompetent; for, it is said, the establishment of a trust in favor of Anna Boyd would inure to their benefit, as her prospective heirs. But this interest is too remote and uncertain

¹ Starr & C. Ann. St. c. 51, § 2, provides, among other things, that in a civil action no party shall testify in his own behalf when any adverse party defends as the heir of any deceased person.

to render them incompetent; for their mother may dispose of the property before she dies, or she may outlive her children. As to Alexander and Wilson M. Boyd, they are defendants in both the original and cross bills, and testified against their own interests, since, as heirs of James Boyd, they would, in the event of a partition, get their respective shares of that portion of the land deeded to their father.

Plaintiffs in error urge that Jane Biggs was incompetent for another reason, which also rendered her husband, Charles Biggs, incompetent as a witness; that is, because they are grantors in the deed to James Boyd and Anna Boyd of the land here in controversy. It is said that they cannot by their testimony impeach, destroy, or take away the title which they conveyed to James Boyd. This latter proposition is true. But it is an answer to the objection made, that they did not seek to impeach or destroy the title they had conveyed, nor did their testimony have any such effect. It merely tended to establish that such title, as to a one-half interest therein, was held in trust. Their testimony was in relation to the negotiations leading up to the purchase of the property, and to a conversation between James Boyd, Solomon Biggs, and the scrivener, that occurred while the deed was being drawn up, and was competent and proper. But, disregarding the testimony of Anna Boyd, there is ample evidence in the record to establish the case set out in the cross bill, and to sustain the decree. Being so convinced, there is no reason why we should enter into a discussion of the evidence.

It is urged that her own laches is a bar to the equitable title of Anna Boyd, because she made no effort, from the time of the execution of the deed, in 1865, down to the filing of her cross bill, to have the trust enforced. This position, however, is not tenable. She is shown to have been in possession during the entire period, and the doctrine of laches cannot, therefore, be invoked against her. *Newell v. Montgomery*, 129 Ill. 58, 21 N. E. 508; *Orthwein v. Thomas*, 127 Ill. 554, 21 N. E. 430; *Bush v. Stanley*, 122 Ill. 406, 13 N. E. 249. The decree of the circuit court will be affirmed. Affirmed.

(163 Ill. 251)

WEAVER v. PEASLEY et al.

(Supreme Court of Illinois. Nov. 10, 1896.)

EXECUTION—REQUISITES—SEAL OF THE COURT—AMENDMENT—ESTOPPEL—SALE UNDER VOID EXECUTION—RATIFICATION.

1. Under *Starr & C. Ann. St. c. 37, par. 67*, providing that all process must bear the seal of the court issuing it, an execution not under the seal of the court is absolutely void.

2. An execution, defective in that it does not bear the seal of the court issuing it, cannot be amended after sale by attaching the seal.

3. On motion to set aside a sale under execution, the defendant is not estopped to deny the validity of the execution for the reason that before the sale he moved to stay the levy and sale on grounds other than the invalidity of the execution.

4. Before sale under execution, a judgment creditor filed a petition claiming the right to share in the proceeds of the sale. To this petition the execution debtor was ruled to plead, but failed to do so. *Held*, that the debtor was not thereby estopped to deny the validity of the execution.

5. Before sale on execution, the defendant moved to stay the levy and sale on grounds other than invalidity of the execution, and, on being ruled to plead to a motion by a judgment creditor claiming to share in the proceeds of the sale, failed to do so. *Held*, that knowledge of the fact that the execution creditor relied on the sale as a satisfaction of his judgment, and waived other means of satisfying it, was not such a ratification of the sale as would estop defendant from subsequently moving to set it aside on the ground that the execution was absolutely void.

64 Ill. App. 80, affirmed.

Appeal from appellate court, Third district.

Action by T. F. Weaver against Peasley & Co. and others. There was judgment for plaintiff, and a sale of lands thereunder on execution. The defendant afterwards moved to set aside the sale on the ground that the execution was void for want of a seal. An order denying the motion was reversed by the appellate court, and the cause remanded, with directions to vacate and set aside the execution and sale. Plaintiff filed a cross motion for leave to amend the execution by attaching a seal, and the order of the court denying this motion was assigned as cross error in the appellate court. From the judgment of the appellate court reversing the order denying the motion to set aside the sale, and affirming the order denying the cross motion for leave to amend (64 Ill. App. 80), plaintiff appeals. Affirmed.

Fifer & Barry, for appellant. A. W. Peasley, for appellees.

CARTWRIGHT, J. The circuit court of McLean county overruled a motion of appellees to set aside a sale of lands under an execution upon a judgment against them in favor of appellant. One ground of the motion was that the execution was void for want of a seal. The appellate court held that the circuit court erred in not sustaining the motion, and the judgment was reversed and the cause remanded, with directions to vacate and set aside the execution and sale. On the hearing of the motion, appellant entered his cross motion for leave to amend the execution by attaching a seal. The cross motion was denied. It is contended by counsel for appellant that the execution was amendable, and the action of the circuit court in denying the motion was assigned as a cross error in the appellate court. It is insisted that the appellate court erred in holding the execution void for want of a seal, and in not sustaining the cross error. The statute requires all process to be sealed with the seal of the court. *Starr & C. Ann. St. c. 37, par. 67*. It has been settled by numerous decisions in this state that this provision is mandatory; that an execution not under the seal of the court is void, and may be successfully resisted wherever the question may arise. *Bybee v. Ashby*, 2 Glm.

151; *Davis v. Ransom*, 26 Ill. 100; *Roseman v. Miller*, 84 Ill. 297. And an execution which is void for such reason cannot be amended after sale. *Sidwell v. Schumacher*, 99 Ill. 423; *Eagan v. Connelly*, 107 Ill. 458. In *Sidwell v. Schumacher*, supra, it became necessary to determine whether an execution could be so amended for the reason that the objection that there was no seal was not specifically made in the circuit court, and, if the execution was amendable on the trial, such objection must have been specifically pointed out, so that it might be obviated. The cases in this court were there reviewed, and it was held that where the law expressly directs that the process shall be in a specific form, and issued in a particular manner, such provision is mandatory, and a failure to comply with the law will render the process void. It was decided that such process cannot be amended after sale, and that a sale of land under such an execution is absolutely void, and may be successfully resisted in any kind of proceedings or in any form in which the question may arise. No subsequent amendment of such a writ could relate back, and make valid a sale under such process. If no right passed by an attempted sale, no amendment could, by relation, cause something to pass. The execution was void, and the court did not err in overruling the motion for leave to amend.

Appellant also claims that appellees were estopped from questioning the validity of the sale—First, because they entered a motion in this case and in a chancery case to stay the levy and sale, before sale was made, for other reasons than because the execution was void; second, because the Third National Bank, a judgment creditor of appellees, filed a petition in the case claiming the right to share in the proceeds of the sale under the execution, making appellees defendants, and this petition appellees failed to answer, though ruled to do so, and a decree was rendered in favor of the bank; and, third, that the sale was ratified by appellees, as they knew that appellant, the purchaser at the sale, relied on the sale as a satisfaction of his judgment, and waived other means of satisfying it. These claims are not tenable. There was no misrepresentation by appellees, and there was nothing which they did that either induced or encouraged the appellant to act in any different manner from what he otherwise would. The means of ascertaining the fact as to the execution were open to appellant, and it was shown that appellees did not know, prior to the sale, that the execution lacked a seal. The appellees neither caused appellant to believe in the validity of the execution, nor induced him to act upon such belief. The essential elements of an estoppel or waiver were lacking. In order to a waiver, it must be shown that appellees knew their rights, and it is proved in this case that they did not. There is no element of estoppel, waiver, or ratification, and the judgment of the appellate court will be affirmed. Judgment affirmed.

(163 Ill. 524)

ILLINOIS CENT. R. CO. v. CITY OF CHAMPAIGN.

(Supreme Court of Illinois. Nov. 10, 1896.)

JUDGMENT—RES JUDICATA—AWARD FOR PROPERTY CONDEMNED—MUNICIPAL CORPORATIONS—ESTOPPEL.

1. A judgment in proceedings commenced by a municipal corporation for the condemnation of land for a street, fixing the amount to be paid to the owner as compensation, is an adjudication binding on the corporation; and it cannot ignore such judgment, and, by commencing new proceedings for the same purpose, again litigate the question of the amount of just compensation.

2. The pleading of a judgment as an adjudication by a defendant is an admission that the judgment is valid and in force, and estops such defendant from afterwards asserting its invalidity.

Appeal from circuit court, Champaign county; F. Bookwalter, Judge.

Proceeding by the city of Champaign for the condemnation of land for the extension of a street across the depot grounds of the Illinois Central Railroad Company. From a judgment fixing the amount of compensation, the railroad company appeals. Reversed.

J. S. Wolfe, C. V. Gwin, and James Fentress, for appellant. E. L. Sweet and J. L. Ray, for appellee.

MAGRUDER, C. J. This is a petition by appellee, reciting the passage of an ordinance for the extension of Main street, in the city of Champaign, from Main street on the west side of appellant's right of way, across said right of way, to Main street on the east side of said right of way, and praying that the just compensation to be paid for the right to use so much of appellant's right of way as is necessary to extend said street across it be ascertained by a jury. Appellant made a motion to dismiss the proceeding, for several reasons, including the reason hereinafter mentioned. This motion was overruled, and exception was taken to the order overruling it. A trial was then had before a jury, resulting in verdict and judgment fixing the just compensation to be paid to appellant for its land taken and damaged, and to one Spaulding for taking or damaging his premises. The present appeal is prosecuted from the judgment so rendered.

One of the reasons urged by the appellant in the court below in favor of its motion to dismiss was that some time theretofore the city council of Champaign had passed another ordinance for the same improvement,—that is to say, for opening and extending Main street on the west side of appellant's railroad easterly to Main street on the east side of said railroad, across that portion of appellant's right of way lying between West and East Main streets in said city,—and had filed its petition in the county court of Champaign county for the ascertainment of just compensation to be paid for such use of said right of way for the purposes of a street, and "that thereafter a jury of twelve men were impaneled to try said cause in said

court. The jury visited the premises; afterwards sat in court, heard the evidence as to the matter in issue, to wit, the just compensation to be paid to said company by said city for the extension of Main street. The court instructed the jury, and the jury, after deliberation, returned into said court their verdict, in the following form and manner: 'We, the jury, find that the Illinois Central Railroad Company is entitled to four thousand (\$4,000) dollars as compensation for land taken, and to six thousand (\$6,000) dollars as compensation for damages in consequence of such taking, and that the sum of ten thousand (\$10,000) is just compensation for both.' Upon which verdict, after overruling motion for new trial, the court entered its judgment as follows: 'It is therefore considered and adjudged by the court that the said petitioner enter upon the property in controversy herein, and have possession of the same, upon the payment by the said petitioner to said Illinois Central Railroad Company of the said sum of \$10,000, and that the said petitioner pay the costs of this proceeding.' Which judgment remains of record, unreversed, not appealed from, nor in aught changed or abated in any manner, in whole or in part, by any court. And defendant, in further aid of its motion, says that at the time said cause was so tried and determined all parties in interest were properly in court, and were heard in their respective interests before said court and jury at the time of said trial and determination, and further says that the premises then and now in controversy are one and identically the same, and that the street extension prayed for in said petition and ordinance provided for are the same street extension claimed and prayed for in this proceeding, and no other, and there has been a former adjudication of the same rights and powers now sought to be again determined between the same parties, namely, the said city of Champaign and the said Illinois Central Railroad Company. Wherefore the defendant insists that the said city shall not relitigate the matters aforesaid in this or any other court; that the said finding and judgment, so unreversed and not appealed from, are final and conclusive as to the damage caused by said improvement, and so declared to be of such force and effect by the fourteenth section of article 9 of the General Laws, for the incorporation of cities, towns, and villages of this state; that the said plaintiff had, prior to the proceedings aforesaid, adopted said article 9 of said act of the general assembly mentioned, and said proceeding was had under the provisions of said act, and all the right and power therein and thereby conferred upon said plaintiff. Wherefore, and for the matters above set forth, this defendant prays that said cause be dismissed and discontinued as to the said matters herein and now involved. [Signed] J. S. Wolfe, Attorney for Defendant."

It thus appears that before the present con-

demnation proceeding was begun the appellee had instituted and prosecuted to a judgment, fixing the amount of compensation, another condemnation proceeding for the extension of the same street across appellant's right of way at the same point. The question thus presented is the same question which arose in Chicago, R. I. & P. Ry. Co. v. City of Chicago, 143 Ill. 641, 32 N. E. 179, and Id., 148 Ill. 479, 36 N. E. 72, and must be disposed of in the same way in which it was disposed of in those cases. In the first one of the two cases last cited, we said: "It is sticking in the bark to say that there was here an abandonment of condemnation proceedings. That which the doctrine involved contemplates is abandonment in good faith,—an abandonment of the improvement contemplated, or a change of location or route, or an abandonment of the design of taking the particular property involved for public use. To permit a corporation clothed with the right of eminent domain to abandon any judicial ascertainment that does not conform to its wishes, and, through the instrumentality of new petitions, submit anew the question of just compensation to successive juries, until a verdict is returned which it regards as sufficiently low, would be to give undue advantage to one of the parties to the controversy, and to work a rank injustice on the citizen and property owner. Even without regard to the statute that the first assessment shall be final and conclusive as to the amount of the damages, both reason and authority would lead us to the conclusion that such must be the law." The language thus quoted is precisely applicable to the case at bar. The fact that appellee has filed the present petition shows that it has not abandoned the enterprise in aid of which the condemnation is sought. The fact that appellant sets up the former judgment awarding compensation as a defense to the present proceeding is a concession of the validity of that judgment. A prior adjudication may be set up by plea, or in the course of the evidence. 2 Black, Judgm. § 783. Here all the proceedings in the former condemnation suit were introduced in evidence by appellant in support of the motion to dismiss. The former judgment awarding compensation, in order to operate as a bar to the present action, for which purpose it was introduced, is necessarily admitted to be a valid and subsisting adjudication. Id. §§ 513, 632. There is therefore no reason why appellee cannot pay the former award, as directed by the county court in its said judgment, and enter upon, and have possession of, the property condemned. Appellant would be estopped from then insisting that the judgment was invalid, after relying upon its validity here. 2 Herm. Estop. § 449. For the error in refusing to dismiss the petition in the present case for the reason above stated, the judgment of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views here expressed. Reversed and remanded.

(163 Ill. 616)

CHICAGO & A. R. CO. v. PEOPLE ex rel. WOOD, County Treasurer.

(Supreme Court of Illinois. Nov. 10, 1896.)

SCHOOLS—TAXATION—PURPOSE OF TAX—SUFFICIENCY OF CERTIFICATE.

1. Under the school law of 1889, art. 8, § 1 (3 Starr & C. Ann. St. p. 1194), authorizing the school directors to levy upon the taxable property of the district not to exceed 2 per cent. of the assessed valuation for educational or school purposes, and 3 per cent. for building purposes, and providing that the directors shall certify to the county treasurer each year the amount needed for school purposes and the amount needed for building purposes, a certificate reciting that a certain amount is needed for school purposes and a certain other amount for "heating and repairing purposes" is insufficient to give validity to a tax levied for heating and repairing purposes as a tax for building purposes.

2. A tax for "heating and repairing purposes" is a tax for school, and not for building, purposes, within the meaning of the school law of 1889, art. 8, § 1 (3 Starr & C. Ann. St. p. 1194), limiting the taxes levied in any one year to an amount not to exceed 2 per cent. of the assessed valuation for school purposes and 3 per cent. for building purposes.

Appeal from Tazewell county court; W. R. Curran, Judge.

Application on the relation of Charles S. Wood, county treasurer of Tazewell county, Ill., for judgment against the Chicago & Alton Railroad Company, for delinquent taxes of 1894. From a judgment in favor of the relator, the respondent appeals. Reversed.

Wm. Brown, T. N. Green, and M. J. Scraf-ford, for appellant.

MAGRUDER, C. J. This is an application to the county court by the county collector for judgment against the property of appellant for the delinquent taxes of 1894. Objections were filed on May 6, 1895, by the appellant, to the entry of judgment against its property for a delinquent school tax of \$336.13, levied in district 5, town 23, Tazewell county, Ill. The objections were sustained as to \$33.61, part of said sum of \$336.13, but overruled in all other respects; and judgment was entered against appellant's property for the remaining balance, to wit, the sum of \$302.52. The present appeal is prosecuted from such judgment, the appellant having deposited with the collector, as required by the statute, an amount of money equal to the judgment, including costs. Upon the hearing of the objections, the people, in addition to other proof, introduced in evidence the certificate of levy of said district, filed in said court on August 10, 1894, in the words and figures following, to wit: "We hereby certify that we require the amount of eighteen hundred dollars to be levied as a special tax for school purposes, and twelve hundred dollars for heating and repairing purposes on taxable property of our district for the year 1894. Given under our hands this 6th day of August, A. D. 1894. W. H. Smith, Stephen Fisher, H. Jennings, Directors District No. 5, Township No. 23, Range No. 3, Tazewell County, Illinois." Un-

der this certificate the county clerk extended a school tax of \$3.60 upon each \$100 of the assessed valuation of the taxable property of appellant in the district for the year 1894. The assessed valuation was \$21,008, and the tax amounted to \$756.29. Of this sum appellant paid \$420.16, which was 2 per cent. on the assessed valuation of its property. The balance of the tax, to wit, the sum of \$336.13, appellant declined to pay.

The objections filed by the appellant at the May term, 1895, of the county court to the entry of judgment against its property for said sum of \$336.13 are, in substance, that the purposes mentioned in the certificate were school purposes, that the sum was in excess of the 2 per cent. which the directors were by law authorized to levy for those purposes, and that the sum was levied without any authority of law. Upon the hearing of the objections it was disclosed by the testimony of the county clerk that of the total tax of \$3.60 on each \$100 levied in the district upon the property of appellant, \$2.16 on each \$100, or \$453.77, was for school purposes, and \$1.44 on each \$100, or \$302.52, was for heating and repairing purposes; also that the sum of \$33.61 of the sum of \$453.77 was in excess of 2 per cent. for school purposes. The court overruled the objections to said sum of \$302.52, so levied for heating and repairing purposes, finding that heating and repairing purposes were building purposes.

The real question in this case is whether "heating and repairing purposes," as specified in the certificate of the directors, are "building purposes," within the meaning of the statute. Section 1 of article 8 of the school law of 1889 authorizes the directors to levy a tax annually upon all the taxable property of the district, not to exceed 2 per cent. for educational and 3 per cent. for building purposes. 3 Starr & C. Ann. St. p. 1194. Two per cent. of the assessed valuation of the taxable property of the appellant in the district is \$420.16. Hence the sum of \$420.16 is the full amount of tax which the directors are authorized to levy upon the taxable property of the appellant in the district for the year 1894 for educational or school purposes. The excess over the sum of \$420.16, to wit, the sum of \$336.13, or, as reduced by the court below, the sum of \$302.52, is an illegal tax if it is a tax for educational or school purposes, because it exceeds the statutory limit of 2 per cent. allowed to be levied for these purposes. Inasmuch, however, as the statute authorized an additional levy of 3 per cent. for building purposes, the tax of \$302.52 is a lawful tax against appellant's property if it is levied as a tax for building purposes. The certificate of the directors does not say that the sum of \$1,200 is required for building purposes, but it does say that such amount is required for "repairing and heating purposes." Where an amount is certified to be required for "repairing and heating purposes," is the statute complied with which requires a certificate of the amount required for "building purposes"? Said

section 1 of article 8 provides that: "For the purpose of establishing and supporting free schools for not less than five nor more than nine months in each year, and defraying all the expenses of the same of every description, for the purpose of repairing and improving school houses, or procuring furniture, fuel, libraries, and apparatus and for all other necessary incidental expenses in each district, * * * the directors of such district * * * shall be authorized to levy a tax annually upon all the taxable property of the district, * * * not to exceed two per cent. for educational, and three per cent. for building purposes, except to pay indebtedness contracted previous to the passage of this act; the valuation to be ascertained by the last assessment for state and county taxes." Section 2 of said article 8 provides that: "The directors of each district shall ascertain, as near as practicable, annually, how much money must be raised by special tax for school purposes during the ensuing year, which amount shall be certified and returned to the township treasurer on or before the first Tuesday in August, annually. The certificate of the directors may be in the following form, viz.: 'We hereby certify that we require the sum of — dollars to be levied as a special tax for school purposes, and — dollars for building purposes, on the taxable property of our district.'" Manifestly, the certificate in the case at bar does not comply with the form prescribed by the statute, because, instead of certifying that the directors require the sum of \$1,800 to be levied as a special tax for school purposes, and \$1,200 for building purposes, on the taxable property of the district, it certifies that the directors require \$1,800 to be levied as a special tax for school purposes, and \$1,200 for heating and repairing purposes. The certificate is not sufficient to authorize a tax to be levied for building purposes. It should expressly state that a tax is required to be levied for building purposes. Without such a certificate, the county clerk is not authorized to extend a tax for building purposes. The meaning of the provision that the certificate "may" be in the specified form is that it "shall" be in such form. Where a statute directs the doing of a thing for the sake of justice or the public good, the word "may" is the same as the word "shall," and imports a duty equally imperative. *Cooley, Tax'n*, p. 214, c. 9. The certificate which the school directors are empowered to make by said section 2, lying as it does at the basis of the school tax, is jurisdictional in its character; and a tax extended by the county clerk without such a certificate of the directors is without authority of law, and null and void. *Weber v. Railway Co.*, 108 Ill. 451; *Chicago & A. R. Co. v. People*, 155 Ill. 276, 40 N. E. 602. "In making a levy of school taxes, a strict compliance with the statute requires the directors to certify the amount required for each of the two purposes [school purposes and building purposes] in dollars and cents, seeing to it that neither amount exceeds the per cent. fixed by section 1." *Chicago & A. R. Co. v. People*, supra. It should

not be left to the county clerk to determine whether or not "repairing and heating purposes" are embraced within "building purposes." It was evidently the intention of the legislature that the purposes for which the money is required should be separately specified as "school purposes" and as "building purposes," so that the county clerk can compute and extend the taxes for each of such purposes within the limits authorized by the law, abating any excess beyond such limits before extending the tax. *Wabash R. Co. v. People*, 147 Ill. 196, 35 N. E. 157; *Chicago & A. R. Co. v. People*, supra. Here there is no certificate in express terms authorizing a tax to be levied for building purposes, nor can the words "repairing and heating purposes" be construed as meaning "building purposes." It does not appear that the word "repairing," as here used, refers to the repairing of schoolhouses any more than it does to the repairing of school furniture or apparatus. Nor does it appear that the word "heating" refers any more to the heating apparatus connected with the schoolhouses, such as stoves, furnaces, etc., than to the fuel which is consumed therein. "Repairing and heating purposes" include such "necessary incidental expenses" as are embraced within the meaning of the terms "educational purposes" and "school purposes," as used in said sections 1 and 2 of article 8. Such "school purposes" are those for which the annual expenditures are or may be necessary. The directors are required to ascertain annually how much money must be raised for school purposes, etc. Such is not the meaning of the words "building purposes." These words refer to the building of schoolhouses. Article 9 of the school law of 1889 (3 Starr & C. Ann. St. p. 1197, etc.) requires the votes of the people at an election to be called in a particular manner before the directors can be authorized to build or repair and improve schoolhouses by borrowing money and issuing bonds. It is unlawful for school directors to build a schoolhouse without a vote of the people of the district on the question, and, if they should do so, their act would be null and void. *Thatcher v. People*, 93 Ill. 240. The indebtedness for building or repairing and improving schoolhouses will, of necessity, be definitely fixed, and the amount to be paid annually by way of interest on such indebtedness is easily and readily ascertained. Accordingly, section 2, while it requires the school directors to ascertain annually how much money must be raised for school purposes, does not require them, in express words, to ascertain how much is required for building purposes, although they are authorized to state the amount in the certificate. Our conclusion is, that the county court erred in rendering judgment for the tax levied upon the property of appellant for heating and repairing purposes, amounting to \$302.52, for the reason that such tax was not, under the law, levied for building purposes, and is in excess of the 2 per cent. which the law authorizes to be levied for school purposes. The judgment of the county court is reversed, and

the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(163 Ill. 210)

ROGERSON et al. v. FANNING et al.

(Supreme Court of Illinois. Nov. 10, 1896.)

APPEAL—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.

A cross bill alleged that defendants thereto consented to a decree which divested them of their title to land in dispute in the main case, and that they had accepted certain benefits, from which, if true, an equitable estoppel arose. The decree, on its face, purported to be entered by default, as to such defendants. The issues were heard in part on oral testimony, and the evidence as to the material facts was very conflicting and unsatisfactory. Held, that a decree in favor of such defendants should not be reversed.

Appeal from circuit court, Sangamon county; James A. Creighton, Judge.

Cross bill by George S. Rogerson and Andrew Russell, administrators of the estate of Andrew Russell, deceased, against George W. Fanning and William F. Fanning. From a decree in favor of defendants, complainants appeal. Affirmed.

Morrison & Worthington, for appellants. W. P. Callon and George W. Smith, for appellees.

CARTER, J. The history of this litigation may be found in *Russell v. Fanning*, 2 Ill. App. 632; *Russell v. Epler*, 10 Ill. App. 304; *Fanning v. Russell*, 21 Ill. App. 220; *Id.*, 94 Ill. 386; *Rogerson v. Fanning*, 38 Ill. App. 265; and *Fanning v. Rogerson*, 142 Ill. 476, 32 N. E. 521.

Substantially the only question on this appeal is, did the Fannings consent in fact to the decree entered in the cause on the 25th day of September, 1885? On its face, the decree purported to be by consent, in open court, of Epler, the complainant, and of these appellants, or their predecessors, defendants to the bill and complainants in the cross bill, but only by default as to appellees, George W. and William F. Fanning, who were defendants to both the bill and cross bill, and who claimed to be the owners in fee of the property affected by the decree. By the previous litigation, culminating in the final decision by this court in 94 Ill. 386, it had been finally adjudged that the title to the lands in controversy was vested in the Fannings, and that the conveyance to them by their father was not fraudulent and void as against his judgment creditor, Andrew Russell, appellees' predecessor in the litigation. The decree above mentioned, called in the record the "consent decree," among other things disregarded this adjudication and the rights of the Fannings in the land, set aside the deed of their father to them, and ordered the lands sold to pay the Russell judgment. On appeal this decree was reversed by the appellate court because it did not appear by the decree itself that appellees, whose rights to

the lands were divested by the consent decree, ever consented to such decree. 21 Ill. App. 220. When the case went back to the circuit court, appellants filed a supplemental cross bill, setting up, among other things, that appellees did in fact consent to the decree, and that the same was entered in pursuance of an understanding and agreement of all the parties in interest, including appellees, but that, by the mere mistake of the draftsman of the decree, the consent of appellees did not appear; and the prayer was that the consent decree be affirmed, as valid and binding, and the title to the 134 acres be established in Russell, etc. The circuit court sustained a demurrer to this supplemental cross bill, but this decree was reversed by the appellate court, and the cause was again remanded. 38 Ill. App. 265. After the cause was redocketed in the circuit court, the supplemental cross bill was amended. The appellees answered, denying that they ever consented to the decree, and claimed title to the property. Issue was made, and the cause tried on depositions and oral and documentary evidence, and a decree rendered in favor of appellees, and dismissing the cross bill. This appeal was brought to reverse that decree. It was also alleged, among other things, in the cross bill, that a sale of the property was made under the consent decree, before it was reversed, and that Russell bought the land in controversy; but it was stipulated that he paid no part of his bid, and that his judgment showed no credit upon the records, and that no deed was ever made to him by the master. It was also alleged in the cross bill that, in pursuance of the understanding and settlement, Elizabeth Fanning, wife of appellee G. W. Fanning, obtained by purchase at the sale the 27-acre tract, and a sufficient amount of the purchase money derived from the sale of other tracts, not a part of the 134 acres, to make \$1,900 (she merely taking the place of her husband, for reasons not disclosed; presumably, because of his insolvency), and that Fanning's attorneys were also paid for their services rendered in the litigation out of the proceeds. These and other circumstances tending to show that appellees had knowledge of the settlement, acquiesced in it, and accepted benefits from it, were alleged, from which it was plain that an equitable estoppel arose, and that appellees should not be permitted to repudiate the transaction, whether they in fact consented to it in the first instance or not. The questions are principally questions of fact. The cause was in part heard upon oral testimony, and the learned chancellor of the circuit court was in a better position than we are to ascertain the very truth of the matter. We are, however, by no means convinced of the fairness of the transaction on the part of appellees. It may, however, be said that it is not necessary that we should be. The burden of proof was on appellants to prove the allegations of their cross bill, and, unless they have done so, the decree must be affirmed, notwithstanding appellees may not have availed

themselves of the opportunity presented on the trial, of relieving themselves from the appearance of having taken an inequitable advantage of their adversary in the litigation. It is a circumstance in favor of appellees, tending to show that they did not consent to the decree, that while, on its face, it appears to have been entered by consent of complainant Epler and defendant Russell, it was only by default as to appellees, and no contract, agreement, or writing of any kind, signed by them or on their behalf, was ever made. Besides, the record does not show that they then had any counsel in the case. At a former period they joined with Epler, and by the same counsel, in a plea of *res judicata* to appellants' cross bill, but, when this issue was finally adjudged against them by the appellate court, they filed no answer, but the consent decree followed, which recited their default.

It is certainly true that the circumstances tend very strongly to show that, as between Epler and the Fannings, the litigation was a friendly one, and that they needed no separate counsel. Indeed, it may be said that, as they had no defense against the vendor's lien sought to be enforced by Epler, their only concern was the same as Epler's,—to defeat the cross bill of Russell,—and they may have relied upon Epler to accomplish this purpose. It is true, the contention is made—and not without reason and evidence in its support—that Epler never owned the notes secured by the vendor's lien, but that the assignment to him was only colorable, and intended to defeat Russell in the collection of his judgment. It had been adjudged that these notes assigned to Epler originally belonged to appellees' father, Sampson Fanning, who was Russell's judgment creditor, as a part of the consideration which he received from them for the land, and not to the daughters to whom the notes were made payable, and that Russell was not precluded by the final adjudication against him, that the sale of the land to the sons by his judgment creditor was not fraudulent and subject to be set aside, from insisting that these notes, if they still belonged to his judgment creditor, should be appropriated towards the satisfaction of his judgment. But it does not appear from the evidence that appellees had any interest in the question between Epler and the Russells, as to which one of them should have the proceeds of the notes. They only claimed title to the land, and did not dispute their liability to pay the notes, so far as anything appears in the record to the contrary. While, therefore, the evidence tends to show that Epler and the appellees acted in concert in their endeavor to defeat appellants in the collection of their judgment, there is no sufficient proof of their joint action and identity of interest in the litigation, or that Epler and his counsel represented, or were authorized to represent, appellees in the matter of the compromise and settlement, so as to bind appellees; but the allegation in the cross bill that appellees did

in fact consent to the decree, and did receive and appropriate to their own use benefits proceeding therefrom, cannot be sustained without proof of the acts of appellees themselves, aside from those of Epler. Mr. Ketchum, whose deposition was taken in the cause, and who represented the Russells in the litigation from its beginning until after the consent decree was rendered, testified that the interests of the Fannings were at all times in the litigation represented by appellee George W. Fanning; that he (George W. Fanning) resided in Jacksonville, where counsel for both parties also resided; that he (said Fanning) made the office of Epler, and counsel associated with Epler, his headquarters during the litigation; that he (Fanning) was present in Epler's office when the agreement between the parties was reached, and acquiesced gladly and eagerly in the settlement; that prior to the settlement the witness met George W. Fanning upon the street, and was asked by him if they would be able to settle the litigation, and assured him (Ketchum) that, if the Russells should bid off any of the lands, there would be no trouble; that he (Ketchum) made a memorandum of the decrees to be entered, and gave it to his law partner, who prepared the decrees, which were afterwards given to counsel on the other side for inspection. He also testified that Elizabeth Fanning, the wife of George W., who had never had any vested interest in the subject-matter of the suit, became beneficially interested in the decree to suit her husband, as represented by his attorneys, and that it was desired by George W. Fanning, and so settled in the compromise, that the Fanning interest should be designated in the decree as that of Elizabeth Fanning; and that she had never before been mentioned in the litigation, except in the instance of her joining in a mortgage with her husband. He also testified that certain payments were to be made, under the compromise, out of the proceeds of the sale of certain of the lands, for services which had been rendered for the Fannings in the litigation. It was not disputed that Elizabeth Fanning received the \$1,900 partly in the 27-acre tract which she bid off, and the rest in cash. But George W. Fanning testified that he never consented to the decree, nor agreed to the compromise, and was not present at the time mentioned by Ketchum, and did not have the conversations testified to by Ketchum; that he did not know the compromise had been effected until several months after the decree was entered; that he did not know how his wife got the \$1,900; that he was not present, and made no arrangement about it, but that Epler owed her about that amount of money, on account of the sale by him of other property belonging to her; and that he supposed that she received the \$1,900 on that account. Mr. Epler, by deposition, testified that Fanning never consented to the settlement, or to the decree, but always objected to it, and that he (Epler) made the settlement irrespective of

him; that he did not remember how Elizabeth Fanning became interested in the settlement; that it might be true that she obtained the \$1,900 for the Fanning interest; that he did not think the Fannings had any solicitors in the case; that he acted for himself, and no one else; that George W. Fanning knew that he was going to compromise the cases, but did not agree with him about it. This was, in substance, all of the testimony bearing upon the question at issue. Neither William F. Fanning, nor any one else having knowledge of the transaction, was called. In this condition of the record, we cannot say that the trial court erred in finding that appellants had failed to establish the allegations of their cross bill; that the decree was in fact entered in pursuance of the agreement and consent of the Fannings, as well as of the other parties to the record; and that they received the benefit of the proceeds arising therefrom. As before said, it would seem that, if they had in fact consented, their consent, instead of their default, would have been recited in the decree, or at least some written agreement taken showing such consent. But, be this as it may, we cannot reverse the holding of the trial court, and divest the title to real estate, upon testimony of so conflicting and unsatisfactory a character. The decree of the circuit court is affirmed. Decree affirmed.

(163 Ill. 393)

CONSOLIDATED COAL CO. OF ST.
LOUIS v. SCHNEIDER et al.

(Supreme Court of Illinois. Nov. 11, 1896.)

CONTRACTS—CONSTRUCTION BY PARTIES—DELIVERY OF COAL FROM MINE—NEGLECT TO FURNISH CARS—MEASURE OF DAMAGES—SUFFICIENCY OF EVIDENCE—PLEADING—REVIEW ON APPEAL.

1. Plaintiffs leased of defendant a coal mine, agreeing to deliver to defendant a certain number of cars of coal each week, at a specified price, *f. o. b.* cars at the mine, unless prevented by strikes or circumstances beyond their control. When plaintiffs took possession, they notified defendant's superintendent that they were ready to deliver coal as soon as cars were furnished. The superintendent informed them that he would see that the necessary cars were furnished. *Held* that, under the construction thus put upon the contract by the parties, the failure of the defendant to furnish cars was a breach of contract, for which it was liable. 63 Ill. App. 88, affirmed.

2. The provision of the contract that the coal should be furnished at a specified price per ton, *f. o. b.* cars at the mine, did not impose upon plaintiffs the duty of furnishing the cars.

3. The measure of plaintiff's damage was the loss of profits due to defendant's failure to supply the number of cars called for by the contract. 63 Ill. App. 88, affirmed.

4. Under the terms of the contract, the defendant was not entitled to recoup for damages sustained by it through the failure of plaintiffs to deliver coal during the continuance of a general strike among the coal miners.

5. In an action on a contract for the delivery of coal, where breach was alleged, in that defendant failed to furnish the necessary cars for the transportation of the coal, the plaintiffs claimed as damages the loss of profits resulting from such failure. It appeared from the

evidence that there was a shortage of 513 cars; that each car would contain $19\frac{1}{2}$ tons of coal, on which there was a profit to the plaintiffs of $38\frac{1}{2}$ cents per ton. *Held*, that the evidence as to the loss of profits was sufficient to support an estimate of the damages sustained by plaintiffs.

6. In an action for breach of contract, a verdict assessing the amount of the damages to be recovered by the plaintiff cannot be reviewed by the supreme court.

7. Where there was evidence tending to support the cause of action, an instruction directing the jury to find for defendant was properly refused.

8. A count in the amended declaration in an action for breach of contract referred to the contract "as it appears in the original declaration in this cause." *Held*, that the count was sufficient without reciting the contract in full.

Appeal from appellate court, Fourth district.

Action by John Schneider and others against the Consolidated Coal Company to recover damages for breach of contract. A judgment for the plaintiffs having been affirmed in the appellate court (63 Ill. App. 88), the defendant appeals. Affirmed.

C. W. Thomas, for appellant. Dill & Schaefer, for appellees.

O'RAIG, J. This was an action brought by the appellees, John Schneider and others, against the Consolidated Coal Company of St. Louis, to recover damages for a breach of a contract. On a trial in the circuit court before a jury, the plaintiffs recovered a judgment for \$3,500, which on appeal was affirmed in the appellate court. The contract upon which the action was predicated was executed on the 1st day of September, 1893. The coal company was party of the first part, and John Schneider et al. were parties of second part. The contract provided: "The said party of the first part hereby leases and sublets to the parties of the second part, for the term of eleven (11) months from the date hereof, its coal mine known as 'Reinecke No. 1 Mine,' located near Birkner Station, together with all machinery and appliances thereto belonging. The said parties of the second part contract and agree to operate the said mine in a workmanlike manner, and in accordance with the directions of the superintendent of the party of the first part, so far as the plan of the works is concerned, and to keep the mine, and all the machinery and appliances thereto belonging, in good repair and working order, and to return the same at the forfeiture or expiration of this lease in as good condition as when received, and to furnish the said party of the first part, unless prevented by strikes or circumstances beyond their control, during the months of September, October, November, and December, 1893, and January, February, and March, 1894, with an aggregate of thirty-six (36) car loads of lump coal per week, and during the months of April, May, June, and July, 1894, an aggregate of twenty-four (24) car loads of lump coal per week, all at a price of sixty (60) cents per ton of two thousand (2,000) pounds for screened lump coal, which shall be free from

slate and sulphur, and with all the nut coal produced at said mine, and which must be well screened, at twenty-five (25) cents per ton, all f. o. b. cars at said mine. The parties of the second part also agree that the above-stipulated amounts of coal shall be the entire lump coal product of said mine which will be shipped on railroad cars. The parties of the second part further agree to pay to the party of the first part as royalty for the said coal, and as rent for the use of said mine and machinery, five (5) cents per ton on all lump coal loaded on railroad cars. Said payments to be made on said first party's regular pay days. Railroad weights are to govern as to all coal loaded on cars. It is further expressly agreed that any failure on the part of the parties of the second part to comply with any part of this contract shall authorize said party of the first part to forfeit and terminate the same, and to enter and take possession of said mine, and all machinery and appliances thereto appertaining, with or without process of law. And the said party of the first part agrees and contracts to receive from the said parties of the second part the aforementioned amounts of coal, and to pay therefor, on its regular monthly pay days, the sum of sixty (60) cents per ton for all lump coal, and twenty-five (25) cents per ton for all screened nut coal, f. o. b. cars at said mine." Upon the execution of the contract, appellees took possession of the mine under the contract, and commenced mining coal, and continued mining until the last of April, 1894, when the work was suspended on account of a strike that existed in almost all the mines in the country. The strike continued until the last of July. During the strike, but little coal was mined or delivered to the coal company. It will be observed that the contract required appellees to mine and deliver on car at the mines, during the months of September, October, November, and December, 1893, and January, February, and March, 1894, 36 cars of lump coal per week, at the price of 60 cents per ton for screened lump coal, and 25 cents per ton for nut coal. It appears from the evidence that appellees were ready and willing and offered to mine and deliver on car all the coal called for in the contract, during the months of September, October, November, and December, 1893, and January, February, March, and April, 1894, but, owing to the failure of the appellant to furnish cars, they were prevented from doing so.

The theory of the plaintiffs, as we understand the record, is that appellant was required to furnish cars in which appellees could load all the coal which the contract called for, and, as appellant failed to furnish the necessary cars, they have the right to recover whatever profit they would have made if the cars had been furnished, and they had delivered the coal on the cars. The contract is silent in regard to the party who shall furnish the cars, but the plaintiffs proved by a number of witnesses that, before they commenced

mining coal under the contract, Emery, the superintendent of the coal company, came into the mine and inquired if they were prepared to fill the contract. They asked him about cars. He replied: "I will see that you get cars. I will see that they put in six cars a day, and I will look to you to fill them." In addition to this testimony, it was proven that plaintiffs repeatedly called on the superintendent for more cars, and he never denied that it was the duty of appellant to furnish cars, but, on the other hand, he promised to furnish cars, or made excuses for appellant's failure to furnish. It was also proven that at no time while appellees were occupying the mine under the contract did they procure or furnish any cars, but all that were furnished and filled came through appellant. From these facts it is apparent that the construction placed on the contract both by appellees and appellant was that appellant was required by the contract to furnish the cars. In the construction of a contract, it is always allowable to look to the interpretation the contracting parties place upon it, either contemporaneously or in its performance, for aid in ascertaining its meaning, as held in *Church v. Brose*, 104 Ill. 209. Moreover, it is apparent from the evidence of appellant's sole agent, Crewley, that it was the duty of appellant to furnish the cars. He testified: "They [meaning the railroad company] had information that a certain number of cars would come from there [the mine in question]. This business was under my control. The course of business with the railroad company was this: It was notified that we received so many cars from the mine, and they put in cars without orders from the parties." The meaning of this evidence is obvious. When the coal company (appellant) had a contract for coal, as they had with appellees, they notified the railroad company of the number of cars the mine was required to deliver, and on this notice the railroad sent the cars to the mine. Whether the appellant adopted this mode, or some other mode, was a matter of no consequence. The result was that the cars were sent to the mine through the direction of appellant. We therefore think it plain, under the contract, that it was the duty of appellant to furnish appellees, at the mine, the number of cars, each week, called for by the contract. The contract contains a provision in regard to the delivery of the coal as follows, "All f. o. b. cars at said mine," which, as the evidence shows, means free on board the cars at the mine. The fact that appellees were required by the contract to deliver the coal free on board of the cars at the mine can have no bearing on the question in regard to whose duty it was to furnish cars. The furnishing cars at the mine, to be filled with coal, was an independent matter,—in no manner connected with the duty of filling the cars. When the cars were furnished, then it devolved on appellees to fill them free of any expense to appellant; but, until the cars were furnished, they were required to do nothing, except to

have the coal ready. It being the duty of appellant to furnish the cars, under the contract, its failure to discharge this duty was a clear breach of the contract, for which appellees, who were ready and willing to furnish the coal, were entitled to recover.

It is said, however, there was no evidence before the jury upon which any damages could be allowed. This is a misapprehension of the evidence. Schneider testified—and his evidence was not objected to, nor was he contradicted by any other testimony in the case—that there was a shortage of 513 cars for lump coal, and 87 cars for nut coal; that each car, when loaded, would contain 19½ tons; that there was a net profit of 38½ cents a ton on the lump coal, and \$2.50 a car on the nut coal. If appellees were entitled to recover for the loss of the profits which they would have made had there been no breach of contract on behalf of appellant, here is ample evidence upon which a recovery may be predicated. If, however, on the other hand, appellees are to be regarded, under the contract, as vendors of merchandise which they sold to appellant for a certain specified price, and appellant failed and neglected to accept the goods at the time and place of delivery, and, on account of such failure, appellees are entitled to recover as damages the difference between the contract price of the goods and the market price, there is evidence in the record to sustain a recovery upon this theory. The written contract in evidence showed the price appellant agreed to pay for the coal, and appellant's sole agent, John T. Crewley, testified to the market price of coal. He testified, as shown by appellant's abstract, as follows: "The market price of coal in East St. Louis from the fall of 1893 up to the strike in 1894 varied from \$1.06¼ to \$1.12. In October, 1893, it was \$1.18½, in November it was \$1.25, and during the winter it was \$1.12½. The freight was 45 cents." Whether the appellees were entitled to recover, under the contract, the profits they would have made if appellant had accepted the coal under the contract, or whether the recovery should be confined to the difference between the contract price and market price of coal at the place of delivery, is a question not presented by this record. The question might have been presented by an appropriate instruction, but no instruction upon this question was asked or given. As respects the amount of recovery, under the repeated ruling of this court, that is a question not reviewable here.

The court refused an instruction of appellant directing the jury to find for the defendant, but there was no error in the decision of the court, for the reason that there was evidence tending to prove appellees' cause of action, and when such is the case the court is not authorized to take the case from the jury.

It is also insisted that the declaration does not state a cause of action, and the court erred in overruling the motion in arrest of judgment. In the amended declaration, after setting out the contract upon which the action was predi-

cated, the declaration in reference to the delivery of cars in which appellees were required to load the coal was, in substance, as follows: That on the 1st day of September, 1893, after the making of the contract, plaintiffs entered into possession of the mine therein mentioned, and that, by the construction then and there put upon the contract by the parties thereto, the defendant assumed the duty of furnishing to plaintiffs, from time to time, the necessary number of railroad cars upon which to load said coal, and that by said construction it was the duty of defendant, under the contract, to so furnish the plaintiffs with such necessary railroad cars, and, in pursuance of said construction, defendant furnished plaintiffs railroad cars on which to load said coal, and received from plaintiffs the coal under said contract; and defendant then and there had control of, and did control, a number of railroad cars, that should, from time to time, be delivered at said mine for the purpose of loading said coal, and it was the duty of defendant to furnish plaintiffs the necessary number of cars on which to load the coal which plaintiffs were required to furnish to defendant under the contract, to be accepted and paid for by defendant. The insufficiency of the declaration, as we understand the argument, is predicated upon the assumption that the contract required appellees to furnish the coal free on board of cars at the mine, and this made it incumbent upon appellees to see that the cars were furnished, before they could put appellant in default for not accepting the coal. The answer to this position is that under the contract, as construed by the parties, it was the duty of appellant, as heretofore stated, to furnish the cars at the mine.

It is also claimed that the court erred in admitting the contract sued on in evidence, for the reason that the third amended count of the declaration, while purporting to set it out in *hæc verba*, did not contain the contract, but merely referred to it in the following words, where the contract should appear in the count: "(Here insert said contract as it appears in the original declaration filed in this cause.)" The contract, as appears, was set out in *hæc verba* in the original declaration on file with the papers in the case, and while the mode adopted by the pleader, in referring to the contract as set out in another part of the declaration, cannot be regarded as a model in pleading, yet we do not regard the declaration as substantially bad. Where a contract sued on is set out in *hæc verba* in one count of a declaration, in declaring on the same instrument in another count no good reason is perceived why the pleader may not refer to the count containing the instrument, instead of copying the instrument again in the second count. That was substantially the course adopted here.

During the months of May, June, and July, appellees did not furnish the coal called for in the contract, and for this failure appellant claimed damages. The evidence, however,

showed that they were prevented by a strike which extended over all the mines in the country. As the contract, by its terms, relieved appellees from furnishing coal, if prevented by a strike, we do not think they were liable for damages for the failure to deliver coal in May, June, and July. After the strike was over, coal was furnished as required by the contract. No substantial error appearing in the record, the judgment of the appellate court will be affirmed. Affirmed.

(163 Ill. 596)

DESPAIN et al. v. WAGNER et al.

(Supreme Court of Illinois. Nov. 11, 1896.)

ESTOPPEL BY DEED—HUSBAND AND WIFE—CONVEYANCES BETWEEN—HOMESTEAD.

1. A remote grantee is estopped to deny a recital in a deed in his chain of title that the grantor therein was the wife of her grantee.

2. A deed from a wife direct to the husband is valid.

3. A deed of the homestead, from the wife to the husband, is void as a conveyance of the homestead, unless subscribed by the husband as required by Starr & C. Ann. St. p. 1103, possession not being abandoned or given pursuant to the conveyance.

4. A deed of the homestead, invalid as a conveyance of the homestead interest, for failure of the husband to sign, is yet valid as a conveyance of all interest in the land in excess of the value of \$1,000, the homestead being by statute limited to that value.

Error to circuit court, Randolph county; B. F. Burroughs, Judge.

Action by Edward Despain and others against J. A. Wagner and others. There was a judgment for defendants, and plaintiffs bring error. Reversed.

Gordon, Allison & Neville, for plaintiffs in error. Wm. M. Schuwerk, for defendants in error.

MAGRUDER, C. J. This is a bill filed by plaintiffs in error, as heirs at law of one Margaret Roberts, deceased, to set aside a deed executed by said Margaret to Wiley Roberts, as her husband, on June 3, 1891, mainly upon the ground that the execution of said deed was procured by coercion. The proof did not sustain the charge of coercion, and plaintiffs in error here admit that the testimony is not sufficient to justify the setting aside of the deed upon that ground. The bill also alleged that the deed was inoperative, and failed to pass title to the premises described in it, for the reasons hereinafter stated. The circuit court dismissed the bill, and the present writ of error is sued out for the purpose of reviewing such decree of dismissal.

The premises described in the deed were owned in fee by Margaret Roberts on June 3, 1891, when she executed the deed, and were at that time occupied by herself and Wiley Roberts as their homestead. The deed, it will be observed, was executed by the wife to the husband directly, and without the intervention of a third person. Afterwards, on November 13, 1891, Margaret Roberts died intestate, so far as

the land in question was concerned, but left a will conveying her personal property to Wiley Roberts, who was appointed executor under said will. She and Wiley Roberts occupied said premises at the time of her death, and had resided on the same, as their homestead, for more than 20 years prior to that time. Wiley Roberts died testate on August 26, 1893, and by his will devised the land in controversy to the defendants in error the trustees of schools, for school purposes, and appointed the defendant in error J. A. Wagner executor of his will. Margaret and Wiley Roberts left no children, and the premises are shown to have been worth about \$3,000, or, at any rate, more than \$1,000.

It is contended by plaintiffs in error, and alleged in their bill in the court below, that the deed was invalid because, being a deed of homestead premises, executed by a wife, it was not signed and acknowledged by her husband as required by the statute. It is contended by defendants in error, and alleged in their answer in the court below, that the deed was valid as conveying the fee, subject to the homestead estate, and it is further alleged that Margaret Roberts was not the wife of Wiley Roberts.

1. Without going into the evidence, to determine whether there was a common-law marriage between the parties to the deed, as such a marriage is defined in the decisions of this court (Port v. Port, 70 Ill. 484; Stoltz v. Doering, 112 Ill. 234; Hiller v. People, 156 Ill. 511, 41 N. E. 181), it is sufficient to say that defendants in error are estopped from denying that Wiley Roberts was the husband of Margaret Roberts, because the deed executed by her to him describes him as her husband, and defendants in error claim title under Wiley Roberts, the grantee in that deed. We have recognized the doctrine of estoppel by the recitals in a deed, and that a party claiming under a deed cannot be permitted to deny any fact admitted to exist by the recitals therein. Orthwein v. Thomas, 127 Ill. 554, 21 N. E. 430; Cobb v. Oldfield, 151 Ill. 540, 38 N. E. 142. In Orthwein v. Thomas, supra, it was held that neither the immediate grantee in a deed, nor his remote grantees, could be heard to deny the recital in the deed that a certain man and woman were husband and wife.

2. A deed is not invalid merely because it is made directly by the wife to the husband. Under the statutes of this state, a conveyance by a husband directly to his wife, or by a wife directly to her husband, is valid, so as to vest all the title capable of being transferred by the instrument of conveyance. Barrows v. Barrows, 138 Ill. 649, 28 N. E. 983, and cases cited.

3. The estate of homestead which is entitled to exemption under the statutes of this state is limited to \$1,000 in value. When its value is \$1,000 or less, it comprises the entire title and interest of the householder, and no conveyance of it is valid, unless it is "in writing, subscribed by said householder and his or her wife or husband, if he or she have one, and acknowledged in the same manner as conveyances of real estate are required to be acknowledged, or

possession is abandoned or given pursuant to the conveyance." *Starr & C. Ann. St. p. 1103.* This statutory requirement as to the conveyance of the homestead has been held to apply to deeds made by householders to their wives; and it has accordingly been decided that a conveyance of the homestead, not exceeding \$1,000 in value, by a householder to his wife, she not joining therein and acknowledging the same, is inoperative to pass the title to the homestead estate. *Kitterlin v. Insurance Co., 134 Ill. 647, 25 N. E. 772.* But when the value of the property to which the estate attaches is more than \$1,000, the excess is unaffected by the estate, and "the conveyance passes the title subject to the estate of homestead, or, rather, it passes the excess over the amount of the homestead right." *Barrows v. Barrows, supra; Kitterlin v. Insurance Co., supra.* Here, as the value of the homestead premises exceeded \$1,000, the conveyance by Mrs. Roberts to her husband was valid, so as to pass the title to the excess over \$1,000. It cannot be said, therefore, that the deed in question was totally inoperative to pass any title, by reason of the nonjoinder of the husband in its execution, as is alleged in the bill. In the recent case of *Anderson v. Smith, 159 Ill. 93, 42 N. E. 307,* we have said: "It must be accepted as the settled law of this state that a deed to a homestead by the householder, even to his or her wife or husband, not subscribed and acknowledged by such wife or husband (possession not being abandoned or given pursuant to the conveyance) is a nullity. *Kitterlin v. Insurance Co., 134 Ill. 647, 25 N. E. 772; Barrows v. Barrows, 138 Ill. 649, 28 N. E. 983; Hagerty v. Hagerty, 149 Ill. 655, 36 N. E. 981.* Under these decisions, if the homestead attempted to be conveyed is worth not more than \$1,000, no title whatever passes, but, if the lands conveyed exceed in value that amount, then it passes only the excess over the homestead right." Therefore the deed of Mrs. Roberts to her husband, though valid so far as it conveyed the excess in value of the homestead premises over \$1,000, was a nullity so far as it attempted to convey the homestead estate not exceeding in value \$1,000. The title in fee to such homestead, being in Mrs. Roberts at the time of her death, then descended to her heirs at law, subject to the homestead right and dower of her husband. There was no abandonment or giving of possession by her pursuant to her deed. As Mrs. Roberts had no children at the time of her death, her husband, as her heir, inherited one-half of her title in the homestead premises, not exceeding \$1,000 in value, and the plaintiffs in error, as her heirs, inherited the other half, subject to his dower and homestead rights therein. These dower and homestead rights ended, of course, when he died. It follows that, under the will of Wiley Roberts, one-half of the homestead estate, not exceeding \$1,000 in value, and all of the homestead premises exceeding \$1,000 in value, passed to the defendants in error. Plaintiffs in error are entitled to one-half of the

homestead estate, not exceeding \$1,000 in value. Hence the decree of the circuit court was erroneous, in dismissing the bill. The deed from Mrs. Roberts should have been set aside as to the homestead estate not exceeding in value \$1,000, and allowed to stand as to the excess in value over that amount. Accordingly, the decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(166 Ill. 400)

LUMBERMEN'S MUT. INS. CO. OF CHICAGO v. BELL.

(Supreme Court of Illinois. Nov. 20, 1896.)

INSURANCE—PROOF OF LOSS—WAIVER—MISTAKE—PAROL EVIDENCE OF AGENCY—INSTRUCTIONS—NOTICE TO AGENT.

1. Proofs of loss may be legally made by an agent of the insured, if the latter is out of the state, and cannot make them in person. 63 Ill. App. 67, affirmed.
2. By refusing to pay a loss on the ground that the policy was void when issued, the insurer waives objections to the proof of loss.
3. Where a fire insurance policy is, by mistake, made payable to a deceased person, the widow, who is in control of the property, carrying on the business in decedent's name, may, without going into equity to have the policy reformed, sue thereon in her own name, alleging the true facts. 63 Ill. App. 67, affirmed.
4. That the person who procured a policy acted as agent of the insurance company may be shown by parol, notwithstanding a statement in the policy that he was the agent of the insured.
5. An instruction which states, as a matter of law, that a broker obtaining insurance is the agent of the insured, is properly refused.
6. Notice to an insurance agent of facts material to the risk is notice to the insurer.

Appeal from appellate court, Fourth district.

Action by Eliza J. Bell, executrix of James Bell, deceased, against the Lumbermen's Mutual Insurance Company of Chicago, to recover on a policy of fire insurance. A judgment for plaintiff was affirmed by the appellate court (63 Ill. App. 67), and defendant appeals. Affirmed.

Myron H. Beach and Dodd & Pickrell, for appellant. Green & Gilbert, for appellee.

WILKIN, J. This is an appeal from the appellate court of the Fourth district. Eliza J. Bell, plaintiff below, as executrix of the last will of her deceased husband, James Bell, was operating a sawmill at Ulin, in this state. By the will of her husband, she was given all his property, and directed to continue the mill business as he had done in his lifetime. One H. C. Candee was an insurance agent, having his office at Cairo, and represented several different companies. In some of these the mill property in question had for several years been insured by James Bell, through Candee. Candee had also, from time to time, procured insurance upon the property in other companies, when not able to get it from those he represented, which he

did through Iott & Son, insurance brokers of Chicago. This course of dealing was continued by Mrs. Bell after the death of her husband. She, by her son George, applied to Candee for the policy in suit, and, not being able to place it in his own companies, he applied to Iott & Son to obtain it. The application was made for the "estate of James Bell," as owner. Iott & Son procured the policy from appellant, but by their mistake it was issued to "James Bell." This policy was afterwards renewed, the same mistake being continued in the renewal, and not discovered until after the loss. Both the original and renewal policies were delivered by appellant to Iott & Son, and by them to Candee, who gave it to Mrs. Bell, who held it, paying all premiums thereon, until June 4, 1890, when the property was destroyed by fire. Proofs of the loss were made by her agent, George T. Adams, superintendent in charge of the mills, she being absent from the state. The company refused to pay the loss on the ground that the policy was void when issued, because written in the name of James Bell, who was then dead. This suit was brought in the circuit court of Union county, where judgment was rendered in favor of appellee. That judgment has been affirmed by the appellate court. 63 Ill. App. 67.

It was insisted by defendant upon the trial of the case that plaintiff was not entitled to recover because she had failed to make the proper proofs of loss; the principal objection being that they were made by an agent, and not by the assured herself. Where it sufficiently appears that the insured was not in a position to make the proofs of loss in person, it may be legally done by an agent. *Insurance Co. v. Grunert*, 112 Ill. 68. Besides this, defendant having based its refusal to pay the policy upon the distinct ground that it was void when issued, because James Bell was then dead, objections to the proofs of loss were thereby waived. *Insurance Co. v. Cary*, 83 Ill. 453.

The only defense going to the merits of the cause was that the policy was invalid because it insured the property in question as being owned by James Bell, who was then dead; and the validity of that defense rests upon the question as to whether Iott & Son, through whose mistake it was so issued, should be treated as the agents of the defendant or not. This question, so far as it is one of fact, has been settled adversely to appellant by the verdict of the jury and judgment of the appellate court. It is insisted, however, that the jury was erroneously instructed upon this branch of the case, by the third, sixth, and ninth instructions given at the instance of the plaintiff. The third is to the effect that the fact of James Bell's death would not necessarily bar the plaintiff's right of recovery, but if she was in control of the property, carrying on the business in the name of James Bell, and was the real person insured, she could maintain the action upon

the policy. There was no error in this instruction. Where an instrument, by accident, mistake, or design, is made payable to a person by a wrong name, it is not necessary for such person to go into equity to have it reformed, but may sue thereon in his or her true name, averring that the instrument was made to him in and by the name therein appearing. *African Society v. Varick*, 13 Johns. 38. The sixth instruction, in substance, announces the rule to be that whether Iott & Son and Candee were the agents of the insurance company in the transaction of obtaining the policy is one of fact, to be determined from all the evidence bearing on that subject, and not merely from the statement in the policy to the effect that the brokers were the agents of the assured. We think this instruction also announces the correct rule of law. The question as to whose agents they really were is open to inquiry, and may be shown by parol evidence, notwithstanding the statement in the policy. *Insurance Co. v. Sammons*, 110 Ill. 166; *Insurance Co. v. Ward*, 90 Ill. 545; *Insurance Co. v. Chipp*, 93 Ill. 96. The ninth is open to just criticism. It assumes to sum up the facts bearing upon the question of agency, informing the jury that, if it finds them to be true from the evidence as stated, then, "as conclusions of law, both Iott & Son and Candee are to be deemed agents of defendant." This method of instructing a jury is always objectionable. Here the question of agency is a mixed one, of law and fact, and the jury should have been directed to determine from all the evidence in the case for whom these persons were acting, as was done by the sixth instruction. However, the most that can be said against it is that it was calculated to mislead the jury, and we regard the evidence as so clear, when considered as a whole, that the agents were, legally speaking, those of the defendant company, and not of the insured, that no injury resulted to the defendant by giving it, though not strictly accurate. Error without prejudice will never work a reversal of a judgment.

The refusal of the second, third, and fourth instructions asked by the defendant is also assigned for error. The second is subject to the fatal objection that it assumes that Candee and Iott & Son were the agents of plaintiff, and then proceeds to say that if these agents knew the facts as to the death of James Bell, and failed to communicate them to the defendant, the policy would be null and void. As we have already said, whether or not they were such agents was only to be determined by the jury, from all the evidence in the case, upon proper instructions as to the law by the court. The third assumes to state, as a matter of law, that a broker obtaining insurance is the agent of the insured, and not of the insurer. For the same reasons, it was properly refused. The fourth is to the effect that if James Bell was dead when the insurance was obtained, and that fact was

not communicated to the insurance company, the policy would be void; omitting entirely the question of notice to the company through its agents. Notice to the agent of facts material to the risk is, in law, notice to the insurer. *Insurance Co. v. Hart*, 149 Ill. 513, 36 N. E. 900. Without this qualification, the instruction was clearly erroneous, and was properly refused.

The contention that the trial court erred in its rulings upon the admission and exclusion of evidence is, we think, without merit. No good purpose would be served by a discussion of that branch of the case. We have carefully examined the record, and agree with the appellate court in its conclusion that no substantial error was committed in that respect. The only question in the case, as we view it, is, whether the policy was void because issued in the name of James Bell, then deceased. Being so issued through the negligence and mistake of defendant's agents, its contract of insurance was not thereby invalidated. The judgment of the appellate court should be affirmed. Affirmed.

(164 Ill. 360)

WADSWORTH et al. v. DUNCAN.¹

(Supreme Court of Illinois. Nov. 10, 1896.)

JOINT-STOCK ASSOCIATIONS—LIABILITY OF MEMBERS—PLEADING IN FORMER SUIT.

1. The members of a joint-stock association are partners, and, as to third persons, each member is liable for the debts of the association, unless he has shifted his liability in the manner prescribed by the articles.

2. The articles of a joint-stock banking association provided that stock should be assignable only on the books, with the assent of the directors, and in case such consent was refused the association should take the stock at a fixed price. From time to time, though not in the mode prescribed by the articles, various stockholders assigned their stock, either to the association,—in which case the stock was held by the remaining members in proportion to their shares,—or to third persons, to whom new certificates of stock were issued; and after such transfers the business was continued as before, without balancing depositors' books up to the time of the change of members, and the assets at all times more than equaled the liabilities. *Held*, in an action by a depositor against those who were stockholders when the bank suspended, that defendants cannot plead nonjoinder of the former stockholders, who assigned their stock as aforesaid, since the latter are not liable for the debts of the association, as between themselves and the remaining members, in the absence of an express agreement.

3. In an action to recover a deposit, against the members of a joint-stock banking association which had suspended, it appeared that the husband of one A. had purchased stock for her benefit, and had placed the same in the hands of a trustee, the latter executing a declaration of trust reciting that he held the legal title for A.'s sole use; but it was not shown that A. knew of the investment, or was ever regarded as a stockholder, either by the bank, by herself, or by third persons. *Held*, that defendants could not plead A.'s nonjoinder.

4. In an action by a depositor against the stockholders of a joint-stock banking association, a bill previously filed by defendants for the appointment of a receiver for the bank is admissible to show who were stockholders at the time such bill was brought.

Appeal from appellate court, Third district.

Action by William H. Duncan against Archibald O. Wadsworth and others to recover a deposit. A judgment for plaintiff was affirmed by the appellate court (see 61 Ill. App. 156), and defendants appeal. Affirmed.

Morrison & Worthington and R. Yates, for appellants. Owen P. Thompson and J. A. Bellatti, for appellee.

PHILLIPS, J. On August 25, 1893, the Central Illinois Banking & Savings Association, a private bank owned by appellants and others, closed its doors; and a bill was filed by appellants and certain others, as complainants, for a dissolution of the partnership and the appointment of a receiver, making certain other partners defendants. This association was organized in 1867 as a joint-stock company, with a capital of \$100,000, divided into 1,000 shares. The articles provided for a board of directors, who were to elect their president and cashier and other officers, and manage the business, which was prescribed and regulated by various provisions; and among others was one to the effect that stock in the association should be assignable and transferable on the books of the association, with the assent of the board of directors, in the presence of the president or cashier, etc. That article further provided that, in case of a refusal to assent to the transfer, the association should take the stock at a price fixed in a special manner. By the articles the association was to continue 20 years. Certificates were issued to the subscribers to the stock, and at the time of its organization there were 28 members. By cancellation and sale of stock, there was a reduced number of members, and the association acquired by purchase about \$40,000 of the stock. Appellee was a depositor in the bank at the time its doors were closed, and brought his action to recover against the stockholders as alleged in the bill for appointment of a receiver. Appellants pleaded the nonjoinder of 26 persons who had been stockholders, and the question presented on this record arises on that plea, on which issue had been joined, and on trial a verdict for plaintiff resulted. The 26 persons named in the plea, except Mrs. E. C. Adams, were persons who had been shareholders, and had assigned their stock to either the association or to third persons before the bank suspended payment. In each case where stock was transferred by a stockholder to another, a new certificate of stock was issued to the purchaser, but in only one instance was the transfer made on the books of the company in the manner provided by the articles. Where the stock was sold to the association, the certificate was

¹ Rehearing denied January 15, 1897.

indorsed and surrendered to the association. The holder of the certificate thus transferred never afterwards drew any dividends, but the purchaser or association took the same.

The members of a joint-stock association are partners, and each member is liable for the debts of the association, unless they have shifted their liability in the very mode pointed out in the articles of association. *Robbins v. Butler*, 24 Ill. 387. Between themselves, as members, and third persons, this liability would exist, but as between the members of the association a different rule would prevail. In this case most of the persons named in the plea of nonjoinder had owned stock, but had sold it (most of them to the bank) long prior to December 14, 1887, and had never, after the sale of their stock, had anything to do with the affairs of the bank. When parties sold their stock, the purchaser generally surrendered the certificate, and the bank issued a new one to the purchaser, except in those cases where the bank purchased the stock, in which case the bank held that so purchased. In the cases where the bank purchased the stock, the bank paid its value to the seller, took an assignment, and the seller's connection with the affairs of the bank ceased. The association retained all the money and assets of the bank, and nothing was said about either assets or liabilities. The remaining partners tacitly formed a new partnership, and appropriated all the assets of the old firm, and, in practice, assumed the liabilities, and paid the checks of the depositors who had deposited with the old firm. On December 14, 1887, when the original articles of association expired, none of those who had previously sold their stock were notified that those who then owned the stock and bank intended to continue the business under the old name, nor was their consent asked or obtained. From December 14, 1887, to October 29, 1890, the bank did business under the old name; and on the last-named date William Brown, named in the plea, sold and assigned and transferred his stock to the bank (that is, to his co-partners), and his co-partners retained all the assets of the bank, including all moneys on deposit, and from that time paid the checks drawn by the depositors of the old firm. In the winter and spring of 1892, at the request of the managers of the bank, Mrs. Hatch, Mrs. Brock, and Mrs. Phillips, who were also named in the plea, severally each sold her stock to the bank (that is, to their co-partners), and the co-partners so purchasing formed a new partnership under the old name, and continued the business, taking all the assets of the old firm, and paying checks drawn on them by depositors of the old firm. The evidence shows that the association bought shares from individuals as early as 1878, and all the stock so purchased was held and owned by the remaining shareholders in the proportion of the shares held by each. This was no more than certain partners buying out their co-partners, and continuing business in the name of the

existing partners, under the same name. As between the remaining partners, a new firm was thus created; and it is difficult to escape the conclusion that there was by the new firm an assumption of the debts, as it appears from the evidence that the assets of the association were at all times apparently more than its indebtedness, and the business was continued without any change of methods, and money paid out to and received from depositors, and credited or debited on the same pass books, without balancing them, up to the time of forming such new partnerships. The relation between the depositor and the bank was that of debtor and creditor, and the firm existing after the retirement of a partner, continuing the business, and receiving other deposits and paying checks, was, as a firm, liable for money had and received, and by retaining all the deposits; and, as between such retiring partner and the association, the liability existed on the part of the association, as it still existed, for the deposit. This would result from the manner in which the business was done. If the depositor knew of the change in the association, and he acquiesced therein, and made other deposits, and drew checks, etc., he could not hold the retiring partner liable, even though such partner or shareholder, in transferring his shares, did not do so in strict accordance with the articles of the association. Much stronger is the case between the partners or shareholders themselves.

It is true that a depositor—with notice of who are shareholders—making a deposit could have his action against all who were partners at the time of making such deposit. But that question is not presented on this record, for here the remaining partners are insisting that the suit should be also against those who have retired from the association by a sale of their stock, which, as we have seen, as between the partners themselves resulted in the organization of a new firm, and the assumption of the indebtedness by it. Such partners of such new firm so continuing business have not the right to demand that such shareholders so transferring their stock should be made defendants. The case, on this record, is distinguishable from *Page v. Brant*, 18 Ill. 37, and *Edwards v. Dillon*, 147 Ill. 14, 35 N. E. 135, as in those cases the partnerships actually existed between the partners themselves; and where there is an actual existing partnership, and liability jointly, and a suit is brought against certain members of the firm, for a partnership's indebtedness, under a plea of nonjoinder, it may be shown that all the partners liable are not sued. But where those who are liable are sued, and by such a plea they seek to have others sued, who have ceased to be members of the association, such plea cannot be sustained, in the absence of evidence showing an agreement or promise to remain liable. In this case there is no positive evidence of an agreement or promise on the

part of those remaining members of the association, and continuing the business, to pay existing indebtedness, nor of those selling their stock to remain liable. But, from all the evidence, we hold the facts show those continuing the business assumed the payment of the indebtedness.

Mrs. Eliza C. Adams, one of the parties named in the pleas of nonjoinder, is a sister of Lloyd W. Brown, president of the bank, and had resided in Jacksonville for some eight years. In 1882 her husband purchased 128 shares of the bank stock of one Wiswall, for the benefit of his wife. The investment was put under the control of said Lloyd W. Brown, who was made a trustee for his sister by the donor; and the trustee filed and had recorded a statement declaring him such trustee, in which it is stated: "That is to say, whereas there has been assigned and transferred to me, as trustee, for the sole and separate use of the said Mrs. E. C. Adams, one hundred and twenty-eight shares of the capital stock of the Central Illinois Banking and Savings Association, of Jacksonville, Illinois, I hereby declare that the legal title of said stock is invested in me, as trustee, for the sole and separate use of the said Mrs. E. C. Adams who is the beneficiary thereof, and her individual directions and receipts shall be complete discharges and vouchers for me, and she shall have the right to dispose of the same by will or otherwise." The evidence shows that Mrs. Adams never held any stock in the association, never knew anything about the affairs of the bank, never attended a meeting of the stockholders in her life, and never in any way held herself out to the public as a partner, and that the appellants and their co-defendants never in any way considered her a partner, or treated her as a partner, or in any way represented to the public or plaintiff that she was their partner. She could not have been made a partner without her knowledge or consent, and, from the evidence in this cause, it does not appear that she was ever consulted or knew anything in regard to the investment of the trust fund. It is true, she may have known the money came from the bank in dividends, but did not know and was not regarded as a shareholder therein by others or herself. We hold that the evidence fully justified the finding for the plaintiff on the plea of nonjoinder.

It is insisted that the court erred in allowing the bill for the appointment of a receiver to go in evidence for the plaintiff. These defendants filing this plea of nonjoinder were complainants in that bill. The admissions of a party to a suit, of a fact, is competent evidence, no matter how made; and, where the statement or declaration of a party is made in a bill in chancery, that bill is competent evidence to be considered by the jury, who are to determine the weight to be given to the evidence. The relevancy of

that evidence was as to the declarations therein made as to who were the shareholders at the time. It was not error to admit the bill in evidence. What we have here said sufficiently disposes of the questions sought to be raised on the instructions given and refused. We find no error in the record, and the judgment of the appellate court of the Third district is affirmed. Affirmed.

(163 Ill. 318)

DICKEN v. MCKINLAY et al.

(Supreme Court of Illinois. Nov. 10, 1896.)

**STATUTE OF FRAUDS—PAROL PROMISE AS TO WILL.
—DEMURRER.**

1. A legal adoption by one, of her deceased son's only daughter, as her own child, is not such part performance as will take out of the statute of frauds the parol contract of the grandmother, in consideration of the adoption, to make no will which should deprive the child of any portion of the grandmother's estate which the child would take as heir if the grandmother made no will.

2. A contract to make no will which will deprive one of property which she would take as heir if there was no will, having relation to real estate and personalty, and being within the statute as to the former, and not being divisible, is wholly void.

3. The defense of the statute of frauds to a bill showing on its face that the case is within the statute may be taken by demurrer.

Error to circuit court; Edgar county; Ferdinand Bookwalter, Judge.

Suit by Beulah C. Dicken, by guardian, against Laura McKinlay and others. Decree for defendants. Complainant brings error. Affirmed.

James A. Eads and Dundas & O'Hair, for plaintiff in error. Van Sellar, Shepherd & Van Sellar, for defendants in error.

MAGRUDER, C. J. This is a bill, filed by Beulah C. Dicken, a minor seven years old, by John M. Welch, her guardian, alleging: That she is an only child of Melvin S. Dicken, deceased, who died on January 1, 1893, and was the son of Serena Dicken. That, besides said Melvin, Serena Dicken had four other children, to wit: Laura McKinlay, John C. Dicken, William A. Dicken, and Ada R. Dicken. That after the death of Melvin complainant became a full heir at law of said Serena. That on the 25th day of January, 1894, the said Beulah was lawfully adopted by the said Serena as her own child, under the adoption laws of the state of Illinois, by proceedings in the county court of Edgar county. That the said Welch was then, as now, guardian of the said Beulah. That, "as a consideration for such adoption, the said Serena verbally contracted with and promised the said Welch, and Ida Dicken, the mother of the said Beulah, that she would make no will or testament which would deprive the said Beulah C. Dicken of any portion of her (the said Serena Dicken's) estate to which the said Beulah C. Dicken would be entitled as an heir in case the said Serena Dicken died intestate." That such contract and promise upon

the part of the said Serena was the true consideration for such adoption. That neither Ida Dicken, nor the said Welch, as guardian, would have consented to such adoption, except for such consideration. That the said Serena departed this life on the 1st day of August, 1894, seised and possessed of real and personal property of the value of \$25,000. That, if the said Serena had died intestate, the said Beulah, both as a grandchild and as an adopted child of the said Serena Dicken, would be entitled as an heir at law to a one-fifth portion of said estate. That after the death of the said Serena a certain instrument was filed in the probate court of Edgar county, and there probated as the will of the said Serena. That under and by virtue of said instrument the said Beulah is divested of all interest in the estate of Serena Dicken, except, only, that she is bequeathed the amount of \$1,000; the entire remainder of said estate being equally divided among said four surviving children of the said Serena Dicken, who are made defendants. That a copy of this will is hereunto attached and made a part of this bill. The prayer of the bill is that complainant may be decreed to be entitled to a full one-fifth portion of all said estate, both real and personal; that said verbal contract may be decreed valid and binding as against the defendants, and may be enforced; that the alleged will may be held to be null and void, as far as the provisions of the same apply to complainant; and that complainant may have such other and further relief in the premises as equity may require and shall seem meet. By the will, which is dated August 4, 1894, and made a part of the bill, the testatrix, after directing the payment of debts and funeral expenses, gives to her daughter Laura 80 acres of land, to her son John C. 100 acres, to her son William A. 80 acres, to her daughter Ada R. 100 acres, and to her grandchild, Beulah C., \$1,000; directing that, if there is not enough personal property to pay it, the children shall contribute, in equal shares, enough to make up the amount, and making the legacy of \$1,000 a charge upon the lands devised. The bill was demurred to by the defendants as not entitling the complainant, in a court of equity, to any discovery or relief from them touching the matters therein. The demurrer was sustained. Complainant elected to stand by her bill. Thereupon the court below dismissed the bill for want of equity, and rendered judgment for costs against complainant. The present writ of error is sued out for the purpose of reviewing such decree of dismissal.

The weight of authority is in favor of the position that a man may make a valid agreement to dispose of his property in a particular way, by will, and that such contract may be enforced in equity, after his decease, against his heirs, devisees, or personal representatives. 22 Am. & Eng. Enc. Law, p. 974, and cases cited in note 2; Schouler, Wills (2d Ed.) § 454; Wat. Spec. Perf. Cont. § 41; Fry, Spec. Perf. (3d Ed.) § 223; Weingaertner v. Pabst, 115 Ill. 412, 5 N. E. 385. But such contracts are look-

ed upon with suspicion, and are only sustained when established by the clearest and strongest evidence. *Id.* There is a want of harmony among the decisions in regard to the enforcement of such contracts when they are oral, and in regard to the scope and applicability to them of the statute of frauds. Without entering into a discussion of the authorities upon the subject, we regard the case at bar as governed by the recent decision in this court in the case of *Pond v. Sheean*, 132 Ill. 312, 23 N. E. 1018. In the *Pond* Case, a person, having no children of his own, took an infant daughter of a relative of his wife to raise as a member of his family, and promised orally, with his wife's consent, that if the child's father would permit her to become a member of his family, and assume the name of her adopter, and allow her to live with the family of the latter, he would, on his death and that of his wife, give the child all the property he might own. The contract was fully performed by the child and her father. She lived with her adopted parents from the time she was 4 years old until she reached the age of 29 years, and was married, rendering, all this time, the same services as though she was an own child. But it was there held that a court of equity would not enforce a specific performance of the oral contract; that the agreement to make provision for the child by will was, so far as the real estate was concerned, an agreement for the sale of such real estate; that, as the agreement was merely verbal, and the child never obtained possession of the property under it, it was void under the statute of frauds; that payment of the purchase money without taking possession is not sufficient to take such a case out of the statute of frauds; and that a court of equity will not decree the specific performance of a parol agreement to convey lands where the purchaser has not entered into possession under the contract. Here the adoption of the plaintiff in error by her grandmother did not require a change of name, because her name, as well as that of her grandmother, was Dicken; nor was her relation, as expectant heir of her grandmother in the event of the latter's death without making a will, changed by the adoption, because, as the only child of her deceased father, she would have inherited one-fifth of the estate from her grandmother if the latter had died intestate, without any legal act of adoption. It was not necessary to adopt her to make her the heir of her grandmother. As adopted child she would inherit no greater interest than would have descended to her as grandchild. As the grandmother only lived about six months after the adoption, she received but little from the plaintiff in error in the way of services or companionship. But, even if the formal and perfected adoption was the consideration for the agreement alleged in the bill, and the deceased received and accepted such consideration, still the agreement was not removed from the operation of the statute of frauds, any more than the payment of purchase money would have relieved it from such operation, because no pos-

session was taken of the real estate by the plaintiff in error.

Counsel for plaintiff in error claim that the Pond Case is different from the present case upon the ground that here there were proceedings under the statute resulting in a legal adoption, while there no formal adoption took place. We regard this distinction as immaterial. The services of Mrs. Pond for 25 years in the case cited constituted a consideration as valuable as is a mere formal act of adoption. The material circumstance in the case at bar, as it was in the Pond Case, is that no possession was taken of the land under the contract, and therefore the contract was subject to the operation of the statute. A further distinction is sought to be drawn between the two cases. It is said that in the Pond Case the child was not a natural heir of the party making the promise, while here, by the death of her father, plaintiff in error as his only child, was entitled to a child's share in the estate of the deceased grandmother if she made no will; that the bill there sought to have property given to the child, which by the course of descent would go elsewhere, while here plaintiff in error does not seek anything more than the law of descent would give her, if the will of her grandmother should be set aside; and that the contract here is not one by which the decedent promised to devise something, but one by which she promised to allow the law of descent to distribute her property, so far as plaintiff in error was concerned. The contract as set up in the bill was one in which the deceased is alleged to have verbally contracted, not with plaintiff in error, but with the guardian and mother of plaintiff in error, that the deceased would make no will which would deprive plaintiff in error of any portion of the estate which she would take as heir if there was no will. The deceased unquestionably had a right to make a will, and leave her property to others than her children or grandchildren. She had a right to leave it to whom she pleased. It is not alleged that she contracted to make no will, but not to make a will giving plaintiff in error less than the law would give her. The contract was, in substance and effect, a contract that, if she made a will, she would make a will giving a certain portion of her estate, which consisted of realty and personalty, to the plaintiff in error. Such a contract is the same as though she had agreed that, if she made a sale of her real property, she would sell it to plaintiff in error. We apprehend that there is no material difference, so far as the application of the statute of frauds is concerned, between an oral agreement by A. to sell land to B. at a certain price, and an oral agreement by A. that, if he made any sale of his land at all, he would sell it to B. at a certain price. Both of such oral contracts of sale are within the statute of frauds. *Farnham v. Clements*, 51 Me. 426.

If the verbal contract set up in the bill is not a verbal contract to devise to plaintiff in

error a certain portion of her grandmother's estate, or (what is equivalent thereto) a verbal contract to make sale to her of a certain portion of the estate, then it is difficult to see upon what theory plaintiff in error claims to be entitled to the relief prayed for in her bill. The bill prays that the oral contract therein set forth may be enforced against the defendant. By the will of the testatrix the title to the realty has passed to the defendants, her surviving children; and an enforcement of the contract against them would require them to convey to the plaintiff in error the portion of the realty claimed by her. But this can only be done by charging the land in the hands of the defendants with a trust in favor of plaintiff in error. The theory upon which the courts enforce an agreement to execute a will in a certain way, against the representatives and estate of the party who makes the agreement, is "to construe such agreement, unless void under the statute of frauds, or for other reason, to bind the property of the testator or intestate, so far as to fasten a trust upon it in favor of the promisee, and to enforce such trust against the heirs and personal representatives of the deceased." *Bolman v. Overall*, 80 Ala. 451; 3 Pars. Cont. marg. p. 406. The trust which is fostered upon the property in such case will necessarily be a trust growing out of a contract of sale. "If an owner of real estate contracts to sell it, he becomes a trustee of the legal title for the vendee; and, if he dies before conveying the legal title, * * * the heir in case it descends, and the devisee in case it is devised, may be called upon to convey it to the vendee." 1 *Perry, Trusts*, § 342. Such contract of sale, however, in order to affect land with a trust in favor of the vendee or promisee, as against the vendor or his heirs or devisee, must be in writing, or attended with such acts of part performance as take it out of the statute of frauds. There are no such acts in this case. Nor can it be said that there is any trust growing out of fraud on the part of the deceased or the defendants, because no fraud is charged in the bill. Even if the contract here is, as counsel for plaintiff in error contend, a contract by which the deceased promised to let the statute of descents have its operation, and not a promise to make a devise in a particular way, it is, nevertheless, a merely verbal agreement, and, as such, could not have the effect of fastening a trust upon the real estate devised to the defendants. A trust which affects land must be in writing. *Tyler v. Tyler*, 126 Ill. 525, 21 N. E. 616. Under "our statute of frauds, all trusts shall be created or evidenced by writing, except resulting trusts, or else they are void." *Hovey v. Holcomb*, 11 Ill. 660.

It has been said that a court of equity will sometimes interfere to enforce a verbal contract, void by the statute of frauds, where there have been such acts of performance by the party asking relief that he or she would suffer an injury amounting to a fraud by the

refusal to execute the agreement. *Wallace v. Rappleye*, 103 Ill. 229; *Pond v. Sheean*, supra. No act of performance is alleged in the bill, except the act of effecting a statutory adoption. This act would not justify a court in holding that plaintiff in error has suffered an injury amounting to fraud unless she is granted relief. Non constat that she was any worse off after the adoption than she was before.

The fact that the oral agreement set up in the bill may include personal as well as real estate does not take it out of the statute of frauds as to such personal estate. Being in part for a devise of land, and not being evidenced by any writing signed by the testatrix, it is within the statute; and, as the contract is indivisible, and falls in part, the whole fails. *Pond v. Sheean*, supra; *Ellis v. Cary*, 74 Wis. 176, 42 N. W. 252.

It is further urged that, in order to take advantage of the statute of frauds, it must be pleaded, or in some way set up at the trial, or it will be deemed to have been waived, and that it cannot be taken advantage of by demurrer to the bill. We think that in the present case the question whether the contract is within the statute of frauds can be raised by demurrer. Where a bill shows affirmatively that a contract or promise to make a will is not in writing, the defense of the statute of frauds may be raised by demurrer. *Manning v. Pippen*, 86 Ala. 357, 5 South. 572. The bill here alleges that Serena Dicken verbally contracted. Where the bill states facts which are relied upon as part performance for the purpose of taking the oral agreement out of the statute of frauds, and a demurrer is filed which admits such facts, the court must determine whether the facts relied upon do constitute part performance. *Van Dyne v. Vreeland*, 11 N. J. Eq. 378. And where the bill discloses an oral contract, without alleging facts which would avoid the statute as a defense, advantage may be taken of the statute by demurrer. 8 Am. & Eng. Enc. Law, p. 746. Here the adoption set up as part performance does not amount, under the decisions in this state, to such part performance as will avoid the statute as a defense. The defense of the statute of frauds may be taken by demurrer where it appears from the face of the bill, as it does here, that the case stated is within the statute. *Story*, Eq. Pl. (9th Ed.) § 762; and note a. We think that there was no error in sustaining the demurrer and dismissing the bill. The decree of the circuit court is accordingly affirmed. Affirmed.

(164 Ill. 124)

EASTMAN v. LITTLEFIELD et al.

(Supreme Court of Illinois. Nov. 10, 1896.)

MORTGAGES—TRUSTEE'S SALE—TITLE—REDEMPTION—LACHES.

1. The grantee in an absolute deed gave an agreement to reconvey on payment of his advances. The title was subject to a prior trust deed, payment of which the grantee did not

assume. The grantor afterwards informed the grantee that he could not pay off this incumbrance, and that he elected to abandon the property, and the grantee thereupon bought in the property at trustee's sale. *Held*, that he acquired a good title thereby, since, after the grantor elected to abandon the property, there was no longer any confidential relation between them. *Turner v. Littlefield*, 32 N. E. 522, 142 Ill. 630, followed.

2. A landowner executed two deeds of trust, each for \$6,000, the superior lien being executed to B. the other to L. Seven years later the trustee sold the premises at public auction under the L. deed of trust, and the premises were purchased by L. for \$6,900, to whom the trustee executed a deed. The sale of the premises was in all respects regular. Soon afterwards L. purchased the deed of trust held by B. on the premises, paying therefor \$8,240. *Held*, that L. acquired a good title.

3. A bill to redeem lands was filed May 12, 1890. It appeared that the trustee's sale from which it was sought to redeem one portion of the land was made in 1882; that from that year the grantee (defendant) was in possession of the land, leasing it, and using it as his own, and paying taxes from year to year as owner; that the other portion was sold to defendant at a trustee's sale January 20, 1885; that in February, 1885, the mortgagor leased 12 acres of the land, which included the home, and declared in the lease that defendant was the absolute owner; that he occupied under the lease till March, 1886, when he quit the premises. The mortgagor was himself present at both sales under the trust deeds, and knew how defendant had acquired title to the lands. *Held*, that complainant's rights were barred by his laches.

Error to circuit court, Adams county; Oscar P. Bonney, Judge.

Bill by Henry B. Eastman against Eaton Littlefield and others to redeem lands from trustees' sales. From a judgment in favor of defendants, plaintiff brings error. Affirmed.

E. A. Sherbourne and Govert & Pape, for plaintiff in error. J. F. Carrott, for defendants in error.

CRAIG, J. This was a bill in equity, brought by Henry B. Eastman against Eaton Littlefield and others to redeem the following described lands: "S. W. N. E. 31, Tp. 1 south, range 8 W.; N. W. 31, 1 S., 8 W.; 56 acres of the north end of the E. ½ S. W. 31, 1 S., 8 W.; and S. ½ N. W. S. 6, Tp. 2 S., 8 W.,"—in Adams county, from certain sales under which the defendant Littlefield claimed title. The complainant filed his bill on the 12th day of May, 1890, in which he claimed to have purchased the lands under a quitclaim deed from Reuben C. Rutherford and Rebecca M. Rutherford, his wife, bearing date April 25, 1890. It appears from the record that for some six years prior to 1879 Rebecca M. and Reuben C. Rutherford owned the lands in sections 6 and 31, described in the bill, subject to certain incumbrances, liens upon the lands. At the March term of the circuit court of Adams county, 1878, William Marsh obtained a judgment against the Rutherfords for \$5,750, upon which an execution issued April 30, 1878, directed to the sheriff of Adams county. This execution was levied on the lands in sections 6 and 31, and, after setting off the

Rutherfords a homestead in section 6, 123 feet wide and 554 feet long, including the dwelling house, the lands were sold in separate parcels to Marsh in satisfaction of his judgment. On May 30, 1879, Robert McComb obtained a judgment against the Rutherfords for \$715.04, upon which an execution was issued August 22, 1879. McComb, as judgment creditor, redeemed the premises from the sale under the Marsh judgment, and the McComb execution was levied on the premises redeemed. On September 18, 1879, a sale was made, and Eaton Littlefield and William H. Collins became the purchasers of the land in section 31, and the lands in section 6 were sold to Browning and Singleton, who had assisted in raising a part of the money to redeem from the sale of the lands under the Marsh judgment. Upon the expiration of the time allowed for redemption, the sheriff, on December 2, 1879, conveyed the lands in section 31 to Littlefield and Collins, and the lands in sections 6 to Browning and Singleton. It appears that an agreement was executed by Littlefield and Collins and the two Rutherfords of date September 18, 1879, in which it is recited that Marsh had obtained the judgment heretofore mentioned, and that the lands had been sold on execution issued thereon. The agreement then states that Robert McComb had also obtained a judgment against the Rutherfords, and then proceeds as follows: "And whereas, Eaton Littlefield and William H. Collins furnished the money for the payment of a portion of the said Marsh's claim, namely, about four thousand dollars (\$4,000), to said McComb: Therefore it is understood and agreed that the said Littlefield and Collins are to take a sheriff's deed of the following described property (when sold to satisfy the aforesaid judgment of the said Robert McComb), to wit: The southwest quarter of the northeast quarter of section thirty-one (31), in township one (1) south of the base line, and range eight (8) west of the fourth principal meridian; also the south half of the northwest quarter of said section thirty-one (31); also fifty-six (56) acres off the north end of the east half of the southwest quarter of said section thirty-one (31),—subject to prior incumbrances; such deed to be treated as a mortgage, and said property to be held in trust for the benefit of said Reuben C. and Rebecca M. Rutherford and their heirs or legal representatives, and as a security to the said Eaton Littlefield and William H. Collins for the repayment to them of the said sum of four thousand dollars (\$4,000), with the interest thereon annually. And it is further understood and agreed that if, at any time within five years from the date of the said sheriff's deed to the said Eaton Littlefield and William H. Collins, the said Reuben C. and Rebecca M. Rutherford, or either of them, or their heirs, executors, administrators, or assigns, shall repay the said sum of four thousand dollars (\$4,000), with interest thereon at the rate of eight per cent. per annum from the 22d day of August, A. D. 1879, together with all money ad-

vanced or loaned to said Rebecca M. and Reuben C. Rutherford by said Eaton Littlefield and William H. Collins, or either of them; also all money advanced or paid by said Littlefield and Collins, or either of them, on the principal or interest that has already accrued or may accrue on any prior liens or incumbrances on said land, or for taxes, or for any necessary repairs, or for maintaining or keeping in repair the fences on said land, with interest at the rate of eight per cent. per annum, to the said Eaton Littlefield and William H. Collins, or their legal representatives,—then the said Littlefield and Collins shall, and they do hereby agree for themselves, their heirs and executors, administrators, or assigns, to reconvey the last above described real estate, situate in section thirty-one (31), township one (1), to the said Reuben C. and Rebecca M. Rutherford, or either of them, or their legal representatives. And it is still further understood and agreed between the said Eaton Littlefield and William H. Collins and the said Reuben C. and Rebecca M. Rutherford, and all parties concerned, that in case the said Reuben C. and Rebecca M. Rutherford, or either of them, or their legal representatives, creditors, or assigns, shall fail to repay the said sum of four thousand dollars (\$4,000), with interest thereon, and other sums or moneys as above mentioned, to the said Eaton Littlefield, William H. Collins, or their legal representatives, within the term of five years as above specified, then the said sheriff deed to said Eaton Littlefield and William H. Collins is to be considered and held by them as a deed absolute for them and their heirs forever. In witness whereof we have hereunto set our hands and seals this 18th day of September, A. D. 1879, at Quincy, Illinois." It also appears that at the time of the recovery of said Marsh judgment and of the execution of said agreement dated September 18, 1879, said land in section 31 was subject to the lien of a deed of trust dated August 1, 1877, to George Castle, trustee, for \$11,000, and was duly recorded in the recorder's office of Adams county, Ill.; that on the 14th day of September, 1882, said William H. Collins and wife, by their quitclaim deed of that date, conveyed all their right, title, and interest in said land to said Littlefield for the sum of \$3,295; that on September 23, 1882, said George Castle, as trustee, after duly advertising said trustee's sale, in pursuance of the power in said trust deed contained, sold said land in section 31 to said Littlefield for the sum of \$11,850, as bid by him at said sale, and made and delivered to said Littlefield his trustee's deed of that date, which was duly recorded in the recorder's office of said Adams county on September 28, 1882; that on October 30, 1884, said Rutherford and wife executed a quitclaim deed of said land in section 31 to said Littlefield, which was duly recorded; that Littlefield paid from July, 1880, to May, 1892, interest coupon notes secured by said Castle trust deed to the amount of \$1,719.15. Turning now to the defendant's title to the

land in section 6, it appears the land in section 6 was subject to two deeds of trust,—one to Orville H. Browning and the other to Eaton Littlefield,—each for the sum of \$6,000, and both dated February 23, 1878, and made by said Rebecca M. Rutherford and her husband to James F. Carrott, trustee, and duly recorded; that on January 20, 1885, said Carrott, as trustee, after duly advertising said trustee's sale, in pursuance of the power in said trust deed contained, sold the land in section 6 to said Littlefield for the sum of \$6,900, as bid by him at said trustee's sale, and made and delivered to said Littlefield his trustee's deed of that date, which was duly recorded in the recorder's office of said Adams county on the 26th day of January, 1885. It also appears that on April 22, 1885, Littlefield purchased the \$6,000 note held by said Browning, and secured by one of the deeds of trust to Carrott, trustee, and paid \$8,240 therefor; that on April 27, 1885, said Rutherford and wife executed a quitclaim deed of said land in section 6 to said Littlefield. It is charged in the bill that at the times Littlefield obtained title to the lands in sections 6 and 31 he was in fact and in law the trustee of said lands for Rebecca Rutherford, and as such he was incapacitated from acquiring any title in the lands adverse to her. The defendant, in his answer, denies that he holds the lands as the trustee of the complainant, and avers that, even if he ever acquired or held said land in section 31 in trust for said Rutherfords, said trust relation ceased to exist between said parties during the summer of 1882, and that the said Rutherfords allowed said agreement in writing of date September 18, 1879, to become forfeited, and wholly abandoned said premises in the summer of 1882. It is also set up in the answer that defendant acted in good faith in advancing his own money to purchase said land in section 6 at said sheriff's sale under said Ralston judgment and execution, and at said trustee's sale by Carrott, trustee, on January 20, 1885; and also said land in section 31, at said sheriff's sale under said McComb judgment and execution, and at said trustee's sale made by Castle, trustee, on September 23, 1882; and in making repairs and valuable improvements on said lands, and in paying the taxes on said lands ever since and including the year 1880. It is also set up that the alleged rights of the complainant are stale and antiquated, and that he is guilty of laches, and is barred by lapse of time; and that, even if said agreement of September 18, 1879, together with said sheriff's deed therein referred to, constituted a loan, and was to be treated as a mortgage, as alleged in the bill, said Rebecca and her husband, having surrendered in the summer of 1882 possession of said land in section 31 to Littlefield, and having surrendered the possession of said land in section 6 to Littlefield more than seven years before the filing of the bill herein, and Littlefield having paid all taxes assessed against said land in section 6 since 1880, it would be unjust and in-

equitable for the Rutherfords or any one claiming under or through them to be permitted to redeem said lands, and that in equity every such person is estopped and barred from claiming the relief prayed for in the bill.

The plaintiff in error, Henry B. Eastman, in consideration of \$1,000, on April 25, 1890, obtained a quitclaim deed from Rebecca M. and Reuben C. Rutherford for the premises described in the bill. The deed passed no better or greater title than belonged to the grantors at the time the deed was executed. If they had no title, none was transferred by the deed. Moreover, as Littlefield was, at the time the deed was executed, in possession of the premises, Eastman purchased with full notice of all the rights and title of Littlefield. The question here, then, between plaintiff in error, Eastman, and defendant in error Littlefield, is one of title; the former claiming through the Rutherfords under the quitclaim deed of April 25, 1890, and the latter claiming under judgment and mortgage sales and under deeds wherein the title of the Rutherfords passed to him long before the execution of the deed to plaintiff in error. As the title relied upon by Littlefield is not the same in both tracts of land, it will be necessary to consider the title in section 31 separate from the title in section 6. It will be observed that the lands in both sections were sold on a judgment in favor of Marsh on June 1, 1878. After the expiration of 12 months, one McComb, having obtained a judgment against the Rutherfords, redeemed as a judgment creditor from the Marsh sale, and the lands were again sold on September 18, 1879, and the lands in section 31 purchased by Littlefield and Collins, and on December 2, 1879, they obtained a sheriff's deed for the lands. Prior to this sale, and on the 10th day of September, 1879, the Rutherfords and Littlefield and Collins executed an agreement in writing, set out in the foregoing statement. It will also be seen by a reference to the statement that at the time the Marsh judgment was recovered, and at the time the agreement was executed, September 18, 1879, the lands in section 31 were subject to a prior lien, a deed of trust dated August 1, 1877, given by the Rutherfords to George Castle for \$11,000. It also appears that under and by virtue of the trust deed, upon due notice being given, Castle sold the premises in section 31, and at the sale Littlefield became the purchaser for the sum of \$11,850, and obtained a deed for the premises. In *Turner v. Littlefield*, 142 Ill. 630, 32 N. E. 522, the validity of this deed was called in question by a bill on behalf of Turner, a judgment creditor of the Rutherfords, to redeem, and after a full consideration we held that Littlefield acquired title under that sale and deed. The facts in this record bearing on the question are substantially the same as were the facts in the *Turner Case*. The Rutherfords have testified on one point in this case where they did not testify in the former

case, but, in view of all the facts presented by the record, we do not regard the evidence of the Rutherfords as producing such a change of facts as to authorize us to change the conclusion reached in the Turner Case as to the validity of the purchase of Littlefield under the Castle trust deed. We therefore adhere to the conclusion reached in the Turner Case, and refer to the opinion in that case for an expression of our views on the question raised.

We now come to the other tract of land, which is a part of section 6. As has been seen, Rebecca M. Rutherford and her husband, on February 23, 1878, executed two deeds of trust on the land, one to O. H. Browning and one to Eaton Littlefield for \$3,000 each. James F. Carrott was made trustee. Both trust deeds bear the same date, but it was recited in the one given Littlefield that Browning's deed of trust was a prior lien. On the 20th day of January, 1885, the trustee sold the premises at public auction under the Littlefield deed of trust, after giving notice as required by its terms, and the premises were purchased by Littlefield for \$6,900. Upon making the sale the trustee executed and delivered to Littlefield a deed for the premises. In the following April, Littlefield purchased the deed of trust held by Browning on the premises, paying therefor \$8,240. This sale, so far as appears, was in all respects regular, made in strict conformity to the deed of trust. Other parties bid at the sale, but the premises were finally struck off to Littlefield, he being the highest bidder. No reason is perceived why the title did not pass to Littlefield under this sale. The validity of the sale is further evidenced by a written lease executed by Littlefield and the Rutherfords on February 4, 1885, which recites that, in consideration of one dollar, Littlefield rented to Rutherfords (wife and husband) 12 acres, being part of the 80 acres in section 6, from date of the lease till April 15, 1885, with the privilege to the second party to purchase the same for \$10,000 in cash; and that, unless so purchased, premises to be surrendered to Littlefield on April 15, 1885; and containing a recital that "said party of the second part hereby declares that they have already surrendered all of said south half of said quarter section, except above described tract of land, except about twelve (12) acres, to the said party of the first part, he being the owner of the same, and legally and equitably entitled to the same, and the same having been long held by us as tenants of said Littlefield." After the purchase by Littlefield, and after the execution of the lease fully recognizing the title of Littlefield, the Rutherfords took another step in confirmation of Littlefield's title at the request of Polong, who was about to loan money to Littlefield and take security on the land. The Rutherfords, on April 27, 1885, executed a quitclaim deed to Littlefield, conveying all their interest in the land to him. It is difficult to understand

why this was done if the Rutherfords still owned the land. If they were the owners, as is now claimed, it is more reasonable to suppose, when they found that Littlefield was about to mortgage lands they owned to secure a debt he was contracting, they would have protested against the action of Littlefield, and, instead of furnishing him with facilities to mortgage the land, they would have entered a protest. But, independent of these considerations, if the relations of Littlefield and the Rutherfords were of such a character that he could not properly purchase the lands in section 31 at the sale under the Castle trust deed and the lands in section 6 under the trust deed given to him to secure \$6,000, these sales were not void, but voidable merely. If the sales were irregular or defective, the Rutherfords had the right to institute proceedings in apt time to set aside the sales, or they could ratify and confirm them. If guilty of laches, their laches will be a bar to relief. In *Hamilton v. Lubukee*, 51 Ill. 416, it was held that a mortgagor should avail himself in apt time of irregularities in the sale of the premises by the mortgagee under a power in the mortgage. A delay of four years after the mortgagor had knowledge of the sale and proceedings under it was held to preclude him from maintaining a bill to redeem. In *Dempster v. West*, 69 Ill. 614, it was held, after a delay of seven years from the sale of land under a power on a mortgage, the mortgagor will be cut off from avoiding the sale for irregularities in the absence of fraud or an equitable excuse for the delay. In *Bush v. Sherman*, 80 Ill. 160, it was held, acquiescence, unexplained, for any considerable time, in a sale which is voidable but not void, will be deemed a waiver of all irregularities that may have intervened. In *Sloan v. Graham*, 85 Ill. 29, where a bill was filed to set aside an administrator's sale on the ground the administrator purchased at his own sale, it is said: "There is evidence in the record tending to prove that John Sloan purchased for his son, and, in our opinion, it is sufficient to establish the fact that the administrator purchased at his own sale. But, while we are satisfied from the evidence that John Sloan purchased for his son, who was at the time administrator, yet that fact did not render the sale void, but voidable only; and, if proceedings should not be instituted in apt time by the heirs of Graham, who alone had the right to contest the sale, ratification by them would be presumed." In *Hoyt v. Institution*, 110 Ill. 390, it was held that a delay of four years in filing a bill by the former owner to set aside a sale of real estate under a deed of trust was such laches as would bar the relief sought. See, also, *Irish v. Antioch College*, 126 Ill. 484, 18 N. E. 768; *Cornell v. Newkirk*, 144 Ill. 247, 33 N. E. 37. Here the bill was filed May 12, 1890. The evidence shows that the trustee's sale of the land in section 31 was made by Castle, trustee, to Littlefield,

on September 23, 1882, more than 7½ years before the bill was filed. During the time he was in possession of the land, leasing it and using it as his own, and paying taxes from year to year as owner. As to the tract in section 6, the evidence discloses that the trustee's sale was made by J. F. Carrott, trustee, to Littlefield, on January 20, 1885, five years and three months before the bill was filed. In February after the sale, the Rutherfords leased 12 acres of the land, which included the home, and declared in the lease that Littlefield was the absolute owner. They occupied as tenants until March, 1886, when they moved into Quincy, and remained there until November, 1887, when they removed to New York. The Rutherfords knew how Littlefield had acquired title to the lands. Indeed, Rutherford himself was present at the trustees' sales, and, if they desired to contest the sales, they were required to proceed in apt time. This they failed to do, and under the authorities they are barred by their laches. *Jackson v. Lynch*, 129 Ill. 72, 21 N. E. 580, and 22 N. E. 246, has been cited as an authority by plaintiff in error. We do not think the decision in that case has any bearing on the facts of this case. The judgment of the circuit court was, in our opinion, correct, and it will be affirmed. Affirmed.

CARTER, J., having been of counsel for one of the parties in the court below, took no part in the decision of the case.

(164 Ill. 254)

EASTMAN v. LITTLEFIELD et al.

(Supreme Court of Illinois. Nov. 10, 1896.)

TITLE TO LANDS—APPEAL—JURISDICTION.

Where an appeal involves the title to lands, the appellate court is without jurisdiction.

Appeal from appellate court, Third district.

Bill by Henry B. Eastman against Lydia M. Littlefield and others to redeem lands from trustees' sales. From a judgment in favor of defendants, plaintiff appeals. Dismissed in appellate court, and plaintiff appeals. Affirmed.

B. A. Sherbourne, and Govert & Pape, for appellant. J. F. Carrott, for appellees.

PER OURIAM. As the question between appellant, Eastman, and the appellees was one involving title to lands, a freehold was necessarily involved, and the appellate court could not do otherwise than dismiss the appeal taken by appellant to that court. The judgment of the appellate court dismissing the appeal will be affirmed.

(163 Ill. 196)

HENDERSON LOAN & REAL-ESTATE ASS'N v. PEOPLE ex rel. COBB.

(Supreme Court of Illinois. Nov. 10, 1896.)

BANKS—CHARTER—AMENDMENT—FRANCHISE—NONUSER—FORFEITURE.

1. A corporation organized under a private act, and authorized to engage in a general banking and real-estate business, the act providing

that the corporation shall be subject to the provisions of any general law hereafter passed on the subject of banking, trust, and deposit companies, is subject to the provisions of Act June 16, 1887, limiting the right of banking corporations to hold real estate, and providing that all corporations with banking powers, existing by virtue of any special charter, shall be subject to the provisions of the act.

2. A private corporation authorized to receive deposits, loan money, and discount notes and other securities, was a corporation with banking powers, within the meaning of the act of 1887, though it was not empowered to issue bills.

3. Where a bank charter provided that it should be void unless the company should organize and proceed to business within two years, and the company organized, but after a few years failed to transact any business for fifteen years, a judgment of ouster against it will not be disturbed.

Appeal from circuit court, Macoupin county; Jacob Fouke, Judge.

Quo warranto proceedings, on the relation of Walter F. Cobb, against the Henderson Loan & Real-Estate Association. There was a judgment of ouster, and defendant appeals. Affirmed.

J. R. Ouster, J. A. Griffin, and George Hunt, for appellant. Edward O. Knotts, State's Atty., and Charles C. Terry, for appellee.

ORRIG, J. This was a proceeding by quo warranto to dissolve a corporation known as the Henderson Loan & Real-Estate Association. The information contained two counts. In the first count it is alleged that on January 11, 1863, in the city of Carlinville and county of Macoupin, state of Illinois, there was existing, from thence hitherto has existed, in said city, county, and state, a certain corporation and body politic, known as and styled the Henderson Loan & Real-Estate Association, formed under a certain act of the general assembly of the state of Illinois, which was approved by the governor of said state on February 28, 1867, entitled "An act to incorporate the Henderson Loan and Real-Estate Association," which said act is as follows: The first section of the act provides that certain persons therein named, their associates, heirs, and assigns, and successors, shall be a body politic and corporate by name and style, etc. The second section provides that books may be opened for subscription for stock. The third section provides that the capital stock shall be \$100,000, with power to increase same to \$500,000, divided into shares of \$100 each. Section 4 was as follows: "The said corporation shall have power to borrow money and to receive money on deposit, and pay interest thereon, and to loan money, either within or without the state, at any rate of interest not exceeding that now, or hereafter allowed by law to private individuals, and to discount loans, and in computation of time thirty days shall be a month, and twelve months a year; and to make such loan payable either within or without this state; and to take such securities therefor, real or personal or both as the directors or managers of said corporation shall deem sufficient, and may secure the payment of such loans by deeds of trust, mortgages or other

securities, either within or without this state; may buy and sell negotiable paper, and other securities; may open and establish a real estate agency; may purchase and sell real estate; and shall have the power to convey the same in any mode prescribed by the by-laws of such corporation; may accept and execute all such trusts whether fiduciary or otherwise, as shall or may be committed to it by any person or persons, or by the order or direction of any court or tribunal, or other legally constituted authority of the state of Illinois, or of the United States or elsewhere; may make such special regulations in reference to trust funds or deposits, left for accumulation or safe keeping, as shall be agreed upon with the depositors or parties interested, for the purpose of accumulating or increasing the same; may issue letters of credit and other commercial obligations, not, however, to circulate as money; and may secure the payment of any loans made to said company in any way the directors may prescribe." Section 11 was as follows: "Until the sum of five thousand dollars shall have actually been paid in on subscription to the capital stock, the company shall not commence, and this act shall be void unless said company shall organize and proceed to business within two years after the passage hereof. The said company shall be subject to the provisions of any general law hereafter passed on the subject of banking, trust and deposit companies."

It is alleged: That \$100,000 capital stock was subscribed, and that the association became organized under the act. That said corporation, from the time of its organization as aforesaid to the present time, with the exception of the interval hereinafter mentioned, has borrowed money and received money on deposit, and paid interest thereon; has loaned money both within and without this state, at any rate of interest allowed by law to private individuals; has discounted loans; has made such loans, payable either within or without this state; has taken such securities therefor, real or personal, or both, as the directors or managers of said corporation have deemed sufficient, and has secured the payment of such loans by deeds of trust, mortgages, and other securities, both within and without this state; has bought and sold negotiable paper and other securities; has opened and established a real-estate agency; has purchased and sold real estate, and has conveyed the same in the mode prescribed by the by-laws of said corporation. That the general assembly of Illinois passed an act which was approved by the governor of said state June 16, 1887, adopted by the people at an election held November 6, 1888, and proclaimed in force by said governor December 6, 1888, entitled "An act concerning corporations with banking powers," which act, in regard to owning and holding of real estate by such corporations, provided as follows (section 9): "Associations organized under this act shall be bodies corporate and politic for the period for which they may be

organized, may sue and be sued, may have a common seal which they may alter or renew at pleasure, may own, possess and may carry as assets the real estate necessary in which to do its banking business, and such other real estate to which it may obtain title in the collection of its debts, but shall not carry in its assets any real estate except its banking house for a period of more than five years after acquiring title to the same." That in section 12 of said last-mentioned act it is provided as follows: " * * * And, provided, further, that any corporation with banking powers availing itself of or accepting the benefits of, or formed under, this act, and all corporations with banking powers existing by virtue of any special charter or general law of this state, shall be subject to the provisions and requirements of this act in every particular, as if organized under this act." That by virtue of the provisions of the said general banking law, which was proclaimed in force December 6, 1888, as aforesaid, and the said reservation clause in the charter of said association, said corporation, on and after said December 6, 1888, became and was subject to the provisions and requirements of said general banking law; but that said corporation, since said December 6, 1888, has conducted its business in the same manner as it did prior to that time, and has opened and established a real-estate agency, has purchased and sold real estate, and conveyed the same in the mode prescribed in the by-laws of the corporation. That said corporation, since December 6, 1888, has purchased, held, owned, possessed, and carried as assets, and now does hold, own, possess, and carry as assets, real estate, situate in the county of Cook and state of Illinois, not necessary in which to do its banking business, and the title to which it has not obtained in the collection of its debts. That said corporation claims the right so to purchase, hold, own, possess, and carry, as assets, real estate not necessary in which to do its banking business, and the title to which it has not obtained in the collection of its debts, under and by virtue of the rights, powers, and franchises granted to it in and by its said charter. In the second count, it is alleged: That said association was formed and has existed under a certain act as aforesaid, and was duly organized, and began to carry on the business for which it was formed on January 11, 1868, and has continued to conduct said business until April 30, 1878. That on said April 30, 1878, said corporation went out of business, and for a period of about 15 years, to wit, from April 30, 1878, to April 10, 1893, transacted no kind of business of any kind or nature whatsoever, and, during said period, neglected and failed to use and exercise any of the rights, powers, and franchises granted to it in said act of incorporation. That, during the year 1893, meetings of the stockholders and directors, and elections of officers, of said association, were held, in regular and proper manner, as prescribed by its charter and by-laws; but that after De-

cember 5, 1868, neither such meeting nor such election was held until January 1, 1875, though its charter and by-laws provided that its directors should be elected annually. That on January 1, 1875, its stockholders held a meeting, and elected directors, pursuant to its by-laws, and on the same date the directors so elected held a meeting, and elected officers of said association, in accordance with its by-laws. That from and after January 1, 1875, no meeting of its stockholders or directors and no election of its officers were held until after said general banking law was proclaimed in force, to wit, until April 10, 1893. That since April 10, 1893, said corporation has resumed the operation of said business, and is now conducting the same. And that said corporation now claims the right to use and exercise any and all of the rights, powers, and franchises originally granted to it in and by its said charter. The defendant demurred to the information, but the court overruled the demurrer, and the defendant elected to stand by the demurrer. The court entered a judgment of ouster, as prayed for in the petition.

Upon an examination of section 4 of the charter of the appellant corporation, it will be found that the legislature authorized the corporation to engage in a general banking business, except that it could not issue bills; and, in addition to banking, the corporation was authorized to engage in a general real-estate business, with full power to buy, sell, and hold real estate, lease and improve the same, in the same manner and with like power as an individual or natural person; and, under the charter as originally enacted, it is plain that appellant had the power to transact a general real-estate business. But it will be observed that the charter of the Henderson Loan & Real-Estate Association provides in section 11: "The said company shall be subject to the provisions of any general law hereafter passed on the subject of banking, trust, and deposit companies." Under this clause in the charter, the state expressly reserved the right, by general law, to change the charter, and the charter was accepted by the loan and real-estate association upon this condition.

The next question to be considered is whether the legislature, since the charter was granted, has, by general law, changed the charter, and taken away any of the powers which were granted under it. If it has, then the corporation has no right to exercise any power which has been taken away by the legislature. It is set out in the information, and admitted by the demurrer, that the legislature passed an act concerning corporations with banking powers, which was adopted by the people, by a vote at an election held for that purpose, and became a law of the state on December 6, 1888. Section 9 of the act provides that an association organized under the act may own such real estate as is necessary in which to do its banking business, and it may take such other real estate to which it may obtain title on the collection of its debts, but shall not carry any real estate in its assets except its banking house for more than five

years after acquiring title thereto. This prohibits banks organized under the state law from engaging in or carrying on a real-estate business. They may own the real estate in which their business is transacted, and they may, on the collection of debts due the bank, acquire real estate in liquidation of indebtedness due; but this must be sold within five years after it is obtained. To this extent, they may, under the banking act, own and hold real estate, but they cannot go any further in that direction. The wisdom of the provision is obvious. The main object of establishing a bank is or ought to be to afford a safe place for the deposit of money, and to accommodate the public by making loans and discounting commercial paper; but, if the funds of a bank are invested in and tied up in real estate, their objects will, of necessity, be defeated. Section 12 of the banking act makes provision for any corporation organized under the act or organized under the special charter to change the name, change the place of business, to increase or decrease the capital stock, to increase or decrease the number of directors, or to consolidate such corporation with any other corporation having banking powers. After providing the steps to be taken to make any of the changes specified, the section contains the following: "And, provided, further, that any corporation with banking powers availing itself of or accepting the benefits of, or formed under, this act, and all corporations with banking powers existing by virtue of any special charter or general law of this state, shall be subject to the provisions and requirements of this act in every particular, as if organized under this act." This provision, in plain terms, makes every bank in the state organized under a special charter passed by the legislature of the state subject to the general banking act, and, in so far as a charter may conflict with the general act, that charter is modified and changed by the general banking act. In so far, therefore, as the Henderson Loan & Real-Estate Association was authorized by its charter to purchase, hold, and sell real estate, that power was taken away by the banking act of 1887. But it is said the proviso should be construed as affecting the section or paragraph to which it is annexed only. We do not concur in that view. A proviso is something ingrafted upon a preceding enactment, and is legitimately used for the purpose of taking special cases out of the general enactment, and providing specially for them. Potter's Dwar. St. 118. There are, no doubt, cases where a proviso might be confined as affecting the section only to which it is annexed; but we do not understand this to be the general rule. Here it is manifest that the proviso was intended to apply to the act, and not to a particular section; and, when such is the case, it should be given that construction. But it is said that the language in section 12 of the act of 1887, "any corporation with banking powers," and "all corporations with banking powers existing by virtue of any special charter or general law of this state," does not apply to the Henderson Loan & Real-Estate Association, for the reason that under the constitution

of 1848, which was 'n force when appellant secured its charter, a corporation with banking powers was understood to be a bank of issue. In *Reed v. People*, 125 Ill. 592, 18 N. E. 295, we had occasion to consider somewhat the meaning of the words "banking powers" as used in the organic act of 1870; and we there held that, "in a commercial sense, banks were of three kinds, to wit, of deposit, of discount, and of circulation; and a corporation authorized to receive deposits, discounts, notes, and invest the proceeds in public securities, and declare dividends, must be regarded as having banking powers." Here the Henderson Loan & Real-Estate Association was not empowered to issue bills to circulate as money, but it was authorized to receive deposits, loan money, discount notes and bills, buy and sell negotiable paper and other securities, and there can be no doubt that it was a corporation with banking powers, within the meaning of the act of 1887.

The next question presented is whether the facts set up in the second count of the information were sufficient to authorize the judgment. It appears from the averments of this count that the corporation was organized and commenced business on January 11, 1868, and continued business until April 30, 1878, when the corporation went out of business, and for a period of 15 years, to wit, from April 30, 1878, to April 10, 1893, transacted no business of any character whatever, but during said period neglected and failed to use or exercise any of the rights, powers, or franchises granted by the act of incorporation; that while the charter required the stockholders to elect directors annually from December, 1868, until January, 1875, no election of directors was had, and after January, 1875, no directors were elected until the year 1893. The grant of corporate rights and privileges by the state, and the acceptance by appellant corporation, created a contract, under which the corporation was bound to exercise its corporate rights and powers, and its failure to do so for a period of fifteen years, without any excuse whatever, constituted a gross and deliberate violation of its duties as a corporation. By section 11 of the charter it is expressly provided that the charter shall be void unless said company shall organize and proceed to business within two years. From this provision it is plain that the legislature intended that the franchises granted should be used, and that continuously; and as was said by this court in *People v. Kankakee River Imp. Co.*, 103 Ill. 507, where a similar question was involved: The noncompliance with the requirement was per se a misuser and a cause of forfeiture, as for condition broken. The powers and privileges conferred upon appellant by the charter were of a public nature. As a corporation with banking powers, it was clothed with power to receive deposits from the people, to make loans to the people, to discount commercial paper, to receive trust funds in deposit, to issue letters of credit,—all matters pertaining to the public. The appellant corporation having assumed those extraordinary powers and privileges from the state,

it owed a duty to the public, which it grossly neglected to discharge. Here was a clear breach of trust, which would authorize a forfeiture. *People v. Bristol & R. T. Road*, 23 Wend. 221. In *Terrett v. Taylor*, 9 Cranch, 43, 51, Mr. Justice Story said: "A private corporation, created by the legislature, may lose its franchises by a misuser or nonuser of them; and they may be resumed by the government under a judicial judgment, upon a quo warranto to ascertain and enforce the forfeiture. This is the common law of the land, and is a tacit condition, annexed to the creation of every such corporation." *Chesapeake & O. Canal Co. v. Baltimore & O. R. Co.*, 4 Gill. & J. 1, 121: "It may be dissolved by a forfeiture of its charter, through abuse or neglect of its franchises, as for condition broken; there being a tacit condition in every such grant that the corporation shall act up to the end of its institution."

We think the judgment of the court warranted by the facts, and it will be affirmed. Affirmed.

(163 Ill. 207)

EVANS v. PIERCE.

(Supreme Court of Illinois. Nov. 11, 1896.)

SUPREME COURT—JURISDICTION.

The state is not interested (Practice Act, § 88) in mandamus proceedings to compel the treasurer of the state normal school to pay the salary of a teacher, so as to authorize an appeal direct to the supreme court.

Appeal from circuit court, Jackson county; A. K. Vickers, Judge.

Mandamus proceeding by J. M. Pierce against J. M. Evans. There was a judgment for plaintiff, and defendant appeals. Dismissed.

Youngblood & Schwartz, for appellant. R. J. McElvain, for appellee.

BAKER, J. J. M. Pierce filed in the Jackson circuit court his petition for a writ of mandamus against J. M. Evans. He stated in his petition that he has been employed since September 1, 1892, as one of the teachers in the Southern Illinois Normal University, at Carbondale, Ill., at a salary of \$1,200 per year, payable in monthly installments of \$100 each; that said university is owned and controlled by the state of Illinois, and is managed by a board of trustees appointed by the governor of the state; that said board of trustees appointed a registrar for the university, whose duty it was to make out the pay roll for each month of all persons who are teaching or performing other work for said university; that said registrar made and prepared a pay roll of and for all persons teaching for said university for the month of July, 1893; that said trustees appointed a treasurer for said university, whose duty it was to have the custody and care of such funds as are appropriated by the legislature of said state for the operating expenses of said university, and to pay the same out to such persons appearing upon the pay roll of said university so prepared by said

registrar. The petition also states that the petitioner was one of the persons so appearing upon the pay roll of said university for the month of July, 1893, as one of the teachers employed by the said trustees, and that there is due him for said month, as such teacher, the sum of \$100; that one J. M. Evans was then, and is now, the treasurer of said university, and that he had on hand then, and has now, funds of said state with which to pay petitioner for his services for said month of July; that said petitioner has demanded of said Evans, as such treasurer, his pay for the month of July aforesaid, and said Evans has refused to pay the same. And petitioner prays for a writ of mandamus against said Evans, commanding him forthwith to pay petitioner the sum of \$100 for the month of July, 1893, etc. Evans, the defendant, filed his plea and answer, which, among other things, alleges that the funds belonging to the university and in the hands of its treasurer were deposited and kept in the private bank of Richart & Campbell, at Carbondale, Ill.; that on or about the 1st day of August, 1893, said D. B. Parkinson, as such registrar, presented to him (Evans, treasurer, as aforesaid), and with the consent of said Pierce therein, the pay roll of said university, and demanded payment thereof; that there appeared to be due on said pay roll to plaintiff \$100 salary for the month of July, 1893; that thereupon the said Evans, at the request of D. B. Parkinson, drew his draft on said Richart & Campbell, payable to said Pierce at sight, for \$100 (that being the amount in full then due plaintiff from said university), and then and there delivered said draft to said Parkinson, which he (Evans) avers said plaintiff accepted, through said registrar, in full satisfaction of said sum of money then due him; that at that time said D. B. Parkinson and said plaintiff, Pierce, both resided in the city of Carbondale, which is the same city where said bank of Richart & Campbell was located. And defendant further avers that at that time, and up until the 21st day of August, 1893, said Richart & Campbell had funds in their bank out of which said draft could and would have been paid, had the same been presented to said bank for payment either by the plaintiff or the said D. B. Parkinson, and that said draft was not presented to the said bank of Richart & Campbell for payment until after the 22d of August, 1893; that said Richart & Campbell failed and suspended payment on the 22d day of August, 1893, whereas said Evans avers that because of the failure of said Parkinson and said plaintiff, Pierce, to present said draft for payment to the said bank of Richart & Campbell within a reasonable time after its date, said plaintiff has forfeited all right of action against the defendant for payment thereof, etc. Such further proceedings were afterwards had in the cause as that final judgment was rendered against the defendant, and a peremptory writ of mandamus awarded. This appeal was then taken.

v.45N.E.N.O.3—10

We find ourselves unable to avoid the conclusion that the appeal to this court was unadvisedly taken, and that we are without jurisdiction to entertain it. The case does not involve a franchise or freehold, or the validity of a statute, or the construction of the constitution. The state is not interested in it as a party or otherwise, and it does not relate to revenue. Section 88 of the practice act, as amended in 1879 (Laws 1879, p. 222); section 8 of the appellate court act, as amended in 1887 (Laws 1887, p. 156). The appeal is dismissed. Leave is given to withdraw the record, abstracts, and briefs from the files. Appeal dismissed.

(163 Ill. 652)

STAR BREWERY CO. v. PRIMAS.

(Supreme Court of Illinois. Nov. 11, 1896.)

NEGATIVE COVENANT—BREACH—INJUNCTION—ACQUIESCENCE—WAIVER.

1. A provision in a deed that "the premises hereby conveyed are not to be used for saloon or dramshop purposes" is a negative covenant, and not a condition.

2. Equity will enjoin the breach of an express, negative covenant, though no substantial injury is caused by the breach, and though the damages, if any, may be recoverable at law. 59 Ill. App. 581, affirmed.

3. In a bill to enjoin a grantee from violating a restriction under which property was conveyed to him, the bill is sufficient, if it sets out the substance of the clause, whether the pleader call it a "condition" or a "covenant."

4. A provision in a deed that the premises conveyed "are not to be used for saloon or dramshop purposes" merely prevents the use of a particular piece of property in a certain way, and is not void as in restraint of trade.

5. Where it is sought to defend against the enforcement of a negative covenant on the ground that the character of the neighborhood has so changed as to defeat the purpose of the covenant, it must be shown that the change in circumstances has resulted from some acts of the grantor in the deed, or those holding under him, or that the enforcement of the covenant will work a serious injury to the property or property rights of the grantee in the deed, or the party against whom it is sought to be enforced.

6. Where the breach of a negative covenant has been enjoined by parties other than the grantor in the deed, it is unnecessary for the grantor to adopt proceedings of his own to stop it, and his failure to do so is not an acquiescence in the breach.

7. Where a dramshop has been erected in violation of an express, negative covenant that the premises conveyed were not to be used for such a purpose, the fact that the grantor in the deed entered the dramshop at one time, and drank some beer there, does not show an acquiescence in the breach, where it does not further appear that he intended to relinquish a known right.

Appeal from appellate court, Fourth district.

Bill by William Primas against the Star Brewery Company and Edward Johnson to enjoin the violation of a negative covenant. From a judgment affirming a judgment in favor of complainant (59 Ill. App. 581), defendant company appeals. Affirmed.

This is a bill filed by appellee against the appellant company and one Edward Johnson

to enjoin them from in any manner using, or authorizing the use of, certain premises for saloon or dramshop purposes so long as the complainant owns the house known as the "Bluff Saloon." Answer and replication were filed, and a decree was rendered by the circuit court granting a perpetual injunction in accordance with the prayer of the bill. This decree has been affirmed by the appellate court (59 Ill. App. 581), and the object of the present appeal is to review such judgment of affirmance. In their opinion the appellate court make the following statement of facts: "The appellee was the owner of a saloon building and premises he had purchased from one Anna Hanslick, situated in Glen Carbon, known as the 'Bluff Saloon,' which in February, 1891, he leased to one William Winters, who ran the saloon until November, 1891, when appellee leased it to the St. Louis Brewing Association, who sublet to the firm of Martin & Paul for saloon purposes, and they so used it. On the 18th day of August, 1891, the appellee sold and conveyed to William Winters a vacant lot situated near the said Bluff Saloon, which deed contained the following clause: 'The premises hereby conveyed are not to be used for saloon or dramshop purposes so long as the grantor owns the house formerly owned by Hanslick.' Winters proceeded to erect a large house on said lot, which was afterwards, in May and June, 1892, used by him for saloon purposes, but he was restrained from continuing in the business, on the complaint of the St. Louis Brewing Association and Martin & Paul, with whom Winters had contracted, on their purchase of his fixtures in the Bluff Saloon, not to keep a saloon within one mile of the Bluff Saloon. The Star Brewery Company desired to purchase the Winters property for the purpose of establishing a saloon, and, having learned of the restriction clause in the deed conveying it to Winters, sought to obtain a written release from appellee, which he refused to give. Winters also sought to obtain such release, and offered to pay \$30 therefor, but appellee unqualifiedly refused to grant it. Notwithstanding this refusal, the Star Brewery Company purchased the property of Winters on the 20th day of May, 1893, and established one Johnson in the saloon business there in July thereafter. On the 13th of September the bill in this case was filed by appellee to restrain such use of the property, he still remaining the owner of the Bluff Saloon."

Knispel & Roplequet, for appellant. Tra-vous & Warnock, for appellee.

MAGRUDER, C. J. (after stating the facts). The question in this case relates to the force and effect of the restriction clause contained in the deed executed on August 18, 1891, by the appellee to Winters, and also to the extent to which that clause is binding, if at

all, upon the appellant, holding under a deed executed to it by Winters on May 20, 1893. The clause in question is as follows: "The premises hereby conveyed are not to be used for saloon or dramshop purposes so long as the grantor owns the house formerly owned by Hanslick." The deed from appellee to Winters refers to a conveyance previously made on January 19, 1891, by Anna Hanslick to appellee, and it is conceded that the house formerly owned by Hanslick is what is known as the "Bluff Saloon." The tract purchased by appellee from Anna Hanslick was about four acres, of which the premises sold by him to Winters, and which Winters conveyed to appellant, are a part. The Bluff Saloon was situated upon the part of the four acres retained by appellee, and not sold to Winters. The deed from Winters to appellant does not contain the clause, but the deed from appellee to Winters was on record when appellant bought the premises and accepted a deed thereof. In addition to the constructive notice afforded by the record, appellant had actual notice that the clause in question was in the deed to Winters, because both appellant and Winters tried to induce appellee to execute a written release of the restriction imposed by the clause, and offered to pay him money to do so, before appellant made its purchase of the premises from Winters, together with the building erected thereon by Winters. The house called the "Bluff Saloon" is still owned by appellee. With the knowledge of such ownership, and with the further knowledge of the restrictive clause in question, and of appellee's refusal to make a written release of the restriction, appellant bought the property for the purpose of using it for saloon purposes, and in July, 1893, placed Johnson in possession thereof, who at once opened a saloon in the building built thereon by Winters, and from July 19, 1893, up to the time of the commencement of this suit, kept a saloon there. Under these circumstances, is there any reason why an injunction will not lie to restrain a use of the property which is contrary to the terms of the clause in question?

The first reason urged by appellant why the relief asked for should not be granted is that the bill calls the clause in question a "condition," whereas it is alleged to be a mere restriction. The bill alleges that the premises in question were conveyed by appellee to Winters upon condition that they should not be used for saloon purposes as long as complainant remained the owner of a house, formerly owned by Anna Hanslick, known as the "Bluff Saloon," situated on another portion of the tract bought from her by appellee; that said Bluff Saloon is used by appellee's tenants for saloon and dramshop purposes; that such tenants pay a higher rent by reason of the agreement to prevent the use of any other land owned by appellee for the same purpose; and that the premises deeded to Winters are so located with ref-

erence to the Bluff Saloon as to make a saloon business prosecuted on said premises a competing business, thereby reducing the rental value of the Bluff Saloon. Conditions, besides being express or implied, may be precedent or subsequent. A precedent condition is one which must take place before the estate can vest or be enlarged, and, if land is conveyed upon a precedent condition, the title will not pass until the condition is performed. A subsequent condition is one which operates upon an estate already created and vested, and renders it liable to be defeated. A deed upon condition subsequent conveys the fee when it is executed, but the fee passes subject to the contingency of being defeated as provided in the condition, the grantor having the power of re-entry upon condition broken; and, if there is a breach of the condition, the estate continues in the grantee until defeated by actual entry. Whether a condition is precedent or subsequent depends upon the intention of the parties. At common law no one but the grantor, or his heirs, could enter for a breach of a condition subsequent. 2 Washb. Real Prop. (5th Ed.) marg. pp. 445-447; Martind. Conv. § 124; 2 Devl. Deeds, §§ 958, 959; 3 Am. & Eng. Enc. Law, p. 423, and cases cited. There is nothing in the language of the deed under consideration to indicate that it is a deed upon condition precedent or subsequent. The words "upon condition" are not used. There is no provision for re-entry in case of a breach of the covenant. Such a provision usually indicates an intent to create a condition subsequent. Kew v. Trainor, 150 Ill. 150, 37 N. E. 223. Conditions, especially conditions subsequent, are not favored in law, because they tend to defeat estates; and courts are inclined to construe clauses in deeds as covenants, rather than conditions. Gallaher v. Herbert, 117 Ill. 160, 7 N. E. 511. The clause here in the deed to Winters, though it is not a "condition," within the legal definition of that term, is a negative covenant. Equity will interpose by injunction to prevent the breach of negative covenants annexed to leases or deeds. The prohibition of their breach is indirectly an enforcement of their specific performance. Equity will interfere by injunction to prevent the breach of an express, negative covenant, even though no substantial injury is caused by such breach. It will also so interfere even though the damages, if any, may be recoverable at law. The reason is that the owner of land, selling or leasing it, may insist upon just such covenants as he pleases, touching the use and mode of enjoyment of the land. He has a right to define the injury for himself, and the party contracting with him must abide by the definition. Steward v. Winters, 4 Sandf. Ch. 587; 2 High. Inj. (3d Ed.) §§ 1142, 1158; Coal Co. v. Schmisser, 135 Ill. 371, 25 N. E. 795. It can make no difference that the bill in this case calls the restrictive clause a "condition," instead of calling it a "negative covenant." The substance of the clause is set forth in the bill, and whether or not it is a condition or a covenant is a matter for the court to de-

termine. As it is a negative covenant, there is no reason why its breach may not be enjoined. There is nothing illegal in the nature of the contract itself. It is not void as being in restraint of trade, because it is not a contract in general restraint of trade, but merely prevents the use of a particular piece of property in a certain way. Restrictions imposed upon the use, which are not undue, but limited only, are not in violation of law. Duncan v. Railway Co., 85 Ky. 525, 4 S. W. 228. While it is true that, where land is conveyed in fee, restrictions in the use are not favored, yet it is also true that, where the intention of the parties is clear in the creation of restrictions upon the use of a grantee, courts will enforce the same. Hutchinson v. Ulrich, 145 Ill. 336, 34 N. E. 556.

The second reason why it is insisted that appellee is not entitled to the relief prayed for is that there has been such a change in the circumstances as to render the restriction useless and of no value to appellee. The change in circumstances here referred to is the fact that when the deed to Winters was executed there were only two saloons in the neighborhood, whereas at the time of the hearing there were eight saloons in the neighborhood. The idea of counsel for appellant seems to be that, inasmuch as there are other saloons, not upon the land sold by appellee to Winters, which compete with the Bluff Saloon, situated upon the portion of the land retained by appellee, therefore the competition of the saloon operated by appellant's tenant upon the land sold to Winters will do appellee no harm. The proof shows, as matter of fact, that the saloons started since the sale to Winters are located at long distances from the Bluff Saloon,—one at a distance of 700 or 800 yards, one at a distance of 1,150 yards, one at a distance of 300 yards, one at a distance of a mile, etc.,—and that the saloon in the building erected by Winters on the land now owned by appellant takes away trade from the Bluff Saloon, and is an injury to it. The contention that the establishment of the additional saloons renders the covenant useless and of no value to the appellee is not supported by the evidence. There are authorities, referred to by appellant's counsel, which hold that if the character of the neighborhood has so changed as to defeat the purpose of the covenant, and thus render its enforcement unreasonable, it will not be enforced. But, in most cases where this doctrine has been applied, it will be found that two elements exist which are not found in the present case, namely: First, the change in circumstances has resulted from some act or acts of the grantor in the deed, or of those holding under him; second, the enforcement of the covenant will work a serious injury to the property or property rights of the grantee in the deed, or of the party against whom it is sought to enforce the covenant. It is true, as a general thing, where the acts of the grantor, or those deriving their title under him, have altered the character and conditions of

the adjoining lands so as to make the restriction of the covenant inapplicable according to the intent and spirit of the contract, that courts of equity refuse to interfere by injunction to prevent a breach of the covenant, and leave the parties to their remedy at law. *Duke of Bedford v. Trustees of British Museum*, 2 Mylne & K. 552; *Page v. Murray*, 46 N. J. Eq. 325, 19 Atl. 11; *Duncan v. Railway Co.*, 85 Ky. 525, 4 S. W. 228; *Peck v. Matthews*, L. R. 3 Eq. 515; *Roper v. Williams*, 1 Turn. & R. 18; 2 High. Inj. (3d Ed.) § 1158; *Sayers v. Collyer*, 28 Ch. Div. 103. But in the present case the new saloons were not upon appellee's land; nor was appellee, nor any one holding under him, responsible for their existence. The change produced by opening the new saloons was not his act, nor the act of any party claiming through or under him. Where the change in the condition of the surrounding property is such that a performance of the covenant in the deed would injure the grantee's property, or make it yield less profit, or make it incapable of yielding any profit, the covenant will not be enforced, as being unreasonable and oppressive. Where, for instance, the covenant required that only dwelling houses, or dwelling houses of a certain price, should be erected, and that the premises should not be used for trade or business, and the neighborhood had so changed that only dwelling houses of a cheaper kind, or houses for trade or business, would be profitable, the court refused to enforce by injunction a performance of the covenant. *Page v. Murray*, supra; *Jackson v. Stevenson*, 156 Mass. 496, 31 N. E. 691; *Trustees of Columbia College v. Thacher*, 87 N. Y. 311; *Amerman v. Deane*, 132 N. Y. 355, 30 N. E. 741; 2 Devl. Deeds, § 943. Here, however, it cannot be said that the establishment of the new saloons will make the performance of the covenant by appellant any more injurious to its interest than was the case before the new saloons were established. The proof does not show, nor is it a fact, that if appellant complies with the contract, by not using its premises for saloon purposes, its property will yield less profit, or be injured in any way, by reason of the change in the circumstances brought about by the opening of other saloons in the neighborhood. The change in the character of the neighborhood cannot have the effect of making a compliance with the covenant unreasonable or oppressive. On the contrary, it would seem that a violation of the covenant by the use of the premises for saloon purposes would be attended with more injury after than before the opening of the new saloons, by reason of the competition produced by the latter.

In the third place, it is contended by appellant that appellee has acquiesced in the use of the premises by his grantees for saloon purposes, and is estopped by his acts from denying their right to so use such premises. Acquiescence cannot be inferred from delay in the taking of steps to prevent the violation of the covenant, because the facts do not show

any very great delay. Johnson, as tenant of Winters, opened a saloon on the premises in question, and operated it during a part of the months of May and June, 1892, but he was at once enjoined by other parties, with whom Winters had agreed not to run a saloon for five years within a radius of one mile of the Bluff Saloon; and, as the use of the premises for the forbidden purpose was thus stopped by others, it was unnecessary for appellee to adopt proceedings of his own for the purpose of stopping it. Johnson, as tenant of appellant, again began to use the premises for saloon purposes on July 19, 1893; but in less than two months thereafter, to wit, on September 13, 1893, appellee filed this bill to enjoin the violation of the covenant. Where a party seeking to enforce a covenant not to carry on a trade in a house, which had been violated by the use of the house for a beer shop, knew for a period of three years that the house was used for a beer shop, and had himself bought beer at the shop, it was held that he had acquiesced in such violation of the covenant, and had lost the right to enforce it by injunction or a suit for damages. *Sayers v. Collyer*, supra. But here there was not only no delay, with knowledge of the violation, for any such period as three years, but proceedings were instituted to restrain such violation within a very short time after the forbidden use was resorted to.

Nor can it be said that the entry of appellee into Johnson's saloon in May or June, 1892, and the fact that he drank some beer there at that time, amount to acquiescence or waiver. A waiver is the intentional relinquishment of a known right, involving both knowledge of the existence of the right, and an intention to relinquish it. *Perin v. Parker*, 126 Ill. 201, 18 N. E. 747. That appellee did not intend to relinquish his right to enforce the covenant by what he did in 1892 is shown by the fact that he refused in May, 1893, to execute a written waiver or release of the restriction, when requested to do so by both Winters and appellant. That Winters and appellant did not regard the restriction as having been waived, or its violation acquiesced in, by appellee, by anything done before May, 1893, is evident from the fact that they endeavored at that time to procure a release, thereby treating the covenant as being in force. Whether the right to equitable relief is affected by acquiescence depends upon the circumstances of each case, and the facts may be inquired into, in order to determine the validity of such a defense. *Jackson v. Stevenson*, supra. "An owner may neglect to object to infractions of restrictions to some extent, without losing his right to enforce the restrictions when they more clearly and seriously affect him." *Id.*

We concur in the following statement made by the appellate court in their opinion in this case: "We do not find there was a waiver of the restriction. It is not natural that appellee should unqualifiedly and firmly, on different occasions, after earnest persuasion, and the offer of a money consideration, refuse to

release such restriction in writing, and at the same time verbally consent to release the same, without any consideration, when the tendency would be to deprecate the rental value of his property." The grounds urged by appellant against the enforcement of the covenant are not well taken. The judgment of the appellate court is affirmed. Affirmed.

(164 Ill. 262)

TROTTER v. BARRETT et al.

(Supreme Court of Illinois. Nov. 20, 1896.)

ESTABLISHMENT OF HIGHWAY — REGULARITY OF PROCEEDINGS—PRIMA FACIE EVIDENCE—REPORT OF SUPERVISORS—WHEN ROAD OPENED.

1. Under Hurd's Rev. St. 1881, c. 121, § 91, making the records of the town clerk, relating to the establishment of a road, prima facie evidence that all the necessary antecedent provisions have been complied with, a final order of the highway supervisors, which states that damages were agreed upon, proves prima facie that a person who the petition for the road shows was the owner of land over which it was to pass executed a release.

2. Though a road must be opened within the time prescribed by statute, it is not necessary that all the work should be done if the road is so opened as to permit of travel along the line thereof substantially as located.

Appeal from circuit court, Wayne county; C. O. Boggs, Judge.

Bill by Samuel Trotter against James T. Barrett and others to enjoin the opening of a highway. The bill was dismissed, and complainant appeals. Affirmed.

Hanna & Hanna, for appellant. Creighton & Kramer, for appellees.

PHILLIPS, J. Appellant filed a bill for injunction against the appellees, as highway commissioners of Elm River township, and as overseer of highways of said township, alleging he was the owner of certain lands in the bill described, and that in 1884 an attempt was made to establish a highway on the south side of said tract of land, but avers the same was never lawfully established, and denies the right to establish the same over said land until obtained by release, condemnation, or otherwise. The bill further alleges that no attempt was made to open the highway for public use until June 1, 1895, more than 10 years after the highway had been attempted to be established, and sets forth that they are removing the fence of the complainant from around said land, and cutting valuable timber thereon, and are attempting to establish a permanent highway, and alleging that on the 25th of May, 1895, they gave complainant notice to remove his fence, and, that notice not being complied with, defendants proceeded to remove the fence 25 feet back on said land, and were proceeding to open said highway on the south side of said tract. The answer avers that the public highway was established on the land in December, 1881, and complainant signed the petition to have the road established, and assisted in taking an appeal to their supervisors when the prayer of the petition was rejected by the commissioners of said town, and complain-

ant agreed to pay a portion of the expenses if said appeal was unsuccessful. On hearing, the court dissolved the temporary injunction, and dismissed the petition, and rendered judgment against the complainant for costs. The evidence shows that, when the original proceeding was had to locate the road, an order was entered by three supervisors reversing the decision of the commissioners, who refused to open the road, and granted the prayer of the petition, laying out the road in pursuance of law. The road, as petitioned for, passed through inclosed lands, except where located on the south side of appellant's land, which was at that time vacant land; and, after the order opening the road was entered, the fences on the inclosed portion were set back, and a track cut out through the woods, and the road opened for public travel. Subsequently, the land south of that owned by appellant was cleared and fenced, and 25 feet left for the public highway by the owner. In 1895 appellant fenced his land, and placed a fence on the south line, which was in the middle of the road as located; whereupon the highway commissioners gave him notice to remove his fence, and, upon his refusal so to do, they removed the same, and placed it on the north line of the highway.

The question of first importance to be determined is whether there is in this record any evidence of appellant having executed a release. By section 91, c. 121, Rev. St. 1881 (Hurd's Ed.), it is provided: "The record of the town clerk, or a certified copy of such record and papers, relating to the establishment, location, alteration, widening or vacation of any road, shall be prima facie evidence in all cases that all the necessary antecedent provisions have been complied with, and that the action of the commissioners of highways or other persons and officers in regard thereto were regular in all respects." This is substantially the same as section 52 of the road and bridge act (Hurd's Ed., 1883), and retained as section 52, Rev. St. Ill. (Myer's Ed., 1895). By this statute, the final order of the commissioners or supervisors who laid out the road is made prima facie evidence of the regularity of the proceedings, and that all antecedent provisions of the statute have been complied with. The final order of the supervisors establishing this road, and reversing the order of the commissioners, contains the following paragraph: "We therefore caused a survey and plat of said road to be made on the 18th day of June, A. D. 1883, by James W. Hilliard, a competent surveyor, which plat and survey were to us duly reported, and are hereunto appended, and made a part of this order, and having ascertained the aggregate amount of damages to which the owners of lands over which said road was to pass were entitled, and said damages having been definitely fixed by a jury of twelve men, which had been summoned, and the case tried, previous to the commencement of this appeal in the damages of George Johnson, and the damage of all others were agreed upon." By this final order, it was determined by the commissioners at the time that the damages had been agreed upon, and by reference to the peti-

tion, as well as the record offered in evidence as to the release made, it appears that Samuel Trotter was the owner of the tract in the bill described at the time the petition was acted on by the three supervisors, and the final order for opening the road made, and the recital in that order is prima facie evidence that the damages to Trotter were assessed or agreed upon, as the assessment of the damages or their release was antecedent to the final order opening the road. That order is, by the statute, prima facie evidence of the regularity of these proceedings. *Hankins v. Calloway*, 88 Ill. 155.

The evidence contained in this record shows the appellant was one of the persons appealing from the order of the commissioners of highways refusing to pay the damages assessed. It further shows he admitted he had given a release, and offered inducements for the establishment of the road as petitioned for. There is nothing to overcome the prima facie case, as to the existence of a release, made by the order of the supervisors for opening the road. With this fact established, it then is important to determine if the road was opened within the period of time required by the statute. It is shown by the evidence that there was not much travel along this part of the road, the opening of which is sought to be enjoined, but it is also shown that a way was opened, and travel had along the same. While it is necessary that a road shall be opened in the manner prescribed by the statute within the period provided, it is not necessary that all the work that could be done on the public highway shall be done, or that it shall be made in the best possible condition. It is sufficient that the road is opened so that travel may be had along the same. The evidence in the record shows that this road was opened so that travel was actually had along the line of the road substantially as located, and it was therefore opened in pursuance of the statute. There was no error in dissolving the temporary injunction and dismissing the bill. The decree of the circuit court is affirmed. Affirmed.

(163 Ill. 225)

CHRISTY et al. v. MARMON et al.

(Supreme Court of Illinois. Nov. 10, 1896.)

HUSBAND AND WIFE—ANTENUPTIAL CONTRACT—CONSTRUCTION—ACTION TO ENFORCE—EVIDENCE—APPEAL—PARTIES.

1. Under an antenuptial contract the intended husband reserved to himself, as his own separate property, a certain lot, of which, after his death, his wife was to have full control during her life and widowhood. She was also "to receive as dower" from his estate \$500 annually, during her life and widowhood. He died intestate, after the marriage, leaving his wife, but no child or children, nor descendants of a child. *Held*, that such agreement did not cut off the widow's interest in his estate as his heir, under 1 Starr & C. Ann. St. p. 879, § 1, cl. 3.

2. The annuity of \$500 was not chargeable exclusively on the half of the land inherited by the collateral heirs, or on the proceeds of the sale of their half of the land, but was chargeable on the whole estate.

3. In an action by such surviving wife for assignment of homestead, the enforcement of the antenuptial contract, and for partition,

proof should have been taken of the amount of rents and profits collected by her up to the date of the decree, to be added to the estate chargeable with the payment of the annuity.

4. One of several defendants may be joined as one of the plaintiffs in error without his authority.

Error to circuit court, Greene county; George W. Herdman, Judge.

Bill by Victoria J. Marmon and others against William Christy and others for assignment of homestead in the land of her deceased husband, to enforce an antenuptial contract, and for partition. There was a judgment in favor of complainant, and William Christy and others bring error. Reversed and remanded.

James R. Ward and Frank A. Whiteside, for plaintiffs in error. H. H. Montgomery and J. M. Riggs, for defendants in error.

MAGRUDER, C. J. This is a bill, as originally filed and as finally amended, for assignment of homestead, to enforce an antenuptial agreement, and for partition. It was filed by Victoria J. Marmon, widow of William P. Marmon, deceased, and with her were joined as co-complainants certain persons, who were nephews and nieces of the deceased. Two of the defendants, May L. Christy, a grandniece, and Frank Loper, a great-grandnephew, of the deceased, were infants; and for these a guardian ad litem was appointed, who answered. Default was entered against all the adult defendants, except certain parties whose interests are not here in controversy. The cause was referred to a master in chancery to take proofs and report his conclusions thereon. The solicitor for the widow, Victoria J. Marmon, defendant in error herein, and the guardian ad litem of the minor defendants, who, with others, are plaintiffs in error, appeared before the master. The master made a report, to which the defendants excepted. The court overruled the exceptions, approved the report, and on March 8, 1894, entered a decree for partition and assignment of homestead, and appointing commissioners, and making other findings which will be hereafter referred to. The commissioners made their report on March 13, 1894, and on the same day a decree was entered approving said report, ordering a sale of a part of the premises, and making other findings hereafter to be noticed. Exceptions to this decree were filed by the guardian ad litem. On September 21, 1894, the master made report of sale, to which the guardian ad litem filed exceptions; and a final decree was entered on the same day overruling such exceptions, confirming the sale and report, directing a deed to be made to the purchaser, appointing a trustee for the fund or a part thereof realized by the sale, and making other findings and orders, all of which were excepted to by the guardian ad litem. The present writ of error is sued out for the purpose of reviewing such final decree, and the various proceedings and orders leading up to and preceding its entry.

The following facts appear from the pleadings, proofs, reports, orders, and decrees in the

cause: On September 24, 1884, at Jacksonville, Ill., the said William P. Marmon, since deceased, and the defendant in error, Victoria Josephine Marmon, then Victoria Josephine Richards, in anticipation of their marriage, entered into the following stipulation or agreement: "This agreement, made and entered into this, the 24th day of September, A. D. 1884, between William P. Marmon, of Carrollton, Greene county, in the state of Illinois, party of the first part, and V. Josephine Richards, of Newark, Ohio, party of the second part, witnesseth: That said party of the first part, in consideration of the agreement hereinafter set out, covenants and agrees to and with the said party of the second part to marry her, the said V. Josephine Richards, on the 24th day of September, 1884; and the said parties to this agreement agree to the following stipulation: The said party of the first part reserves to himself, as his own separate property, to wit, lot numbered forty-one, in Sharon, Morrow & Calvin's addition to the town of Carrollton, Greene county, Illinois. And it is further agreed to, by and between the said parties, that after the death of the said William P. Marmon the said V. Josephine Richards shall have full control and use of the property described above during her natural life and widowhood. Also, the said party of the second part is to receive as dower from the estate of the said William P. Marmon the sum of five hundred dollars annually, each and every year from said estate, during her natural life and remaining my widow. Witness our hands and seals this 24th day of September, A. D. 1884. William P. Marmon. [Seal.] V. Josephine Richards. [Seal.]" On the same day, September 24, 1884, William P. Marmon and Victoria J. Richards were married, and lived together as husband and wife until January 12, 1893. On January 12, 1893, William P. Marmon died intestate, leaving no child nor children, nor descendant of a child, but leaving, as his only heirs at law, his widow, the said Victoria J. Marmon, defendant in error, and certain nephews and nieces and grandnieces, and a grandnephew and a great-grandnephew, children and descendants of his two deceased brothers, James Marmon and John H. Marmon, and who, with said infants above named and one William Christy, husband of one of said nieces, and others, are plaintiffs in error herein. At the time of his death, William P. Marmon owned personal property, and was the owner, seised in fee, of the above-described lot 41 and of other lots and lands. The deceased and his said wife occupied lot 41 and the house thereon as a homestead, and were so occupying such premises as a homestead when he died. The defendant in error Victoria J. Marmon was appointed administratrix of her husband's estate by the probate court of Greene county, and makes the following statement in her evidence before the master: "There are no outstanding debts against the estate. I have an abundance of personal property as his administratrix to

settle all claims against his estate." By the decree of March 8, 1894, the circuit court found that said marriage contract was valid and binding in law; that, by the death of William P. Marmon, Victoria J. Marmon, Sarah E. Altum, Jennie Virginia Marmon, John L. Marmon, George Marmon, Charles Marmon, Joseph P. Marmon, William B. Marmon, Mary Marmon, Sallie Crawford, John Christy, Mary L. Christy, and Fannie Soper became seised in fee simple, as tenants in common, of the premises described in the bill, subject, however, to provisions made in said marriage contract; that "Victoria J. Marmon became seised in fee simple of an equal undivided half part of said premises, and in addition thereto is entitled to the sum of \$500, to be paid her each and every year, so long as she shall live and remain the widow of the said William P. Marmon,—said annual sum to be derived from the other half of said real estate, and to be in lieu of dower, as provided in said marriage contract,—and, in addition, the said Victoria J. Marmon is entitled to the use of lot 41 as a homestead; that the respective interests of the above-named heirs in the remaining half of said premises are subject to the homestead and the said annuity of \$500 of the said Victoria J. Marmon." Said decree ordered and adjudged that she recover her homestead in said premises, and recover her annuity of \$500 in lieu of her dower. The commissioners set off and assigned to the said Victoria J. Marmon, as her homestead in said premises, lot No. 41, etc., and appraised the value of said lot, subject to said homestead, at \$75; and further set off and assigned to her, as her half of all the remainder of said premises, in fee simple, the east one-third of lot No. 24, in Carrollton, except the third story of the building situate thereon, and appraised its value at \$6,275; and reported that the several pieces, tracts, and parcels of said premises remaining, from which above are set off and assigned, are not susceptible of division or partition, without manifest prejudice to the parties in interest. The remaining pieces are appraised severally, the appraised value aggregating \$6,200. The decree of March 13, 1894, declared lot 41 to be the homestead of the widow, and also declared the east one-third of lot 24, except as above stated, to be set off to her as her half of the remainder of said premises, as heir of her husband, and adjudged that the remainder of said premises be sold at public auction to the highest bidder, by the master, for one-third cash, and the balance payable in one and two years. In his report of sale, the master reported that he sold all the premises directed to be sold to the defendant in error, Victoria J. Marmon, for \$5,027. By the final decree of September 21, 1894, it was ordered and decreed "that the proceeds of said sale by said master in chancery, coming into his hands, after the costs of said sale are fully paid, shall be placed, as the same are collected, in the hands of George W. Davis, who is hereby appointed trustee of said fund, and

who is hereby ordered and directed to give bond, to be approved by said master in chancery, in double the amount of said fund so placed in his hands. The said trustee is hereby ordered and directed to loan said fund on the best terms possible, and on good security, and the interest or proceeds of said fund so loaned, after retaining his reasonable commissions as said trustee, to be fixed by the court, he is to apply in payment of said annuity of \$500 due the said Victoria J. Marmon each and every year during her widowhood as aforesaid, and that said annuity be paid by said trustee or his successors annually." And it was further ordered that Victoria J. Marmon retain the rents and profits collected by her in payment and in satisfaction of her annuity so accruing up to the date of the decree, the said annuity to be paid annually, at the end of each and every year after the date of said decree, and beginning with said date.

It is contended by plaintiffs in error that the widow is cut off by the antenuptial agreement from claiming interest in the estate of her husband as his heir. The third clause of section 1 of the act in regard to the descent of property provides that, "when there is a widow or surviving husband and no child or children or descendants of a child or children of the intestate, then (after the payment of all just debts) one-half of the real estate and the whole of the personal estate shall descend to such widow or surviving husband as an absolute estate forever, and the other half of the real estate shall descend as in other cases, where there is no child or children or descendants of a child or children." 1 Starr & C. Ann. St. p. 879. If there had been no antenuptial agreement in this case, the defendant in error would not only have taken all the personal property left after the payment of the just debts, and one-half of the real property, as heir of her deceased husband, but she would also have been entitled to dower in the other half of the real property inherited by the children and other descendants of the intestate's deceased brothers. The antenuptial agreement here undoubtedly bars the widow of her dower, but it does not bar her of her inheritance as an heir at law of the intestate. What she takes as heir of her husband is entirely separate and distinct from her right of dower. There is no language in the agreement which recites that the provisions therein made are to be in satisfaction of her inheritance as heir. The annuity of \$500 she is to receive as dower, and not in lieu of her share in the estate as heir of her husband. Where a party, in anticipation of marriage, conveyed to his intended wife certain real estate, which is declared to be a jointure, in full recompense and satisfaction for dower, or any claim of dower on her part, the latter joining in the execution of the same to evince her assent to the provisions thereof, and after the marriage the husband died intestate, leaving no child or children, or descendants of any child, it was held that such antenuptial contract did

not bar the widow from claiming as heir of her husband, and that, under the statute, she took, as such heir, one-half of the real and all the personal estate of her deceased husband left after payment of his debts. *Sutherland v. Sutherland*, 69 Ill. 481. So here, notwithstanding the execution of the antenuptial agreement of September 24, 1884, the defendant in error, as heir of her husband, is entitled to one-half of the real estate and the whole of the personal estate left after the payment of all the debts. That agreement does not bar her from recovering, as such heir, one-half of the realty and all the personalty remaining after the debts are paid. In so holding, the decree of the court below was correct.

But we think that the decree was erroneous in charging the payment of the annuity of \$500 exclusively upon the half of the land inherited by the collateral heirs of the deceased intestate, or upon the proceeds of the sale of their half of the land, and relieving that part of the estate inherited by the widow as heir of her husband from the payment of any portion of such annuity. The contract reads as follows: "The said party of the second part is to receive as dower, from the estate of the said William P. Marmon, the sum of five hundred dollars annually, each and every year from said estate, during her natural life and remaining my widow." The annuity is to be paid "from the estate"; that is to say, from the whole estate, and not from one-half of it, or from one-half of so much of it as is real property. The words, "from the estate," or "from said estate," are repeated, as if to give emphasis to the idea that the annuity was to be a charge upon the whole estate. The whole estate consisted, not only of the half of the realty inherited by those heirs of William P. Marmon who were his nephews, and nieces, etc., but also of the half of the realty and the portion of the personal property inherited by his wife, who was also an heir. It is true that, under the contract, the widow is to receive the annuity from the estate "as dower." But, if the annuity is to be received as dower, or for dower, or in the face and stead of dower, it does not therefore follow that such annuity must be raised entirely and exclusively from that part of the estate to which dower would attach if there were no antenuptial agreement, particularly when the provision is that the annuity is to be received from the whole estate. A bond, conditioned for the payment of money after the obligor's death, made to a woman in contemplation of the obligor's marrying her, and intended for her benefit if she should survive, is not released by their marriage. *Millbourn v. Ewart*, 5 Term R. 381. A stipulation in a marriage contract to the effect that, in case the wife should survive the husband, she should receive from the estate of the husband a certain sum, is valid; and such an instrument creates a legal liability in favor of the wife, and she may bring suit on the same after the decease of her husband against his rep-

representatives. *Vogel v. Vogel*, 22 Mo. 161. By the terms of the present contract the deceased was to marry defendant in error in consideration that she should receive the annuity of \$500 from his estate as her dower, and herein the present case differs from *Jordan v. Clark*, 81 Ill. 465, where "the money was not given in consideration" for the marriage.

There is no proof in the record to show how much personal property was left after the payment of all the debts. The court should have directed proof to be taken upon this subject. The amount of the personal property left after payment of debts, and belonging to defendant in error as heir, and the one-half of the realty inherited by her as heir, are chargeable with the payment of their proportion of the annuity, as between the widow and the other heirs. Proof should also have been taken of the amount of rents and profits collected by the widow up to the date of the decree. These, also, should have been added to the estate chargeable with the payment of the annuity. The widow was not entitled to appropriate such rents and profits as damages for delay in the assignment of her dower, and in satisfaction thereof prior to the date of the decree, because the antenuptial agreement was in the nature of an equitable jointure, and barred her right of dower in the real estate of the deceased intestate, and also her widow's award, though it was no bar to her estate of homestead. *Barth v. Lines*, 118 Ill. 374, 7 N. E. 679; *Spencer v. Boardman*, 118 Ill. 553, 9 N. E. 330; *McMahill v. McMahon*, 105 Ill. 597; *McGee v. McGee*, 91 Ill. 548.

One of the defendants below, whose name is joined as one of the plaintiffs in error, moves to dismiss the writ of error upon the ground that his name has been so used without his authority. The joining of his name as one of the plaintiffs in error was allowable under the statute and under the decisions of this court. *Practice Act*, c. 110, § 70; 2 *Starr & C. Ann. St. p. 1834*; *McIntyre v. Sholtz*, 139 Ill. 176, 29 N. E. 43; *Moore v. Capps*, 4 Gilman, 315. The motion is accordingly overruled.

For the reasons above stated, the decree of the circuit court is reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(163 Ill. 176)

CRAIG v. CRAIG et al.

(Supreme Court of Illinois. Nov. 10, 1896.)

APPEAL—REVIEW—ALIMONY—MODIFYING DECREE.

1. Where an appeal taken to the appellate court was specifically from a decree modifying a former decree for alimony, a writ of error to the appellate court brings before the supreme court for review only that decree, so that cross assignments of error questioning the former decree and the decree for divorce cannot be considered.

2. Under *Rev. St. c. 40, § 18*, providing that, where a divorce has been decreed, the court

may, on application, make alterations in the allowance of alimony, a petition of the beneficiary for assistance in collection of alimony puts the whole matter before the court, so as to authorize it to make changes in regard to prospective alimony. 64 Ill. App. 48, affirmed.

3. The court is not powerless to reduce or abrogate future installments of alimony merely because accrued installments remain unpaid. 64 Ill. App. 48, affirmed.

4. Error cannot be predicated of refusal to hear testimony, it not appearing what the evidence offered was, or that it was material.

5. A divorced wife has a vested right in accrued alimony, so that a decree canceling such alimony, and providing in place thereof for alimony to accrue in the future, is erroneous.

Error to appellate court, Third district.

Suit by *Frances A. Craig* against *James R. Craig* and others. From a decree modifying a decree for alimony, complainant appealed to the appellate court, where it was affirmed (64 Ill. App. 48), and she brings error. Modified.

Frank R. Henderson and *E. M. Prince*, for plaintiff in error. *Charles M. Peirce* and *James S. Neville*, for defendants in error.

BAKER, J. At the February, 1890, term of the McLean circuit court, the plaintiff in error, *Frances A. Craig*, obtained a divorce a vinculo matrimonii from her husband, *James R. Craig*, and she was awarded the custody of their two infant children, and the question of alimony was reserved for further hearing and consideration; and, by leave of court, the bill of complaint was amended, and *Dellie J. Kibble*, *William Kibble*, and *Robert M. Craig* made parties defendant, upon said question of alimony. In a further decree, entered on March 27, 1891, the court found that a certain conveyance of a tract of land, containing 80 acres, was in fraud of the marital rights of plaintiff in error; that the rights of the *Kibbles* and of *Robert M. Craig*, as well as the rights of *James R. Craig*, the husband, were subject to said marital rights; and permanent alimony amounting to \$208 a year was decreed to her, and the decree made a lien on the land prior to any homestead right of said *James R. Craig*. On a subsequent bill or petition, filed on January 14, 1892, by *Frances A. Craig*, a decree was entered on May 31, 1892, by correcting a mistake in the description of said 80 acres of land; finding there was \$338.90 of alimony due her to June 1, 1892; decreeing that from and after June 1, 1892, the alimony should be reduced to \$100 per year, payable in quarterly installments of \$25 each, "until the further order of this court, as permanent alimony"; making alimony a lien on the 80 acres prior to homestead and other rights of all the defendants; and directing the master in chancery to sell from time to time in case of default of payment, and to first exhaust the life estate of *James R. Craig* before selling any of the remainder in said premises. On September 10, 1894, plaintiff in error filed in court her petition, showing that there was due and unpaid to her, under the decree, seven quarterly installments of alimony, amounting to \$175, together with interest thereon; further

showing that the life estate of James R. Craig had already been sold; and praying that so much of the remainder of the premises be sold as is necessary to pay that amount, with costs. At the hearing had upon this latter petition, the court, on December 11, 1894, ordered, adjudged, and decreed "that the said James R. Craig pay to the said Frances A. Craig, in full of all alimony due or to become due under said bill and decree, the sum of \$200; that the same be paid in quarterly installments, of \$25 each, the first of which shall be paid on or before January 1, 1895, and \$25 on the 1st of April, 1895, and \$25 on the 1st of July, and \$25 on the 1st of October, 1895, on the 1st of January, 1896, on the 1st of April, 1896, on the 1st of July, 1896, and on the 1st of October, 1896; that, unless said alimony be paid within 10 days after the same or any part thereof becomes due under this decree, the said complainant have such execution therefor as she may desire, directing the sheriff to sell sufficient of the premises described in the decree, subject to the life estate of James R. Craig, to satisfy such execution." And it was further ordered, adjudged, and decreed by the court "that, on and after the aforesaid payments shall become due and payable, the alimony in this case shall cease, and that there shall be nothing more paid under said original decree than the above-mentioned payments, meaning hereby to make this a final allowance for alimony in this case until the further order of this court; and that the original decree in this case be, and the same is, modified as herein provided." Plaintiff in error excepted to this decree, and prayed and was allowed an appeal therefrom to the appellate court; and in that court the decree was affirmed, and this writ of error then sued out.

The appeal allowed and taken to the appellate court was, specifically, from the decree rendered on December 11, 1894, modifying and changing the decree for alimony that had been rendered in favor of said Frances A. Craig at a former term of the court; and the writ of error to the appellate court brings before us for review that decree, and that only. It follows that the numerous assignments of cross error, questioning the decree for divorce, the decree for the custody of the children, the original decree for alimony, that the 80 acres of land were subject to the marital rights of plaintiff in error, the decree for the sale of the life estate of James R. Craig, etc., must be ignored. For that matter, neither the original bill upon which the divorce was granted, nor the amended bill upon which the decree of March 27, 1891, was based, are in the record that is before us, further than as they appear as instruments of evidence in the report of the master made in the matter of the bill of January 14, 1892.

It is assigned as error by the plaintiff in error that the court modified the decree for alimony without a petition so to do, and when the defendant was in contempt for nonpayment of alimony, and without hearing any evi-

dence. The statute (Rev. St. c. 40, § 18) provides that, where a divorce had been decreed, the court may, on application, from time to time, make alterations in the allowance of alimony and maintenance, and the care, custody, and support of the children, as shall seem reasonable and proper. The statute does not prescribe in what manner the application for alterations in the decree shall be made. Ordinarily, it would be by petition, reasonable notice of which had been served upon the opposite party. It is not, however, indispensable that there should be a formal application therefor by petition. Upon a petition of the beneficiary under the decree for the equitable assistance of the court in the collection of alimony, the whole subject-matter of such alimony is sufficiently submitted to the court to authorize it to make changes in regard to prospective alimony, if it finds that the circumstances of the parties and the nature of the case have so changed as that there should be some modification in the decree for alimony in order to make it fit, reasonable, and just. It is true that here the defendant was in contempt of court in not paying the installments of alimony in conformity with the requirements of the decree. *Wightman v. Wightman*, 45 Ill. 167; *O'Callaghan v. O'Callaghan*, 69 Ill. 552. It may have been error, even if there had been a formal petition and application for a reduction of alimony, to have denied such application on that ground alone, and especially in the absence of any showing of pecuniary inability. In *Cole v. Cole*, 142 Ill. 19, 31 N. E. 109, it was said of the appellant that he did not come into court with clean hands, and would not be permitted to ask relief from a decree of which he was in contempt; and that, before he should be permitted to be heard, he should be required to comply with the order of the court up to the time of his application. But what was there said had reference only to the facts of that case, and did not announce a general rule that would govern all cases of applications for reduction of alimony. If the existence of accrued and unpaid alimony should be held to absolutely prevent the court from altering, reducing, or altogether abrogating future installments of alimony, then it would result that, in cases of the pecuniary inability of the defendant to pay and discharge all arrearages of alimony, the court would be powerless to grant relief as to future and further alimony, no matter what the changed condition of the parties in the property, or how loudly the facts and circumstances might call for the equitable intervention of the court. The hands of a court of equity are not thus bound.

The claim that the court erred in modifying the decree without hearing any evidence additional to that already in the record, lying open before it, is without merit. It sufficiently appears from the record that, at the hearing upon the petition, the court heard and considered all the matters appearing of record in the cause; and this, of course, included those portions of the record showing the sale and conveyance of the life estate of the husband

in satisfaction of alimony, and the fact that the purchaser of the same was, and for a long time had been, in possession and control of the premises, and in the enjoyment of all the rents, issues, and profits thereof, he having gained such possession by means of a writ of possession awarded by the court. In view of this and the other evidence found in that record, we are unable to say that the order of the court that alimony should cease from and after October 1, 1896, was erroneous. It is manifest that, if the installments of alimony continued to accrue, it would result in no benefit to plaintiff in error, and would deprive Delie J. Kibble and Robert H. Craig, the infant defendants in error, of their estate of inheritance in the land. It seems such results would necessarily follow from the conditions of the several estates in the land. A court of equity should, if possible, avoid a conclusion which would destroy the estate of one party, without any corresponding benefit to the other party. Besides this, it is well settled that a court of review will not disturb a decree disposing of a matter of alimony, unless it is manifest that injustice and injury has been done.

Another of the assignments of error is that the court, at the hearing, refused to hear any evidence on the part of plaintiff in error. It does not appear what, if any, testimony she offered to introduce, or that the same was material upon any issue before the court. In the absence of any showing to the contrary, the conclusion must be that the oral evidence which the court refused to hear was either incompetent or immaterial, and that its exclusion worked no injury.

There is, however, one claim of error that is well made. This claim is that it was error to refuse to enforce the payment of alimony already due by virtue of the decree, and to enter an order which canceled such alimony. The petition showed that seven installments of alimony, amounting to \$175, had accrued to plaintiff in error under the provisions of the decree, and were due and unpaid. The substantial effect of the order and decree entered was to cancel and set aside this accrued and past-due alimony, and to make provision for \$200 of alimony to accrue in the future, in quarterly installments of \$25 each, the first of them to be paid on the 1st day of January, following the date of such order and decree. It was, of course a matter of uncertainty whether any or some only or all of these eight installments of alimony would ever become due to plaintiff in error. The accruing of each and every of them was contingent upon the continued life of both the parties, for the general rule is that alimony will not accrue after the death of either party. Alimony decreed upon the dissolution of a marriage, if payable in installments, is, unless otherwise specially provided, an allowance for the support of the beneficiary, during the joint lives of herself and her divorced husband. The duty of support ends with the death of the beneficiary. *Stillman v. Stillman*, 99 Ill. 196-201. And unless

It appears, unequivocally, that the intention was to bind the heir by the decree, its life terminates with the life of the defendant. *Lenahan v. O'Keefe*, 107 Ill. 620.

Was it error to set aside the right of plaintiff in error to the \$175 of accrued alimony? This depends upon the answer to be given to the inquiry whether she had a vested property right therein. It is to be noted that there is a marked distinction between permanent alimony decreed upon a dissolution of the marriage relation, and either an allowance pendente lite of temporary alimony, or alimony allowed upon a divorce a mensa et thoro, or an allowance under our statute of separate maintenance. In respect to the alimony of the several kinds last mentioned, the parties stand before the court and in the relation to each other as husband and wife; but, in respect to alimony allowed after divorce from the bonds of matrimony, they stand before the court and in relation to each other upon such footing as that the legal liability of the divorced husband for alimony is in the nature of an obligation or duty to a stranger. In *Dinet v. Eigenmann*, 80 Ill. 274, it was held that the sum awarded to a wife, after divorce a vinculo matrimonii, for alimony, becomes a debt from the former husband to her, and, upon her death before payment, the husband is not discharged, but the sum due passes to her legal representative, precisely as any other money decree, and he may proceed and collect the same. It was there said: "When the amount was ascertained and fixed, the right to the money became vested and as fully fixed as had the money been paid or the husband had given his note for the amount." In *Stillman v. Stillman*, 99 Ill. 196, it is said, on page 201, that the formal representatives of the beneficiary are never permitted to recover any portion of the sum decreed, except such sum or installment thereof as had become due in her lifetime, and which remained unpaid at her death; and it is further said, on page 204, that there was no error in the circuit court in refusing to make its decree retroactive, so as to cut off alimony that had previously accrued. *Miller v. Clark*, 23 Ind. 370, holds that arrears of alimony decreed by a court in favor of a divorced wife may be collected after her death by her administrator. In *O'Hagan v. O'Hagan's Ex'r*, 4 Clarke (Iowa) 509, in speaking of a decree giving to the wife, on a decree for divorce, an annual or other allowance during her lifetime, it is said: "In such a case the court has acted upon the whole question, during their joint lives, and has decreed to her a definite and fixed sum. This decree has the same force and validity as any other judgment, and may be collected in the same manner. It is a fixed, ascertained, and subsisting debt against him, and, upon his death, against his estate."

In the case at bar it was error to set aside and cancel alimony which had already accrued, and was due to plaintiff in error under the decree. The amount of such alimony was a debt

due from the defendant James R. Craig to the beneficiary in the decree, and the latter had a vested property right therein, which the court was not authorized to take away from her. That part of the decree must be reversed. In all other respects the decree is without substantial error, and is affirmed. The cause is remanded to the circuit court, with directions to modify the decree as that it will be in conformity with the views herein expressed. The defendants in error will pay the costs of this suit. Affirmed in part. Reversed in part.

(163 Ill. 439)

TELFORD v. BRINKERHOFF et al.

(Supreme Court of Illinois. Nov. 11, 1896.)

JUDGMENT—RELIEF AGAINST IN EQUITY—GROUNDS FOR.

1. A court of equity will not set aside a judgment at law on grounds which were presented to the trial court in a motion for new trial and held insufficient. 58 Ill. App. 56, affirmed.

2. To entitle a party to relief in equity against a judgment on account of a loss of his defense, it must be shown that it was occasioned by the fraud of the opposite party, or by his own mistake, unmingled with any fault of himself or his agent.

Appeal from appellate court, Fourth district.

Bill in equity by Joseph Telford against George M. Brinkerhoff and others. Complainant appeals from a decree of the appellate court (58 Ill. App. 56) reversing the decree of the circuit court in his favor. Affirmed.

S. L. Dwight, for appellant. L. M. Kagy, for appellees.

MAGRUDER, C. J. This is a bill, filed at the July term, 1893, of the circuit court of Marion county, by appellant, Telford, against appellee George M. Brinkerhoff and one Edward T. Oliver, since deceased, and of whose estate Margaret V. Oliver is administratrix, to set aside and vacate a judgment rendered by said court on February 23, 1892, in favor of Brinkerhoff & Oliver, a firm of loan brokers composed of said George M. Brinkerhoff and said Edward T. Oliver, against appellant, in a suit brought against him by said firm for the recovery of commissions due them for negotiating a loan for him, and to enjoin the collection of said judgment and the levying of an execution issued thereon on February 1, 1893. The judgment so recovered against appellant was affirmed by the appellate court in December, 1892, as will be seen by reference to Telford v. Brinkerhoff, 45 Ill. App. 586. Answers were filed denying the material allegations of the bill. After issue formed and hearing had, the circuit court rendered a decree ordering that the judgment be set aside, that the execution issued thereon be canceled, and that the suit at law in which the judgment was rendered be placed upon the docket for trial,

and that there be a new trial thereof. From this decree, setting the judgment aside and ordering a new trial of the issues involved in the suit, an appeal was taken to the appellate court, where the decree of the circuit court was reversed, and the cause was remanded, with directions to dismiss the bill, as will be seen by reference to Brinkerhoff v. Telford, 58 Ill. App. 56. From this judgment, reversing and remanding, with directions to dismiss, the present appeal is prosecuted, accompanied by a certificate of importance signed by two judges of the appellate court.

It appears that the suit at law for the commissions was set for trial on January 19, 1892, in the circuit court, and appellant, who lived a few miles from the county seat, on his farm, was informed by his attorney beforehand of the day fixed for the trial. On the day before the trial, to wit, January 18, 1892, one Whitlow, the local agent of Brinkerhoff & Oliver, the latter being residents of Springfield, Ill., went to appellant's farm to try to obtain a settlement of the suit, but failed to effect any compromise. While Whitlow was at appellant's farm, some conversation occurred between them upon the question whether the suit should be tried the next day, or should be continued, as it had been continued twice before. Whitlow and appellant contradict each other as to what was said. The former swears that appellant declined to consent to a continuance, and said that he would be present himself if the weather was not too bad. Whitlow also swears that, although it was a cold day, and snow was on the ground, appellant was out of the house, attending to some matter connected with the management of his farm. On the other hand, appellant swears that he and his family were sick with the grippe, and that Whitlow agreed with him to go to town, and see his attorney, and try to have the case postponed to some later day in the term. When the case was called, appellant's attorney made an oral application for continuance, which was denied. Whitlow made a statement of what he claims to have taken place between himself and appellant the day before. Oliver was on hand, and the trial proceeded in the absence of appellant, and resulted in said judgment against him. Appellant made a motion for a new trial a few days after the trial was had, and supported the motion by affidavits of himself and two members of his family, setting up therein what occurred between himself and Whitlow upon the subject of the continuance, according to his understanding of what was said. The plaintiff in the suit submitted counter affidavits. The circuit judge, however, denied the motion for a new trial. The bill herein proceeds substantially upon two grounds: (1) The same facts which were set up in the affidavits filed on the motion for new trial—that is to say, appellant's alleged sickness, Whitlow's alleged violation of an

agreement to continue the case, and appellant's absence from the trial on account of such sickness and agreement, as claimed by him—are urged as reasons for setting aside the judgment and ordering a new trial. (2) It is furthermore charged that Whitlow was interested with Brinkerhoff & Oliver in the claim against appellant, and that there was a conspiracy between them to defraud appellant by keeping him away from the trial and obtaining a judgment during his absence.

1. A bill in equity to stay proceedings in law after judgment is always examined with jealous scrutiny. The general rule is that no relief will be granted where the matter upon which the claim to relief is founded was litigated in the original action. Accordingly, where a party moves for a new trial, and fails, he cannot then, upon the same facts, apply to the same judge for an injunction, and retry his case in equity; nor will a court of equity, as a general rule, set aside a judgment because it is founded upon perjured evidence. 1 High, Inj. (3d Ed.) § 113; Haynes, New Trials & App. § 340; Collins v. Butler, 14 Cal. 226; U. S. v. Throckmorton, 98 U. S. 61. "A judgment will not be enjoined upon grounds which had been relied upon on a motion for a new trial, and which had on such motion been held insufficient." 1 High, Inj. (3d Ed.) § 115; Matson v. Field, 10 Mo. 100. When courts of law and equity have concurrent jurisdiction over a question, and such question is decided at law, equity will not re-examine it. It is also well settled that a party who seeks to enjoin a judgment must show that he himself has a good defense to the merits, or that the plaintiff had no cause of action. 1 High, Inj. (3d Ed.) § 114; Hill, New Trials (2d Ed.) p. 591, par. 4. The affidavits presented on the motion for new trial, by both parties, in relation to what was said between them in regard to a continuance of the cause, are in the record. A comparison of their contents with the allegations of the present bill upon that subject shows that there is no substantial difference between the matters set up in the bill and the matters set up in the affidavits of appellant. The merits of the question, as to whether appellant was misled and wrongfully deprived of a continuance of the cause, were passed upon by the law court when it denied the motion for a new trial, and therefore a court of equity will not review the question. A circuit court, with full jurisdiction to pass upon given facts, should not apply one measure of relief where sitting as a court of law, and another and different measure of relief where sitting as a court of equity. Haynes, New Trials & App. § 340. It has not been shown that the plaintiffs obtaining the judgment had no cause of action, nor that appellant had a good defense to the suit. We think the appellate court correctly held that "the evidence fully established appellant's liability

to pay appellees the amount recovered." 45 Ill. App. 586.

2. So far as the second ground upon which the bill proceeds is concerned, we are inclined to agree with the appellate court in the statement made by them in their opinion in the present case, when they say: "After a careful investigation of the evidence, we are unable to find that any conspiracy existed on the part of any of the defendants to defraud or deceive Telford, and especially are we unable to find that Whitlow designed or desired to mislead him." "The loss of a defense, to justify a court of equity in removing a judgment, must in all cases be occasioned by the fraud or act of the prevailing party, or by mistake on the part of the losing party, unmixed with any fault of himself or agent." Ward v. Durham, 134 Ill. 195, 25 N. E. 745. The proof fails to show that appellant was prevented from making defense to the action at law by the fraud or act of the opposite party, or that he himself was entirely free from negligence or fault in the matter. Upon neither ground set up in the bill was appellant entitled to relief. Accordingly the judgment of the appellate court is affirmed. Affirmed.

(163 Ill. 447)

SMITH v. MAYFIELD.

(Supreme Court of Illinois. Nov. 11, 1896.)

PRACTICE—SUBMISSION OF PROPOSITIONS OF LAW—WITHDRAWAL—PAROL EVIDENCE—PROOF OF INCORPORATION—COLLATERAL ATTACK—JUDGMENTS OF THE APPELLATE COURT.

1. Under the practice act (section 41), providing that when, by agreement of parties, matters of both law and fact are tried by the court, "either party may submit to the court written propositions to be held as law in the decision of the case on which the court shall write 'Refused' or 'Held,' " etc., it was not error to allow the plaintiff to withdraw his propositions so submitted before the court had passed upon them. 60 Ill. App. 266, affirmed.

2. The provisions of the practice act (section 41) allowing either party to submit written propositions to be held as the law in the decision of the case, which shall be passed upon by the court, being for the benefit of the party making the submission, the refusal so to do, or the withdrawal of the propositions, is not ground for complaint by the adverse party. 60 Ill. App. 266, affirmed.

3. In an action to recover commissions claimed by the plaintiff for his services as broker in the sale of certain property, a letter written by the defendant was introduced to show that the agreement to pay the commission was the personal liability of the defendant. Held, that it was competent for the plaintiff to explain by parol statements in such letter tending to show that he was entitled only to a much smaller commission than that claimed. 60 Ill. App. 266, affirmed.

4. In an action to recover commissions claimed by the plaintiff for his services as broker in negotiating the sale to a corporation of a street railway belonging to another corporation, the contract of sale, signed by the officers of such corporations, cannot be excluded from evidence on the ground that there was no proof of the incorporation of the companies parties thereto. 60 Ill. App. 266, affirmed.

5. Upon proof that the agreement of sale was consummated upon a certain day, it cannot be

excluded as inadmissible on the ground that the signature of one of the officers who signed the agreement had not been proved to be genuine. 60 Ill. App. 266, affirmed.

6. In an action to recover commissions claimed by plaintiff for his services as broker, the amount to which plaintiff is entitled is a question of fact upon which the judgment of the appellate court is final and conclusive.

Appeal from appellate court, Fourth district.

Action by Manning Mayfield against William E. Smith. A judgment for the plaintiff having been affirmed by the appellate court (60 Ill. App. 266), the defendant appeals. Affirmed.

This is assumpsit, brought in the Madison circuit court by Manning Mayfield, appellee, against William Elliot Smith, appellant, to recover commissions for negotiating the sale of certain street-car lines. The declaration, after stating that the defendant represented to the plaintiff that he was the owner of a certain horse-car line extending from the city hall in the city of Alton to the town of Upper Alton, and also of a certain other street-car line in said city, known as the "Dummy Line," alleges that the defendant "understood and promised the plaintiff, who was then and there a broker, that if he, the plaintiff, would negotiate the sale of said car lines to one A. M. Farnum, or to a certain syndicate of capitalists who were then and there represented by the said Farnum, and should succeed in consummating a contract for the sale of said car lines to said Farnum for said syndicate, or to any corporation or company organized by him or them, or under his or their control, for the sum of seventy-two thousand dollars, and, in addition thereto, the sum of certain costs and expenses of certain improvements, paving tax, and other charges against said horse-car line, which were then unascertained, but which were afterwards liquidated, and stated by the defendant to the plaintiff to amount to the sum of eight thousand seven hundred dollars, that he, the said defendant, in consideration thereof, would pay the plaintiff, for his services in conducting such negotiations and in consummating such contract of sale, a commission of five per cent. upon the price agreed to be paid for said street-car lines, to wit, upon the sum of eighty thousand seven hundred dollars, which said commissions would amount to a large sum, to wit, the sum of four thousand and thirty-five dollars." The declaration then states the undertaking and promise of the plaintiff, etc., and avers that he, the plaintiff, "entered into negotiations with the said Farnum for the sale of said street-car lines, and so successfully conducted the same that they resulted in a contract in writing, whereby a certain corporation, known as the Alton Electric Street-Railroad Company, and composed of the said A. M. Farnum and the members of said syndicate who were associated with him, was formed and organized under the statute of the state of Illinois in such case made and provided, and thereupon a contract was made and

entered into between it and the duly-authorized agents and representatives of the Alton Improvement Association, the corporation which then owned and operated the said 'Dummy Line,' and of the Alton and Upper Alton Horse-Railway Company, the corporation which then owned and operated the said horse-car line, both of which were then and there under the control of the defendant, who was then and there the owner of a controlling number of the shares of the stock of said companies, whereby the said street-car lines were both negotiated and sold by and through the agency of the plaintiff, acting pursuant to the terms of his employment aforesaid, to the said Alton Electric Street-Railroad Company, at and for the price and sum of eighty thousand seven hundred dollars, under a contract in writing between said last-mentioned company and the duly-authorized agents and representatives of the said companies which owned and operated said street-car lines, the terms and provisions of which said contract were submitted to and accepted and approved by the said defendant prior to the consummation and delivery thereof; by means whereof the said defendant," etc., "became liable to pay," etc. The declaration also contains the common money counts. The plea is non assumpsit. The case was tried by the court without the intervention of a jury, and the finding and judgment were in favor of the plaintiff and against the defendant for \$4,035 damages. One ground of the motion interposed for a new trial was that the damages assessed were excessive in amount, and thereupon the court reduced the judgment to \$2,835, and overruled the motion for a new trial. The present appeal is from the judgment of affirmance rendered in the appellate court.

Everett W. Pattison, for appellant. John G. Irwin, for appellee.

BAKER, J. (after stating the facts). From the judgment of affirmance in the appellate court the law conclusively presumes that in the trial court all questions of fact were properly disposed of, and all material allegations of the declaration established by the weight of evidence. And, in the absence of rulings of the trial court upon propositions of law submitted to it, the presumption also is that the law was properly applied to the facts of the case. It is, however, by the appellant here (defendant below) assigned as error that the trial court allowed the plaintiff below to withdraw his propositions of law, and did not pass on the same. It is provided in the statute (Prac. Act, § 41) that when, by agreement of parties, both matters of law and fact are tried by the court, "either party may, within such time as the court may require, submit to the court written propositions to be held as law in the decision of the case, upon which the court shall write 'Refused' or 'Held,' as he shall be of opinion is the law, or modify the same, to which either party may except as to other

opinions of the court." It is to be noted that the statute, while it is mandatory as to the duty of the court, is, as to the actions of the parties to the controversy, permissive merely. In order to properly dispose of the present contention, it is necessary to ascertain just what the court did in the premises. It appears from the record and bill of exceptions that the case was tried on October 19, 1894; and at the close of the evidence, by agreement and consent of both parties, time was given to each to submit propositions of law; and that thereafter, on October 26, 1894, counsel for plaintiff submitted certain propositions in writing, to be held as law in the case, and that on the same day "counsel for defendant, in open court, stated to opposite counsel and the court that the defendant did not desire to submit any propositions of law; whereupon counsel for plaintiff asked leave to withdraw the propositions submitted by him, and thereupon leave to withdraw them was granted, and the said propositions were never read, considered, or passed upon by the court; and thereafter, on a later day of said October term, the court gave judgment for the plaintiff, and assessed his damages at \$4,035, to which finding and judgment of the court the defendant by his counsel at the time excepted." It is an amply sufficient answer to the assignment of error that defendant did not object or except to the ruling of the court upon the motion of plaintiff to withdraw the propositions that the latter had submitted. It must be presumed that he fully acquiesced in the action taken by the plaintiff and by the court. But it is a still better answer that appellant had no right to either object or except. If the court had, in fact, passed upon the propositions and had held them to be law applicable in the decision of the case, then a very different question would be presented, and its action in allowing a withdrawal under such circumstances might well be held error. If appellant desired the ruling of the court upon any question of law involved in the case, then he should have complied with the requirements of the statute, by submitting such propositions as he desired the court to rule upon. The court neither read nor considered nor passed upon the propositions handed up by appellee, and the latter, upon the announcement of counsel that defendant did not desire to submit propositions, immediately withdrew those he had just offered. The court owed no duty to appellant in respect to the propositions that were withdrawn, except this: that it should not hold to be law a proposition that was not the law, and that was inimical to his rights or interests. The court did not violate this duty. The mandate of the statute to write upon a proffered proposition of law either the word "Refused" or the word "Held" is one that is for the exclusive benefit of the party submitting the proposition, and, if such party elects to withdraw such proposition from the con-

sideration of the court, and waive his right to demand that the court should pass upon it, then no one else has a right to complain. It is sound law that a party for whose benefit either a constitutional or statutory right is given may waive such right, at least in a civil case. The assignment of error is without any merit whatever.

It is claimed that the court erred in admitting the testimony of appellee explaining, varying, and contradicting the terms of the document of February 27, 1893. We may say, by way of premise, that it devolved on appellee to show, under his declaration, that his contract for commissions was with appellant personally, and in his individual capacity, and not with him as the agent of the Alton & Upper Alton Horse-Railway Company and Alton Improvement Association, owners, respectively, of the two street-car lines; also that the commissions were due when the contract of sale to Farnum, or the syndicate or company or corporation organized by him or them, or under his or their control, was consummated; and also that under the contract his commissions were to be 5 per cent. upon the total price of \$80,700. In respect to each of these matters the evidence was conflicting; appellant contending that the liability for commissions under the contract was not personal, and also contending that the commissions were not to be paid when the sale was closed, but when the full contract price was paid, and then only upon the \$72,000 mentioned in the declaration. Appellee, after testifying that the contract was personal with appellant, further testified that, after the sale was consummated, he went to appellant, and told him that he would like to have his commissions; that appellant said he was hard up, and did not have the money to pay it; that the \$8,700 which had been paid by Farnum and his associates had passed into the Alton Savings Bank to the credit of the street-paving account, which that bank had cared for; that he (appellee) urged that he was in need of the money, and appellant said he would write a letter to Mr. Hayner, of the Alton Savings Bank, and he thought arrangements could be made by which he (appellee) could get money; and that appellant wrote a letter, and he (appellee) wrote an indorsement on its back, and appellant subscribed thereto his approval. As corroborative of his claim that the promise and undertaking of appellant was personal, appellee introduced in evidence the said letter, indorsement, and approval. The same are as follows:

"Alton, Ill., Feb. 27, 1893. Mr. J. E. Hayner, Dear Sir: As per our talk with Mr. White, I am to pay \$3,600 as commission or bonus on street-railway deal, of which Mr. White said to us Mr. Mayfield was to receive 1,200. The only question between us is, when paid. My remembrance is distinct this was to be paid from proceeds of note 47,000. If you can assist Mr. Mayfield in this, I

shall be glad. Yours, truly, Wm. Elliot Smith."

"State of Illinois, City of Alton. Know all men by these presents that I hereby authorize J. E. Hayner, or the cashier of the Alton Savings Bank, to collect the amount of twelve hundred dollars within named from William Elliot Smith, and apply same to the payment of my note of \$1,000, dated of this day, at eight months' time, bearing 7 per cent. interest, executed by me to the Alton Savings Bank; and such balance as shall be left over to place to the credit of myself at said Alton Savings Bank. Witness my hand and seal this 27th day of February, 1893. Manning Mayfield. [Seal.] Approved: William Elliot Smith. Feb. 27, 1893."

The record shows that the following then occurred: The witness was asked by the plaintiff's counsel this question: "Q. That letter contains a statement from Mr. Smith that he understood from Mr. White that \$1,200 was to go to you?" and to which the witness answered, "Yes, sir." The following question was then put to the witness: "Q. Explain that statement. State whether you sanctioned it or not?" This question was objected to by defendant's counsel as incompetent, irrelevant, and immaterial, and as attempting by oral evidence to contradict or explain the terms of a written contract or document. The objection was overruled by the court, and defendant was allowed to answer, to which overruling of the court defendant duly excepted. The witness answered as follows: "I will have to state, then, the contract between Farnum and his associates with my business. I was to receive 5 per cent., and, after I received the charter which I obtained for the Alton and Suburban Electric Railway Company I sold this property to Farnum and his associates, and in order to accomplish the sale, I made an agreement with Farnum and his associates that two-thirds of the commission, under certain conditions, should be paid to them. That would leave me entitled to collect one-third. It was a conditional arrangement with Mr. Farnum and his associates that a certain portion of that money should go to them,—two-thirds of the commissions to them, and one-third to me. They were to receive of the \$7,500 bonus which the citizens subscribed for the North Alton Line four-fifths, and one-fifth was to come to me. That would make \$1,500 as my portion of the bonus. So the arrangement was that I was to receive 20 per cent. of the bonus and one-third of the interest to be paid by Mr. Smith, as also some preferred stock. But I never got anything. White and I never had any conversation about that at all. As they failed to build the road within the specified time, they could not collect the bonus, and it was lost. Therefore I claim against Mr. Smith the entire commission, they not performing their part, because I agreed they should have it only on certain conditions." The letter was not the contract between appellant and appellee. The contract between them was made in 1892, was a verbal contract, and

was entirely executory. At the time the letter was written, the services the contract provided for had been completely performed, and appellee was seeking to collect his commissions and appellant was expressing an inability to pay. The evident purpose of the letter was to enable appellee to borrow \$1,000 from the savings bank, which purpose, by means of the letter and indorsements thereon, was accomplished. That which was done was to enable appellee to use \$1,200 of his claim against Smith as collateral security in obtaining the loan. The letter was competent evidence for appellee, it being an admission in writing by appellant of his personal liability. But the letter, unexplained, tended to show that appellee was only entitled to receive \$1,200 of the 5 per cent. commissions. This was owing to the fact that the letter, which used the language of appellant, not the language of appellee, incidentally made reference to an independent transaction between appellee and Farnum and his associates, whereby, under certain conditions, two-thirds of the commissions were to be paid to them. It would have worked a rank injustice to have excluded explanatory testimony showing what these conditions were, and that they were not complied with, and that the entire commissions were due and owing to appellee. In *Brant v. Gallup*, 111 Ill. 487, certain letters written by appellant were read in evidence against him and he offered, in a general way, to testify to the motives which induced him to write the letters in the manner in which he did; but the evidence was rejected, the trial court holding he might testify to the circumstances under which they were written, but not to his intentions or purpose in writing them as he did. This court said: "Appellant might, no doubt, as the court below decided he could, have shown the circumstances under which the letters were written, but he had no right to change the fair and reasonable import of the letters by proving a secret and unexpressed intention." In *Starkie*, Ev. 677, it is said that, where a written document is given in evidence as containing an admission of the adversary, parol evidence is admissible to explain it, or to show that it originated in mistake; and on page 719 it is said that when a document, such as a letter, not being matter of compact and agreement, is given in evidence as an admission of the adversary, the latter may adduce evidence to show that it originated in mistake, or to explain it by circumstances. And see, also, *M'Crea v. Purmort*, 16 Wend. 460; *Railroad Co. v. Bartlett*, 20 Ill. App. 96; and the numerous authorities cited in the last-named case. The rule is that writings which only acknowledge the existence of a simple fact are susceptible of explanation, and liable to contradiction. If the writer of a letter can introduce in evidence proof of circumstances explanatory of statements made therein, surely his adversary, who has, under the exigencies of the case, produced such letter for the evidence it affords as to some point in controversy, may also show circumstances that are explanatory of other state-

ments in the letter that would be in derogation of his claims. Nor do we think the fact that the letter, the assignment indorsed thereon, and the written assent by appellant to such assignment, may, when taken and considered together, amounts to a contract by appellant to pay to the savings bank the \$1,200 mentioned in the letter, take away the rights of the parties to this controversy to show therein such explanatory circumstances. The letter, in and of itself, is simply an admission. The letter, assignment, and approval, taken together, constitute a contract in regard to the specified \$1,200; and the evidence admitted did not tend to explain, change, or contradict the terms of that contract. In 1 Greenl. Ev. § 204, it is said that it is material to consider whether an admission is made independently, and because it is true, or is merely conventional, entered into between the parties from other causes than a conviction of its truth, and only as a convenient assumption for the particular purpose in hand. Here the particular purpose in hand was to enable appellee to use \$1,200 of the claim for commissions as a collateral at the bank in obtaining credit to the extent of \$1,000. As to whether the amount due appellee was more than the \$1,200 mentioned was wholly immaterial, so far as the transaction with the bank was concerned, and it might well be assumed in that transaction that the indebtedness was \$1,200. There was no error in admitting in evidence the explanatory circumstances in question.

It is urged that the court erred in admitting in evidence the articles of agreement dated February 21, 1893, purporting to be made between the Alton Improvement Association and the Alton & Upper Alton Horse-Railway & Carrying Company as parties of the first part and the Alton Electric Street-Railway Company as party of the second part. Objection was made to the introduction in evidence of that agreement "on the ground that there was no proof of the incorporation of the companies purporting to be parties to it, nor of the signatures to the document." The objection was overruled by the court, and the agreement was admitted in evidence, and the counsel of appellant excepted. There is abundance of proof in the record that the parties of the first part were going corporations, de facto, if not de jure, engaged in the actual transaction of business; one of them operating a horse-car line of railroad, and the other operating a dummy line. In respect to the Alton Electric Street-Railroad Company, it may be said that the making of the contract itself is of itself sufficient proof of the existence of a corporation de facto for all the purposes of this case. The legality of the organization of a corporation, when the rights of the public or the rights of third persons are involved, cannot be inquired into in a collateral proceeding, but such legality can be attacked and judicially examined by quo warranto only. *Osborn v. People*, 103 Ill. 224; *Trumbo v. People*, 75 Ill. 561. In the very nature of things, it cannot be the law that in every suit brought by one person against

another which involves some transaction had with a corporation such transaction cannot be shown in evidence without first establishing that the corporation, although not a party to the pending litigation, is a de jure corporation. If such were the rule, the business of the country, under present conditions, could not be transacted. It is shown that Charles W. Milner was president and H. R. Phinney secretary of each of the two corporations named as parties of the first part, and that their respective signatures as such officers of said respective corporations were genuine. A witness also testifies to the signature of A. M. Farnum as president of the Alton Electric Street-Railroad Company. Although no witness testified in direct terms to the signature of J. G. White as secretary of the latter company, yet the evidence shows that a contract was made between the companies named as parties of the first and the company named as party of the second part, and that the contract was reduced to writing. Appellant himself testifies that the agreement was consummated in February, and that the date of the "consummated agreement was February 21st." The contract introduced bore the date thus indicated. It was attested by the seals of the respective companies. All the signatures to it except that of White were testified to in positive terms, and that it was also duly signed by him—the name "J. G. White, Secretary," being attached thereto—is at least prima facie established by the facts above stated, and the admission that the agreement of the date of February 21st was "consummated." If it was not duly signed by the necessary officers, how could it have been a "consummated agreement"? Under the circumstances, the court did not err in admitting the agreement as evidence.

Appellant claims in his brief and argument that the contract of February 21, 1893, was ultra vires the Alton Electric Railroad Company. But, as no propositions of law raising that question, or involving in any way the construction or legal effect of the contract, were either given or refused, the matter thus sought to be submitted for our decision is not preserved in the record.

It is also suggested that the judgment is excessive, notwithstanding the reduction made by the court at the time the motion for a new trial was overruled. As we have very frequently held, the question of the amount of damages, in a case such as this, is a question of fact, upon which the judgment of the appellate court is final and conclusive. We find no error to justify a reversal. The judgment is affirmed. Affirmed.

(164 Ill. 331)

TAYLOR et al. v. FELSING.

(Supreme Court of Illinois. Nov. 10, 1896.)

MASTER AND SERVANT — PERSONAL INJURIES — PLEADINGS—QUANTUM OF PROOF—INSTRUCTIONS—TRIAL—INTERROGATORIES.

1. Where the complaint, in an action by a servant for injuries caused by defective machinery, alleges in what the defect consisted, and a

promise on the part of the master to remedy the same, it is not necessary to also allege that the master's failure to remedy the defect was negligence.

2. A servant is only required to prove his cause of action against his master for injuries caused by defective machinery by a "preponderance" of the evidence, and not by a "clear preponderance."

3. The giving of an instruction in the form of an abstract proposition of law, instead of applying the law to the facts in evidence, is not ground for reversal, where it was not calculated to mislead the jury.

4. It is proper to refuse an instruction on a point already covered by the charge.

5. The fact that there was a safer method by which the servant could have performed his duty does not necessarily preclude his recovery for injuries due to defective machinery.

6. Where the negligence of the master in the equipment of his cog gearing prevented its being shut off while the servant was at work about the same, the fact that the servant was thrown into the gearing by reason of his foot accidentally slipping does not prevent a recovery by him, in that the injuries were the result of a mere accident.

7. It is proper to refuse to submit to the jury questions of fact relating to evidentiary facts not conclusive.

8. Where a master has promised his servant to remedy a defect in the machinery, the fact that the servant continued to work with knowledge that there was some danger, does not conclusively show negligence, so as to prevent his recovery for injuries received therefrom.

Appeal from appellate court, Third district.

Action by Henry Felsing against Proctor Taylor and others. From a judgment of the appellate court (63 Ill. App. 624) affirming a judgment for plaintiff, defendants appeal. Affirmed.

J. F. Carrott, for appellants. Govert & Pape, for appellee.

CARTWRIGHT, J. Appellee was employed by appellants in their flouring mill at Quincy, and it was his duty to attend to the running of the machinery in the basement. He went up into a passageway between a gearing of cogwheels and the west wall of the basement, and relieved a spout for the passage of wheat, which had become choked, and, while coming down, and walking along a bridge tree four feet above the floor of the basement, he accidentally slipped and fell into the cogwheels, which were in rapid motion, and his right arm was cut off. He brought this suit, and obtained a judgment for his injury, which has been affirmed by the appellate court.

At the trial the first count of the declaration was dismissed, and the case was submitted to the jury on the amended second count. It is assigned as error that the court overruled a motion in arrest of judgment, based upon the insufficiency of this count to sustain the judgment. The ground of the claim is that it contains no averment that the act of the defendant which caused the injury was carelessly and negligently done. The facts alleged were that there had been a clutch pulley with a lever attached on the main shaft which turned the gearing of cogwheels, and by this means the cogwheels could be thrown out of gear at

the pleasure of plaintiff, and all danger in going about the machinery and cleaning the spouts averted; that, a few weeks before the accident, said clutch pulley became out of repair, and was removed temporarily to be repaired, and a stiff pulley was temporarily put on the shaft, so that the cogwheels could not be thrown out of gear; that the removal of the clutch pulley and the substitution of the stiff pulley rendered the service of plaintiff more hazardous; that plaintiff repeatedly, and shortly before the injury, objected to the absence of the clutch and the use of the stiff pulley, and requested defendants to have said clutch pulley replaced; and that defendants promised plaintiff to have it replaced, and he, relying on said promise, continued in the service, and in the performance of his duties, for a reasonable time, to permit the performance of said promise by defendants. This count set out, not only the disregard of a positive duty owing by the defendants to the plaintiff, created by the facts averred, but also an agreement of the defendants to remove the cause of danger, by which agreement defendants took upon themselves the responsibility of injuries resulting from such dangerous condition to the plaintiff while in the exercise of ordinary care. Whether the liability rests upon the disregard of duty, or upon the contract to replace the clutch pulley, it was not necessary that either such disregard or failure to comply with the agreement should be characterized in the declaration as careless or negligent. If there was any disregard of duty, it was necessarily negligent, whether so averred in the declaration or not. Where facts are stated which in law raise a duty, and the disregard of duty and consequent injury are properly averred, the count will be regarded as sufficient. The pleader must state facts from which the law will raise a duty, and show an omission of the duty and resulting injury; but, when that is done, an allegation that the act was negligent is unnecessary. *Ayers v. City of Chicago*, 111 Ill. 406; *Railroad Co. v. Hawthorn*, 147 Ill. 226, 35 N. E. 534. The motion in arrest was properly overruled.

The defendants by their thirty-eighth instruction asked the court to direct the jury that, under the law as applied to the facts, plaintiff was not entitled to recover, and the jury should find a verdict for the defendants. We do not care to review the evidence. It tended to prove the cause of action. The instruction was properly refused.

The first five instructions given on behalf of the plaintiff are complained of. We think there is no objection to any, unless it be the second, and that there was no reversible error in giving that one. The objection made to the first is that it permits the plaintiff to recover upon a mere preponderance of the evidence in his favor, while it is insisted that the law required him to prove his case by a clear preponderance. The law only requires that a preponderance of the evidence should be in favor of the plaintiff. *Mitchell v. Hindman*,

150 Ill. 538, 37 N. E. 916. The third relates to the credit to be given to different witnesses, and it is objected that it is too broad, as permitting the jury to reject the testimony of a witness although corroborated by other witnesses or by circumstances in evidence. The criticism, as applied to this instruction, we think, is unfounded. If the second is subject to the exception taken to the third, and also wrong in requiring, instead of permitting, the jury to reject the testimony of a witness who has knowingly testified falsely to some matter, as it is insisted in the argument, we cannot see that any harm could have resulted to the defendants in this case. The second instruction given at the request of defendants was on the subject of the credibility of witnesses. It was very full, and correctly stated the rules for judging of credibility, among other things directing the jurors to take into consideration all the circumstances proved corroborating or contradicting the witness. There was no conflict in the evidence on the main features. In view of that fact, and the second instruction given for defendants, we think there is no just ground for a belief that defendants were in any way harmed by the instruction complained of. The fourth was an abstract proposition of law. It is objected that it assumes the existence of facts in this case. It states conditions under which a servant may continue in an employment, relying upon the promise of the master to remove a source of danger, but does not assume that the conditions existed in this case. That form of instruction is not approved, and it is regarded as much better that the court should apply rules of law to the evidence in the case; but a judgment will not be reversed for the failure to make such application. The principle of law is correctly stated in this instance, and the giving of such an instruction is not error where it is not calculated to mislead the jury. *Peoples v. McKee*, 92 Ill. 397; *Betting v. Bobbett*, 142 Ill. 72, 30 N. E. 1048; *Railroad Co. v. Dickson*, 143 Ill. 368, 32 N. E. 380. It is also urged that by this instruction the condition shown was treated as a defect in the machinery, when, in fact, it was not a defect. But we think there could be no question that the machinery, situated and used as it was proved to be, was defective after the removal of the clutch pulley, not being equipped with any suitable means of throwing it out of gear. There was no error in so treating it. The fifth instruction is criticised on the same ground as the fourth, as assuming that the machinery was defective, and also as telling the jury that the plaintiff would be entitled to recover whether he was at the time in the exercise of any care whatever for his own safety or not. It is subject to neither of these objections, and expressly requires that the jury shall believe, from the evidence, that the plaintiff was in the exercise of ordinary care and caution for his own personal safety.

It is also claimed that the court erred in refusing to give instructions Nos. 6, 12, 19,

20, and 27, requested by the defendants. The request for instructions was practically unlimited, and embraced 38 such papers, which the court was asked to review and read and deliver to the jury for the purpose of enlightening them upon the law of the case. The absurdity of such a request in a case of this character is too apparent to call for comment. The issue was simple, and there were not 38 propositions of law that could be presented to the jury. Consequently, the instructions necessarily consisted of mere repetitions in varying form. For example, 9 of them were devoted to informing the jury that the plaintiff was bound to prove the exercise of ordinary care and diligence on his part to avoid the injury, and in the absence of such proof he could not recover; and these instructions were all given to the jury. Too many instructions were given, instead of too few. The sixth, which was refused, stated that if the jury believed, from the evidence, that the injury was an accident, and not caused by the negligence of the defendants, they should find the defendants not guilty. The jury had been told repeatedly that they should find the defendants not guilty unless the plaintiff had proved that the accident was caused by their negligence. There was no need of telling that again. The twelfth recited facts from which the court was asked to draw an inference of negligence, and direct a verdict for defendants. The question of negligence of plaintiff was one of fact for the jury, and the court had no right to give such an instruction. The nineteenth stated that, if there was any safer method of performing the work than the one adopted by the plaintiff, he could not recover. The fact that there might have been another method, which a very timid or cautious person might have adopted as safer, would not be conclusive of negligence. The twentieth was of the same nature as the nineteenth. The twenty-seventh was designed to inform the jury that, if plaintiff's foot accidentally slipped, and he was thereby thrown into the dangerous machinery, they must ascribe the injury to a mere accident, and the defendants were not liable. It was wrong in excluding the element of negligence on the part of defendants. The fact that the slipping was accidental would not relieve them, if they were guilty of negligence in respect to the machinery, and plaintiff exercised due care.

Defendants asked the court to submit to the jury seven questions of fact, to be returned with their findings. They all related to evidentiary matters not conclusive, and might have been refused; but the court gave three of them, and refused to submit the remaining four. The refusal is complained of, but it was right. If answer had been returned as desired by defendants, no judgment could have been entered, as there would still have been no finding that was conclusive of the rights of the parties. By

the answers to those which were submitted, the jury found that it was dangerous for a person to climb up or down the passage where the plaintiff was injured while the gearing of cogwheels was in motion; that it was not hazardous and dangerous for plaintiff to attempt to climb up and down said passage where he was injured without stopping said gearing of cogwheels, or causing them to cease to revolve; and that the plaintiff, before the time of his injury, knew that such gearing of cogwheels was uncovered or unguarded. On these findings the defendants entered a motion for judgment notwithstanding the general verdict, and the motion was denied. It is plain that no judgment could be entered upon these findings. The plaintiff's claim was that the undertaking was not free from danger, and the fact that he knew the wheels to be uncovered would not exempt defendants from liability when they had promised to remove the cause of danger. The jury did not find that plaintiff had voluntarily incurred any known and immediate danger, where injury was reasonably certain to occur, so that no prudent person would undertake to perform the service. His knowledge of some danger was not conclusive evidence of a want of ordinary care on his part under the promise of defendants. The judgment of the appellate court will be affirmed. Affirmed.

CARTER, J., took no part.

(184 Ill. 250)

TOWN OF WHEATFIELD v. GRUNDMANN.

(Supreme Court of Illinois. Nov. 11, 1896.)

HIGHWAYS—DEDICATION.

In an action to recover the statutory penalty for obstructing a public road never laid out by the public authorities, running through defendant's land, it appeared that the public commenced using the road about the year 1849, when the land was owned by H., who died in 1856; that after his death the land was owned by two other persons for 18 or 20 years before it was sold to defendant. There was evidence tending to prove a dedication by H. and such two other persons, and also to prove the existence of the highway by prescription. *Held*, that instructions which limited the jury to evidence tending to show a dedication by H. only were erroneous.

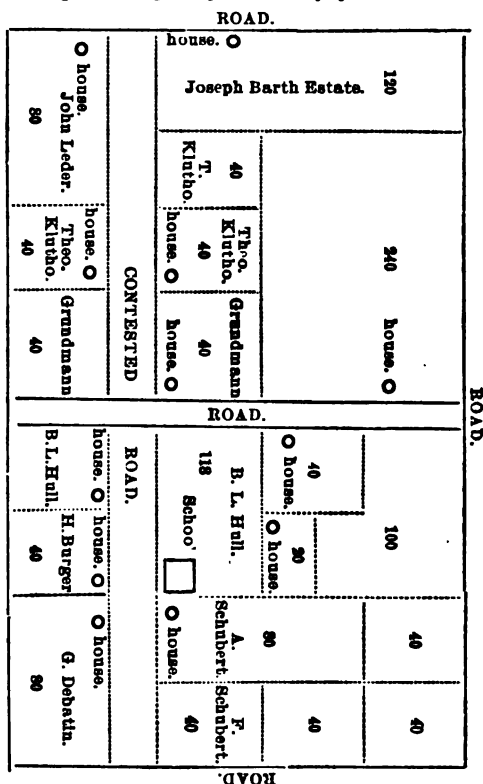
Appeal from circuit court, Clinton county; A. S. Wilderman, Judge.

Action by the Town of Wheatfield against J. R. Grundmann to recover the penalty prescribed by statute for obstructing a public road, commenced in justice's court, and taken on appeal by defendant to the circuit court. From a judgment in favor of defendant, plaintiff appeals. Reversed and remanded.

Van Hoorbeke & Ford, for appellant. Lambe & McGaffigan, for appellee.

CRAIG, J. This was an action originally brought before a justice of the peace by the

town of Wheatfield against J. R. Grundmann to recover the penalty provided by section 71 (chapter 121, Starr & C. Ann. St.) of the act entitled "Roads and Bridges," for obstructing a public road. A fine of \$10 was imposed by the justice of the peace, and the defendant appealed to the circuit court, where a trial was had before a jury, resulting in a verdict and judgment in favor of the defendant, to reverse which the plaintiff, the town of Wheatfield, has appealed. The road in question runs about two miles east and west, crossing what was known as "Hull's Mound." The following plat shows the location of the road, the defendant's land on each side of the road, schoolhouse, and other residences on the line of the road, as it has been traveled and used as a public highway for many years:



Mr. Hull first settled on the farm now occupied by the defendant, Grundmann, and while he was occupying the land, some 47 years ago, the people commenced traveling on the line of road now in dispute. The road was traveled by the public from the west, going east to Wisetown, and from the east going west to Jamestown. As appears from the evidence, Jamestown was the business point for the neighborhood. It contained a mill, blacksmith shop, general store, post office, etc., and the road in question was the route used by the neighborhood in going to and from that place to transact their business. Hull gave the land, and a schoolhouse was erected on the line of the road, and, as the lands in the neighborhood were settled upon

and improved, dwelling houses were erected on the line of the road. From the time the public first commenced using the road, down to the time the obstruction was placed upon it by the defendant, the road ran substantially in a straight direction. Mr. Hull erected and kept up fences on each side of the road. He saw other owners of land along the line of road erecting fences on each side of the road, and setting apart the line of road to public use. From the acts and conduct of Mr. Hull, it is apparent that he recognized the road as a public highway. It is true that he placed gates at each end of the road, where it run through his land; but this was not done to interfere with the travel on the road by the public, but the gates were erected for his own convenience. It was claimed on the trial by the plaintiff that the road was a public highway, both by dedication and prescription. In order to establish a dedication at common law, it must appear that there was an intention on the part of the owner of the land to devote the land to the public use, and an acceptance by the public must be established, and the proof of these facts must be clear and unequivocal. *City of Chicago v. Chicago, R. I. & P. Ry. Co.*, 152 Ill. 571, 38 N. E. 768; *Fisk v. Town of Havana*, 88 Ill. 208. In order to establish a road as a public highway by prescription, it must appear that the public has had the adverse use or possession, under claim of right, continuous and uninterrupted, for 20 years, with the knowledge and acquiescence of the owner of the land over which the easement is claimed. *Township of Madison v. Gallagher*, 159 Ill. 105, 42 N. E. 316. Evidence was introduced tending to prove the existence of a highway by dedication, and also by prescription, and it was important that the law bearing on the question should be accurately given to the jury. The court, on its own motion, gave to the jury 13 instructions, two of which (Nos. 4 and 5) are claimed to be erroneous. No. 4 was as follows: "(4) I will say to you, in this connection, that there is no evidence before you that the road in controversy in this case was ever laid out by the public authorities of this state, or by the territory of Illinois, and that, if this road exists as a public road, its existence must be established by a dedication to public use by William Hull, the then owner of the lands through which its course lies, or by user by the public as a public road, and that, as to this road, such user must have been for 20 years. Given." In No. 5 the court stated to the jury as follows: "(5) As to whether there has been a dedication, I will say that it must appear from the evidence that William Hull, the owner of the lands through which it is claimed the road in question runs, did some act or made declarations indicating an intention to dedicate the strip of land over which it ran to the public for a public road, and did dedicate it, and it must also appear that the public some way accepted this dedication." It appears from

the record that William Hull died in the winter of 1856, and after his death, in 1866 or 1867, the land now owned by the defendant fell into the hands of Martin Hull. He resided upon it for a number of years, and then sold it to his brother, who occupied the land until a few years ago, when he sold to the defendant. Martin Hull testified that after he acquired the land he recognized the road as a public highway. While he resided on the land, in 1867, one of the gates which had been erected by his father was taken from the hinges, and he never tried to put up the gates again. On the trial he testified: "A. I regarded it—yes, sir—as a public road. Never tried to keep it closed in daytime at all. After gates were knocked down or, taken off hinges, I never tried to put them up any more. I say this road could not be shut, because there were five or six dwelling houses besides the schoolhouse on this road. I now live a quarter of a mile north of schoolhouse. Only own 20 acres now." He also testified that the road was worked and kept in repair. In establishing a road by dedication, the plaintiff was not confined to proof that the original owner, William Hull, had dedicated the land used as a road to the public. For a period of 18 or 20 years the land over which the road passes was owned by Martin Hull and his brother, and there was much evidence tending to prove a dedication by them, and the plaintiff was entitled to rely on this evidence to establish a public highway by dedication. If William Hull did not dedicate the land in question for a public highway while he owned the farm, but after the farm fell into the hands of his two sons they made the dedication, the plaintiff was entitled to prove and rely upon that fact. But the two instructions complained of confined the dedication entirely to William Hull. In this regard they were, in our opinion, erroneous. The judgment will be reversed and the cause remanded. Reversed and remanded.

(164 Ill. 9.)

GRAND LODGE OF BROTHERHOOD OF LOCOMOTIVE FIREMEN v. CRAMER.

(Supreme Court of Illinois. Nov. 11, 1895.)

ABATEMENT—SUFFICIENCY OF PLEA—DENIAL OF
CORPORATE EXISTENCE—EFFECT OF
DEMURRER—WAIVER.

1. In an action against the "Grand Lodge of the Brotherhood of Locomotive Firemen," where service was made upon the officers of a subordinate lodge as agents of the grand lodge, a plea in abatement alleging that the "Brotherhood Firemen" is not a corporation, and has never exercised corporate powers, is insufficient as an allegation that the defendant named in a writ is not a corporation. 60 Ill. App. 212, affirmed.

2. An allegation that the officers of the subordinate lodge upon whom service was made are not agents of the Brotherhood of Locomotive Firemen, is not sufficient as an allegation that they are not the agents of the defendant named in the writ. 60 Ill. App. 212, affirmed.

3. Where a demurrer is sustained to a plea in abatement, a plea over to the merits does not operate as a waiver of the right to assign as error the ruling on the demurrer.

4. Where a plea in abatement has been adjudged insufficient on demurrer, a motion to quash the writ on the same grounds as those alleged in the plea will not be entertained. 60 Ill. App. 212, affirmed.

Appeal from appellate court, Fourth district.

Action by Philip Cramer against the Grand Lodge of the Brotherhood of Locomotive Firemen. A judgment for the plaintiff having been affirmed by the appellate court (60 Ill. App. 212), the defendant appeals. Affirmed.

This is an appeal from the judgment of the appellate court for the Fourth district affirming a judgment of the city court of East St. Louis in favor of appellee against appellant upon a certificate of insurance for \$1,500, insuring appellee against total disability. The disability in this case arose from an injury to his arm received while appellee was engaged as engineer in running a locomotive engine. The return of service of summons in the trial court was as follows: "I have duly served the within summons on F. W. Arnold Lodge, No. 44, a subordinate lodge, and agent, of defendant, located and existing in said city, by reading and delivering a true copy of said summons to Robert A. Stevenson, master and chief officer of said subordinate lodge, in his capacity of such master; and also by reading and delivering a true copy of said summons to W. W. Gillis, secretary of said subordinate lodge, in his capacity of such secretary; and also by reading and delivering a true copy of said summons to William Boyne, an agent of the defendant,—all of which was done on the 7th day of August, 1894. The president of said company not found in my county." The defendant then filed the following plea in abatement: "Now comes the Brotherhood of Locomotive Firemen, against which the plaintiff has issued his said writ, and declared thereon by the name of the 'Grand Lodge of the Brotherhood of Locomotive Firemen,' and enters a limited appearance herein for the purpose of showing the following fact only, and for no other purpose: The Brotherhood Firemen is not now, and never has been, a corporate body, under the laws of the state of Illinois or elsewhere; that the organization is a co-operative or mutual benefit association, having no corporate existence whatever; that it is operative under a voluntary constitution and voluntary by-laws, peculiar to that class of organization; and that the organization has never been held out as having corporate powers. It is true there is an organization called the 'Brotherhood of Locomotive Firemen'; that such organization has headquarters in Terre Haute, in the state of Indiana; that it has a grand master and secretary and treasurer, who reside in the city of Terre Haute, in said state, and transact the business of said organization there; but none or either of them have ever resided or do now reside in the city of East St. Louis, in the state of Illinois, and did not at the time of the writ herein, nor have they, since the issue of

the writ herein, been in the city of East St. Louis, county and state aforesaid. The organization has declared, in the constitution of the grand lodge, as follows: 'Section 1. This body shall be known as the "Brotherhood of Locomotive Firemen," with headquarters permanently located at Terre Haute.' And by such designated name the order is known as a mutual benefit organization. That the said Robert A. Stevenson, upon whom service has been made in this case, as shown by the amended return herein, of the date of 7th day of August, 1894, is not now, and never has been, an agent of the Brotherhood of Locomotive Firemen of the city of East St. Louis or elsewhere; that the said W. W. Gillis, upon whom service has been made, as shown by said amended return, is not now, and never has been, the agent of the Brotherhood of Locomotive Firemen in the city of East St. Louis or elsewhere; and that the said William Boyne, upon whom service has also been made, as shown by said amended return, is not now, and never has been, an agent of the said Brotherhood of Locomotive Firemen in the city of East St. Louis or elsewhere. And the defendant avers that, while the parties upon whom service has been made as aforesaid may be officers of a subordinate lodge of the Brotherhood of Locomotive Firemen, the said Brotherhood of Locomotive Firemen cannot, under the laws of Illinois or elsewhere, be brought into court by service upon the officers of a subordinate lodge. If, in law, subordinate lodges can be held as the agents of Locomotive Firemen, defendant denies that its officers can be made the agents of said organization for the purpose of bringing the same into court, or that the Brotherhood of Locomotive Firemen can be served through the officers of a subordinate lodge. Defendant avers that, if the parties named, upon whom service has been made as officers of a subordinate lodge, are the officers, as alleged in said amended return, that the said officers did not report said service to the officers of said subordinate lodge, nor did the subordinate lodge take any action thereon; and notify the Brotherhood of Locomotive Firemen, the defendant herein. Wherefore defendant prays judgment if the court here will take cognizance of the action aforesaid." This plea was sworn to. The plaintiff demurred to this plea, and assigned the following special grounds of demurrer: "(1) The plea purports to be by the Brotherhood of Locomotive Firemen, instead of the Grand Lodge of the Brotherhood of Locomotive Firemen, the party sued, and shows on its face that they are different and separate organizations. (2) That so much of the plea that denies corporate existence is matter which goes in bar of the action, and cannot be pleaded in abatement; and the plea is defective in containing matter both in abatement and in bar of the action. (3) The plea does not deny that the said subordinate lodge is an agent of the defendant sued, with the Grand Lodge of the Brotherhood of Locomotive Firemen. (4) The plea does not deny that any of the parties served as agents of the said grand lodge were such at the time service was

had. (5) The plea is argumentative, and alleges matter as law which is erroneous. (6) The plea is both a traverse and statement of affirmative matter. (7) The plea is not signed by counsel, nor by anyone on the part of defendant. (8) And is in other respects defective." The demurrer was sustained, the cause continued, and at the next term the defendant entered its motion to quash the return for reasons substantially the same as those set up in the plea in abatement. The motion was overruled, and the defendant excepted. Defendant then filed pleas in bar, upon which issues were formed, and a trial had, resulting in a verdict and judgment for the plaintiff.

Cockrell & Moyers, for appellant. M. Mil-lard, for appellee.

CARTER, J. (after stating the facts). The questions presented by counsel for appellant for our consideration, aside from questions of fact, which are not open to review in this court, are few, and may be briefly disposed of. Counsel seem to be under the impression that the appellate court decided that, by pleading in bar, appellant waived its right to assign for error the ruling of the trial court in sustaining the demurrer to the plea in abatement. We do not so understand the opinion of the appellate court. That alleged error seems to have been fully considered by the appellate court, and it was held that the demurrer was properly sustained. The rule is that, where the defendant pleads over to the merits in response to a judgment quod respondeat ouster, he does not waive the right to assign for error the decision of the court in sustaining the demurrer to the plea in abatement. *Delahay v. Clement*, 3 Scam. 201; *Weld v. Hubbard*, 11 Ill. 574; *Branigan v. Rose*, 3 Gilman, 123; *Harkness v. Hyde*, 98 U. S. 476; *Association v. Riel*, 38 Ill. App. 424; *Railroad Co. v. Hook*, 40 Ill. App. 547. This rule was not intended to be changed by anything that was said in *Furnace Co. v. Magill*, 108 Ill. 658.

Appellant's plea in abatement was clearly defective and insufficient, and for most of the reasons assigned in the demurrer. In the first place, the plea is uncertain and argumentative. As stated in the opinion of the appellate court by Presiding Justice Scofield, the plea, though not signed by either the defendant or counsel, purports in the body thereof to be by the Brotherhood of "Locomotive Firemen" instead of by the defendant, and does not show that these are the same organizations, except argumentatively, in the introductory part of the plea. It is then averred in the plea that the "Brotherhood Firemen" is not and never was a corporation; non constat the defendant may not have been. After the averment that the "Brotherhood Firemen" was not a corporation, but only a voluntary or mutual benefit association, the question is argumentatively raised in the plea whether or not service of process can be had

on such an association by service upon the officers of the subordinate lodges. There is no positive averment in the plea that the defendant is not a corporation, and liable as such to service in the manner provided by statute for the service of process upon corporations. Nor is there any averment that the "F. W. Arnold Lodge, No. 44," served as "subordinate lodge and agent of the defendant," was not such agent. So that, assuming, for the argument, that the defendant, the "Grand Lodge of the Brotherhood of Locomotive Firemen," was a corporation, the plea lacks the principally essential averment that the summons was not served upon its agent; or, if it were intended to be alleged that the defendant, whether properly designated the "Grand Lodge of the Brotherhood of Locomotive Firemen," or as the "Brotherhood of Locomotive Firemen," was not a corporation, but only a voluntary association, without corporate powers, and was not amenable to service had upon its agents under the laws of this state, it is sufficient to say that there was no such allegation in the plea, and it is only by inference or argument that it can be said that such a question is remotely suggested. It might be perfectly true that the "Brotherhood Firemen" was not a corporation, and still true that the defendant as named in the writ, or the "Brotherhood of Locomotive Firemen" mentioned in the introductory part of the plea, was. Every intendment must be taken most strongly against the pleader. If, then, in considering the plea, it be assumed that the defendant was a corporation, the plea is bad for not denying the agency of the subordinate lodge. The plea has other substantial defects, but it is unnecessary to lengthen this opinion in their enumeration. They were fully pointed out in the opinion of the appellate court. It follows that no error was committed in sustaining the demurrer to it.

At a subsequent term appellant moved the court to quash the return on substantially the same grounds set up in the plea in abatement. This motion was properly overruled. A plea in abatement is waived by interposing an insufficient motion founded upon the same matter. *Union Nat. Bank v. First Nat. Bank*, 90 Ill. 56; *Holloway v. Freeman*, 22 Ill. 197. The converse of this proposition is equally true, and we agree with the learned judge who wrote the opinion of the appellate court "that, after an insufficient plea in abatement has been disposed of, a motion to quash the service on substantially the same grounds will not be entertained."

Counsel for appellant insist that the principal question presented to this court, and the one they desired settled is, whether or not the officers of a local lodge are ex officio agents of the grand lodge, and whether the local lodge is such agent, and in their argument say: "We invite the attention and ask this court to determine how far a local lodge is the agent of a grand lodge, and to what extent; and in what case, if any, an officer of

a local lodge may or may not be considered the agent of a grand lodge." "There is nothing before us from which we can determine the question pressed upon our attention by counsel. The plea in abatement, as we have seen, was not sufficient to raise the question whether or not service was had upon an agent of appellant; and, the return of the officer being *prima facie* true, there is nothing more to be decided on that score. We had occasion in two recent cases to consider voluntary unincorporated associations as parties in suits brought by and against them. *Fitzpatrick v. Rutler*, 160 Ill. 282, 43 N. E. 392; *Gullfoil v. Arthur*, 158 Ill. 600, 41 N. E. 1009. But the questions decided in those cases are not presented in this.

Appellant filed pleas in bar, and contested its liability to appellee, thus fully entering its appearance in the cause; but no question of law arising under the issues formed on those pleas is presented for our decision. It follows, therefore, that the judgment of the appellate court must be affirmed. Judgment affirmed.

(163 Ill. 136)

BUMGARTNER et al. v. HALL et al.

(Supreme Court of Illinois. Nov. 10, 1896.)

MECHANIC'S LIEN—ENFORCEMENT—DECREE.

1. Where the wife ratifies and adopts a contract entered into by her husband for the construction of a building on her lot, the lot is subject to a mechanic's lien therefor.

2. A decree to enforce a mechanic's lien, ordering a sale of the land on default by defendants in the payment of a certain sum, does not impose a personal liability on defendants.

Appeal from appellate court, Third district. Action by Henry B. Hall and others against Mary A. Bumgartner and others. From a judgment of the appellate court (64 Ill. App. 45) affirming a decree for complainants, defendants appeal. Affirmed.

Patton, Hamilton & Patton, for appellants. Scholes & Selby, W. H. Colby, and W. F. Herndon, for appellees.

WILKIN, J. Appellees, who are carpenters and contractors, obtained a decree in the circuit court establishing a lien on a certain lot owned by Mary A. Bumgartner, one of the appellants, for the amount remaining unpaid to said appellees and their subcontractors for work performed and material furnished in and about the construction of a dwelling house on said lot. The court found, and recited in the decree, the following facts, as having been established by the evidence: "That Frank X. Bumgartner, with the knowledge and consent of Mary Bumgartner, his wife, entered into a contract in writing with the complainants for the erection of a dwelling house on the lot owned by the said Mary Bumgartner, and immediately after the making of said contract, in compliance with the terms thereof, the complainant commenced work upon said

building, and erected the same upon the said lot; that, after said contract was entered into as aforesaid, said Mary Bumgartner ratified, adopted, acknowledged, and accepted the said contract made by Frank X. Bumgartner, her agent, and from time to time during the progress of the work, until its completion, took charge of the construction of said building, and took the said contract as her own, and from time to time made changes in the plan and construction of the house, and claimed the house, and demanded its completion, and demanded possession of said house as her own, and took possession thereof, and moved into said house, and does now and ever since said time has occupied the same as her own property, with her family, and that the said Mary Bumgartner is liable to the complainants for the labor and materials furnished by them in the erection of the dwelling house upon such premises, and that there is due the complainant the sum of \$2,151.07, for which they are entitled to a lien upon the premises; that there are due certain subcontractors and material men, from complainants, for labor and material furnished in said building, various sums. It is therefore ordered, adjudged, and decreed that the complainants and said contractors have a lien on said premises for the amount so found due, and that the defendants Mary Bumgartner and Frank X. Bumgartner, within twenty days from this date, pay to M. U. Woodruff, special master in chancery of this court, the said sum, with interest from this date, to be distributed by said master between said subcontractors and complainants, after the payment of costs, according to their respective interests, and, in case of default, that said premises be sold at public vendue by said special master." We have carefully reviewed the testimony in this record, and find that it fully sustains the decree of the circuit court. The only question, upon the merits of this cause, is whether appellant Mary A. Bumgartner was bound by the contract set up in the bill, entered into by her husband with the contractors. We think that she must be so held, upon the ground that the husband, in making the contract, acted as her authorized agent, and especially upon the theory that she fully ratified his action by her conduct after its execution, and during the progress of the work. Her letters of July 24th and 29th, addressed to appellees, are wholly inconsistent with any other conclusion; and the explanation on her part, to the effect that she signed them because told by attorneys that it was necessary that she should do so, cannot result in destroying their binding force upon her. There was no error in providing in the decree that the husband and wife pay the amount found due within the time named. The effect of that order was not to make the husband personally liable, but simply to provide that

a sale of the property might be avoided by payment of the amount due by either him or his wife, the owner of the property. *Gochenour v. Mowry*, 33 Ill. 331. The judgment of the appellate court will be affirmed.

(163 Ill. 641)

ST. LOUIS, I. & E. R. CO. v. WARFEL.

(Supreme Court of Illinois. Nov. 11, 1896.)

TITLE—EVIDENCE—DEED—WAIVER OF OBJECTION
—COLOR OF TITLE—PAYMENT OF TAXES.

1. Objection, in ejectment for part of S. E. $\frac{1}{4}$ of section 30, township 7 N., range 9 E. of third P. M., in Jasper county, Ill., that such land is not properly described by a deed omitting from the description "township 7 N.," cannot be made for the first time on appeal.

2. Title through a person is not shown by a deed purporting to be executed by his widow and heirs, but it must be shown that he died intestate, and that the persons signing were his heirs and widow.

3. A deed by a railroad company of its railroad, as located and occupied by it, is color of title as right of way.

4. The effect of payment by a railroad, having color of title to a right of way through a section of land, of taxes assessed on the strip as a railroad track, is not avoided by prior payment by the paramount owner of taxes on the section, and the taking of a receipt for payment on the entire section, he in fact having paid no taxes on the part occupied by the railroad.

Error to circuit court, Jasper county; S. Z. Landes, Judge.

Ejectment by Uriah Warfel, against the St. Louis, Indianapolis & Eastern Railroad Company. Judgment for plaintiff. Defendant brings error. Reversed.

Gibson & Johnson, for plaintiff in error.
Fithian & Davidson, for defendant in error.

CRAIG, J. This was an action of ejectment brought by Uriah Warfel against the St. Louis, Indianapolis & Eastern Railroad Company to recover a strip of land 80 feet wide, commencing at the S. E. corner of the S. E. $\frac{1}{4}$ of section 30, township 7 N., range 9 E. of the third P. M., in Jasper county, Ill., extending thence in a northwesterly direction across said subdivision to the northwest corner of said subdivision. The parties, by agreement, waived a jury, and a trial was had before the court, resulting in a judgment in favor of the plaintiff. It appears from the record that the parties stipulated that the cause might be tried on abstracts of deeds and records, in the place of the original deeds. Under this stipulation the counsel for the plaintiff put in evidence an abstract of title which showed that the S. E. $\frac{1}{4}$ of section 30, township 7 N., range 9 E. of third P. M., in Jasper county, Ill., was entered by Daniel Pauls on September 6, 1852. The abstract also showed a conveyance of the quarter section from Daniel Pauls and wife to William Marsh on February 3, 1858. The abstract also showed a deed dated March 20, 1893, which purported to be from the widow and only heirs of W. Marsh, deceased, to Uriah Warfel, the plaintiff, conveying the quarter section of land. The description of

the land in the deed from Pauls to Marsh was defective, "township 7 N." having been omitted; and had the deed been objected to when it was offered in evidence, on the ground that the land was not properly described, the deed might have been excluded. But no objection was made to the introduction of the instrument in evidence on the ground that the land was not properly described, and the objection, when made for the first time on appeal, comes too late. If the defendant desired to rely on the objection on appeal, good faith required that it should make the objection on the trial, in order that the plaintiff might introduce other evidence to remove the objection. As it failed to do so the objection may be regarded as waived. It will be observed that Daniel Pauls, who entered the land, conveyed to William Marsh; and, as the plaintiff claimed title from the widow and heirs of William Marsh, it devolved on him to prove that William Marsh died intestate, and that the persons who conveyed to him were the widow and heirs at law of William Marsh. This was not proven. The plaintiff read in evidence a deed which purported to be executed by the widow and heirs of W. Marsh, but that was not sufficient. He was bound to go further, and prove the death of William Marsh, and that the persons who signed the deed were the heirs at law and widow of William Marsh. As the plaintiff failed to establish this fact, he did not then show title to the land; and for this reason, if for no other, he was not entitled to recover.

But it will not be necessary to rest the decision of the case upon this ground alone. The defendant, upon the trial in the circuit court, relied as a defense upon color of title, and seven successive years' possession, and payment of taxes. For the purpose of establishing this defense, the defendant proved that on or about the 20th day of July, 1880, the Springfield, Effingham & Southeastern Railroad entered into a contract with one Pierpont, who was then residing on the quarter section of land, and who claimed to be the agent of William Marsh, for a strip of land two rods wide over and across the land; that after the contract was made the railroad was constructed over and across the land. The defendant read in evidence, as color of title, a deed from the Springfield, Effingham & Southeastern Railroad Company to the Indiana & Illinois Southern Railroad Company, conveying the railroad as located in Jasper and other counties. The defendant also read in evidence a deed from the master in chancery to William Alley, trustee, dated February 3, 1890, also a deed from Alley to defendant dated February 6, 1890. The defendant then put in evidence a railroad tax book of Jasper county, which contained the following (page 61): "List of taxable property belonging to the Indiana & Illinois Southern Railroad Company, in the county of Jasper and state of Illinois, and the taxes levied thereon for the year 1885. What kind of property. Railroad

track. A strip of land extending on each side of said railroad track, and embracing the same, together with all the stations and improvements thereon, commencing at the point where said railroad crosses the east boundary line of Jasper county in entering said county, and extending to the point where said track crosses the west boundary line of said Jasper county in leaving the same, containing twenty-four miles. Total tax, eight hundred and twelve dollars and sixty-one cents." The defendant proved a like assessment of its railroad property in Jasper county for the years 1886, 1887, 1888, 1889, 1890, 1891, 1892, and 1893. The evidence also showed payment of taxes embracing the strip of land in controversy, by the defendant and its grantees, uninterruptedly, from 1885 to 1892, inclusive,—a period of eight years. The evidence also disclosed that the possession of the right of way conveyed by the deed was continuous in the defendant and its grantees from January, 1883, until the commencement of the action of ejectment,—a period of more than seven years. Section 6, c. 83, Hurd's Rev. St. 1895, provides: "Every person in the actual possession of lands or tenements, under claim and color of title, made in good faith, and who shall, for seven successive years, continue in such possession, and shall also, during said time, pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her title." The deed from the Springfield, Effingham & Southeastern Railroad Company to the Indiana & Illinois Southern Railroad company, bearing date January 27, 1883, was good color of title. The evidence sufficiently establishes possession under color of title for the period required by the statute to create a bar.

The only remaining question is in regard to the payment of taxes. The railroad company paid its taxes on its railroad property in Jasper county, including the strip of land occupied as a right of way on the quarter of land in question, each year from 1885 to 1893,—a period of more than seven years; and it is plain that this would be a sufficient compliance with the statute to establish a title under the limitation law, if the owner of the other title had done nothing during the seven years to arrest the running of the statute. It is, however, claimed that the owner of the other title, for several of the years relied upon by defendant, paid the taxes on the land before payment was made by the railroad company, and hence the payment by the railroad company was of no avail. Where the owner of the paramount title pays the taxes on a tract of land, the tax is extinguished, and any subsequent payment by a person holding color of title, or any other title, will be treated as a nullity. This rule is settled by *Morrison v. Kelly*, 22 Ill. 610, and *Ross v. Coat*, 53 Ill. 54. When the taxes have been paid, the burden created by the tax is removed from the land. There is

then no tax resting on the land to be paid, and an attempt to make a second payment is a nullity. The question to be determined, then, is whether the owner of the paramount title did make payment before payment was made under color of title. It appears that the owner paid on the S. E. $\frac{1}{4}$ of section 30, township 7 N., range 9 E., and took a receipt for payment on the entire quarter. In this way it is claimed that payment was made on the entire quarter, including the strip of land occupied by the railroad company as right of way. We do not, however, concur in this view. The strip of land occupied by the railroad company was assessed as railroad track, and the taxes growing out of the assessment thus made were paid each year by the railroad company. The strip of land, as to its assessment and taxation, and payment of taxes, was separated and removed from the quarter section of land of which it was a part; and although the owner of the paramount title, in the payment of taxes, obtained a receipt for the whole quarter, he in fact paid no taxes on that part of the quarter occupied by the railroad company as right of way. Our conclusion, therefore, is that, as to the strip of land actually occupied by the railroad company for seven successive years, the evidence introduced by the defendant was sufficient to defeat a recovery under the statute of limitations. The judgment will be reversed, and the cause will be remanded. Reversed and remanded.

(163 Ill. 557)

DAVIS et al. v. STAMBAUGH.

(Supreme Court of Illinois. Nov. 10, 1896.)

STATUTE OF FRAUDS—TRUSTS—CONSTRUCTIVE.

1. Under the statute of frauds, § 9 (1 Starr. & C. Ann. St. p. 1200), providing that all declarations of trust shall be void unless manifested by some writing signed by the party enabled to declare such trust, or by his last will, a will executed by the grantor long before the conveyance in trust, and afterwards revoked, is insufficient to take the case out of the statute.

2. A deposition, signed by a party, acknowledging that land was conveyed to him in trust, is insufficient to take the case out of the statute of frauds, where deponent pleads the statute as a defense to the enforcement of the oral declarations of trust.

3. The mere refusal of the grantee to carry out the oral declarations of trust, or denial of the existence of the trust, is not such fraud as to take the case out of the statute of frauds and raise a constructive trust.

Error to circuit court, McDonough county; Charles J. Scofield, Judge.

Bill by Artemisa Davis and others against Emma Stambaugh. There was a decree for defendant, and complainants bring error. Affirmed.

Wheat & Meloan and Sherman & Tunncliffe, for plaintiffs in error. Bally & Holly and Neece & Son, for defendant in error.

BAKER, J. The bill alleges, in substance, that on and prior to September 20, 1892, Adam Stambaugh was the owner of certain described

tracts of land, which were reasonably worth \$20,000; that he was 74 years of age, and suffering from an incurable disease, and anticipated an early death; that he reposed great confidence in his wife, Emma Stambaugh, to whom he had been married since September, 1863; that he desired and undertook to divide his real estate equitably between his said wife and his three children and heirs at law, Artemisa Davis, Sabina Griffith, and Hattie Rodgers; that said Adam and his said wife, Emma, joined in making an absolute deed for said lands to one Thomas J. Welch, and that Welch immediately conveyed the same, by like absolute deed, to said Emma Stambaugh; that said Emma stated to said Adam that, if he would convey the real estate to her, she would accept and hold the real estate, and dispose of the same in the manner to be directed at the time of the conveyance to her; and that he then informed her that he wanted the lands disposed of and divided as follows: The northwest quarter of section 12, etc., after his death, to be sold, and the proceeds equally divided between his said three children; and the southeast quarter of section 14, etc., and the other real estate, to be used and enjoyed by said Emma Stambaugh during her lifetime, and at her death to be equally divided among said three children. The bill charges that Adam Stambaugh was induced to make the conveyances, transferring title to her, by her oral promises to comply with his said wishes and requests, and that such promises were the sole inducement and consideration for the conveyances, and that since the death of said Adam Stambaugh the said Emma Stambaugh has refused to carry out the directions of the deceased, or to perform the promises whereby she induced him to convey the lands to her, and claims that she owns the same in fee, and has the absolute right to control, sell, and use the same in any manner she may see fit. The prayer of the bill is for a decree establishing and executing the trust, and for other and further relief. The answer of Emma Stambaugh admits that on September 20, 1892, Adam Stambaugh was seised in fee of the premises, and was in feeble health; denies that he tried to or did dispose of his lands for the purpose of dividing the same among his children; denies that she induced him to make the deeds by any promises, or that the premises were conveyed to her in trust, or because of any inducements held out by her; and alleges that said Adam voluntarily conveyed to her, for the purpose of investing her with the absolute fee, to use and dispose of as she might see fit, unincumbered with any trust of any kind whatever. And said answer sets up the statute of frauds, and insists upon and claims the benefit of the same. The cause was heard in the circuit court of McDonough county upon bill, answer, replication, and proofs, and a decree rendered dismissing the bill for want of equity.

Section 9 of the statute of frauds provides that "all declarations or creations of trusts or confidences of any lands, tenements or here-

ditaments shall be manifested and proved by some writing signed by the party who is by law enabled to declare such trust, or by his last will in writing, or else they shall be utterly void and of no effect." 1 Starr & C. Ann. St. p. 1200. It appears from the evidence that Adam Stambaugh on the 4th day of August, 1892, made a will; that afterwards, in the presence of the witnesses J. G. Rippetoe and S. D. Barrett, he tore said will into three pieces, announcing to them that he wanted said will destroyed, and expressly called upon them to witness that such was his wish. The first contention made by appellants is that this will, signed by Adam Stambaugh, is sufficient to take the case out of the statute. There are several reasons why this contention cannot prevail. In the first place, the will and its provisions were expressly revoked and destroyed by said Adam, as is shown by the evidence of said witnesses. In the second place, the deed to appellee, which was executed and acknowledged long after the making of such will, makes no reference to the will or its provisions, either directly or indirectly, and there is therefore no ground upon which it can be claimed that the conveyance to appellee was for the purpose of carrying into effect the provisions of the will. And, in the third place, the trusts claimed in the bill are very materially different from the disposition of the property that the will made provision for. According to the trusts alleged in the bill, the land in section 12, upon the death of Adam Stambaugh, was to be sold, and the proceeds of sale equally divided between the three children, whereas by the will there was "devised to Emma Stambaugh, out of said tract of land," the sum of \$2,000, to be hers absolutely, said land not to be sold until one year after the probating of the will, and the rents for said land for that year directed to be paid to Emma Stambaugh; and, according to the trusts alleged in the bill, said Emma Stambaugh was given a life estate in the real estate other than that in sections 12 and 14, with remainder to the three children, whereas, by the provisions of said revoked will, all the real estate, other than that in sections 12 and 14, was devised to said Emma Stambaugh, "to be hers absolutely."

It appears from the record that a notice was given to take the deposition of Emma Stambaugh; that she did not appear, but that her attorneys appeared, and stated that they would agree to take her deposition if complainants would waive her signature to the same. This offer was declined. Thereupon the court made an order appointing a commissioner to take her deposition, and ordering that she "appear and give her deposition in said cause," and that she "shall sign the same." The deposition was taken, and she signed it, prefacing such signature with this statement: "As I put my name to this paper, I protest against it. It is the first time I have disobeyed my husband in any of the business. To-day I would rather go to the penitentiary than to take the step I

am taking. But my attorney says the court will punish me if I don't. But I want the court to know I protest against doing this. I do not do it willingly." The substantial part of the deposition was this: "He [meaning Adam Stambaugh] said after he made those deeds to me—the squire came down and brought them, and my husband was in the bedroom, and I was not in the bedroom. After he came out I went into the bedroom, and my husband handed me the deeds and said, 'Here; take care of these deeds'; and after he handed me these deeds he said: 'Now, ma, take care of these deeds, and put them on record right away. Now, I believe you are perfectly honest, and, feeling that Sim is a notorious rascal, I have trusted this now in your hands. I want the first year's rent of both farms to go to good causes, and give you six years in which to settle this business up. As Sim has had \$1,000 more than the other girls (Mrs. Griffith and Mrs. Rodgers), I want them all equal.' The first year's rent of both farms was to go to good causes, and the second and third year's rent of the Davis farm was to go to Mrs. Griffith, and the fourth and fifth year's rent of the Davis farm was to go to Hattie, to make them equal with Mrs. Davis, who had received \$1,000 before, and the sixth year I was to have the rent of the Sim farm to repair the place, and at the end of the sixth year the Davis farm was to sell, and I was to have \$2,000, and the rest was to be equally divided between the three girls; and the home farm was to be mine my lifetime, and at my death was to be divided among the children equally; and this property (the Colchester property) was my own; and the timber was to be divided between the children equally after my death; and the furniture and all the household goods and money was left to me, without saying how to dispose of it. The rent money was not to be received by Mrs. Griffith and Mrs. Rodgers until the land is sold. He asked me to favor Mrs. Griffith by putting all her money in land. He wanted me to put her rent, and what the place sold for (her share of the place), in lands, and to be deeded to her and her heirs. When he got done telling me this, he said: 'Now, ma, you know Sim Davis has always felt head and shoulders above us all, and when I am dead and gone he will want to take this business into his hands. Now, will you lay your hand in mine that you will never sign any papers that will ever take this business out of your hands until it is settled?' And I laid my hand in his dying hand that I would never put my hand to a paper that would take it out of my hands until it was settled." The second contention of appellants is that this deposition, signed by Emma Stambaugh, the appellee, takes the case out of the statute, and establishes the trust. It will be conceded that the deposition cannot be given greater force than a sworn answer. And the doctrine is that, even if the defendant confesses the parol parts in his answer, yet, if he

at the same time sets up the statute of frauds and perjures in bar, he will have the benefit of the statute, and the court will not use the answer as a written declaration and proof of the trust. 1 Perry, Trusts, § 85, and authorities there cited; Story, Eq. Pl. § 763. The firmly-established doctrine is that, even where the answer confesses the parol agreement, if it insists, by way of defense, upon the protection of the statute, the defense must prevail as a competent bar. 2 Story, Eq. Jur. § 757. A party who insists upon his statutory right, and does not submit to waive it, cannot be legally bound by a declaration or creation of trust which the statute declares to be utterly void and of no effect.

It is urged that the evidence shows a constructive trust, or trust *ex maleficio*. The settled doctrine is that equity does not, in the face of the statute, enforce verbal promise. 2 Pom. Eq. Jur. § 1056. The mere refusal of a trustee to execute an express trust, or the denial of the existence of the trust by the trustee, does not constitute such fraud as takes the case out of the statute. *Perry v. McHenry*, 13 Ill. 227-236; *Lantry v. Lantry*, 51 Ill. 458; *Scott v. Harris*, 113 Ill. 447; *Stevenson v. Crapnell*, 114 Ill. 19, 23 N. E. 379; *Lawson v. Lawson*, 117 Ill. 98, 7 N. E. 84; *Moore v. Horsley*, 156 Ill. 36, 40 N. E. 323; *Champlin v. Champlin*, 136 Ill. 309, 28 N. E. 526; *Allmon v. Pigg*, 82 Ill. 149; *Rogers v. Simmons*, 55 Ill. 76. In order to take the case out of the statute, and establish a trust *ex maleficio*, the transaction by means of which the ownership of property is obtained must be in fact a scheme of actual deceit; in other words, there must be an element of positive fraud accompanying the promise, and by means of which the acquisition of the legal title is wrongfully consummated. 2 Pom. Eq. Jur. §§ 1055, 1056. Otherwise the statute of frauds would be virtually abrogated. There is no evidence in the record that brings the case now before us within the rule that there is a trust whenever a person acquires the legal title to land by means of an intentionally false and fraudulent verbal promise to hold the same for a certain specified purpose. *Larmon v. Knight*, 140 Ill. 232, 29 N. E. 1116; *Allen v. Jackson*, 122 Ill. 567, 13 N. E. 840; *Moore v. Horsley*, 156 Ill. 43, 40 N. E. 323; *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18; *Reed v. Peterson*, 91 Ill. 288; *Biggins v. Biggins*, 133 Ill. 211, 24 N. E. 516; *Lantry v. Lantry*, 51 Ill. 458. Even if it was or could be held that the case of plaintiffs in error is not within the statute of frauds, yet the trusts that they urge in their brief and argument, as shown by the evidence, are materially and essentially different from the trusts that are alleged in the bill. Allegations and proofs must correspond. A complainant in chancery is not entitled to a decree where one case is stated in the bill, and a different case is shown by the evidence.

The case before us affords a marked illus-

tration of the wisdom of the statute of frauds and perjuries. Adam Stambaugh died, and left, him surviving, his widow and three married daughters. The evidence of all four of them is contained in this record. No two of them agree, even substantially, as to what the verbal requests of Adam and the verbal promises of his wife were in respect to the final disposition to be made of the property conveyed by the deed. Each of the four states the requests and promises in the way that is most conducive to her own personal interest and advantage, and not one of the four would be content to have the supposed trusts established and enforced as testified to by either of the others. And the doctrine is that a trust will not be executed if the precise nature of it, and the proportions in which the cestui que trust are to take, cannot be ascertained. 1 Perry, Trusts, § 83, and authorities cited in notes. There was no error in rendering a decree that dismissed the bill out of court. It is affirmed. Affirmed.

(163 Ill. 566)

GLOVER et al. v. CONDELL.

(Supreme Court of Illinois. Nov. 10, 1896.)

WILLS—CONSTRUCTION OF—EXECUTORY GIFT—RELEASE OF INTEREST IN ESTATE—EFFECT ON CONTINGENT INTERESTS.

1. A will provided that, on the death of a son of the testator, the principal of a bequest made in trust, the income from which was to be paid him during his life, should be paid over to his heirs, but that, in case of his death without living heirs of his body, such bequest should be divided among the other children of the testator, in the same manner as provided for the distribution of the share of the testator's wife on her death. The will contained no provision for the division of the principal of the wife's share, but provided for the division of the income therefrom among the testator's children after her death. *Held*, that such provisions would be construed as requiring the division of the principal of the son's share, on his death without direct heirs, between the surviving children of the testator, in the manner provided for the distribution of the income from the wife's share.

2. In a will creating a trust fund, the income to be paid to a son of the testator during his life, and the principal to be paid over to his heirs by the trustees after his death, a further provision that, in case of his death without living heirs of his body, the fund should be divided among other children of the testator, is good as an executory bequest, being limited upon a definite failure of issue of the first taker.

3. A release and quitclaim, given by a son and legatee, of all his "claim, right, title, and interest in and to the estate" of his deceased father, does not pass his interest in an executory devise or gift under the will of his father, dependent on a future contingency.

4. A provision in a will, that if, in the settlement of the testator's estate, it should appear that the advancements and loans made by him to a son exceeded the son's share of the estate, then his share should be what he had already received, and his notes should be canceled and delivered to him, refers to the settlement of the estate in the due course of administration in the probate court, and not to the final execution of the trusts created by the will, and to the "share" of the estate given the son directly by the will; and the fact that the advancements to

the son exceeded such share does not debar him from his rights in an executory contingent bequest afterwards accruing under the will on the death of a brother.

Appeal from appellate court, Third district.

Action in equity by Mary J. Glover and others against Moses B. Condell and others. From a decree of the appellate court (56 Ill. App. 107) reversing that of the circuit court, plaintiffs appeal. Reversed.

This is a bill filed on February 13, 1893, by Mary J. Glover and Emily Montgomery, daughters of Thomas Condell, deceased, and devisees under his will, and Winthrop Sudduth, who was appointed successor in trust under said will, on May 14, 1892, by decree of the circuit court of Adams county, against Moses B. Condell and Thomas E. Condell, sons of said Thomas Condell, and devisees under his will, alleging, among other things, "that by virtue of advancements to and releases by said Moses B. and Thomas E., and the matters alleged, neither of them had at the death of said Thomas Condell, nor now have, any interest remaining in or to the estate of said Thomas Condell, deceased, under his will and codicil, either directly or by way of contingent remainder, upon the death of Albert B. Condell," hereinafter named; and further alleging that, "by reason of the questions arising concerning the construction of said will and codicil, and said releases, upon the matters above stated, your orator, Winthrop Sudduth, trustee, is in doubt to whom to pay the interest accrued on the trust fund of \$14,000 since October 30, 1892, the date of the death of said Albert B. Condell, who was entitled to the interests of said fund while he lived, and whether he should pay over the principal of, or only the interest upon, said fund to the parties entitled, and he desires the construction of said will, as to his duties as trustee thereunder, and to administer the trusts of said will under the direction of the court"; and praying "that said will and codicil and releases may be construed by the court, and trusts of said will carried into effect, and the rights and interests of all the parties under said will may be ascertained and declared; that the trusts of said will and codicil may be performed and carried into execution by and under the direction of the court; that the duties of said trustees, as to the management, investment, and distribution of the said trust fund under said will be determined; that an account may be taken,—with prayer for general relief." Default was entered against Thomas E. Condell. Moses B. Condell filed an answer denying the material allegations of the bill, and denying that he had no further interest in the fund in litigation. The circuit court, upon a hearing, declared and decreed that the two sums of \$14,000 held by Sudduth, as trustee, respectively, for Emily E. Montgomery and Albert B. Condell, were and are parts of the testator's estate, and that Moses B. Condell and Thomas E. Condell, having received by way of advancements amounts in excess of the one-sixth share each of the

testator's estate, had no interest or right whatever in the fund accruing to Albert B. under the will, but that all interest and right in such trust fund vested in Mary J. Clover and Emily Montgomery, to whom the court decreed the trustee should pay and disburse such fund in accordance with the provisions of the will. Moses B. Condell prosecuted an appeal from the decree of the circuit court to the appellate court. The appellate court reversed the decree of the circuit court, and remanded the cause, with directions "to the chancellor to declare, by a decree to be entered in the cause, that the fund created by a will in favor of Albert B. Condell, and upon which he was entitled to receive the interest accruing during his life time, upon the death of said Albert B., constituted a trust fund, to be held by a trustee, acting under the provisions of the will of Thomas Condell, deceased, and to decree that such fund shall be administered as follows: Such trustee shall invest the fund in stocks, or cause it to be loaned out at interest, with good security, and shall pay the interest or dividends derived therefrom to Mary J. Glover, Emily Montgomery, Moses B. Condell, and Thomas E. Condell, in equal parts, unless a greater proportion shall be required to be paid to some one of them to keep them from want, or to furnish them with the necessities of life for themselves or children, in which event said trustee shall apply to a court sitting in chancery for specific directions as to his duties." The present appeal is prosecuted from the judgment of the appellate court.

The material facts, as set up in the pleadings and as established by the proofs, are substantially as follows: Thomas Condell died on October 11, 1880, in Lyon county, Kan., leaving a will, dated December 23, 1865, and a codicil thereto, dated August 19, 1867.

The will is as follows:

"I, Thomas Condell, of Sangamon county, in the state of Illinois, do make and ordain this, my last will and testament, in manner following, to wit:

"First. I devise to my wife, Elizabeth H. Condell, so much of my household and kitchen furniture and provisions as she may think fit to retain for her own use.

"Secondly. I direct that my executors, hereinafter named, shall sell all the rest of my estate, real and personal, which I may leave at my death, except my homestead, on such terms as they may deem advisable; and they are also authorized to sell my homestead, with the consent of my wife, Elizabeth H. Condell, and to make all necessary and proper conveyances of such real estate as they may sell.

"Thirdly. Out of the first proceeds of my estate my executors are to pay to my wife, Elizabeth H. Condell, such an amount as will, with the amount charged to her in the account attached to this will, make up the sum of five thousand dollars, to be at her absolute disposal.

"Fourthly. All the remainder of the proceeds of my estate, including cash on hand, debts due to me, stocks, or bonds, to which shall be

added all the advances I have heretofore made to each one of my children or shall hereafter make from time to time, as the same are or hereafter may be charged and set forth in the account attached to this will, which account will be charged in my own handwriting, and the sum of my estate then on hand, composed of all advances made to my children, debts due to me by my children for money loaned them, debts due to me by other persons, stocks, bonds, etc. (except the specific sum devised to my wife), shall then be divided into six equal parts,—one part for the use of my wife, and one part for the use of each of my children, Moses B. Condell, Mary Jane Glover, Thomas E. Condell, Emily Montgomery, and Albert B. Condell, to be disposed of as hereinafter directed.

"(a) The sixth part devised to my wife is to be held in trust by my executors, hereinafter named, and invested in stocks, or loaned out at interest, with good security, during the lifetime of my wife, and the interest or dividends thereof are to be paid to my wife as they may accrue and are received, for her own use during her natural life; and after her death the same is to be held in trust by my executors as trustees, to be invested in stocks, or loaned out at interest, with good security, and the interest or dividends is to be divided amongst my children in such sums to each, and in such manner as she, my wife, may direct by will, as she may think their circumstances may require; and if my wife should not make a will, then my executors, as trustees, shall hold the same in trust, and pay the interest or dividends derived therefrom to my children in such proportions as their circumstances may require, to keep them from want or to furnish them the necessities of life for themselves and children.

"(b) The parts devised for the use of each one of my children are to be made up of the amounts charged in the account kept and to be kept as aforesaid against each one of them, and such sum of money, or notes, or stocks, as will make the one-sixth part as aforesaid, and so much is to be paid at once to Moses B. Condell as will, with the advances charged to him, amount to one-half of his sixth part as aforesaid; and the other half of the sixth part devised to him is to be held by my executors as trustees, and in trust for him, and is to be loaned out on good security, or kept invested in stocks, and the interest or dividends is to be paid over to him as the same accrues and is received during his natural life, and after his death the principal of his share or part is to be paid over to his heirs.

"(c) And so much is to be paid over at once to Mary Jane Glover as will, with the advances charged to her, amount to one-third of her sixth part as aforesaid; and the other two-thirds of her sixth part as devised to her is to be held by my executors as trustees, and in trust for her, and is to be loaned out on good security, or kept invested

in good stocks, and the interest or dividends is to be paid over to her as the same accrues and is received during her natural life, and after her death the principal of her share or part is to be paid over to her heirs.

"(d) And so much is to be paid at once to Thomas E. Condell as will, with the advances charged to him, amount to one-third of his sixth part as aforesaid; and the other two-thirds of his sixth part devised to him is to be loaned out on good security, or kept invested in stocks, and the interest or dividends is to be paid over to him as the same accrues and is received during his natural life, and after his death the principal of his share or part is to be paid over to his heirs.

"(e) And so much is to be paid at once to Emily Montgomery as will, with the advances charged to her, amount to one-third of her sixth part as aforesaid; and the other two-thirds of the sixth part devised to her is to be held by my executors as trustees, and in trust for her, and is to be loaned out on good security, or kept invested in stocks, and the interest or dividends is to be paid over to her as the same accrues and is received during her natural life, and after her death the principal of her part or share is to be paid over to her heirs.

"(f) The part devised to my son Albert B. Condell is to be kept by my executors entire at interest or invested until he shall arrive at legal age, and so much of the interest or dividends as may be necessary to his support and to give him a good education shall be applied to that purpose by my executors; and when he shall arrive at lawful age he is to receive one-third of his sixth part, and the other two-thirds of the sixth part devised to him is to be held by my executors as trustees, and in trust for him, and is to be loaned out on good security, or kept invested in stocks, and the interest or dividends is to be paid to him as the same accrues and is received during his natural life, and after his death the principal of his share or part is to be paid to his heirs.

"(g) If, by misfortune, affliction, or otherwise, any of my children should not make a proper use of the income to be derived from their trust fund, my executors and trustees are hereby directed and authorized to use said income in such a manner as will insure to them the necessities of life and to keep them from want. In the event of the death of any of my children without the living heirs of their bodies, their share of my estate shall be added to the sum held in trust for the benefit of my wife, Elizabeth H. Condell, during her natural life, and after her death the same shall be divided amongst my children in the same manner as is provided for the distribution of her share.

"I do hereby appoint my wife, Elizabeth H. Condell, my son-in-law, John M. Glover, John S. Condell, William I. Condell, John T. Peters, and Charles W. Matheny executors

of this my last will and testament, and I direct that they shall not be required to give any bond or security."

The codicil to the will is as follows:

"If, in the settlement of my estate according to the provisions of the foregoing will, it should appear that the amount advanced and loaned to my son Moses B. Condell should exceed his share of my estate, then his share shall be what he has already received, and his notes shall be canceled and delivered to him. In the settlement with the share of my son Thomas E. Condell, if he should die without heirs except his daughter, Nellie, his share of my estate shall revert to my wife Elizabeth H. Condell's share, and be held for her use as is provided for her share, except any sum, not exceeding five thousand dollars, she or my executors may see fit to give to his daughter, Nellie, in trust for his said daughter, Nellie, the interest of which is to be paid to the said Nellie annually, for her individual use, and no other purpose whatever."

The testator's wife, Elizabeth H. Condell, died intestate in his lifetime, to wit, on December 5, 1876. He left no widow, but five children, namely, Moses B. Condell, Mary J. Glover, Thomas E. Condell, Emily Montgomery, and Albert B. Condell (the latter since deceased), his heirs and legatees under his will. Charles W. Matheny, one of the executors named in the will, died in the lifetime of the testator, and three of the executors therein named, John S. Condell, William I. Condell, and John T. Peters, declined to act, and filed written renunciations. The testator owned, at his death, about 5,800 acres of land and personal property in Lyons county, Kan., and also other real and personal estate in Sangamon county, Ill. The will and codicil were admitted to probate in Lyons county, Kan., on December 6, 1880, and letters of administration with the will annexed were issued to J. Jay Buck of that county. On February 16, 1881, a duly-authenticated transcript of said will and codicil were presented to and spread upon the records of the county court of Sangamon county, Ill.; and on that day and in that court John M. Glover (who has since deceased), the husband of Mary J. Glover, took out letters testamentary and qualified as executor and trustee under said will; and on November 28, 1881, he was empowered by said probate court of Lyons county, Kan., to act as trustee under said will there, and did so act. The advancements made to Moses B. Condell, as charged in the account attached to the will, amount to \$10,348.70, upon \$5,348.70 of which he was to be charged interest at the rate of 10 per cent. per annum from January 1, 1869. The advancements made to Mary Jane Glover, as charged in said account, amount to \$5,700, with interest at 10 per cent. per annum on \$300 thereof from September 29, 1890, on \$300 thereof from January 1, 1871, and on \$100 thereof from February 28, 1871. The advancements made to Thomas E. Condell and

Emily Montgomery amount to \$10,000, \$5,000 to each. It would appear that there was advanced to Albert B. Condell about \$4,500. The record shows that notes were executed by Moses B. Condell to his father before the date of the will, amounting to \$22,840, and after the date of the will, and up to February 2, 1871, amounting to \$9,433, aggregating \$32,273, and all drawing interest at the rate of 10 per cent. per annum. Other advances were made to Thomas E. Condell, it being found by the decree that there was about \$35,000 chargeable upon his share.

On January 19, 1882, Mary J. Glover, Emily Montgomery, and Albert B. Condell entered into the following agreement:

"This article of agreement, signed, sealed, and delivered by and between Mary Jane Glover, wife of John M. Glover, of La Grange, Missouri, Emily Montgomery, of Muncy, Pennsylvania, and Albert B. Condell, of New York City, witnesses: First. That Thomas Condell, late of Lyons county, Kansas, left at his decease only five children, viz. Moses B. Condell, of Sangamon county, Illinois, Thomas E. Condell, of California, said Mary J. Glover, Emily Montgomery, and Albert Condell. That said Moses and Thomas E., in the lifetime of their father, received from him such advancements that neither of them is now entitled to any part of his estate, and the said estate is to be divided entirely between said Mary, Emily, and Albert. Second. That said Mary, Emily, and Albert have come to the following agreement in respect to said estate: That said Emily and Albert have agreed with said Mary that they will make, sign, and seal an instrument of writing, in form of their deed, duly acknowledged, purporting to convey with general warranty to said Mary, for her sole, separate, and exclusive use, in consideration of forty-two thousand dollars, all their interest, real, personal, and mixed, in said estate of Thomas Condell, deceased, and place the same in the hands of U. S. Penfield, Esq., as cashier of the First National Bank of Quincy, Illinois, as an escrow, and to be delivered to said Mary, as their deed, on said Mary's depositing with said bank the sum of seven thousand dollars to the credit of the said Emily Montgomery and the further sum of six thousand four hundred and fifty dollars to the credit of said Albert B. Condell. Third. That said Mary Jane Glover is to sell and convey and dispose of the property so conveyed to her, for such price, for cash or on credit, and in such manner, as will secure to said Emily and Albert the further sum of fourteen thousand dollars each, with six per cent. interest from sale, and satisfy and discharge all debts and liabilities of the said estate of Thomas Condell, deceased. As soon as said Mary shall sell and dispose of said property, for cash or on credit, the unpaid purchase money being secured by notes and deed or deeds of trust on the property sold, she shall turn over in cash, or in paper, or in cash and paper, so secured, to the trustee appointed

under the will of Thomas Condell by the probate court of Lyons county, Kansas, the sum of fourteen thousand dollars for the use of said Emily and fourteen thousand dollars for the use of said Albert, according to the said will. Fourth. That all the residue of the proceeds of sale and of the estate of said Thomas Condell, after paying the sum of twenty-one thousand dollars each to said Emily and Albert as mentioned, and after paying all debts and liabilities of said estate of Thomas Condell, deceased, shall belong absolutely to said Mary Jane Glover, in consideration of her services herein to be rendered by her or her agent. In testimony whereof, the said Emily Montgomery, Albert B. Condell, and Mary Jane Glover have hereunto set their hands and seals this 19th day of January, 1882. Mary J. Glover. [Seal.] Emily Montgomery. [Seal.] A. B. Condell. [Seal.]"

In February, 1882, Mary J. Glover paid to Emily Montgomery \$7,000, and to Albert B. Condell \$6,450, through the First National Bank of Quincy, in accordance with said agreement, and thereupon said Emily and Albert conveyed to said Mary all their right, title, and interest in and to more than 5,000 acres of the lands in Kansas, and in and to the real and personal estate of said testator. Thereafter said lands were sold by the trustee and administrator to Hiram and William Miller, and the purchase money secured by note or notes and trust deed upon the lands. Buck, administrator, made his final settlement in said probate court in Kansas on July 3, 1883, and was discharged; but said Glover was not formally discharged, although he fully performed the trusts of the will in Lyons county, Kan. Mary J. Glover, on the sale of said lands and the gradual payment therefor, turned over to said John M. Glover, as trustee, \$14,000 for the use of said Emily and \$14,000 for the use of said Albert, by delivering to him the Miller notes and trust deed. Mary J. Glover received nothing on her share of the estate; the advancements and loans to her, with interest, being about equal to her share, except as said agreement provided. On April 6, 1883, John M. Glover made his final report as executor in the Sangamon county circuit court, showing that the debts of the estate and costs of administration had been all paid, leaving a balance due him, and his report was recorded, but he was not formally discharged as executor, and remained as trustee under the will. The trust fund of \$14,000 belonging to Emily Montgomery was invested and arranged for satisfactorily to the parties in interest, and is not here in controversy. John M. Glover, as trustee, held the trust fund of \$14,000, being the two-thirds portion of the share of Albert B. Condell, and kept the same invested in the purchase-money notes and trust deed and other securities. John M. Glover died intestate on November 11, 1891, in Missouri, leaving the said Mary J. Glover, his widow, and three chil-

dren. One Kendrick was appointed administrator of his estate in Missouri, on January 30, 1892, but no administrator of his estate was appointed in Illinois. Mary J. Glover had in her hands the trust fund of \$14,000 and interest belonging to Albert B. Condell, \$10,000 thereof being in one of said purchase-money notes and trust deed securing the same, and \$4,000 thereof being in a note of the Bonnett-Vance Stove Company. Upon bill filed by her in the Adams county circuit court, the appellant Sudduth was appointed trustee, as already stated, and the notes and securities, representing the fund of \$14,000 set apart for the use of said Albert, were indorsed and delivered to said Sudduth as trustee. On October 30, 1892, Albert B. Condell died intestate and unmarried, leaving no child or children, or descendant or descendants of any child or children. The said fund of \$14,000, with interest since his death, is now in the hands of said Sudduth as trustee.

On March 14, 1883, more than nine years before the death of Albert B. Condell, Moses B. Condell and his wife executed the following quitclaim or release:

"This indenture, signed, sealed, and delivered by Moses B. Condell and Helen M. Condell, his wife, of Sangamon county, Illinois, to Mary J. Glover, of La Grange, Missouri, witnesses: That the said Moses B. Condell and wife, in consideration of \$829.35 paid to the Marine & Fire Insurance Company of Springfield, Illinois, the receipt whereof is hereby acknowledged, do hereby give, grant, quitclaim, and release to the said Mary J. Glover all their claim, right, title, and interest in and to the estate of the late Thomas Condell and of the late Elizabeth H. Condell, lands, real estate, and personalty, wherever situated, to have and to hold to her sole, separate, and exclusive use, and to her heirs, forever. In testimony whereof, we have hereunto set our hands and seals this 14th day of March, 1883. M. B. Condell. [Seal.] H. M. Condell. [Seal.]"

Theretofores, in March, 1882, Thomas E. Condell executed a similar quitclaim or release to Mary J. Glover. It is conceded that Moses B. Condell, Thomas E. Condell, Mary J. Glover, and Emily Montgomery are still living. The amounts advanced to Moses B. and Thomas E. Condell, and the amounts due upon the notes executed by them, with interest, exceeded the two shares, of one-sixth each, which were set apart for their use under their father's will.

Carl E. Epler, for appellants. Govert & Pape and Patton, Hamilton & Patton, for appellee.

MAGRUDER, C. J. (after stating the facts). There are now in the hands of the appellant Sudduth, as trustee, notes and securities amounting to \$14,000, together with interest on said sum since October 30, 1892, which repre-

sent two-thirds of the sixth part devised to Albert B. Condell, deceased, under the will of his father, Thomas Condell. The question in this case is as to the ownership of the trust fund thus held by the trustee. The appellee, Moses B. Condell, claims that, since the death of his brother Albert B. Condell, he is entitled to a proportionate share in the fund in question as one of the four surviving children of the testator. The appellants Mary J. Glover and Emily Montgomery claim that they are entitled to the whole of said fund, and that neither the appellee nor Thomas Condell has any interest therein. The appellant Sudduth, as trustee, asks the instruction of the court as to the disposition to be made of the fund, both as to the income derived from the investment thereof, and as to the principal of the fund itself, and not only as to the persons between whom the fund should be divided, but also as to the proportions in which the division should be made. The grounds upon which appellants base their contention that the appellee has no interest in the fund are: First, that he is barred from asserting such interest by the quitclaim deed, or release, dated March 14, 1883, and executed by himself and his wife; and, second, that any interest which he would otherwise have had in the fund was extinguished by advancements made to him by the testator. In seeking a solution of the question involved, the subject will be considered from the two standpoints of the release and the advancements.

1. As to the release, or quitclaim deed: In order to determine whether or not the instrument of March 14, 1883, had the effect of cutting off appellee's claim to any part of the fund in question, it will be necessary to consider what is the character of the interest which the surviving children of the testator took in the share of Albert B. Condell after his death without living heirs of his body. The nature of this interest is fixed by the terms and provisions of the will itself. Although the fund of \$14,000 grew out of what was done under the agreement of January 19, 1882, yet, by the terms of that agreement, the fund was turned over to the trustee appointed under the will, for the use of Albert. "according to the will," and it is conceded by both sides that the will operates to control the disposition of the fund. What, then, are the terms and provisions of the will, so far as they bear upon the interest of the testator's children in the two-thirds share of Albert after he died without living heirs of his body? The will directs the executors to sell all the estate, real and personal, except so much of the household furniture, etc., as the testator's wife might think fit to retain; and all the legacies are to be paid out of the proceeds of the sale. The will is, therefore, to be regarded as a devise of money or personalty, and not of land. *Crerar v. Williams*, 145 Ill. 625, 34 N. E. 467. The legacies in the will of Thomas Condell to his wife, Elizabeth H. Condell, failed or lapsed by reason of her death before the death of the tes-

tator. This is true, not only of the provision for the payment to her during her life of the interest or dividends on the one-sixth part of the estate mentioned in paragraph (a) of the fourth clause of the will, but also of the provision for adding the share of any child dying without living heirs of his body to the sum held in trust for her benefit during her natural life, as contained in paragraph (g). The general rule is that, if a legatee dies before the testator, the legacy lapses, because the gift cannot take effect until the death of the testator, and, if the legatee is then dead, he cannot be benefited thereby. 2 Woerner, Adm'n, § 434; 13 Am. & Eng. Enc. Law, p. 28. This rule, however, does not extend to a legacy given over after the death of the first legatee. Prescott v. Prescott, 7 Metc. (Mass.) 141. Paragraph (f) of the fourth clause of the will provides that two-thirds of the sixth part devised to Albert B. Condell, or, as the case now stands, the fund of \$14,000, "is to be held by my executors as trustees, and in trust for him, and is to be loaned out on good security, or kept invested in stocks, and the interest or dividends is to be paid to him as the same accrues and is received during his natural life, and after his death the principal of his share or part is to be paid to his heirs." The second sentence of paragraph (g) of the fourth clause provides that, "in the event of the death of any of my children without living heirs of their body, their share of my estate shall be added to the sum held in trust for the benefit of my wife, Elizabeth H. Condell, during her natural life, and after her death the same shall be divided amongst my children in the same manner as is provided for the distribution of her share." Because the share of Albert, dying without living children of his body, could not be added to the sum held in trust for the benefit of the testator's wife, by reason of her death before the death of the testator, it does not follow, that the last provision, to wit, "The same shall be divided amongst my children in the same manner as is provided for the distribution of her share," is to be regarded as nugatory and of no effect. We have been referred to no authority so holding, nor have we been favored with any argument in favor of such a position. On the contrary, counsel on both sides have treated the provision in regard to division among the children as being in force, though they differ as to its proper construction. We shall, therefore, consider the last sentence of paragraph (g) as though it read as follows: "In the event of the death of any of my children without living heirs of their body, their share of my estate * * * shall be divided amongst my children in the same manner as is provided for the distribution of her share."

What is meant by the expression, "in the same manner as is provided for the distribution of her share"? The reference here is evidently to paragraph (a) of the fourth clause, where one-sixth part of the remainder of the estate is required to be invested by the executors, and the interest or dividends thereof to

be paid to the wife during her life, and where, in the event of the wife dying without a will, as was the case here, it is provided as follows: "Then my executors, as trustees, shall hold the same in trust, and pay the interest or dividends derived therefrom to my children in such proportions as their circumstances may require to keep them from want, or to furnish them with the necessities of life for themselves and children." It will be noticed that paragraph (a) only provides for the payment of the "interest or dividends" derived from the wife's share to the children. It nowhere provides for the disposition of the principal of the one-sixth share set apart for the use of the wife during her life. Whether such principal was or was not intestate property, it is unnecessary for us to determine, as no question is made as to the wife's share. Its consideration is only important as bearing upon the meaning of paragraph (g), which directs that Albert's share shall be divided "in the same manner as is provided for the distribution of her [the wife's] share." There is no provision for the distribution of the wife's share, but only a provision for the distribution of the interest or dividends derived from that share. We do not understand that the words, "the same," as used in the above-quoted portion of paragraph (g), refer to the income of Albert's share, or to the interest or dividends therefrom; but we think that they refer to the principal of Albert's share, as referred to in paragraph (f). Paragraph (g) says: "In the event of the death of any of my children without living heirs of their body, their share of my estate shall be added to the 'sum' held in trust for the benefit of my wife during her natural life," etc. The words "their share of my estate," as here used, must mean the principal of the share, because it is to be added to the "sum"—that is, the "principal"—held in trust for the wife. The income of the son's share would not be added to the principal of the wife's share. It is the share itself which is to be added to the amount invested for the wife's use. Paragraph (g) then proceeds as follows: "And after her death the same shall be divided." Clearly, in the grammatical construction of the sentence, the words "the same" refer back to the words "their share of my estate,"—that is to say, to the principal of the share of the deceased child. As the principal of the two-thirds share of the deceased child dying without living heirs of his body is thus to be divided among the children in the same manner as is provided for the distribution of the wife's share, and as no provision is made for the distribution of the wife's share, it follows either that paragraph (g) provides for no mode of dividing the deceased child's share among the surviving children, or that such deceased child's share is to be divided among the children in the same manner as is provided for the distribution of the income or interest or dividends of the wife's share. We are inclined to regard the latter construction as the

proper one. There is here evidently an omission by the testator of the words "of the income," or "of the interest," or "of the dividends." With the omission supplied, the last clause of paragraph (g) would read as follows: "The same shall be divided amongst my children in the same manner as is provided for the distribution of the dividends of her share." This harmonizes with the previous part of the will, to wit, paragraph (a), where provision is made for the distribution of the dividends of the wife's share. Jarman, in his work on Wills (volume 2, Rand. & T. 5th Am. Ed., top page 60), says: "It is established that, where it is clear, on the face of a will, that the testator has not accurately or completely expressed his meaning by the words he has used, and it is also clear what are the words which he has omitted, those words may be supplied, in order to effectuate the intention, as collected from the context." Kellogg v. Mix, 37 Conn. 243. The insertion of the words above indicated effectuates the clear intention of the testator, and is necessary to give expression to his meaning. Without them, there is manifest ambiguity upon the face of the will. 2 Jarm. Wills (Rand. & T. 5th Am. Ed.) p. 60, note 1.

After these preliminary explanations, the provision of the will in regard to the disposition of the fund in controversy, which represents two-thirds of the sixth part devised by the testator to Albert, is substantially and in brief as follows: The executors, as trustees, are to hold said two-thirds in trust for Albert, and lend it out or invest it, and pay him the interest or dividends therefrom during his life, and, after his death, pay the principal thereof to his heirs; but, in the event of his death without living heirs of his body, the same is to be divided among the children of the testator in such proportions as their circumstances may require to keep them from want, or to furnish them with the necessities of life for themselves and children. The question again recurs: What interest in the two-thirds of Albert's share did this provision of the will give to the children of the testator after the death of Albert without living heirs of his body? Leaving, for the present, the consideration of the original gift, it cannot be said that there are any words in the gift over which import an indefinite failure of issue, or contravene the rule against perpetuities. The language of the gift over is that, "in the event of the death of any of my children without living heirs of their body," etc. The words "without living heirs of their body" import a definite failure of issue, and the language used refers to the death of any one of the children of the testator without heirs of his body, or issue, living at the time of his death. Smith v. Kimbell, 153 Ill. 368, 38 N. E. 1029. Where the limitation over is upon the first taker "dying without issue living," the will means issue living at the death of the first taker, and the limitation over is not too remote, but is good as an executory devise.

4 Kent, Comm. (12th Ed.) marg. p. 277. Where the bequest is of personal property, slight circumstances and other expressions in the will will be laid hold of as indications of an intention that a limitation over on death without issue shall take effect at a definite time, to wit, at the death of the first taker. Bedford's Appeal, 40 Pa. St. 18; Ladd v. Harvey, 21 N. H. 514; 4 Kent, Comm. (12th Ed.) marg. p. 282. The construction of the words of the gift over in the case at bar as importing a definite failure of issue is supported, not only by the use of the qualifying word "living," but also by the fact that the share of any one of the children dying without living heirs of his body is to be divided among the remaining children of the testator. These children are mentioned by name in the will, and belong to the same class as the first taker, and must be regarded as his survivors, or persons in being at the time of his death. As was said by Mr. Justice Strong, in Bedford's Appeal, supra: "It has often been held that a limitation over, by will, to survivors, or persons in being, after the death of the first taker without issue, raises a strong presumption that the testator did not contemplate an indefinite failure of issue." A gift over upon a definite failure of issue does not alter the construction of the preceding limitation, but ingrafts upon it an executory devise, to operate upon the happening of the event specified. 11 Am. & Eng. Enc. Law, p. 924. As applied to land, an executory devise is "such a limitation of a future estate or interest in lands as the law admits in the case of a will, though contrary to the rules of limitation in conveyances at common law." 2 Washb. Real Prop. (5th Ed.) marg. p. 341. One species of executory devise, as applied to lands, is "where a fee simple is devised to one, but is to determine upon some future event, and the estate thereupon to go over to another." Id. p. 344. Or, stated more generally, one species of executory devise relative to real estate is "where the deviser parts with his whole estate, but, upon some contingency, qualifies the disposition of it, and limits an estate on that contingency." 4 Kent, Comm. marg. p. 268. Limitations over upon the death of the first taker without issue are construed as executory devises on definite failure of issue after an estate in fee simple. 2 Jarm. Wills (Rand. & T. 5th Am. Ed.) p. 485. Thus, a devise to A. and his heirs, with a gift to B. in case A. dies without issue surviving him at the time of his death, gives B. an executory devise. 20 Am. & Eng. Enc. Law, p. 920, and cases cited in note 1.

Substantially the same rule applies to personal property. It has been said that all future interests in personalty, whether vested or contingent, and whether preceded by a prior interest or not, are in their nature executory, and fall under the rules by which that species of limitation is regulated. 20 Am. & Eng. Enc. Law, p. 930. Preston divides executory limitations of personalty into three kinds, and says that the second sort is where there is a complete disposi-

tion of the property, and there is a substitution of another person to take in some event which is to defeat or abridge the former gift. 2 Prest. Abst. 142, 143; 20 Am. & Eng. Enc. Law, p. 936. Here, the original disposition of the two-thirds part of Albert's share was that it should be held in trust by the trustees, and invested, and the interest or dividends paid to him during his life, and after his death the principal of his share was to be paid to his heirs. It is a general rule that, where there is a gift of personalty to A. and his heirs, A. will take the absolute interest. Strictly, the words "heirs" and "heirs of his body" are inapplicable to personal property. Whereas real estate is conveyed to a man, his heirs and assigns, personal property is assigned to him, his executors, administrators, and assigns. So, where there is a gift to A. and his representatives, A. will take the absolute property. So, also, a gift to A. for life, and then to his personal representatives, will give A. the absolute property. Williams, Pers. Prop. marg. pp. 242, 243; Theob. Wills (2d Ed.) p. 371; 29 Am. & Eng. Enc. Law, pp. 436, 437. This rule applies where the personal property is in the hands of trustees. "Thus, if money or stock be settled in trust for A. for life, and after his decease in trust for his executors, administrators, and assigns, A. will be simply entitled absolutely, in the same manner as a gift of lands to A. for his life, with remainder to his heirs and assigns, gives him an estate in fee simple." Williams, Pers. Prop. marg. p. 244. This is an application by analogy of the rule in Shelley's Case to personal property. 22 Am. & Eng. Enc. Law, p. 512, and cases cited in note 3. Though, strictly speaking, this rule has reference to real estate only, yet it is often applied to grants of personalty by way of analogy, for the purposes of construction, and when so applied yields more readily to the apparent intention of the testator than it does in grants of realty. Taylor v. Lindsay, 14 R. I. 518; Williams, Pers. Prop. marg. p. 244; Horne v. Lyeth, 4 Har. & J. 431. The rule in Shelley's Case applies to equitable as well as legal estates, but requires that both estates (the prior estate limited to the ancestor, and the subsequent estate limited to the heirs) shall be of the same quality (that is, both legal, or both equitable), because, if the prior estate is an equitable or trust estate, and the subsequent estate is a legal one, the two do not unite as an estate of inheritance in the ancestor. 4 Kent, Comm. marg. pp. 210, 211. Thus, if the legal estate is given to A. in trust for B. for life, and the legal remainder to the heirs of B. at his death, the rule cannot apply, as the legal and equitable estates cannot so coalesce as to give B. either a legal or equitable fee. 1 Perry, Trusts (3d Ed.) § 358. So, also, if the trustee holding the property for A. for life has active duties to perform, but at the death of A. the trust for the heirs is merely passive, the statute will execute the use, so that the estate of the heirs is a legal one, while the prior estate is equitable. 22 Am. & Eng. Enc. Law, p. 509, and cases in note 4.

But personal property is not within the statute of uses. In the case at bar, the trustees were to hold the proceeds of sale—the money or securities representing two-thirds of Albert's share—during his life, and invest the same, and pay him the interest during his life; so that the trust was an active one, and his estate was equitable. At his death the principal of the share is to be paid to his heirs, and so, for the purpose of turning the share over to the heirs by payment, or delivery, or assignment of securities, the legal title at his death still remained in the trustees, and, until such payment, delivery, or assignment, the estate of the heirs was equitable. In such cases the legal title remains in the trustee "until the purposes of the trust are accomplished, and until the possession of the property is in some way transferred to the person entitled to the use, or the last use." 1 Perry, Trusts (3d Ed.) 303, 311; Kirkland v. Cox, 94 Ill. 400. If, therefore, in this case, the original devise to the trustees of the fund to be invested for Albert during his life, and to be paid to his heirs at his death, considered separately from the gift over to the children of the testator, be construed by the application thereto of the principles involved in Shelley's Case, it cannot be said that the prior estate (given for life to Albert) and the subsequent estate (to go to his heirs) are not both of the same quality. But, whether the rule in Shelley's Case be applied by analogy to the original devise or bequest herein mentioned, or whether it be regarded as a gift to Albert and his heirs, in either case he thereby took the ownership of the fund, subject to the limitation over thereof to the children of the testator, upon the contingency of his death without living heirs of his body at the time of his death. At common law there could be no limitation over of a chattel, so that, where a chattel or other personal property was given to one for life, with a limitation over to another, the former took the absolute title, and the limitation over was void, both at law and in equity; but in the course of time equity has established the doctrine that, where there is a gift of personal property to one for life, with a limitation over to another, such limitation is good as an executory devise. Welsch v. Bank, 94 Ill. 191; 2 Kent, Comm. marg. p. 352; 1 Schouler, Pers. Prop. § 138. Cases which hold that, where there is a gift of personal property to A. and his heirs, A. takes the property absolutely, and there can be no limitation over in the event of his dying without issue, will be found, upon examination, to be cases where the words used import an indefinite failure of issue. Thus, in Albee v. Carpenter, 12 Cush. 382, it was held that a devise to A. and his heirs of the residue of the testator's property, "and if said A. die without issue or heirs," remainder over to others, gave A. an estate tail by implication; and that any words in a devise of real estate which would give an estate tail to the first taker, with or without a remainder over, would, in a bequest of personal property, give the first taker an absolute estate, and the remainder over would be void. But the holding was placed upon the

ground that the gift over was upon a general failure of issue, and for that reason made the estate an estate tail in the first taker, and it was there said by Chief Justice Shaw: "If she has no issue living at the time of her decease' may be a contingency the happening of which may give effect to a bequest over as an executory devise, because it must vest at her decease, and therefore has no greater effect than a gift for life." So, in the case at bar, the words of the gift over have been construed to mean, in substance, that if Albert shall die without heirs of his body living at the time of his death, the fund shall be divided among the testator's children, and therefore effect will be given to the gift or bequest over as an executory devise. "Limitations over in chattels have been supported like limitations of real property very generally. *Holms v. Williams*, 1 Root, 332, and many other cases. In many of the foregoing cases, limitations of personal property over upon failure of issue of the first taker have been held good, as limited upon a definite failure of issue." 3 *Jarm. Wills* (Rand. & T. 5th Am. Ed.) p. 374, note 1. In *Theob. Wills* (2d Ed.) p. 371, after stating the doctrine that a bequest of personalty to a man and his heirs would no doubt pass the absolute interest, the author says: "Of course, if, in wills, * * * the gift over upon failure of issue can be limited to failure of issue at the death of the tenant for life, a prior gift to A. and the heirs of his body gives A. an interest, defeasible upon failure of issue at his death." Here Albert took an absolute interest in the fund, defeasible upon failure of living heirs of his body at his death. And this is so notwithstanding the fund was in the hands of trustees.

In *Hughes v. Sayer*, 1 P. Wms. 534, where one, having two nephews, devised his personal estate to A. and B., and, if either should die without children, then to the survivor, the devise was held to be good. In *Jackson v. Noble*, 2 Keen, 590, the testator gave real and personal estate to his daughter, A., and to two other persons, upon trust to permit A. to receive the rents and interest for life for her separate use, and after her decease in trust to convey to her heirs, executors, etc., but, in case A. should marry and have no children, then the property to belong to D., or, in case of his decease before A., then to his children. It was held that A. took an absolute equitable estate, with an executory gift over to D. and his children, etc. In *Edelen v. Middleton*, 9 Gill, 161, where a testator made a bequest to his son, to be paid to him after the natural life of his wife and himself, at which death might last happen, but in case his son should die without lawful issue, and before he possessed the property, the whole to go to his daughter, and the son died without issue in the lifetime of the testator, it was held that the limitation over to the daughter was good as an executory devise; that, by the words used, the testator showed that he meant a definite failure of issue,—a dying without issue before the right

to possess the property could accrue; that the widow took a life estate, etc. In *Ladd v. Harvey*, 21 N. H. 514, personal property was given by a will to L. and her heirs, "in case she should leave at the time of her decease a living child or children born of her body," otherwise her property was to go to her father; and it was held that the will referred to the legatees dying without issue living at the time of her death, and that the limitation over to her father was a good executory devise. So, also, when a testator bequeathed leasehold property to A. and to his lawful heirs, and, if he die and leave no lawful heir, then to B., it was held that the limitation to B. was good; the words "leaving no lawful heir" being, in the first place, interpreted to mean "leaving no lawful issue," and then being confined to "leaving no issue at the time of his death." *Goodtitle v. Pegden*, 2 Term R. 720. See, also, *Boyd v. Strahan*, 36 Ill. 355; *Siegwald v. Siegwald*, 37 Ill. 430; *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191; *Giles v. Anslow*, 128 Ill. 187, 21 N. E. 225. This court has held in a number of cases that, although a fee cannot be limited upon a fee by deed, yet it can be so limited by will by way of executory devise. *Ackless v. Seekright*, Breese, 76; *Siegwald v. Siegwald*, 37 Ill. 430; *McCampbell v. Mason*, 151 Ill. 500, 38 N. E. 672; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Palmer v. Cook*, 159 Ill. 300, 42 N. E. 796. The case of *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325, so far as it holds to the contrary, is overruled. The language used in *Silva v. Hopkinson*, 158 Ill. 386, 41 N. E. 1013, should be construed as applicable only to the facts of that case, and not as contravening the doctrine of *Siegwald v. Siegwald*, supra, and the other cases of a like character above referred to. If a fee can be limited upon a fee by way of executory devise as to real estate, there is no reason why, in case of a gift of personal property to one person, there cannot be a limitation over of such property by way of executory devise to other persons, especially where, as here, the latter belong to the same class as the first taker, provided, always, such limitation over does not contravene the rule against perpetuities; that is to say, provided it is to take effect upon a definite failure of issue. Indeed, Mr. Gray, in his work on the Rule against Perpetuities, says, at the close of the chapter on "Future Interests in Real Estate and Personal Property" (section 98): "The result of the investigation pursued in the present chapter is this: Originally, the creation of future interests at law was greatly restricted, but now, either by the statute of uses and wills, or by modern legislation, or by the gradual action of the courts, all restraints on the creation of future interests, except those arising from remoteness, have been done away."

From what has been said, it follows that, Albert having taken an absolute interest in the fund in question, determinable in the

event of his death, and having died without living heirs of his body at the time of his death, the fund is to be divided among the surviving children of the testator, to wit, Mary J. Clover, Emily Montgomery, Thomas E. Condell, and Moses B. Condell, in such proportions as their circumstances may require to keep them from want, or to furnish them with the necessities of life for themselves and their children, and that the appellee, Moses B. Condell, is entitled to participate in that division, unless the interest to come to him upon such division has been released by the quitclaim deed executed by him. The interest of appellee in the share of his brother Albert had not accrued when the quitclaim was executed. It was, then, a future contingent interest, which might never ripen into possession. It was limited to take effect upon a contingency which might never happen, to wit, upon the death of Albert without living heirs of his body. By an executory devise no estate vests upon the death of the testator, but only on some future contingency. *Bristol v. Atwater*, 50 Conn. 402; *Griswold v. Greer*, 18 Ga. 545. We do not deem it necessary to discuss the question whether such a contingent executory interest is assignable in equity or not. For the purposes of the present case it may be admitted that such an interest is assignable. If the instrument of release executed by appellee purported to release a future interest of any kind, then the question of the assignability of the interest in question would be presented. But the release is an ordinary quitclaim of all the "claim, right, title, and interest," etc., of appellee and his wife, and contains no covenants of warranty. It is well settled that such an interest does not pass a subsequently acquired interest. *Holbrook v. Debo*, 99 Ill. 372. "A conveyance of all the right, title, and interest in lands is certainly sufficient to pass the land itself, if the party conveying has an estate therein at the time of the conveyance, but it passes no estate which is not then possessed by the party." *Blanchard v. Brooks*, 12 Pick. 47. A quitclaim is sufficient to pass any estate which the person executing it has at the time of such execution, but it cannot affect by way of release a future contingent interest limited to the surviving members of a class upon the event of the death of one of them without living issue at the time of his death, there being no terms used in such quitclaim or release which can be construed as referring to future interests. *Striker v. Mott*, 28 N. Y. 82. In order to create an assignment of future interests and contingencies, "there must be, on the face of the instrument expressly, or collected from its provisions by necessary implication, language of present transfer, directly applying to the future as well as to the existing property, or else language importing a present contract or agreement taken between the parties to sell or assign the future property." 3 Pom. Eq. Jur.

§ 1290. Here the quitclaim does not amount to a release of future interests. While, therefore, the instrument of release executed by Moses B. Condell has the effect of passing all his interest in the share specifically set off to him or for his use in his father's estate, yet it did not have the effect of passing the future contingent interest in his brother Albert's share limited over to him so as to take effect only in the uncertain event of Albert's death without living heirs of his body.

The court could here direct the fund in question to be divided among the children of the testator in such proportions as their circumstances may require to keep them from want, or to furnish them the necessities of life for themselves and children, if there were any evidence in the record upon that subject. Where a power in relation to the distribution of a fund is conferred by the testator upon a trustee, the court will place itself in the position of the trustee, if the discretion of the latter is to be governed by some rule or state of facts which the court can inquire into and apply as effectually as a private individual could do. In such case, the court "can look with the eyes of the trustee," and substitute its own judgment for his. 1 Perry, *Trusts* (4th Ed.) §§ 117, 255. But there is no evidence in the record to show that any of the testator's children or grandchildren are in such circumstances as require them to be kept from want, or to be furnished with the necessities of life. Hence, the court will execute the trust by dividing the fund equally among the children, on the ground that equality is equity. *Id.* § 255. Counsel for appellants concedes in his brief that, in the absence of evidence as to the circumstances of the testator's children, all the court can do is to carry out testator's general intent, and divide the fund equally between the children entitled thereto. The difference between appellants and appellee is not as to the principle of equality in the division, but as to the persons among whom the division should be made; appellants contending that the division should be between Mrs. Glover and Mrs. Montgomery only, and appellee contending that it should be made between them and himself and his brother Thomas E. Condell. Our conclusion is that the fund here in question, with the interest accrued thereon since the death of Albert B. Condell, should be equally divided between the four surviving children of the testator above named, unless the right to such division, so far as appellee is concerned, has been cut off by advancements made to him in the lifetime of his father.

2. As to the advancements: Upon this branch of the case the contention of appellants is that the moneys charged to Moses B. Condell in the account attached to the will, and the notes against him held by the testator at the time of the latter's death, are advancements, and that, as such advancements exceed in amount his share of the

estate, he is not entitled to any interest in the fund in question without bringing into hotch pot what he has received. It is not at all clear that the testator did not intend to draw a distinction between the advancements made to his children and the debts due to him from them, as evidenced by their notes. The intention to make such a distinction is very strongly indicated by the language used in the fourth section of the will, and in the various clauses embraced under that section. But, whether the notes, as well as the moneys charged in the account, are to be embraced in the amount of the advancements, or not, can make no difference, in view of the language used in the first clause of the codicil. That language is as follows: "If, in the settlement of my estate according to the provisions of the foregoing will, it should appear that the amount advanced and loaned to my son Moses B. Condell should exceed his share of my estate, then his share shall be what he has already received, and his notes shall be canceled and delivered to him." The will and the codicil are to be construed together. *Jones v. Jones*, 124 Ill. 254, 15 N. E. 751. When they are construed together here, it will appear that the amount of the advances and loans to Moses B. Condell were not intended to be set over against the contingent and executory interest which might come to him in the event of the death of his brother Albert without living heirs of his body. The words "settlement of my estate" refer to the adjustment of the estate in the due course of administration in the probate court, where the debts are paid, the credits are collected, and nothing remains but to proceed with the steps for the division of the residue. *Giles v. Anslow*, 128 Ill. 187, 21 N. E. 225; *Valentine v. Ruste*, 93 Ill. 585; *Calkins v. Smith's Estate*, 41 Mich. 409, 1 N. W. 1048. The reference here is not to the settlement of the trust imposed upon the executors by the will. An executor may serve in two capacities, and have two different sets of duties to perform. When he acts simply as executor, he performs the functions of administration, such as receiving and paying what is due to and from the estate. But, in addition to these duties, he may be appointed testamentary trustee under the will, and have another class of duties to perform as the donee of a power in trust. *Calkins v. Smith's Estate*, supra; 7 Am. & Eng. Enc. Law, p. 179; 1 Perry, Trusts, § 262; *Nevitt v. Woodburn*, 160 Ill. 203, 43 N. E. 385. The trust may last longer than the administration of the estate. The settlement here referred to is that which is made with the probate court under the 114th section of the administration act, where it is provided that "the county court shall enforce the settlements of estates within the time prescribed by law," etc. 1 Starr & C. Ann. St. p. 243. That the settlement as executor, and not as trustee, is referred to, is further apparent from the

fact that, when it takes place, the notes of Moses B. Condell are to be surrendered and delivered up to him,—showing it to have been within the contemplation of the testator that his son Moses would then be alive; and it could not have been intended that the notes should remain uncanceled and undelivered until the executory interests of Moses in the shares of his brothers and sisters should have been determined by their respective deaths. The share of Moses was to be what he had already received, and his notes were to be canceled and delivered to him, if, at such settlement, it should appear that the amount advanced and loaned to him should exceed "his share of my estate." The word "share," as here used, has the same meaning which it has when used in section 4 of the will and the clauses thereunder; that is to say, it refers to the one-sixth share given to Moses by the will, and does not include the executory contingent interest to accrue upon the death of Albert without living heirs of his body. The word "share," in a will, does not apply to executory interests taken under the will. "Accrued shares will not pass under the word 'share' or 'portion.'" *Theob. Wills* (2d Ed.) p. 516; 3 *Jarm. Wills* (Rand. & T. 5th Am. Ed.) p. 560. In view of the first clause of the codicil, we are of the opinion that the advancements and loans made to Moses B. Condell do not have the effect of destroying or cutting off his interest in the fund in question.

For the reasons here stated, the judgment of the appellate court and the decree of the circuit court are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

CARTER, J., took no part in the decision of this case, having been of counsel in the court below.

(167 Mass. 201)

ATTORNEY GENERAL v. CLARK et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Dec. 2, 1896.)

RELIGIOUS SOCIETIES—ACTION TO RECOVER DONATION—PARTIES.

Information will not lie by the attorney general, on the relation of the trustees of an unincorporated religious society, to recover funds donated for the erection or repair of the church building, since such society is a definite body, capable, under Pub. St. c. 39, § 9, of maintaining suit itself for the right to hold and use gifts in the manner intended by the donors.

Appeal from supreme judicial court, Suffolk county.

Information by the attorney general, on the relation of Andrew B. Lattimore and others, trustees of the Twelfth Baptist Church, against William H. Clark and others, to compel defendants to turn over to relators certain books and records. A demurrer to the

information was sustained, and plaintiff appeals. Affirmed.

J. E. Abbott, for appellant. H. G. Allen, for appellees.

BARKER, J. While equity will enforce a valid trust, charitable or otherwise, it does not do so upon an information filed by the attorney general, if the trust is in effect a private one, nor unless there appear to be "some benefit to be conferred upon, or duty to be performed towards, either the public at large or some part thereof, or an indefinite class of persons." *Society v. Crocker*, 119 Mass. 1, 23. When the trust is for the whole public, or for some part of the public, or for an indefinite class of persons, the attorney general is evidently the proper officer to bring the case before the court, and to represent and act for the public, or for the persons who, because they constitute an indefinite class, cannot themselves appear in person or constitute an attorney. Trusts connected with religious work have been not infrequently considered by this court, and in the case cited it was held that, while "gifts for the erection of a house for public worship, or for the use of the ministry, may constitute a public charity, if there is no definite body, for whose use the gift was intended, capable of receiving, holding, and using it in the manner intended, * * * when there is a body, or a definite number of persons, ascertained or ascertainable, clearly pointed out, by the terms of the gift, to receive, control, and enjoy its benefits, it is not a public charity, however carefully and exclusively the trust may be restricted to religious uses alone." These principles are decisive of the present case upon the demurrer. It appears by the amended information that the Twelfth Baptist Church is an unincorporated religious society, established in Boston for the purpose of maintaining religious worship in accordance with the faith and usages of the Baptist denomination, and that the society has trustees, who hold the title to the real estate occupied by the society, and who are the proper custodians of all its property. It also appears that the funds represented by the deposits in the defendant savings banks, and the amount withdrawn for legal expenses, had been raised by a building association, which has now ceased to exist, by membership fees and contributions from various persons for the purpose of assisting the church to obtain funds, either for erecting a new church edifice, or for renovating and repairing the structure then occupied by it, and upon which extensive improvements are now in progress, for the expense of which the funds so raised are needed. Under the provisions of Pub. St. c. 39, § 9, the Twelfth Baptist Church, as an unincorporated religious society, has power to use and employ, according to its terms and conditions, any donation or gift made to it, and may sue for any right which may vest in

it in consequence of such donation or gift. If, then, the fund now in question consists of moneys given for the purpose stated in the information, the Twelfth Baptist Church is a definite body, for whose use the gift was intended, and which body is capable of receiving, holding, and using the gift in the manner intended, and which has power to sue for the right to use the fund in accordance with the purpose for which it is alleged to have been raised. The case, therefore, is not one in which it is necessary for the attorney general to intervene, upon the ground that those who are entitled to the benefit of the donation are incapable of asserting their own rights. Because the Twelfth Baptist Church is a definite body, capable of enforcing whatever rights it may have in the fund in controversy, the attorney general cannot be permitted to have the disposition of the fund determined in this proceeding, which is an information brought by himself; and for this reason the demurrer was rightly sustained. *Society v. Crocker*, ubi supra. See, also, *Goring v. Emery*, 16 Pick. 119; *Parker v. May*, 5 Cush. 338; *Jackson v. Phillips*, 14 Allen, 539, 579; *Attorney General v. Ice Co.*, 104 Mass. 239, 244; *Attorney General v. Meeting House*, 3 Gray, 1, 50. Decree affirmed.

(167 Mass. 115)

SWIFT et al. v. TOWN OF FALMOUTH.

(Supreme Judicial Court of Massachusetts.
Barnstable. Oct. 28, 1896.)

TOWNS—CONTRACTS—FISHERIES.

1. A town authorized by St. 1797, c. 74 ("An act to prevent the destruction and to regulate the catching of * * * alewives in * * * streams" therein), to keep free from obstructions streams through which said fish pass, and to remove any obstructions, and to open any sluiceway through any dam, then or thereafter erected, on any of said streams, at the expense of the town, if the owner of the dam neglect to open it when required by the town, "the dam or sluice so opened * * * [to] continue open in every year to such depth and width * * * and for such * * * time * * * as * * * [is] necessary," covenanted with the owner of a dam, in consideration of the right to make a way across it for herring to pass above it, to "at all times * * * keep open a water course" between ponds above, so that the water should run freely. Held, that as the town had no power to prevent the building of dams, or to remove any built, the covenant should be construed as requiring it to do no more than it had authority to do, and, if not so construed, it was invalid.

2. St. 1847, c. 94, authorizing a town to prescribe times, places, and manner of taking herring in streams therein, and to adopt such further rules and regulations as it may deem expedient for preservation of said fisheries, gives no power to prevent the construction of dams, or to remove them.

3. Pub. St. c. 27, § 9, authorizing towns to make "contracts necessary and convenient for the exercise of their corporate powers," does not empower them to covenant, in consideration of the right to make a way across a dam for herring to pass above it, that no dams shall be maintained above it.

4. Pub. St. c. 91, § 63, authorizing a town to open ditches into any pond for the introduction

and propagation of herring, and to acquire land for opening the ditches, does not authorize a town, where a ditch already exists, along which the fish can go, notwithstanding dams, through sluiceways which the town has authority to keep open, to take land for a ditch to supply a party with water kept back by the dams.

Report from supreme judicial court, Barnstable county; O. W. Holmes, Judge.

Suit by Swift and others against the town of Falmouth. Bill dismissed.

Robert M. Morse, for plaintiffs. H. P. Hariman, for defendant.

LATHROP, J. The plaintiffs seek by this bill in equity to compel the defendant to cause the waters of Coonamesset pond to flow freely into Parker's pond. Coonamesset pond is a great pond, and, so far as the report upon which the case comes before us shows, had no outlet; but in 1842 a passageway, called "Dutchman's Ditch," was built by the defendant, connecting the waters of this pond with a natural stream, called "Dexter's River," which flowed into Parker's pond, and thence into Factory pond. Both of the last-named ponds are owned by the plaintiffs, and in 1846 were owned by the predecessors in title of the plaintiffs. In 1842 the town acquired title to part, and in 1846 to the rest, of the land on each side of Dutchman's ditch. Dexter's river, after leaving Parker's pond, flows into Vineyard sound, or the sea. In 1846 the plaintiffs' predecessors in title had a mill, called the "Pacific Woolen Mills," at the foot of Factory pond, and there was a flume at the highway which crossed the stream between Parker's pond and Factory pond. The mill was taken down more than 20 years ago. Later a shoddy factory was built there, which still stands, but is not now used for that purpose. Parker's pond and Factory pond are now cranberry bogs, and for six months of the year the water is off, except within the limits of a stream flowing through the bog. The mill is still used a little, however, by the plaintiffs, in their business. On February 27, 1846, an agreement under seal was entered into between three persons, describing themselves as agents of the town of Falmouth, and as being duly authorized by a vote of that town, of the first part, and other persons named, described as the owners of the Pacific Woolen Factory, of the second part. The agreement was declared "to be perpetually binding on said town and the owners of said factory forever." By the agreement the town acquired a right to make a way across the dam of the mill owners for herring to pass from the sea into the pond above the dam, and also across the dam into Parker's pond. The town also acquired a right to erect a house on the land of the mill owners, near the place where the herring were to be taken. The covenant which the plaintiff seeks to enforce in this case is that contained in article 3 of the agreement, which reads as follows: "The party of the first part, in consideration of the premises, shall at all times during each and every year

keep open a water course between Coonamesset pond and Parker's pond, so that the water of Coonamesset pond shall run into Parker's pond freely, except in seasons of unusual drought; and at all such times the party of the second part may widen or deepen (at their own expense) the ditch called 'Dutchman's Ditch,' so as to supply their factory or factories with necessary water through Dutchman's ditch; it being always understood that the party of the second part are not to do any act in relation to Dutchman's ditch which shall prevent the ingress or egress of the herring into and out of said Coonamesset pond through Dutchman's ditch." The obstructions complained of are six dams, built of late years, but precisely when does not appear, above Parker's pond, on Dexter's river, by the owners of cranberry bogs, acting under Pub. St. c. 190, § 48. This act reads as follows: "Any owner or lessee of land appropriated to the cultivation and growth of the cranberry may erect and maintain a dam upon and across a stream not navigable, for the purpose of flowing and irrigating said land, upon the terms and conditions and subject to the regulations contained in this chapter [the mill act], so far as the same are properly applicable in such cases." The provision for compensation for injury thereby caused is found in section 4 of the same chapter. See *Hinckley v. Nickerson*, 117 Mass. 213; *Howes v. Grush*, 131 Mass. 207. This act was first enacted by St. 1866, c. 206, § 1. There is no contention that the six dams were not legally built, and there is nothing to show that they were not furnished with proper sluiceways for the passage of fish. The report finds: "There was no obstruction to the flow of the water in Dutchman's ditch. All of the dams that obstruct the flow of the stream have been located on the stream below where Dutchman's ditch empties into said stream." The report also finds that these dams interfere appreciably with the plaintiffs' use of the waters, sometimes keeping it back for 48 hours, and that the purpose for which the plaintiffs really want the use of the water is for their cranberry bogs.

At a town meeting held in Falmouth in 1892, a committee of three was appointed to confer with the owners of the property formerly owned by the Pacific Manufacturing Company, "to take all needed measures to permanently locate and provide a suitable way for the herrings to pass up and down through said property in their season, and also to locate and provide one or more suitable places for the taking of herrings on said way." Whether any action was taken by this committee does not appear, but on March 6, 1894, another committee of three was appointed "to carry into effect the vote passed at the annual meeting in 1892 in relation to the above-named herring river." On August 4, 1894, the last-named committee, purporting to act for the town, entered into an agreement with the plaintiffs, describing them as

"the present owners of the land and premises formerly belonging to the Pacific Woolen Factory," whereby certain modifications of the agreement of 1846 were made. These modifications are immaterial to the present controversy. And the purpose of putting in the agreement is to show, as the plaintiffs contend, that the town in 1894 ratified and confirmed the agreement of 1846, although there was no ratification or confirmation, unless implied in the fact that the former agreement was modified.

The first question arises as to the construction of the covenant contained in article 3 of the agreement of 1846. The only specific authority which the defendant or its agents then had to act in the matter was under the statute of 1797 (chapter 74, § 1), passed March 2, 1798, and entitled "An act to prevent the destruction and to regulate the catching of the fish called alewives in the rivers and streams in the town of Falmouth." This statute empowered and directed the town, at its meeting for the choice of town officers, in March or April, annually, to choose five or more persons as a committee to see that the act be duly observed. This committee was authorized and empowered "to cause the natural course of the streams through which the said fish pass to be kept open and without obstruction, to remove any such as may be found therein"; and the act declared that they "shall have authority for those purposes to go on the land or meadow of any person through which such streams run, without being considered as trespassers; and shall open or cause to be opened any sluiceway through any dam now erected, or that may be hereafter erected on or over any of the said rivers or streams (between the ponds where said fish usually cast their spawns and the sea), at the expense of the said town of Falmouth; provided, the owner or owners of any such dam shall neglect to open the same when thereto required by the said committee. And the dam or sluice so opened shall continue open in every year to such depth and width as shall be necessary for a passageway for said fish; and for such term of time, between the first day of April and the tenth day of June, as the major part of the said committee shall judge necessary." While the statute gave the town committee the power to cause the natural course of the streams to be kept open and free from obstructions, it did not authorize the removal of any dam, but only gave authority to the committee to open, or cause to be opened, a sluiceway through any dam then erected, or that might thereafter be erected, for a passageway for the fish, and this only for a limited time in each year. The legislature, from early times, has recognized the rights of the owners of dams upon streams, and also the right of the public to have the fish run freely up natural streams during the spawning time, and to return to the sea. In the earliest statute on this subject, providing for

the removal of obstructions to the free passage of fish, it is especially provided "that nothing herein contained shall be construed to extend to the pulling down or demolishing of any mill-dam already made, or that shall hereafter be lawfully and orderly made." Prov. St. 1709-10, c. 7; 1 Prov. Laws (State Ed.) 644. The first provision as to a sluiceway in a dam is found in Prov. St. 1735-36, c. 21; 2 Prov. Laws (State Ed.) 786. Section 1 provides "that no dam shall, hereafter, be erected across any river or stream, thro' which alewives or other fish have been accustomed to pass into ponds, in which there is not made and left a convenient sluice or passage for such fish, on penalty that the owner or owners of such dam shall, upon conviction of failure or neglect therein, before any court proper to try the same, forfeit and pay the sum of fifty pounds." See, also, Prov. St. 1741-42, c. 16; 2 Prov. Laws (State Ed.) 1087; Prov. St. 1743-44, c. 26; 3 Prov. Laws (State Ed.) 133; Prov. St. 1745-46, c. 20; 3 Prov. Laws (State Ed.) 267; Prov. St. 1754-55, c. 31; 3 Prov. Laws (State Ed.) 809; Prov. St. 1764-65, c. 34; 4 Prov. Laws (State Ed.) 774. It has become the established law of the state that every owner of a dam across a stream where migratory fish are accustomed to pass is obliged to provide a sufficient and reasonable way for the fish, unless he is exempt by express provision or obvious implication in his grant. *Town of Stoughton v. Baker*, 4 Mass. 522; *Com. v. Chapin*, 5 Pick. 199; *Vinton v. Welsh*, 9 Pick. 87; *Com. v. Alger*, 7 Cush. 53, 98-101; *Com. v. Essex Co.*, 13 Gray, 239, 247-250; *Commissioners on Inland Fisheries v. Holyoke Water-Power Co.*, 104 Mass. 446, 450. The situation of the parties at the time the agreement of 1846 was made was this: The town, apparently without any authority, had opened a passageway from a great pond into a natural stream. Between this point and the land owned by the woolen company was land owned by third persons, on which dams were liable to be built. So long as no dam was built, the committee had authority, under the statute of 1797, to keep open and unobstructed the natural course of the streams through which the fish passed; but, if a dam should be built, the only authority of the committee was to open, or cause to be opened, a sluiceway in the dam. When, then, the committee covenanted to "keep open a water course" between two ponds, it would seem that the meaning was to do no more than was authorized by the statute. If, however, we assume that the covenant in the agreement of 1846 is to be construed as an absolute agreement to keep the waters between the two ponds clear and free from all obstruction, then it is obvious from what has already been said that the committee exceeded its authority, and did what it had no right to do under the statute. That a contract made by a town or its agents in excess of its corporate powers is invalid, is settled by

many cases, of which only a few need be cited. *Stetson v. Kempton*, 13 Mass. 272; *Anthony v. Adams*, 1 Metc. (Mass.) 284; *Minot v. West Roxbury*, 112 Mass. 1; *Greenough v. Wakefield*, 127 Mass. 275; *Mead v. Inhabitants of Acton*, 139 Mass. 341, 344, 1 N. E. 413; *Spaulding v. Inhabitants of Peabody*, 153 Mass. 129, 28 N. E. 421.

The question then arises as to the effect of the agreement of 1894. St. 1797, c. 74, was expressly repealed by St. 1847, c. 94, § 4; and while this act, in section 1, gave to the town of Falmouth the power, at any legal meeting called for the purpose, to "prescribe the times, places, and manner of taking alewives or herrings, in Dexter's river and other waters connecting Coonamesset pond with the Vineyard sound or sea, and also in the other rivers, streams and ponds, which have heretofore been used by the inhabitants of said towns as herring fisheries," and while power was also given the town, at said meeting, to "adopt such further rules and regulations as may by them, be deemed expedient for the preservation of said fishery," we find no mention made of any power to enter upon the lands of another, or to interfere with dams across any stream. Nor was there at that time any general law upon the subject. By the statute of 1869 (chapter 384), provision was made for the appointment by the governor of a board of commissioners on inland fisheries. Section 1 provides: "All the laws of the commonwealth relating to the culture, preservation, capture, or passage of fish, shall be known as the laws relating to inland fisheries." Section 3 provides: "Each of said commissioners may personally, or by deputy, enforce all laws regulating inland fisheries; and may seize and remove, summarily if need be, all obstructions to the passage of migratory fish illegally used, except dams, mills, or machinery, at the expense of the persons using or maintaining the same." By section 4 it is provided: "Whenever either of said commissioners finds that there is no fishway or an insufficient fishway in or around a dam where the law requires a fishway to be kept and maintained," he may enter and improve the fishway, or cause one to be constructed where none exists. This law is still in force. Pub. St. c. 91, §§ 1-4, 6-8. To what extent it supersedes powers previously granted to towns by special laws it is unnecessary in this case to consider, for there is nothing in the act which gives towns any power over dams. It may also be noticed that while, in some special acts passed since the Public Statutes, power has been given to the selectmen of certain towns to remove obstructions in streams, no power is given to remove dams. See St. 1882, c. 189; St. 1891, c. 164, §§ 2, 3; St. 1893, c. 36, § 3; St. 1894, c. 134, § 3; St. 1895, c. 203, § 3.

The plaintiffs further contend that the contracts are valid under Pub. St. c. 27, § 9, re-enacting Rev. St. c. 15, § 11, and Gen. St.

c. 18, § 9. The language is that towns "may make contracts necessary and convenient for the exercise of their corporate powers." But the construction which has been put upon this section is that "they cannot engage in enterprises foreign to the purposes for which they were incorporated, nor assume responsibilities which involve undertakings not within the compass of their corporate powers." *Vincent v. Inhabitants of Nantucket*, 12 Oush. 103, 106. By Pub. St. c. 91, § 63, it is provided: "A city or town may open ditches, sluiceways, or canals, into any pond within its limits, for the introduction and propagation of herrings and alewives, and for the creation of fisheries for the same; and the land for opening such ditches, sluiceways or canals, within such city or town may be taken according to the provisions of the statutes, which regulate and limit the taking of land for highways." This was first enacted in St. 1866, c. 187, § 3. Under this statute the plaintiffs contend that the town may fulfill the contract of 1894 either by purchasing the lands and dams above Parker's pond, or by acquiring the right to such land as shall be required for extending Dutchman's ditch directly into Parker's pond. It seems to us that there are two answers to this contention. The first is that, if any such scheme had been in the contemplation of the parties, it would have been expressed in the covenant; and, considering the situation of affairs in 1894, it cannot be read into it. The second is that to take the land on which the dams are, or to take land for the purpose of cutting a canal to supply the plaintiffs with water, when not needed for the purpose of a fishery, and when not done for this purpose, would clearly not be within the scope of the act, and would be invalid. *Austin v. Murray*, 16 Pick. 121, 126; *Inhabitants of Watertown v. Mayo*, 109 Mass. 315, 320; *In re Niagara Falls & W. Ry. Co.*, 108 N. Y. 375, 15 N. E. 429; *Forbes v. Delashmutt*, 68 Iowa, 164, 26 N. W. 56; *Ligare v. City of Chicago*, 139 Ill. 46, 28 N. E. 934. Bill dismissed.

(146 Ind. 258)

HERRICK v. FLINN.

(Supreme Court of Indiana. Nov. 24, 1896.)

APPEAL—REVIEW—OBJECTION NOT RAISED BELOW.

1. To enable the appellate court to review a finding, it should be assigned as error on motion for a new trial.

2. Where, in a contest between the administrator of a wife and judgment creditors of her husband as to the wife's interest in the husband's land sought to be subjected to judicial sale during the wife's life, the land was sold, under agreement that the interest of the parties should be transferred to the proceeds, the proceeds will be treated as land, so as to descend to the husband in case of the wife's death pending its distribution; Rev. St. 1894, § 2671 (Rev. St. 1881, § 2510), providing that, if any wife dies holding land vested in her by judicial sale of her husband's land, it shall descend to the surviving husband.

Appeal from circuit court, Wabash county; Hiram Brownlee, Special Judge.

Proceeding by Charles Flinn, administrator, against George T. Herrick, administrator. From the judgment, the latter appeals. Affirmed.

Alvah Taylor, for appellant. Henry O. Pettit, Oliver M. Bogue, A. N. Grant, and Chas. Flinn, for appellee.

MCCABE, J. The appellee, as administrator of Joseph H. Ray, deceased, filed a petition in the Wabash circuit court asking an order to sell certain real estate situate in the city of Wabash, of which said Joseph H. died seised, for the purpose of making assets to pay the debts of said decedent. Said real estate, by law and the provisions of the will of said Joseph H., went to three of his heirs, one of whom was his son Webster B. Ray, who was, among others, made a party to said proceeding. Numerous creditors of said Webster B. filed petitions, became parties to said petition to sell before any sale of the real estate, and showed that they had recovered judgments against said Webster B., and that said judgments had become liens on the interest of said Webster B. in said real estate, by reason of such judgments being either rendered in the Wabash circuit court, or by transcript thereof being filed and recorded in the clerk's office of said court. And they further showed that there would probably be a surplus of the proceeds of the sale by the administrator over and above the debts of said Joseph H. Ray, deceased; and they asked that their respective liens on Webster B. Ray's interest be transferred to his interest in the surplus of the fund arising from any sale that might be made thereof on such petition. The wife of said Webster B. appeared, and became a party, showing that she was the wife of said Webster B. when his father died, and that she was still his wife, and claiming, as against her husband's said judgment creditors, that she was entitled to the one-third of her husband's share of the surplus of the proceeds of said sale. It was agreed by and between all the parties in open court that the sale should take place, and the rights of all the parties in the real estate should be transferred to the fund, which was accordingly ordered by the court. The real estate was accordingly sold, and the deed made, on June 16, 1891. Louisa A. Ray died on December 10, 1891, leaving, surviving her, said husband, Webster B. Ray, and several children; and on February 16, 1892, appellant, George T. Herrick, was appointed administrator of the estate of said Louisa A. Ray, deceased. Appellant was then admitted a party to said proceeding, and he filed an answer to the claims of the judgment creditors of said Webster B. Ray as to one-third of his share of the surplus of said fund, claiming that such amount

of such surplus vested in said Louisa by virtue of the statute on the subject of judicial sales of real estate of a man having a wife. Rev. St. 1894, § 2669 (Rev. St. 1881, § 2508). The circuit court sustained a demurrer to the answer of the administrator of said Louisa, setting up these facts. This ruling and the finding of the court in favor of the lienholders are assigned for error. If the finding was supposed to be erroneous, it should have been made a ground for the motion for a new trial, and overruling that motion should have been assigned for error; otherwise, the error, if any there was in the finding, is unavailable. The circuit court overruled appellant's motion for a new trial, but such ruling is not assigned for error.

The statute referred to provides that, "in all cases of judicial sales of real property in which any married woman has an interest by virtue of her marriage where the inchoate interest is not directed by the judgment to be sold or barred by virtue of such sale, such interest shall become absolute, and vest in the wife in the same manner and to the same extent as such inchoate interest of a married woman now becomes absolute upon the death of the husband, whenever, by virtue of said sale, the legal title of the husband in and to such real property shall become absolute and vested in the purchaser thereof, his heirs or assigns, subject to the provisions of this act, and not otherwise." Rev. St. 1894, § 2669 (Rev. St. 1881, § 2508). Another section (section 2671, Rev. St. 1894; section 2510, Rev. St. 1881) of the same act provides that "if any married woman shall die, holding real property vested in her by the provisions of this act during the existence of the marriage in virtue of which she received the same, the whole of such real estate shall descend to her surviving husband." By agreement of the parties, the court ordered all the rights of the parties in and to the real estate to be transferred from the real estate to the fund arising from its sale; so that the fund must be treated as the real estate. And, by virtue of the statute last above quoted, it must be held to descend to the husband of the deceased wife, and that her administrator had no right to it at all, even if she had been entitled to it had she lived, which we do not decide. *Summit v. Ellett*, 88 Ind. 227. Therefore the circuit court did not err in sustaining the demurrer to the answer of the administrator. Judgment affirmed.

(146 Ind. 261)

BURNS v. WINDFALL MANUF'G CO.

(Supreme Court of Indiana. Nov. 24, 1896.)

MASTER AND SERVANT—DEFECTIVE MACHINERY—ASSUMPTION OF RISK.

In an action by a servant against his master for injuries from defective appliances, a complaint alleging knowledge both on the part of the servant and the master as to the exist-

ence of the defect, and a promise on the part of the master to remedy the same, is demurrable, where it fails to show that the master, after such knowledge and promise, had a reasonable time before the accident to remedy the defect.

Appeal from circuit court, Tipton county; L. J. Kirkpatrick, Judge.

Action by Frank Burns against the Windfall Manufacturing Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

L. B. Nash, for appellant. Dean & Dean and Beauchamp & Mount, for appellee.

HACKNEY, J. The question in this case is the sufficiency of a paragraph of complaint by the appellant against the appellee. It was alleged that the appellant was employed in hauling clay from a pit into appellee's tile mill, by means of cars pulled up an inclined railway, in which employment he was required to ride upon such cars; that, while returning to the pit on the occasion in question, the car in which he was riding struck a point where the ends of two of the rails of said way reared up and overlapped, causing said car to stop suddenly, thereby precipitating the appellant to the ground, and inflicting the injuries complained of. It was alleged that the condition of the track was known to the appellee, and was negligently and carelessly permitted to so remain. It was alleged, also, that the appellant was free from fault or contributory negligence. The following allegation supplies the principal point of contention upon the pleading: "The plaintiff, at the time of said injury, was aware of the defective condition of said track, and had been for several days prior thereto (the exact time plaintiff being unable to state); but, because of a promise made by defendant to repair said defects, plaintiff remained in defendant's service, and relying upon said promise, being led to believe that said repairs would be made at the earliest possible convenience, and, but for such promise and understanding, plaintiff would not have remained in defendant's employ, and plaintiff would aver that the condition of said track was not so dangerous that a man of ordinary prudence would have refused to assume the risk."

The appellant relies upon the following proposition and authorities: "A servant who learns of defects in machinery about which he is employed, and gives notice thereof, but is induced to remain in the service by a promise of the master to remedy the defect, may recover for an injury caused thereby, where it occurred within such time after the promise as would be reasonably allowed for its performance, and where it is not so imminently dangerous that a man of ordinary prudence would have refused to work about it." *Railway Co. v. Watson*, 114 Ind. 20, 14 N. E. 721, and 15 N. E. 824; *Roth- enberger v. Milling Co.* (Minn.) 59 N. W. 531; *Schlitz v. Brewing Co.* (Minn.) 59 N. W. 188; *Graham v. Coke Co.*, 38 W. Va. 273, 18 S. E. 584; *Foundry Co. v. Van Dam*, 149 Ill. 337, 38 N. E. 1024; *Madara v. Steel Co.*, 160 Pa.

St. 109, 28 Atl. 639; 4 Am. & Eng. Enc. Law, pp. 34, 64.

Counsel for the appellee insist that the exception to the rule that the servant assumes the hazards incident to such defects as he has knowledge of does not prevail, even where the master agrees to make timely repairs, if the servant, while continuing in the use of the defective appliance, has plainly before his view the yet unrepaired defects; in other words, that the exception prevails where the defect which is promised to be repaired is latent, and does not prevail where such defect is patent. In support of this position, counsel cite the statement of Wharton that "the only ground on which the exception can be justified is that, in the ordinary course of events, the employé, supposing the employer has righted matters, goes on with his work, without noticing the continuance of the defect. But this reasoning does not apply, as we have seen, to cases where the employé sees that the defect has not been remedied, and yet intelligently and deliberately continues to expose himself to it." Whart. Neg. (2d Ed.) § 220. The case of *Graham v. Coke Co.*, supra, is cited, and the exception is there stated as follows: "An employé knowing of defects in machinery, appliances, or his working place is not precluded, by continuing in the service, from recovering damages for injuries by reason of such defects, where he is lulled into a sense of security by the words, acts, or conduct of his employer, and the danger is not so plain and obvious that a prudent, careful man, anxious for his safety, ought not to risk it." We need not pursue the inquiry as to whether the exception has its support in the reason that the servant, relying upon the master's promise, may presume that the defect has been cured, although we know of no better reason for it; yet that reason is not consistent with the statement of the exception that it obtains where the injury occurs "within such time after the promise as would be reasonably allowed for its performance." The complaint in this case did not, in our opinion, allege facts sufficient to support a recovery upon any recognized statement of the rule and the exception. By it we are advised that the appellant was aware of the defect for several days before the injury, but we are not advised that the appellee had notice of it, and had promised to repair it for a time within which the repair could reasonably have been made. There is an entire absence of allegation as to the time appellee had known of the defect, or had promised to repair it. It may have been during all of the time that the appellant knew of it, or it may have been at the moment the car was started down the track to the pit, and when repair was impossible before the car went upon it. When knowledge was admitted, the burden rested upon the appellant to bring the case within the exception. The defect in the track must have been open, and a knowledge of it unavoidable, each time the car passed over it. No change in its condition from the appellant's first knowledge of it is alleged. No negligence in running the car

is alleged, and, upon the facts pleaded, it is a reasonable presumption that each time the car went upon it the concussion was considerable. In the most favorable view for the appellant of the conflicting theories of the parties, the case would turn upon the presence of allegations disclosing that the appellant had not continued in the use of the defective track, after a knowledge of its condition, for such time that the appellee, having promised to repair it, might reasonably have been presumed, by the appellant, to have abandoned such repairs. The pleading supplied no facts for the application of the presumption either that appellant had continued to use the track after the appellee's promise to repair had been delayed an unreasonable time, or that the appellee had had any reasonable time after the promise in which to make the repairs. Finding the complaint insufficient, the court did not err in sustaining the demurrer thereto. Judgment affirmed.

(146 Ind. 277)

CRIST et al. v. SCHANK et al.

(Supreme Court of Indiana. Nov. 24, 1896.)

TESTAMENTARY POWERS—EXECUTION.

Testator devised land to his wife, in trust that, if C. married, and had "issue," and the wife thought it advisable to do so, she might convey the land to such "issue or children," and, if no such conveyance was made, the land was to go to a township for school purposes. *Held*, that the interest of the children of C. was dependent upon a conveyance by the wife, and therefore, where the land was conveyed by the wife to one child alone, the other children acquired no interest therein.

Appeal from circuit court, Perry county; Edward Gough, Judge.

Action by John M. Crist and another against Henry Schank and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

John T. Patrick, Oscar C. Minor, and Edwin C. Henning, for appellants. Chas. A. Weathers and Leach & Odle, for appellees.

JORDAN, C. J. Appellants, John M. Crist and Maggie Norton, instituted this action to recover possession of the E. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$ and the S. E. $\frac{1}{4}$ of the N. W. $\frac{1}{4}$ of section 8, township 7, range 1 W., situated in Perry county, Ind. They alleged, among other things, in their complaint, that they were the owners in fee simple and entitled to the possession of an undivided two-thirds of said lands; that the defendant Schank held possession of the real estate, and for 19 years had unlawfully kept them out of possession; and they demanded judgment for possession and \$2,000 damages, etc. Upon a trial by the court there was judgment in favor of the appellee. The appellants predicate their alleged error upon the action of the trial court in overruling their motion for a new trial, which, in the main, was based upon the following reasons: (1) That the decision was not sustain-

ed by the evidence; (2) that the decision is contrary to law.

The evidence, as it appears in the record, establishes the following facts: John Riggs died in 1850, the owner of the real estate in dispute, leaving Polly Riggs as his widow. Previous to his death, in 1849, he executed his last will and testament, which, after his death, was duly probated. By this will the testator, after giving certain moneys and incomes to his wife, Polly Riggs, and to Nancy Crist, sister of the latter, and, after devising other personal property to the inhabitants of congressional township 7 S., of range 1 W., in Perry county, Ind., for the use of the common school fund, etc., disposed of his real estate as follows: "I do hereby give and bequeath the rents and profits of all my real estate to my said wife and Nancy Crist during their natural lives, share and share alike; and whichever may survive the other, then the survivor shall have the whole of such rents and profits to the day of her death. And I do hereby give and devise all of my said real estate to my said wife, to be held by her in trust for the following purposes, to wit: In case James Crist marries and has issue, and my said wife may think it advisable so to do, she may convey, by deed or otherwise, all of my said real estate to such issue or children of the said James Crist; and in case no such conveyance is made by my said wife to such children or issue of the said James Crist, I do give and devise all my said real estate to the said congressional township seven south, of range one west, to be used and managed by said township the same as other school lands," etc. After the death of the testator, James Crist, who was a nephew of the wife of the testator, married, and the following children were the fruits of said marriage, namely: Benjamin F. Crist, born June 28, 1852; John M. Crist, born October 22, 1853; Maggie Norton, née Crist, born October 2, 1857,—the last two being the appellants in this appeal. On August 3, 1852, Polly Riggs, the surviving wife, executed a deed conveying the land in question to Benjamin F. Crist, the infant son of John Crist. She recited in said deed of conveyance that she was the widow of John Riggs, deceased, and that, by virtue of the trust to her granted by the last will of her said husband, and for the love she bore to Benjamin F. Crist, son of James and Elizabeth Crist, and for the further consideration of five dollars to her paid, she did "hereby bargain, barter, sell, and convey to Benjamin F. Crist, son and only issue of James and Elizabeth Crist," the following real estate, describing it, being the same now in controversy. The deed also recited the probate of the will, giving the record, etc., and stated that Nancy Crist and the grantor had a life estate in said lands, and after their death the conveyance was to operate as a "fee-simple conveyance" of the land to Benjamin F. Crist, his heirs and assigns, forever, etc. Nancy Crist, one of the life tenants, died in 1864; and Polly Riggs, the

other life tenant, died in 1865. James Crist, the father of Benjamin F. Crist, with his family, moved onto this land in 1865, after the death of Polly Riggs. James Crist died soon thereafter, and Benjamin F. Crist, together with his mother and the other two children, John M. and Maggie Crist, continued to reside on this land until 1875. On January 15, 1875, Benjamin F. Crist sold and conveyed this land to the appellee for the sum of \$2,000, and the latter, under this deed, went into possession thereof in January, 1875. There is evidence that the appellants made no claim to the land until about one year before the commencement of this action. This, however, is disputed by the evidence given by them in their own behalf.

It is insisted by their counsel that, under the provision of the will of John Riggs, heretofore set out, two estates were created, namely, a life estate in Polly Riggs and Nancy Crist, and a contingent remainder to the children of James Crist in the event he married and had issue; said remainder, they say, being held in trust by the life tenant, Polly Riggs. Clearly, this contention of the appellants, under the evidence, cannot be sustained. We have seen, by the provision of the will in dispute, that the testator devised all of his real estate to his wife, Polly Riggs, to be held in trust by her, and, in the event James Crist married and had "issue," and the wife thought it advisable to do so, then it provided that "she may convey, by deed or otherwise, all of my real estate to such issue or children." It further provided that, in case no such conveyance was made by the wife, then the land was to go to the congressional township. Manifestly, the will did not operate to pass any title directly to the "issue or children" of James Crist, but their taking title depended upon the action of Mrs. Riggs in conveying the same to them by deed, as provided by the will. In the absence of such a conveyance by her, it appears to have been the intention and desire of the testator that his lands, after the death of the two life tenants, should go to the township mentioned. At the time Mrs. Riggs executed the deed to Benjamin F. Crist, appellees' grantor, the appellants were not in being; hence, it cannot be said that they took any title under this conveyance. If it can be urged that the conveyance of the land by Polly Riggs to Benjamin F. Crist alone, who was the only child, at that time, of James Crist, was not within the meaning of the will, and therefore did not vest the title in him, then it would not follow, as a sequence, that the title to the land in controversy was vested in appellants; for, in the absence of the act of conveyance by the trustee, it was to go to the township. The trust created by the will is apparently in the nature of an active one, as it at least required the agency of the trustee to execute it. See *Locke v. Barbour*, 62 Ind. 577; *McCoy v. Monte*, 90 Ind. 441. Upon any view of the question, it is evident that there is an entire lack of title in appellants. They

were required, under section 1069, Rev. St. 1894 (section 1057, Rev. St. 1881), to recover upon the strength of their own title; and the burden was cast upon them to show title in themselves, before they could recover against the appellee in possession, even if it could be conceded that the latter had no title to the premises. The judgment is a correct result, under the facts in the case, and is therefore affirmed.

(146 Ind. 285.)

GRAY et ux. v. OUGHTON.

(Supreme Court of Indiana. Nov. 24, 1896.)

RECEIVERS—INTERLOCUTORY ORDER—PLEADING—APPEAL.

1. An interlocutory order appointing a receiver will not be reversed because of the insufficiency of the complaint to state a cause of action, as the complaint is still pending in the trial court, subject to amendment.

2. An interlocutory order appointing a receiver, made in the presence of appellant, will not be disturbed unless an exception was taken thereto. A motion to set aside the appointment, or for a new trial, is insufficient.

Appeal from circuit court, Pulaski county; George Burson, Judge.

Action by John R. Oughton against Thomas Gray and wife. From an interlocutory order appointing a receiver, defendants appeal. Affirmed.

McConnell & Jenkins and Borders & Borders, for appellants. Steis & Hathaway and M. Winfield, for appellee.

MCCABE, J. This is an appeal from an interlocutory order of the Pulaski circuit court appointing a receiver "to take charge of the rents and profits of [certain] described real estate," situate in Pulaski county. A large body of land is shown by the complaint to have formerly belonged to appellant Thomas Gray. That he and his co-appellant, Jennie A. Gray, his wife, had conveyed said lands to one Judd, and that Judd had conveyed them to appellee; that afterwards Jennie A. Gray was duly appointed guardian of said Thomas, for unsoundness of mind; that afterwards, in a suit between appellee and said Grays in the Pulaski circuit court, his title to all of said land so conveyed was by the Pulaski circuit court duly quieted in appellee; that after the entry of said decree said Grays had stealthily taken possession of 400 acres of said land, and were by force, and by the assistance of numerous other people, keeping appellee out of possession by force; that the Grays were totally insolvent. The final relief sought was a writ of assistance. What there was to assist by such a writ, we are unable to perceive, just at this time. The decree quieting title subsists in all its force, without regard to the question of possession.

One of the errors assigned is the insufficiency of the complaint, and another is the overruling of a demurrer thereto. But the complaint remains in the trial court, and is therefore subject to amendment, so long as the case is

still pending in that court. It seems well settled in this court that, on an appeal from an interlocutory order appointing a receiver, the sufficiency of the facts stated in the complaint to constitute a cause of action cannot be urged, as the complaint, in all respects, is still pending in the trial court, subject to amendment, and may, on such application, be supplemented and enlarged by affidavits and oral proofs. The nature of the facts on which the appointment is sought in this case is of such a character as, if perfectly stated, would make a case for the appointment of a receiver. The insufficiency of the complaint, or overruling a demurrer thereto for want of sufficient facts, cannot prevail on this appeal from the interlocutory order. *Bufkin v. Boyce*, 104 Ind. 53, 3 N. E. 615; *Shoemaker v. Smith*, 100 Ind. 40; *Supreme Sitting of the Order of Iron Hall v. Baker*, 134 Ind. 293, 33 N. E. 1128.

Overruling a motion for a new trial is another one of the alleged errors assigned. There can be no motion for a new trial in such a case, because there has been no trial. *Shoemaker v. Smith*, 74 Ind. 75.

The only other assignment of error is that the circuit court erred in overruling appellants' motion to set aside the appointment. The receiver had been appointed in open court, in presence of appellants, without objection or exception. They afterwards seek to raise the legality of the appointment by a motion to set it aside. In *Association v. Black*, 136 Ind. 544, 35 N. E. 829, it was held by this court that a party who did not except to such an appointment is not in a position afterwards to complain of the same. And so here the time to object to the appointment of a receiver was before the appointment was made, and when the appointment was made the objection should have been made available by an exception thereto. We find no available error in the record. The interlocutory order is affirmed.

(146 Ind. 282)

OLERICK et al. v. ROSS et al.

(Supreme Court of Indiana. Nov. 24, 1896.)

WILLS—EXECUTION—ATTESTATION.

Under Rev. St. 1894, § 2746 (Rev. St. 1881, § 2576), providing that no will, except a nuncupative will, shall be valid unless it be signed by testator, or by some one in his presence and with his consent, and attested by two witnesses, the attestation clause need not recite compliance with such requirement. It is sufficient if the witnesses subscribe their names, as witnesses, opposite the word "witness."

Appeal from circuit court, Lake county; J. H. Gillett, Judge.

Action by Frank Olerick and others against Ida Ross and others. There was a judgment for defendants, and plaintiffs appeal. Affirmed.

Thomas J. Wood, for appellants. Bruce & Bruce, for appellees.

MONKS, J. This action was brought by appellants against appellees to quiet title to certain real estate in Lake county. Appellees claim title to said real estate under the will of William Hoofhouse which was probated August 7, 1888. Appellants contend that said will is void, and claim title to the real estate as the heirs of said testator. It is insisted that the will is void because it is not attested as required by statute; that the attesting clause should be in writing, and recite all the forms required by the statute, and thus show that the same had been complied with. Section 2746, Rev. St. 1894 (section 2576, Rev. St. 1881), provides that "no will except a nuncupative will shall affect any estate, unless it be in writing signed by the testator or by some one in his presence and with his consent, and attested and subscribed in his presence by two or more competent witnesses." The testator signed the will by mark, and the only attesting clause was the word "witnesses," opposite which the names of the witnesses were subscribed. While it is very desirable, for reasons not necessary to state in the determination of this cause, that an attestation clause should be full, and give all the details required by the statute, yet this is not essential to the validity of the will. In order to probate a will, it is necessary to prove by proper evidence that all the requirements of section 2746, Rev. St. 1894 (section 2576, Rev. St. 1881), were complied with, but said section does not require an attesting clause showing that said legal formalities were all observed. It is sufficient if the witnesses subscribe their names as witnesses under or opposite the word "witness" or "attest," or other words of like meaning, or subscribe their names without any expression whatever. *Herbert v. Berrier*, 81 Ind. 1, 3; *Potts v. Felton*, 70 Ind. 166; *Ela v. Edwards*, 16 Gray, 91; *Fatherree v. Lawrence*, 33 Miss. 585; *Waddington v. Buzby*, 45 N. J. Eq. 173, 16 Atl. 690; *Robinson v. Brewster*, 140 Ill. 649, 30 N. E. 683; *In re Fry's Will*, 2 R. I. 88; *Chaffee v. Missionary Convention*, 10 Paige, 85; *Jackson v. Cristman*, 4 Wend. 277; *Jackson v. Jackson*, 39 N. Y. 153; *Roberts v. Phillips*, 4 El. & Bl. 450; *Bryan v. White*, 5 Eng. Law & Eq. 579; *Croft v. Pawlet*, 2 Strange, 1109; *Brice v. Smith*, Willes, 1; *Hands v. James*, Comyns, 531; 29 Am. & Eng. Enc. Law, 194, 198, 203, and notes; 1 Jarm. Wills (5th Ed.) 85; *Schouler*, Wills, § 346, and notes 5 and 6. In *Potts v. Felton*, supra, the word "attest," written opposite the signature of the witnesses, was the only attesting clause, and the will was sustained. The statute of Massachusetts concerning the execution of wills, as set out in *Ela v. Edwards*, supra, is the same as section 2746, Rev. St. 1894 (section 2576, Rev. St. 1881), except as to the number of witnesses required. In that case the court said, "The single requirement of the statute is that the instrument be attested and subscribed in the presence of the tes-

tator by three or more witnesses. Even this, though it be essential that the facts be established by the evidence, yet neither the statute nor the decisions of the courts require that it be recited in the form of an attesting clause. * * * It seems, therefore, to be well established that the fact of the want of an attesting clause does not invalidate the will." In *Fatheree v. Lawrence*, supra, the court held that, although the statute expressly required that the attestation should be in the presence of the testator, that fact need not necessarily be stated in the attestation, and that it would be sufficient if that fact was proved at the trial. In *Roberts v. Phillips*, supra, the court said: "The first objection taken to the attestation of William Bevan was that nothing appears on the face of the will to designate him as a witness. * * * It never has been held that a testimonium clause is necessary, under this statute, or that the witnesses should be described as witnesses on the face of the will. Nothing more is required than that the will should be attested by witnesses, i. e. that they should be present as witnesses, and see it signed by the testator, and that it should be signed by the witnesses in the presence of the testator, i. e. that they should subscribe their names upon the will in his presence." It follows that the will in controversy was properly attested, within the meaning of section 2746, Rev. St. 1894 (section 2576, Rev. St. 1881), and was not therefore invalid. Judgment affirmed.

ANDERSON GLASS CO. v. BRAKEMAN.¹
(Appellate Court of Indiana. Nov. 24, 1896.)

APPEAL—PARTIES—PRACTICE.

1. The granting of a motion to amend the assignments of error so as to insert the name of appellant's co-defendant as a party appellant does not make him a party to the appeal, unless the assignment is actually amended.
2. Denial of a motion for a new trial will not be reviewed unless all of the moving parties are made parties to the appeal.

Appeal from circuit court, Madison county; A. Ellison, Judge.

Action by George A. Brakeman against the Anderson Glass Company and another. There was a judgment for plaintiff, and the defendant glass company appeals. Affirmed.

Chipman, Keltner & Hendee, for appellant. George M. Ballard and Wm. M. Kittinger, for appellee.

ROSS, J. The appellee sued the appellant, the Anderson Glass Company, and one Phillip Matter, to recover an alleged balance due upon an account. To the complaint the defendants filed a joint answer in four paragraphs, and to the affirmative answers the plaintiff replied with a general denial. The issues thus joined were submitted to a jury for trial, and a verdict in favor of the appellee for \$1,350.34 returned, upon

¹ Rehearing granted, 47 N. E. 937. Rehearing denied. Superseded by opinion.

which the court rendered judgment. The appellee insists that the appellant has not made its co-defendant, Phillip Matter, a party to this appeal; hence no questions are presented under the assignment of errors for our consideration. We have examined the record with special care to ascertain whether appellee's contentions are well founded, and are compelled to say that the appellant has no standing in this court. Although it appears that, after issue joined, no account was apparently taken of the fact that Phillip Matter was a party defendant, nevertheless the action was not dismissed as to him, and the verdict and judgment are sufficiently broad to include and bind him. If he is in any way a party to the judgment of the court below, it was necessary that he be made a party to the appeal. The appellant's counsel, recognizing the fact that it was necessary to make Matter a party to the appeal, on the 17th day of April, 1896, filed a written motion in this court asking leave to amend the assignment of errors, and to insert Matter's name as a party appellant. This motion was granted on the 5th day of May, 1896, but up to this time the appellant has failed to take advantage of the right granted. Counsel probably assumed that because the motion was sustained, and leave granted to amend the assignment of errors by inserting the name of Phillip Matter as a party appellant, that made him a party to the appeal. In this, counsel are in error. Even though leave was granted to make Phillip Matter a party appellant, unless counsel amended their assignment of errors, and inserted his name therein, he would not be a party.

The first and third specifications in the assignments of error are predicated upon matter relating to the overruling of the motion for a new trial. This ruling was upon a motion made apparently by both of the defendants, and hence cannot be considered unless all the parties to be affected by its consideration are before the court. The defendant Phillip Matter is not a party to this appeal. The complaint states a cause of action; hence the second specification of error must fail. The judgment of the court below is therefore affirmed.

(16 Ind. App. 697)

STAEDING v. STROUSE et al.¹
(Appellate Court of Indiana. Nov. 24, 1896.)

APPEAL—REVIEW—EVIDENCE.

Where there is some evidence to support the finding, though meager and unsatisfactory, it will not be disturbed.

Appeal from superior court, Marion county; Vinson Carter, Special Judge.

Action by Robert H. Strouse and others against Martin Staeding. There was a judgment for plaintiffs, and defendant appeals. Affirmed.

U. J. Hammond and E. S. G. Rogers, for appellant. Holtzman & Leathers, for appellees.

¹ For opinion on rehearing, see 45 N. E. 1066.

LOTZ, C. J. The appellees sued the appellant to recover commissions on the sale of real estate, and recovered judgment in the court below. The only error assigned in this court is the overruling of the motion for a new trial. It is insisted that the finding is contrary to the law, and not supported by sufficient evidence. The appellant asserts that there was no evidence whatever to support the finding. We have given the evidence a careful consideration, and find that there is some testimony tending to support the finding. It is true that such testimony is meager and unsatisfactory, but, under the familiar rule, this court will not weigh the evidence under such circumstances. The cause must therefore be affirmed. Judgment affirmed.

(16 Ind. App. 345)

STARK v. OWENS.

(Appellate Court of Indiana. Nov. 24, 1896.)

APPEAL—RECORD—BRINGING UP THE EVIDENCE—BILL OF EXCEPTIONS.

It is only when the stenographer's report of the evidence is incorporated in the bill of exceptions that the original bill may be certified as a part of the record on appeal. All other bills of exceptions must be copied by the clerk.

Appeal from circuit court, Monroe county; Robert Muls, Judge.

Action between James O. Stark and Thomas I. Owens. There was a judgment for the latter, and the former appeals. Affirmed.

Henley & Wilson, for appellant. Loudon & Loudon, for appellee.

DAVIS, J. The only error assigned in this court is: "The court erred in overruling the appellant's motion for a new trial in this cause." The only question discussed arises on the evidence. Counsel for appellee insist that the evidence is not in the record. No shorthand reporter was appointed in the court below to take down the evidence in shorthand in pursuance of the provision of section 1470, Rev. St. 1894 (section 1405, Rev. St. 1881). No attempt has been made to bring the evidence in the record as provided in section 1473, Rev. St. 1894 (section 1410, Rev. St. 1881). The evidence at the trial was taken in longhand, and was afterwards incorporated in bill of exceptions, in accordance with the provision of sections 637-641, inclusive, Rev. St. 1894 (sections 625-629, Rev. St. 1881). In making the transcript of the record for this appeal the bill of exceptions containing the evidence was not copied. Rev. St. 1894, § 661 (Rev. St. 1881, § 649). The original bill of exceptions is incorporated in the transcript filed in this court. Under the rule announced by the supreme court, and followed by this court, the evidence is not in the record, and no question arising thereon can be considered or determined by us on this appeal. McCoy v. Able, 131 Ind. 417, 30 N. E. 528, and 31 N. E. 453; Gish v. Gish, 7 Ind. App. 104, 34 N. E. 305. It is only when the stenographer's report of the

evidence with its incidents is incorporated in the bill of exceptions that the original bill may be certified up to this court as a part of the record. All other bills of exceptions must be copied by the clerk, in order to make them a part of the transcript of the record on appeal. As the original bill of exceptions containing the evidence is incorporated into the transcript of the record on this appeal, we cannot, as before stated, under authorities cited, determine the question sought to be presented for our consideration. Judgment affirmed.

(16 Ind. App. 346)

COLEMAN v. GOBEN et al.

(Appellate Court of Indiana. Nov. 24, 1896.)

OFFICERS—ILLEGAL FEES—PAYMENT—RECOVERY.

A borrower from the school fund paid to the county treasurer, on demand of the auditor, the 2 per cent. penalty for delinquency in payment of interest (Burns' Rev. St. 1894, § 5815; Horner's Rev. St. § 4386); and the auditor issued warrants, drawn on the county revenue, to the county attorney for fees in the collection of the interest. Held, that no action for illegal fees would lie against the officers, under Burns' Rev. St. 1894, § 6549 (Horner's Rev. St. § 6032h), providing that, when any public officer receives any money denied him by law, the party aggrieved shall have an action against such officer for its recovery, together with a penalty.

Appeal from circuit court, Montgomery county; James F. Harney, Judge.

Action by Edward Coleman against John L. Goblen and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Paul & Vancleave, for appellant. Kennedy & Kennedy, Wright & Seller, Crane & Anderson, and Finley P. Mount, for appellees.

LOTZ, C. J. The errors assigned in this case are the sustaining of the appellees' separate demurrers to the first and third paragraphs of the appellant's complaint. These paragraphs are unskillful and bungling in their construction, and contain many averments which have little, if any, relevancy to the cause of action attempted to be stated. The substantial averments, as we gather them, are about as follows: The appellant was a borrower from the school funds of Montgomery county, and had executed two mortgages upon real estate to secure the loans. He had failed to pay the interest thereon for a number of years. The appellee Goblen, as the auditor of the county, in requiring him to pay the delinquent interest demanded the 2 per cent. damages, as required by the terms of the mortgage, and by section 5815, Burns' Rev. St. 1894 (section 4386, Horner's Rev. St. 1896). This penalty the appellant paid to the appellee Johnson, who was county treasurer, and Goblen issued a quietus therefor to appellant. The appellee Mount was the county attorney, and Goblen issued warrants to Mount for his services as attorney rendered in and about such

collections. These warrants, however, were not drawn upon the money paid by the appellant, but upon the fund known as "County Revenue." The statute (section 6549, Burns' Rev. St. 1894; section 6032h, Horner's Rev. St. 1896) provides that if any county, township, or other public officer shall obtain any fee or sum of money denied him by law, the person aggrieved shall have an action against such officer for the recovery of such money, together with a penalty. But the auditor did not obtain any part of the money paid by appellant, nor did the county attorney, Mount, nor was the county attorney a public officer. The treasurer, Johnson, did not demand or exact the payment of the money. So far as he was concerned, it was but a voluntary payment, and there is no charge that he made any claim to any part of it. There was no error in the rulings complained of. Judgment affirmed.

(16 Ind. App. 348)

STATE v. WICKWIRE.

(Appellate Court of Indiana. Nov. 24, 1896.)

INTOXICATING LIQUORS — VIOLATION OF LIQUOR LAW—AFFIDAVIT.

An affidavit for violation of Act March 11, 1895, § 4 (Horner's Rev. St. § 5323d), which requires any room in which liquors are sold to be drank on the premises to be situated on the basement or ground floor fronting the street or highway, alleging that defendant was the proprietor of a room where intoxicating liquors were sold, and that such room did not face on a street or highway, is sufficient, without directly alleging that defendant sold liquors in the room; the gist of the offense being the maintenance of such a room.

Appeal from circuit court, Elkhart county; H. D. Wilson, Judge.

Prosecution against Frank Wickwire for violation of the liquor laws. From a judgment quashing the affidavit, the state appeals. Reversed.

Wm. A. Ketcham, Atty. Gen., Miles R. McClaskey, and V. W. Vanfleet, for the State. Chamberlain & Turner, for appellee.

LOTZ, C. J. The state commenced this prosecution against the appellee for the violation of section 4 of the act of March 11, 1895 (section 5323d, Horner's Rev. St.). So much of this section as is applicable to this case is as follows: "Any room where intoxicating liquors are sold by virtue of a license issued under the laws of the state of Indiana for the sale of spirituous, vinous, malt or other intoxicating liquors in less quantities than a quart at a time, with permission to drink the same upon the premises shall be situated upon the ground floor or basement of the building where the same are sold and in a room fronting the street or highway upon which such building is situated; and said room shall be so arranged either with window or glass door, as that the whole of said room may be in view from the street or highway; and no blinds or screens or obstructions

shall be arranged, erected or placed so as to prevent the entire view of said room from the street or highway upon which the same is situated during such days and hours when the sales of such liquors are prohibited by law." The affidavit upon which this prosecution is based charges that the defendant "was then and there the proprietor of a room where intoxicating liquors were sold by virtue of a license issued under the law of the state of Indiana to him for the sale of spirituous, vinous, and malt liquors in less quantities than a quart at a time, with permission to drink the same upon the premises, and that said Frank Wickwire did then and there unlawfully maintain and keep said room in a place not fronting the street or highway upon which the building where the said liquors were sold was situated." The trial court sustained appellee's motion to quash, and this ruling presents the error assigned.

The manifest purpose of the statute is to prevent the sale of intoxicating liquors during such times and hours as are prohibited by law, and as a means to this end the room or place where sold is required to be exposed to view from the street or highway. The appellee insists that the charge is insufficient, because it is not directly averred that either he or his agents sold any intoxicating liquors in the room or place. The gist of the offense consists in keeping or maintaining the room for the sale of such liquors when not fronting upon a street or highway, and this is directly averred. It is also averred that the appellee was the proprietor of the room where the liquors were sold. Some other minor objections are made to the affidavit, but we think it sufficient. Judgment reversed, with instructions to overrule the motions to quash.

(55 Ohio St. 224)

STATE ex rel. BATEMAN et al. v. BODE et al.

(Supreme Court of Ohio. Nov. 13, 1896.)

CANDIDATE'S NAME ON BALLOT MORE THAN ONCE — CONSTITUTIONAL LAW.

The act of April 17, 1896 (92 Ohio Laws, p. 185), which prohibits the name of any candidate for office from being placed upon the official ballot more than once, is a valid law.

(Syllabus by the Court.)

Application by the state, on the relation of Warner M. Bateman and others, for mandamus against August M. Bode and others. Denied.

The defendants constitute the board of elections of Hamilton county, and are ex officio deputy state supervisors of elections in said county. The proceeding is a petition in mandamus to compel said board to place the names of Alexander B. Huston and Alfred B. Benedict upon both the "Democratic judicial ticket" and upon the "Lawyers' judicial ticket," said two persons having been duly nominated by the parties representing both of said tickets. The board refused to place

said names upon both tickets, but offered to place them upon such tickets as the persons might respectively designate, and, upon failure to so designate, to place them upon the Democratic ticket, as that nomination was first certified to the board.

E. W. Kittredge, L. C. Black, and Wm. Worthington, for relators. August H. Bode, for defendants.

BURKET, J. (after stating the facts). It is conceded by counsel for the relators that section 6a of the act of April 17, 1896 (92 Ohio Laws, p. 185), prohibits the printing of said names twice on the same ballot, but it is insisted that said section, in that regard, is unconstitutional. The only question, therefore, to be determined in this case, is whether the general assembly has the power to pass an act providing, as this one does, that the name of a candidate for office shall appear but once upon the ticket or ballot prepared by the board of elections. Full legislative power is vested in the general assembly, by section 1 of article 2 of our constitution, and the power in question is included in that grant of power, unless taken away by some other provision of the constitution. The only limitation upon this general grant of power cited by counsel for the relators in this case are section 2 of article 1, which reads, "All political power is inherent in the people. Government is instituted for their equal protection and benefit . . .," and section 2 of article 5, which reads, "All elections shall be by ballot." The relators seek to compel the board of elections to place the names of the two candidates upon both the Democratic and upon the Lawyers' judicial tickets. This necessarily concedes that those tickets are ballots, within the meaning of the constitution, because, if they are not ballots, there is no right to have these or any other names placed thereon. If they are ballots when the names of certain candidates are on twice, they are equally ballots when the names are on but once. As the constitution is silent as to the number of times a candidate's name shall appear on a ballot, the matter is open to be regulated by the general assembly. The ballot now authorized by statute is different in form from that in use at the time of the adoption of the constitution, but it is nevertheless a ballot. No form of ballot is prescribed by the constitution, and therefore the general assembly is free to adopt such form as, in its judgment, shall be for the best interests of the state. The election must be by ballot, but the form of the ballot, so long as it is a ballot, is left to the sound discretion of the general assembly. The ballot or ticket in question is clearly a ballot, and therefore does not contravene the second section of the fifth article of the constitution. By the second section of the first article of the constitution, it is provided, in substance, that government is instituted for the equal protection and benefit of the people. It seems clear that the placing of the name of

each candidate upon the ballot once, and only once, would be equal protection and benefit to all the candidates. To place the name of one on the ballot in two places, and the name of his opponent in only one place, would not be exactly fair. It would give the candidate whose name appears twice an advantage over the candidate whose name appears but once. So that the statute, instead of being in conflict with this section of the constitution, is in harmony with it, and may have been passed for the purpose of doing away with this advantage which existed under the former statute. It is a proper regulation of the elective franchise, well calculated to avoid and prevent corruption and fraudulent practices, as well as undue advantage to one candidate over another.

But it is argued that the voters have a right to have the names appear upon both ballots, so that they may more easily vote for the candidates of their choice. No legislature and no court can know in advance how the electors desire to vote, and if an opportunity is given them to vote for the candidates of their choice, by placing the names once, in plain print, upon the ballots, it is all that can in fairness be required. The ballot is the same for all, and gives equal protection and benefit to all. There is no discrimination against or in favor of any one; and, if any inequality arises, it arises, not from any inequality caused by the statute, but by reason of inequalities in the persons of the voters, and such inequalities are unavoidable. It is always much more difficult for some electors to cast their ballots than for others. Distance, bad roads, means of transportation, bad health, and many other considerations, may and do render it much more difficult for some men to cast their ballots than others. But these difficulties inhere in the men themselves, and not in the law. Before the law all stand equal, with equal protection and equal benefit; and, if their condition becomes such as not to enable them to enjoy the protection or reap the benefit, it is their fault or misfortune, and not the fault of the law. The act in question was passed to secure purity in our elections. Certain evil practices had grown up by reason of placing the name of a candidate upon the same ballot more than once, and the general assembly attempted to prevent such practice by providing that the name of each candidate should appear on the ballot but once. This is a reasonable regulation of the elective franchise, and not in any sense a destruction thereof. But grant, as is urged by the relators, that some voters may be somewhat inconvenienced by reason of the name of each candidate appearing but once upon the ballot; yet such voters are not thereby deprived of any protection or benefit in casting their ballot. The inconvenience is only that which is experienced by every one who votes other than a straight ticket. Such slight inconvenience to the voter should be endured, rather than permit the advantage which one candidate has over another when

the name of one is placed upon the ballot twice, and the name of the other but once.

The subject is clearly within legislative discretion, and that body has the power to provide that the name of each candidate shall appear but once upon the official ballot, or it may permit the name to appear more than once. Whatever inconvenience there may be to either the candidate or voter in such cases does not rise to the importance of a failure of equal protection or benefit, and therefore does not conflict with the provisions of the second section of our bill of rights. When rights secured by the constitution seem to conflict when applied to the practical affairs of men, the general assembly is at liberty to so adjust the matter as to cause the least injury to the conflicting interests, and thereby protect the rights of the community as a whole. The equal protection and benefit guaranteed by the constitution does not cover every little inconvenience which may be distorted or reasoned into a seeming inequality, but has reference rather to cases in which it is attempted by statute to grant rights or privileges to some which are withheld from others in the same substantial situation or relation. The case of *Fisher v. Dudley*, 74 Md. 242, 22 Atl. 2, is cited by the relators, and relied upon, to show that the names of candidates may appear more than once on the official ballot. In that case the power of the legislature to pass the act was not questioned, but the case involved the construction of a statute, which did not prohibit the name from appearing more than once on the official ballot; and the court held that, not being prohibited, it might properly appear as many times as nominations of the same person had been made by different parties. Such was the practice in this state, under a similar statute, before the enactment of the present statute. The Maryland case would therefore be an authority to show that our practice was right under the former statute, but it can have no bearing upon the question as to whether the general assembly has the power to prohibit the names from appearing more than once upon the official ballot. The case of *Todd v. Board*, 104 Mich. 474, 62 N. W. 564, and 64 N. W. 496, is very much like the present case, and fully supports the conclusions here reached. We regard the act in question as clearly within the power of the general assembly, and therefore a valid law. Writ refused.

(55 Ohio St. 217)

**TOLEDO COMMERCIAL CO. v. GLEN
MANUF'G CO.**

(Supreme Court of Ohio. Nov. 17, 1896.)

**FOREIGN STOCK CORPORATIONS — RIGHT TO DO
BUSINESS—REQUIREMENTS FOR CERTIFICATE.**

The act of May 19, 1894 (91 Ohio Laws, pp. 355, 356), which provides "that no foreign stock corporation, other than a banking and insurance corporation, shall do business in this state without first having procured from the secretary of state a certificate that it has com-

plied with all the requirements of law to authorize it to do business in the state," etc., and that no such "corporation doing business in this state without such certificate shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate," etc., does not apply to a foreign corporation whose business within the state consists merely of selling through traveling agents, and delivering goods manufactured outside of the state.

(Syllabus by the Court.)

Error to circuit court, Lucas county.

Action by the Glen Manufacturing Company against the Toledo Commercial Company.

The petition declared upon an account for two bills of paper sold by the manufacturing company, a Massachusetts corporation, having its home office and principal place of business at Boston, to the Commercial Company, an Ohio corporation. By its answer the defendant company set up that the paper was sold and delivered at Toledo, Ohio, and that all transactions and negotiations respecting the matter were carried on at that place; also, in substance, alleged that the plaintiff company had not complied with the requirements of the statute giving foreign corporations authority to do business in Ohio, but was doing business in the state in violation of law, and was without power to maintain the action. A demurrer to this answer was sustained by the common pleas, and, defendant not desiring to further plead, a judgment was rendered for the amount of plaintiff's claim, which judgment was affirmed by the circuit court. To reverse these judgments the present proceeding in error is brought. Affirmed.

Hamilton & Kirby, for plaintiff in error.
Potter & Emory, for defendant in error.

SPEAR, J. (after stating the facts). The question arising upon the record is whether or not the facts appearing by petition and answer bring the case within the operation of the act of May 19, 1894 (91 Ohio Laws, 355, 356), which provides that no foreign stock corporation other than banking and insurance shall do business in this state without procuring from the secretary of state a certificate that it has complied with all the requirements of law to authorize it to do business in this state. No such foreign stock corporation doing business in this state without such certificate shall maintain any action in this state upon any contract made by it in this state until it shall have procured such certificate. Then follow certain requisites which the statute requires of foreign stock corporations before such certificate shall be issued, viz. the filing with the secretary of state of a sworn copy of its charter, or a certificate of incorporation, and a statement under its corporate seal stating the amount of its capital stock, the business or objects of the corporation which it is engaged in or proposes to engage in within this state, and the place within this state which is to be its principal place of business, and designating in the manner prescribed in

the Code a person upon whom process against such corporation may be served within the state. It may be remarked, in passing, that the allegation in the answer that the plaintiff company was doing business in this state cannot aid the pleading unless it can be shown that the performing of any act in the nature of a business transaction in the state is a doing of business against the terms of the statute. No fact is stated which will assist the court in determining whether the claim was true as applied to the contention of the parties here, and, unless every business act in the state is forbidden without such certificate having first been obtained, it is but the statement of a legal conclusion. It is to be further noted that there is no averment in the answer that the goods were manufactured in the state of Ohio, and, in the absence of such averment, the natural inference would be that they were manufactured in the state of Massachusetts, inasmuch as the petition shows that the plaintiff company is a corporation of that state, having its principal place of business in Boston.

The question, therefore, is: Is the sale and delivery, within the state of Ohio, by a corporation of another state, of goods manufactured without the state of Ohio, the "doing of business" in this state, within the meaning of the statute? It is contended by plaintiff in error that, as held in *Telegraph Co. v. Mayer*, 28 Ohio St. 521: "Foreign corporations can exercise none of their franchises or powers within this state except by comity or legislative consent. That consent may be upon such terms and conditions as the general assembly, under its legislative power, may interpose." And further, that under the facts there is no question of interstate commerce involved, because the sales and delivery were at Toledo, Ohio; and a clear case is thus made of a foreign corporation undertaking to maintain, without having complied with the terms of the statute, an action which the statute permits only upon the condition precedent of a compliance with its terms. The general proposition announced in the *Mayer Case* is established law. But it is there applied to facts which admittedly showed that the telegraph company was the owner of lines of telegraph in Ohio, maintaining offices, and transacting as fully as in the state where incorporated (New York) a general telegraph business; and the question involved was whether such a corporation could be required to pay a tax on gross receipts in Ohio of its telegraph lines, which transactions were clearly an exercise of corporate franchises and powers. The decision falls to cover the case before us. In arriving at the meaning of the statute it is the duty of the court to avoid, if practicable, giving to it such construction as will render it void or inoperative. Whatever view might have been entertained if the question with respect to interstate commerce were an open one, it is now, as applied to facts like those in the

case at bar, settled that the attempt to forbid sales of this character is an interference with interstate commerce, and is beyond the power of the legislatures of the several states. The holdings are numerous that it is the right of persons and of corporations residing in one state to contract and sell their commodities in another, unrestrained, except where restraint is justified under the police power. This rule does not deny the power of any state to impose conditions upon the right of foreign corporations to establish themselves within its boundaries for the performance generally of their business involving the exercise of corporate franchises and powers, but does hold that the selling through travelling agents and delivering of goods manufactured outside of the state, does not fall directly within the purview of their corporate powers. The pertinent provision of the federal constitution is that "the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states," and that instrument gives to congress power "to regulate commerce * * * among the several states." The distinction to be noted is that the sale and delivery of merchandise is a right possessed in common by all the citizens of the state. The exercise of corporate franchises and powers is not. It is a special privilege conferred only on corporations. And the sale and delivery in one state of goods manufactured in another state by a citizen of that state is interstate commerce. Amid a score of authorities it is sufficient to cite *Manufacturing Co. v. Ferguson*, 113 U. S. 727, 5 Sup. Ct. 739; *Robbins v. Shelby Co.*, 120 U. S. 489, 7 Sup. Ct. 692; *Horn Silver Min. Co. v. New York*, 143 U. S. 314, 12 Sup. Ct. 403; *Brennan v. City of Titusville*, 153 U. S. 289, 14 Sup. Ct. 829; and *Colt v. Sutton*, 102 Mich. 324, 60 N. W. 690. The decisions of the supreme court of the United States are controlling. They forbid the exercise by the legislature of the power claimed by the plaintiff in error, and hence its construction of the statute cannot be maintained, because it would result in a conflict upon a question as to which question the authority of the general government is paramount to the governments of the states.

But if it were determined that the power exists, do the terms of the act bear the construction contended for? The act requires, on the part of a foreign corporation, a showing of its condition, its capital stock, the business it proposes to engage in within the state, and a designation of a place as a principal place of business, and of a person upon whom process against it may be served, and such person must have an office at the principal place of business. He is given authority to maintain actions in the courts of the state. And where the agent dies or resigns the corporation is required within 30 days to appoint another. For the certificate of the secretary of state a fee is to be paid, from \$15 to \$50, according to amount of capital

stock. Why should all this machinery be necessary in case of a sale and delivery of goods? Of what importance is it to know the amount of capital stock in order to permit the sale? Why is a principal place of business of consequence when the business may be only one sale? Why require a general agent and an office in a specified place when the sale is to be made by an itinerant agent anywhere in the state? Do not these provisions imply that the purpose of the act is exactly what is stated in the title, viz. "An act to regulate foreign stock corporations"? And does this not mean their regulation in respect of their exercise of corporate franchises and powers? The provisions of the law are not, as it seems to us, consistent with an intent to interfere with the enjoyment by corporations of other states of the ordinary privileges enjoyed, as matter of right, by citizens of the states generally; and hence the act does not apply to sales and delivery of goods such as are shown by the record in this case.

A point is made that, for all that appears in the answer, the Glen Company may be a banking or insurance corporation. It is not worth while to take time to discuss this, for it is not pretended that it is such a corporation, and an amendment would easily cure that defect, were the answer otherwise sufficient.

An act is found in the volume of Ohio Laws heretofore cited, at page 272, relating to the regulation of foreign corporations doing business in this state. But this act is not relied upon by plaintiff in error, and its bearing upon this case is not, for that reason, here considered. Judgments affirmed.

(55 Ohio St. 210)

HALE v. STATE.

(Supreme Court of Ohio. Nov. 17, 1896.)

CONTEMPT OF COURT—POWER TO PUNISH—ABRIDGEMENT OF POWER IN LEGISLATURE—REMOVAL OF WITNESS.

1. The general assembly is without authority to abridge the power of a court created by the constitution to punish contempts summarily, such power being inherent, and necessary to the exercise of judicial functions; and sections 6906, 6907, Rev. St., will not be so construed as to impute to the general assembly an intention to abridge such power.

2. Removing a witness from the county of his residence, where he was under subpoena to attend upon the trial of a cause pending, with the purpose and effect of preventing his appearance upon the day of trial, being a wrongful act, which obstructs the administration of justice, is a contempt of court. *Baldwin v. State*, 11 Ohio St. 681, overruled.

Minshall, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Jackson county.

William T. Hale, being convicted of contempt, brings error. Affirmed.

The plaintiff in error seeks a reversal of the judgment of the circuit court, affirming a judgment of the common pleas court of Jackson

county finding him guilty upon an information for contempt of court and adjudging him to pay a fine of \$500 and the costs of prosecution. The information charged, in substance, that on the 28th of November, 1893, a witness named was under subpoena to appear before said court, at its session on December 1, 1893, to testify upon the trial of an indictment charging Hale with a felony; that the accused, knowing that said witness was under subpoena and that she would be a material witness against him on the trial of said indictment, by promising to pay her expenses, and other promises, induced her to leave said county, and did take her from the county, and beyond the reach of the process of said court, thereby preventing the appearance of said witness at said trial, and obstructing the administration of justice. On Hale's plea of not guilty, the evidence was heard by the court, and the accused found guilty. His motions for a new trial and in arrest of judgment were overruled. The latter motion challenged the jurisdiction of the court and the sufficiency of the information.

Elmer C. Powell, for plaintiff in error. John W. Higgins and John T. Moore, for the State.

SHAUCK, J. (after stating the facts). The case submitted to us concedes that the evidence produced in the court of common pleas established the allegations of the information. The question of law presented by the record here is whether that court erred in overruling the motion in arrest of judgment, which challenged the sufficiency of the information and the jurisdiction of the court to try the accused summarily. We do not understand counsel for the plaintiff in error to deny, either that the act charged was a contempt at common law, or that the court may punish summarily any act which, under the statute, is a contempt of court. Their contention is that it is within the authority of the legislature to abridge the power of courts in this regard, and that such authority has been exercised in the enactment of sections 6906 and 6907 of the Revised Statutes, which make certain acts, formerly punishable as contempts, punishable by indictment as "offenses against public justice." The former section provides for the punishment of persons who, in the manner pointed out, evade the service of subpoenas, or refuse to appear and testify after service. It contains the express provision that "this section shall not prevent summary proceedings for contempt." The latter section provides for the punishment of persons who "corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, * * * in the discharge of his duty," etc.; and it is not by any express provision made cumulative to summary proceedings for contempt. It is said that the actual removal of the witness from the jurisdiction of the court, which this information charges, is wholly comprehended within the attempt to influence to which the

statute affixes a penalty; and that, from the omission of words making the section cumulative to summary proceedings for contempt, it results that it is exclusive of such proceedings.

However justifiable this inference might be, if a proper view comprehended the provisions of the statute alone, it will, according to a familiar rule, be a sufficient reason for rejecting it, if it leads to such an interpretation of the statute as would impute to the general assembly an intention to exercise power which it does not possess. The difference between the jurisdiction of courts and their inherent powers is too important to be overlooked. In constitutional governments their jurisdiction is conferred by the provisions of the constitutions and of statutes enacted in the exercise of legislative authority. That, however, is not true with respect to such powers as are necessary to the orderly and efficient exercise of jurisdiction. Such powers, from both their nature and their ancient exercise, must be regarded as inherent. They do not depend upon express constitutional grant, nor in any sense upon the legislative will. The power to maintain order, to secure the attendance of witnesses to the end that the rights of parties may be ascertained, and to enforce process to the end that effect may be given to judgments, must inhere in every court, or the purpose of its creation fails. Without such power, no other could be exercised. When constitutional governments were established upon this continent, there was general familiarity with the course of judicial proceedings in the administration of the common law. This power had long been exercised by courts as inherent. It was within every conception of a judicial court. The view of the subject then generally taken was stated by Chief Justice McKean, in 1788: "Not only my brethren and myself, but likewise all the judges of England, think that, without this power, no court could possibly exist; nay, that no contempt could, indeed, be committed against us, we should be so truly contemptible. The law upon this subject is of immemorial antiquity, and there is not any period when it can be said to have ceased or discontinued." *Respublica v. Oswald*, 1 Dall. 329. The power, therefore, arose upon the creation of a court, because it was implied in every conception of a court. A people does not lose majesty by achieving liberty. The powers of government are the same, whatever may be the form. Here the people, possessing all governmental power, adopted constitutions, completely distributing it to appropriate departments. They created courts, and, in some instances, authorized the legislatures to create others. The courts so created and authorized have all the powers which are necessary to their efficient action, or embraced within their commonly received definition. The power in question was lodged permanently in the courts, to be exercised by those who, for the time being, may be charged with the performance of judicial

duties. But judges may not remain in office and resign their functions.

The suggestion that this power may be abused raises no doubt as to its existence. In the Virginia convention, assembled to adopt or reject the proposed federal constitution, John Marshall answered this suggestion, and anticipated every occasion upon which it may be urged: "All delegated power is liable to be abused. Arguments drawn from that source go in direct opposition to all government, and in recommendation of anarchy." In making the constitutional distribution of the powers of government, the people assumed that the several departments would be equally careful to use the powers granted for the public good alone. Accordingly, we have the familiar and generally accepted doctrine that none of the several departments is subordinate, but that all are co-ordinate. It is not, therefore, within the discretion of the judicial department to refuse to enforce a criminal statute because to it the prohibited act may seem innocent, or the prescribed penalty excessive. The power of commitment for contempt has long been regarded as inhering in legislative bodies. It is not expressly granted. If it were not inherent, it could not be created by the act of the legislature itself. The existence of that power was recognized by this court in *Ex parte Dalton*, 44 Ohio St. 142, 5 N. E. 136. The power we now assert is correlative of that which was there recognized. That it is not competent for the legislature to abridge the power of courts to punish summarily such wrongful acts as obstruct the administration of justice has been held in well-considered cases. The conclusion is a necessary inference from the very numerous cases in which it has been held that the power inheres in courts independently of legislative authority. A power which the legislature does not give, it cannot take away. If power, distinguished from jurisdiction, exists independently of legislation, it will continue to exist notwithstanding legislation. From the numerous cases sustaining these views, the following are selected, because of their elaborate review of the authorities or their clear and vigorous statement of the principles involved: *State v. Frew*, 24 W. Va. 416; *Little v. State*, 90 Ind. 338; *Yates v. Lansing*, 5 Johns. 282; *State v. Morrill*, 16 Ark. 384; *Arnold v. Com.*, 80 Ky. 300; *People v. Wilson*, 64 Ill. 195; *In re Wooley*, 11 Bush, 95; *U. S. v. Hudson*, 7 Cranch, 32; *Watson v. Williams*, 36 Miss. 331; *Darby's Case*, 3 Wheeler, Cr. Cas. 1; *Neel v. State*, 4 Eng. (Ark.) 259; *State v. Matthews*, 37 N. H. 450; *Cartwright's Case*, 114 Mass. 230.

In the case before us, a court, created by the constitution, punished summarily as for a contempt, one guilty of a wrongful act which interfered with the exercise of its jurisdiction. Upon a careful examination of the reported cases, we find but one which seems to deny its power to do so. We are

not concerned with cases which hold that the power may be exercised by courts or legislative bodies only when they are proceeding within the sphere of duty when the alleged contempt is committed. However clear it may seem, from a consideration of the principles involved, that the authority conferred by the constitution upon the legislature to create additional courts has reference only to courts with all the attributes and inherent powers that are requisite to the efficient performance of judicial duties, we are not now concerned with any reported case which holds that the legislature may create a judicial tribunal without power to enforce respect for its sessions, its writs, or its process. We are mindful that, in reviewing the judgment of the circuit court in this case, we are exercising jurisdiction conferred by the statute, as was the circuit court, when it reviewed the judgment of the court of common pleas. This we do, without doubt as to the validity of the statute which authorizes the review. It does not in any manner or to any degree limit the power of the judicial department of the government of the state. Its object is to diminish as much as may be the liability of the power to abuse, but without assuming a revisory authority in another department.

The sections of the statute considered do not in terms seek to limit the judicial power considered, and it would be indecorous to place such construction upon them as would impute to the general assembly either ignorance of the limitations upon its authority or a purpose to transcend them. We conclude that the insertion of the provision in section 6906, making its provisions cumulative to summary proceedings for contempt, was not necessary to that end, and that its omission from section 6907 is not significant. In *Baldwin v. State*, 11 Ohio St. 681, without statement of reason or citation of authority, a conclusion is announced apparently in conflict with the views here expressed. That case is overruled. Judgment affirmed.

MINSHALL, J., dissents.

(163 Ill. 603)

STRAIN v. SWEENEY et al.

(Supreme Court of Illinois. Nov. 10, 1896.)

WILLS — CONSTRUCTION — EXECUTORY DEVISE — FAILURE OF ISSUE — "HEIRS" CONSTRUED AS MEANING "CHILDREN."

1. A devise to testator's son D., "and his heirs forever, but, in case he should die without issue of his body, then the same shall go to the heirs of N., to them and their use forever," vests in D. a fee, determinable on his dying without children surviving him; and hence the limitation over, being upon a definite failure of issue, is valid as an executory devise.

2. Testator devised his homestead to his son D., "and his heirs forever, but, in case he should die without issue of his body, then the same shall go to the heirs of N., to them and their use forever." When the will was made, N. had two children, which fact was known to testator. *Held*, that the limitation over to the heirs

of N. was to N.'s children; otherwise, if D. should die before N., without issue of his body, the title to the estate would be in abeyance.

Error to circuit court, McLean county; Alfred Sample, Judge.

Bill by Phillip Strain against Nelson C. Sweeney and others to construe a will. There was a decree for defendants, and plaintiff brings error. Affirmed.

J. E. Pollock, A. J. Barr, and Mayne Pollock, for plaintiff in error. Owen T. Reeves, for defendants in error.

MAGRUDER, C. J. This is a bill filed to the September term, 1895, of the circuit court of McLean county, by the plaintiff in error against Nelson C. Sweeney and his two children, Nellie Bell Newton and Cora May Sweeney, defendants in error, mainly for the purpose of construing the will of Joseph Sweeney, deceased, who died on or about December 21, 1871, leaving a will dated November 18, 1871. The parties agree as to the facts as herein stated. The defendants answered the bill, admitting all the material facts. The plaintiff in error, who derives title by mesne conveyances from Dennis S. Sweeney, one of the devisees named in the will, to the land therein devised to said Dennis, claims to be the owner in fee of the property in controversy, while the defendants in error contend that Dennis S. Sweeney took only a determinable fee, upon the future event that he should die without issue of his body, in which event the devise, as to the heirs of Nelson C. Sweeney, was to take effect as an executory devise. The circuit court dismissed the bill, and the present writ of error is sued out for the purpose of reviewing such decree of dismissal.

The first clause of the will of Joseph Sweeney, and that on which the present controversy hinges, is as follows: "I give, devise, and bequeath to my son Dennis S. Sweeney my homestead, situate on the northeast corner of Douglas and Evans streets, in the city of Bloomington, Illinois, except a strip of land belonging thereto, fifty feet wide, across the east end of my homestead grounds, to him and his heirs forever. But, in case he should die without issue of his body, then the same shall go to the heirs of Nelson C. Sweeney, to them and their use forever." By the second clause the testator gives, devises, and bequeaths to his son Nelson C. Sweeney, one of the defendants in error, 60 acres off the west side of a farm owned by him, "to him and his heirs forever." By the third clause he gives, etc., to his granddaughter Margaret Ida Maple the remainder of said farm, and 20 acres besides. By the fourth clause he gives, etc., to his grandson Edwin A. Maple the strip 50 feet wide reserved from the bequest to his son Dennis, with certain restrictions upon its alienation, and also all his personal property after payment of his debts, but with a provision that out of his personalty shall be erected by his executors two tombstones, not to cost more than \$300,—one at his own grave, and the other between the

graves of his wife and daughter. By the fifth clause he devises to his said granddaughter a strip of land, being a private road on a certain farm. By the last clause he appoints his sons, Dennis S. Sweeney and Nelson C. Sweeney, his executors. It is admitted that Dennis S. Sweeney is still alive, and, up to the time of filing the answer in this cause, has had no issue of his body; that Nelson C. Sweeney is still alive, and is the only qualified executor of the will of Joseph Sweeney; that Nettie Bell Newton (formerly Nettie Bell Sweeney) and Cora May Sweeney are the only children of Nelson C. Sweeney, and were in being at the time of making said will.

It is claimed that Dennis S. Sweeney took a fee-simple title to the property devised to him in the first clause of the will, and, in support of this position, reliance is placed upon the recent cases of *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325, and *Silva v. Hopkinson*, 158 Ill. 387, 41 N. E. 1013. In regard to these two cases we have recently, in the case of *Glover v. Condell*, 163 Ill. 566, 45 N. E. 173, used the following language: "This court has held in a number of cases that, although a fee cannot be limited upon a fee by deed, yet it can be so limited by will, by way of executory devise. *Ackless v. Seekright*, *Breese*, 76; *Slegwald v. Slegwald*, 37 Ill. 430; *McCampbell v. Mason*, 151 Ill. 500, 38 N. E. 672; *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Palmer v. Cook*, 159 Ill. 300, 42 N. E. 796. The case of *Ewing v. Barnes*, 156 Ill. 61, 40 N. E. 325, so far as it holds to the contrary, is overruled. The language used in *Silva v. Hopkinson*, 158 Ill. 386, 41 N. E. 1013, should be construed as applicable only to the facts of that case, and not as contravening the doctrine of *Slegwald v. Slegwald*, supra, and the other cases of a like character above referred to."

Undoubtedly the following words in the first clause of Joseph Sweeney's will, "I give, devise, and bequeath to my son Dennis S. Sweeney my homestead, * * * to him and his heirs forever," would, if they stood alone, vest in him the fee-simple title to the property in question. Since, at common law, a fee cannot be limited upon a fee, the limitation over, contained in the following words, "But, in case he should die without issue of his body, then the same shall go to the heirs of Nelson C. Sweeney, to them and their use forever," can only be sustained, if sustained at all, as an executory devise. The only question, then, is whether the contingency upon which the limitation is to take place is so remote as to make a limitation void. Do the words referring to the death of Dennis S. Sweeney without issue of his body mean a general, indefinite failure of issue (that is, a failure at the death, or at a time afterwards), or do they, when considered in connection with all the other words in the clause in which they occur, import a definite failure of issue? If they cannot be construed otherwise than as meaning an indefinite failure of issue, the limitation is void for remoteness; but if they can be construed as importing a

definite failure of issue (that is to say, if they can be construed as referring to the death of Dennis S. Sweeney without issue of his body, or children, living at the time of his death), the limitation over is valid, as not contravening the rule against perpetuities. *Smith v. Kimbell*, 153 Ill. 368, 38 N. E. 1029; *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191. The textbooks lay down the general rule that where a devise is to one and his heirs, with a devise over "if he die without issue," or "without having issue," and with no explanatory words defining the time to which this contingency is to apply, it will be construed to be a general failure of issue at any time, however indefinite or remote, and which may not, therefore, happen for many generations. But the decisions upon this subject are exceedingly arbitrary, and without much foundation in reason or common sense. Hence courts will seize hold of slight circumstances to give to executory devises a construction which regards the failure of issue as relating to a definite period of time. *Smith v. Kimbell*, supra. The construction of the words as importing an indefinite failure of issue will give way to any explanatory words in the context which can be interpreted as fixing the time of the failure at the death of the first taker. The words here are not, "if he die without issue," or "without having issue," but they are, "in case he should die without issue of his body, then the same shall go to the heirs," etc. The supreme court of the United States has said: "The words 'issue of his body' are more flexible than the words 'heirs of his body,' and courts more readily interpret the former as the synonym of 'children,' and a mere descriptio personarum, than the latter." *Daniel v. Whartenby*, 17 Wall, 639. In *Carpenter v. Van Olinder*, 127 Ill. 42, 19 N. E. 868, we construed the words "issue of their bodies" as meaning "children." In *Butler v. Huestis*, 68 Ill. 594, it was said that the words "issue" and "children" might be construed interchangeably, in order to effectuate the intention of the testator. In *Summers v. Smith*, 127 Ill. 645, 21 N. E. 191, it was said that every part of the will might be taken into consideration for the purpose of showing that the words "heirs of body," which are less flexible than the words "issue of body," are used synonymously with "children." And in the *Summers* Case it was held that the words "dying without heirs of body" meant "dying without leaving such heirs of body as the estate would have vested in, in fee, instantly, upon the death of the first taker, as children," etc.

In the case at bar, all the provisions of the will, considered together, show an intention on the part of the testator to provide for his children and grandchildren, and not for remote issue. By the first clause he gives a part of his property to one son; by the second, another part to another son; by the third, another part to his granddaughter; by the fourth, another part to his grandson, etc.; showing that those who were in his mind as objects of his bounty, were his immediate issue, such as children and

grandchildren, and not remote issue. The time intended as the time for the failure of the issue of his body was the death of the first taker, Dennis S. Sweeney, so that the words, "in case he should die without issue of his body," mean, "in case he should die without issue of his body living at the time of his death"; that is, at the time of the death of Dennis S. Sweeney. This is apparent from the use of the word "then" in the connection in which it here occurs. The word "then," in a gift to A., and, if A. die without issue, then to B., has been held in many cases to be a word of reference or reasoning, as merely indicating a consequence following from previous premises. Where employed as such a particle of reference, it means "in that event," or "in that case," or "in consequence." When so employed it generally follows a clause beginning with the word "if." But the word "then" is also an adverb of time, and, when used as such, means "at that time." It has this meaning here. As the clause which precedes it begins with the words "in case," to construe it as meaning "in that case" would be a mere repetition of the same expression. The meaning here is that, in case he should die without issue of his body at that time (that is, at the time of the death of Dennis S. Sweeney), the property should go to the heirs of Nelson C. Sweeney. This meaning of the word "then," as being an adverb of time, and not of reference, in the connection in which it here occurs, is sustained by the following authorities: *Harris v. Smith*, 16 Ga. 545; *Snyder's Appeal*, 95 Pa. St. 174; *Pinbury v. Elkin*, 1 P. Wms. 563; *Griswold v. Greer*, 18 Ga. 545. Indeed, when the words "issue of his body" are construed to mean "children," a definite failure of issue (that is, a dying without issue living at the death of the first taker) is necessarily intended, because "child" or "children" are words which generally refer to the death of the first taker. *Morgan v. Morgan*, 5 Day, 517; *Richardson v. Noyes*, 2 Mass. 56; *Smith v. Hunter*, 23 Ind. 580; *Sherman v. Sherman*, 3 Barb. 385; *Hull v. Eddy*, 14 N. J. Law, 169. What has been said becomes still more apparent when it is remembered that the words "heirs of Nelson C. Sweeney" mean "children of Nelson C. Sweeney." The word "heirs," in a will, is sometimes used as synonymous with the word "children." *Summers v. Smith*, supra; *Smith v. Kimbell*, supra. It is admitted that, when the present will was made, Nelson C. Sweeney had two children, the defendants in error Nettie Bell Newton and Cora May Sweeney. This fact was well known to their grandfather Joseph Sweeney, the testator. One of the established rules for the construction of a will is that "the court will look at the circumstances under which the deviser makes his will, as the state of his property, of his family, and the like." 3 Jarm. Wills (5th Am. Ed., by Rand. & T.) pp. 705, 706. Joseph Sweeney must have meant the children of his son Nelson C. Sweeney, and not the heirs generally of Nelson C. Sweeney. It is also a well-established rule in the construction of wills that

"a testator is rather to be presumed to calculate on the dispositions in his will taking effect, than the contrary." *Id.* p. 709. If Dennis S. Sweeney should die, without issue of his body, before Nelson C. Sweeney should die, then, upon the construction of the word "heirs" as having its ordinary signification, the title to the estate would be in abeyance, because no one can be the heir of a living person, and Nelson C. Sweeney could have no heirs until his death. To say that the estate should go to the heirs of Nelson C. Sweeney before the death of the latter would be equivalent to saying that it could go nowhere, and that the testator calculated upon one of the dispositions of his will failing to take effect. To avoid a construction which would lead to such an absurdity, the word "heirs," as here used, must be regarded as meaning "children." And, if it means children, then the failure of issue was to take place at a definite time, inasmuch as the parties in whose favor the limitation over was to take effect were then in being. *Smith v. Kimbell*, supra. The plain intention of Joseph Sweeney was that the homestead should go to his son Dennis S. Sweeney, but, if the latter should die without leaving any children when he died, the homestead should go to the children of his son Nelson C. Sweeney. We see no reason why the will should not be so construed as to effectuate this intention of the testator, there being no arbitrary rule of property, like the rule in *Shelley's Case*, which stands in the way of such a construction. After the devise of the fee to Dennis S. Sweeney, the limitation over to the children of Nelson C. Sweeney, upon the death of the said Dennis without children surviving him, is valid as an executory devise, because it is not void for remoteness, but imports a definite failure of issue.

The result of this view is that the devise to Dennis S. Sweeney must be regarded as the devise of a fee, determinable upon his dying without leaving children at the time of his death. It cannot be known until his death whether the contingency will happen by which the limitation over is to take effect. If he die, leaving no children at the time of his death, the children of Nelson C. Sweeney will take the property; but, if he leaves a child or children at that time, the property will go to such child or children. We think that the circuit court took the correct view of the first clause of the will, and properly dismissed the bill. The decree of the circuit court is accordingly affirmed. Affirmed.

(163 Ill. 234)

BOLTON v. JOHNSTON.

(Supreme Court of Illinois. Nov. 9, 1896.)

QUESTION OF FACT—APPEAL—RECORD—AFFIRMANCE OF JUDGMENT.

1. Where the evidence introduced was agreed upon and embodied in a statement of facts, whether the evidence was sufficient to authorize the judgment is purely a question of fact.
2. Where a trial is had before the court with-

out a jury, and no objection is raised in regard to the ruling of the court on questions of evidence, and no proposition of law is submitted to be ruled upon, and the judgment of the trial court is affirmed by the appellate court, the record presents no question of law to the supreme court.

Appeal from appellate court, First district.

Action by John Johnston, Jr., against James Bolton on a contract. From a judgment affirming a judgment in favor of plaintiff (57 Ill. App. 178), defendant appeals. Affirmed.

Jones & Strong, for appellant. Henry Browne and E. J. McArdle, for appellee.

CRAIG, J. This was an action brought by John Johnston, Jr., against James Bolton to recover damages for a breach of contract wherein Bolton had agreed to convey a certain tract of land to Johnston for a certain price, upon conditions named in the contract. By agreement of the parties a jury was waived, and the cause was submitted to the court for trial upon an agreed statement of facts. The superior court, upon the evidence introduced, found the issues for the plaintiff, and assessed his damages at \$2,896, and entered judgment for that amount. The defendant entered an exception to the judgment, and appealed to the appellate court, where the judgment was affirmed. No objection was made on the trial to the introduction of evidence by the appellant, nor was any proposition submitted to the court to be held as law by him; but he claimed there, and claims here, as we understand the argument, that, under the facts, appellee was not entitled to recover. Section 89 of the practice act declares that the supreme court shall re-examine cases brought to it by appeal or writ of error as to questions of law only, and no assignment of error shall be allowed which shall call in question the determination of the inferior or appellate courts upon any controverted questions of fact in any case, excepting those enumerated in the preceding section. This case does not fall within the excepted cases, and it is insisted by appellee that no question is involved here, and that the judgment of the appellate court should be affirmed. This court has often held that where a good cause of action is alleged in the declaration, and an issue has been made by pleas to the declaration, and a trial is had before the court without a jury, and no objection is interposed to the admission or exclusion of evidence, and no propositions of law are submitted to the court as provided by the statute to be ruled upon, and the judgment of the trial court has been affirmed in the appellate court, no question of law can arise in this court in regard to the finding of the trial court, and in such case the judgment of the appellate court must, of necessity, be affirmed. *American Exch. Nat. Bank v. Chicago Nat. Bank*, 131 Ill. 530, 22 N. E. 523. This case, as we understand the record, falls within the rule announced in

the cases cited, and must be controlled by them. It is conceded in the argument that the law as stated is correct, as a general rule, but it is claimed that the present case is an exception. It is said that the facts were all agreed upon, and hence there was no controverted fact upon which the appellate court was called upon to pass. The same contention was made in *Cothran v. Ellis*, 125 Ill. 502, 16 N. E. 646, and in disposing of the question it is said: " * * * We might here dismiss this branch of the case without further remark, but for the fact it has been supposed that where there is no conflict in the evidence, and the proofs appear wholly insufficient to sustain the judgment of the trial court, this court * * * may nevertheless reverse it, on the ground that the want of evidence to support the judgment presents a question of law to be reviewed here. This position is unsound, in any view that may be taken of it. It is true that whether a matter offered in evidence tends to prove an issue presents, when [properly] challenged, a question of law for the determination of the court. But, when once admitted, the jury, under the instructions of the court, are to determine its force and effect upon the issue submitted, and pass upon the issue itself as one of fact; and no review of it, by this or any other court, can change it to one of law. * * * And whether the evidence is good, bad, or worthless, the finding of the jury, based upon it, will be a finding of the facts involved in the issue, within the meaning of our statute, without regard to whether it is justified by the evidence or not; and, if the jury have made a mistake, the ultimate power to correct it is conferred upon the appellate court, and not upon this." Where the facts alleged in the declaration, upon which the cause of action is predicated, are put in issue by pleas interposed by the defendant in the action, the questions raised by the pleadings may be regarded as controverted questions of fact, although the evidence introduced in the trial may be agreed upon and embodied in a stipulation of facts. *Crean v. Hourigan*, 158 Ill. 301, 41 N. E. 880; *Railway Co. v. Red*, 154 Ill. 95, 39 N. E. 1086; *Fitch v. Johnson*, 104 Ill. 111. If the evidence introduced in this case was insufficient to authorize a recovery, and the defendant desired to save that question to be passed upon in this court, he might have done so by submitting a proper instruction or proposition of law for the decision of the trial court. If, under the written contract upon which the action was predicated, which was read in evidence, defendant desired a construction of the contract by the court, the decision of the court on that question could have been obtained by an appropriate proposition of law submitted to the court for decision. So, also, any other legal question might have been preserved in the same way. But that course was not pursued. No propositions of law were submitted for the decision of the court

on any question. Under the pleadings, whether the evidence was sufficient to authorize the judgment was purely a question of fact, and, under the statute, the judgment of the appellate court affirming the judgment of the trial court is conclusive. The judgment of the appellate court will be affirmed. Affirmed.

(163 Ill. 528)

PETERSON v. CURRIER.

(Supreme Court of Illinois. Nov. 9, 1896.)

APPEAL—RECORD—NO QUESTION OF LAW—AFFIRMANCE.

Where a trial is had before the court without a jury, and no objection is made to the ruling of the court on questions of evidence, and no proposition of law is submitted to be ruled upon, and the judgment of the trial court is affirmed by the appellate court, the record presents no question of law to the supreme court.

Appeal from appellate court, First district. Assumpsit by Henry E. C. Peterson against Charles L. Currier. From a judgment affirming a judgment in favor of defendant (62 Ill. App. 163), plaintiff appeals. Affirmed.

R. A. Childs and Chas. Hudson, for appellant. L. S. Hodges, for appellee.

ORRIG, J. This was an action of assumpsit brought by appellant, Peterson, against appellee, Currier, on a contract which read as follows: "Chicago, Ill., September 5, 1889. Rec'd of H. E. C. Peterson the sum of five thousand dollars, to be invested in bonds issued by the Chicago and Iowa Coal Company at par, said bonds being a series of sixty, of the amount of five hundred dollars each, and are secured by a mortgage on all the property of said company, being first lien, and valued at two hundred thousand dollars (\$200,000), which bonds I agree to purchase of said Peterson, on thirty days' notice, at par, with all accumulated or accrued interest unpaid, if any. Said bonds run ten years at 7½ semiannual interest, to pay which a sinking fund of 8c. per ton is to be paid to the trustee (the Illinois Trust & Savings Bank, of Chicago). Said bonds date Sept. 1st, 1889. Charles L. Currier." The declaration contained one special count on the contract, and the common counts, to which the defendant pleaded the general issue. The parties, by agreement, waived a jury, and a trial was had before the court, resulting in a judgment for the defendant. The plaintiff appealed to the appellate court, where the judgment was affirmed. No objection was made to the ruling of the circuit court on the admission or exclusion of evidence. No written propositions were submitted to be held as law by the court in the decision of the case. The judgment of the circuit court having been affirmed by the appellate court, and no proposition of law having been submitted, and no question raised in regard to the

ruling of the court in questions of evidence, under the repeated rulings of this court the record presents no questions of law for our decision. *Barber v. Hawley*, 116 Ill. 91, 4 N. E. 770; *McDonald v. Allen*, 123 Ill. 521, 21 N. E. 537; *Hall v. Cox*, 144 Ill. 532, 33 N. E. 33; *Bradish v. Yocum*, 130 Ill. 386, 23 N. E. 114; *Hawes v. Sternhelm*, 156 Ill. 341, 40 N. E. 947. The judgment of the appellate court will be affirmed. Affirmed.

(163 Ill. 46)

LORD et al. v. BOARD OF TRADE OF WICHITA.

(Supreme Court of Illinois. June 13, 1896.)

REVIEW ON APPEAL—QUESTIONS OF FACT—AMOUNT OF DAMAGES—TRIAL—INSTRUCTIONS—ASSUMING EXISTENCE OF FACTS IN DISPUTE—CONTRACT—PUBLIC POLICY.

1. When the trial court does not make, and is not requested to make, a ruling as to whether the evidence proves or tends to prove plaintiff's cause of action, the supreme court cannot pass upon it.

2. Though the grounds on which damages are recoverable and the basis on which they should be estimated are questions of law, the amount of damages is a question of fact, upon which the conclusion of the appellate court is final.

3. Where the facts are in dispute, and a party submits propositions containing correct legal principles as applied to a hypothetical condition of facts, statements therein that such principles are applicable to the facts in the case are properly stricken out.

On Rehearing.

A contract between a board of trade and a person who represents himself as having control over certain industries which he is about to establish in another town, whereby such person agrees to withdraw from that deal, and use his influence to have those industries established in the town represented by said board, is not against public policy.

Appeal from appellate court, First district. Assumpsit by the Board of Trade of Wichita against Daniel M. Lord and another. A judgment for plaintiff was affirmed by the appellate court (62 Ill. App. 526), and defendants appeal. Affirmed.

G. W. & J. T. Kretzinger, for appellants. Bentley & Ferguson and Walker & Eddy, for appellee.

CARTWRIGHT, J. Appellee brought this suit in assumpsit against appellants, partners doing business under the firm name of Lord & Thomas. There were two special counts, in which a written contract was set out, wherein appellants agreed, in consideration of \$25,000, to use their influence to establish certain industries in the city of Wichita, which they represented they had power to control, and which they were about to establish in the city of Hutchinson, Kan., and to induce capitalists to invest in real estate in said city of Wichita, and also agreed to sell real estate, to be donated for the purpose, the proceeds of which were to be used to boom said city of Wichita. It was alleged that appellee paid to appellants \$10,000 under the contract; that

they failed to perform their agreements; and the declaration contained also the common counts, among which were counts for money had and received by appellants for the use of appellee, and for interest. A jury was waived, and the cause was submitted to the court for trial, resulting in a finding and judgment for appellee for \$13,326.39. That judgment has been affirmed by the appellate court.

The arguments in this case are devoted almost exclusively to questions of fact, such as whether defendants used their best efforts and influence to boom the city of Wichita, whether there was any rescission of the contract, and whether there was evidence which would justify a recovery for money had and received. The position of appellants, as stated by counsel, is as follows: "Appellants did not claim in the court below, and do not claim now, that the allegations of either the special counts or the common counts of the declaration are defective or insufficient to support a judgment based upon competent evidence of such allegations. * * * There was no question of variance between proof and pleading to be raised in the court below, nor do we raise any such question now. We concede that all the evidence in the record was properly admitted under some count in the declaration. We do say, however, that there was no evidence admitted that supports the judgment, or proves, or tends to prove, all the essential elements of any ground of recovery known to the law." The question so stated by counsel was not raised in the trial court as a question of law, and it cannot be said that the court whose judgment is being reviewed has committed an error upon a question not raised in that court and on which it has made no ruling. If the trial court is not asked to make, and does not make, a ruling upon the question whether the evidence proves, or tends to prove, plaintiff's cause of action, this court cannot pass upon it. *Cothran v. Ellis*, 125 Ill. 496, 16 N. E. 646. We must, therefore, decline to enter upon a consideration of the arguments upon those questions.

It is urged that the damages allowed were excessive, and it is said that the court included \$3,326.39 as interest. The grounds upon which damages are recoverable, and the basis upon which they are to be estimated, are questions of law, and if there has been an erroneous holding of a trial court upon such a question it may be reviewed by this court; but, otherwise, the question is one of fact. No question of law as to the amount of damages was preserved in any way in this case, and the conclusion of the appellate court must be regarded as final. *Railroad Co. v. Frelka*, 110 Ill. 498; *Jones v. Fisher*, 116 Ill. 68, 4 N. E. 255.

Complaint is made of the action of the court in modifying appellants' propositions of law Nos. 1 and 3. The principles of law contained in these propositions were held by the court to be correct, but the court struck out of each a statement that the proposition was applica-

ble to the facts of this case. Defendants had a right to deal with the facts claimed by them as hypothetical, and state a rule of law as applicable to such condition of facts, the same as in an instruction; but the proposition should present a rule of law only, and in no case assume the existence of facts in dispute. The statement that these rules were applicable to the facts of the case was equivalent to a finding of the condition of facts stated in the proposition, and it was not error for the court to strike out that statement.

We have considered all questions presented for our consideration which we are at liberty to investigate, and, finding no error in respect to them, the judgment of the appellate court will be affirmed. Judgment affirmed.

On Petition for Rehearing.

(Oct. 21, 1896.)

PER CURIAM. Appellants complain, in a petition for rehearing, that the court failed to notice the refusal of the trial court of propositions Nos. 5 and 9, tendered by them. No mention was made of these propositions in the division of appellants' original argument relating to the action of the trial court on propositions of law. Under the agreement appellants were to sell for appellee real estate in Wichita, appraised by T. B. Sweet at \$345,021, at a price to net appellee 50 per cent. of that sum, or \$172,510.50; and it was provided that, if appellants failed to do any of the things mentioned for them to do, appellee should have the right to recover from them all the moneys advanced under the contract and damages for the failure. Appellants did not make any sale of any real estate, and defaulted in the first payment to be made on account thereof March 16, 1889. Proposition 5 stated that appellee had no right or authority to terminate, declare forfeited, or rescind said contract by reason of said default, but that appellants had at least until the date of maturity of the last payment within which to perform on their part, and that, having elected to determine, or tender a rescission of, said contract, before that date, appellee was left without any remedy against appellants for the breaches of contract. On the day of the default appellants wrote to appellee, asking an extension of time, but stating that of this appellee must judge for itself. The brokers, Carr & Greenwood, who subsequently sold the real estate, would not take hold of it if appellants had any objection; and one of them, Greenwood, asked Irwin, who was in the employ of appellants in St. Louis the latter part of March, 1889, if appellants had any objection, or would have any claim if he negotiated with appellee. Irwin replied that there would be no objection, and that Greenwood could go ahead, and do what he could with the property. On March 27, 1889, appellants wrote to the brokers that appellee

wished to take advantage of a technical lapse on their part, which, under the circumstances, they did not care to fight. Later they wrote another letter, hoping that these brokers would control the property. They had done nothing under the contract; and, after the rescission mentioned in proposition 5, they did nothing, and did not offer to do anything. The contract was executory on their part, and they defaulted in a substantial part of it. The proposition was properly refused.

By proposition 9 appellants asked the court to hold that the contract was an attempt to bind appellants to use their influence against the growth, development, prosperity, and public interests of the city of Hutchinson, Kan., and that it was therefore void, being contrary to public policy. There was no provision of the contract which would bear such a construction. Appellants agreed to use their influence to establish certain industries in the city of Wichita, which they represented they had power to control, and which they were about to establish in the city of Hutchinson, and they agreed to withdraw from the "Hutchinson deals." It seems they did not control any industries, but, if they had, they could only have located in one place. They could not serve two masters, and the withdrawal from Hutchinson was a necessary preliminary to the making of the contract with appellee. It is argued that such withdrawal was a part performance of the contract with appellee, but we do not so regard it. Whether it was or not, there was no stipulation to inflict any injury upon the city of Hutchinson, but only an attempt to secure the services of appellants, not to injure Hutchinson, but to aid and benefit Wichita. This was not against public policy. The rehearing asked for is denied. Rehearing denied.

(163 Ill. 42)

SCHROER v. PETTIBONE et al.¹

(Supreme Court of Illinois. June 13, 1896.)

JUDGMENT — ENFORCEMENT — EQUITABLE RELIEF.

In a suit in equity in aid of a special execution issued on a judgment rendered in attachment, where it alleged by a cross bill, and admitted by demurrer, that the judgment therein was recovered on a fictitious demand, by the fraud of plaintiff, in the absence of defendant, and without his knowledge, and on constructive service merely, equity will interfere to prevent the enforcement of the judgment.

Appeal from appellate court, First district.

Bill by Conrad E. Schroer against William H. Pettibone and others in aid of a special execution issued on a judgment rendered in an attachment proceeding. From the affirmance of a judgment overruling a demurrer to defendant Pettibone's cross bill (58 Ill. App. 436), complainant appeals. Affirmed.

Stirlen & King, for appellant. H. F., F. A. & H. F. Pennington, for appellees.

¹ Rehearing denied October 16, 1896.

CARTER, J. Appellant filed his bill in equity in the superior court of Cook county in aid of a special execution issued upon a judgment rendered in an attachment proceeding against certain lands in Cook county, alleged in the bill to belong to appellee, while the legal title thereof was vested in appellee's wife, Mary M. Pettibone. The bill set up the recovery of the judgment in rem in the attachment proceeding, for the sum of \$3,000, upon constructive service, and the issuing of the execution; alleged that the real estate was purchased with the money of appellee, and the title placed in the name of appellee's wife, for the fraudulent purpose of hindering and delaying the complainant and other creditors of appellee in the collection of their debts. Appellee and his wife, Mary M. Pettibone, made defendants to the bill, appeared and answered, denying the material allegation of the bill, and alleged that the real estate in question was purchased with the moneys of the wife, and was her property, and that appellee had no interest therein. Replication was filed by complainant, and appellee then filed his cross bill, in which he attacked the judgment rendered in the attachment proceeding as having been obtained by fraud, and upon a false and fictitious demand. Complainant in the original bill filed a demurrer to the cross bill, which was overruled by the court; and, appellant abiding by his demurrer, a decree was rendered in compliance with the prayer of the cross bill, setting aside and canceling the judgment of \$3,000, and dismissing the original bill. The appellate court affirmed that decree, and we are asked by the appellant, on this appeal, to reverse the judgment of the appellate court and the decree of the circuit court.

It appears from the cross bill that, prior to the attachment suit, appellant exchanged two lots in Pennock, Cook county, which were subject to a mortgage of \$1,500, with appellee, for 12 lots in Nickerson, Kan.; that the abstracts of title showed that the title to the two lots was clouded by a creditors' bill for \$50; and that there was \$100 interest due on the mortgage. Appellee loaned appellant \$100, with which to pay this interest, and took appellant's note for that amount, for its repayment. It was then agreed that, to secure the payment of the note and the removal of the cloud, appellee, as to 1 of the 12 lots in Kansas, should only deliver the deed therefor in escrow, to the Globe National Bank, to be delivered by said bank to appellant when, and not before, he should pay the note and remove the cloud. The note not having been paid when due, appellee sued and obtained judgment on it against appellant, and, by subsequent proceedings in Kansas, enforced the collection of the judgment out of the lots he had conveyed to appellant. Appellee having removed to the state of New York, appellant commenced the attachment suit against him in the superior court of Cook county, and attached the lands here in controversy, as the lands

of appellee, the legal title whereof was in his wife.

The demand upon which the attachment suit seems to have been brought was that the \$100 note was paid by the nondelivery of the deed to the one lot,—the deed which had been delivered in escrow,—and that nothing was due appellee upon the note when he obtained judgment upon it, or when he caused the Kansas lots to be sold to satisfy said judgment; and appellant claimed that by reason of the premises, and of the sale under execution of the Kansas lots, he was damaged to the amount of \$3,000; so testified, and so obtained his judgment. It further appears by the cross bill—and its allegations are admitted by the demurrer—that neither the Kansas lots, nor the Pennock lots subject to the mortgage, were worth more than \$300, and that their value was well known to appellee. Appellee knew nothing of the attachment suit, nor of the judgment therein, until he was served with a copy of the bill in this case, when he moved to set aside the judgment, and for leave to appear and defend; but, on objection of appellant, his motion was denied. While the cross bill is by no means a model of good pleading, we think it is sufficiently alleged that the \$3,000 judgment was recovered upon a false and fictitious demand, by the fraud of appellant, in the absence of appellee, and without his knowledge, upon constructive service merely. In such a case, equity will interfere to prevent the enforcement of such a judgment. *Ogden v. Larrabee*, 57 Ill. 389; 12 Am. & Eng. Enc. Law, 142. We must, of course, decide the case upon the pleadings. It might be that upon a hearing upon the evidence no fraud would appear, but it is so alleged, and upon the admission of the demurrer it must be so held. The judgment of the appellate court is affirmed. Judgment affirmed.

(163 Ill. 91)

SEAMAN v. BISBEE et al.¹

(Supreme Court of Illinois. June 13, 1896.)

FRAUDULENT CONVEYANCES—EVIDENCE—ABSTRACT OF TITLE—MORTGAGED LANDS.

1. The mortgagor of land is the legal owner, except as against the mortgagee.

2. A witness having testified that one taking a mortgage on land objected to the title as appearing by the abstract, and requested a quitclaim deed from P., because it appeared from the abstract that he had made a trust deed on the land, it was proper to admit the abstract to show that such conveyance did appear, and as affording a reason for obtaining a quitclaim from P.

3. Evidence of indebtedness of a husband long after voluntary conveyances were made to his wife, and at a time when a conveyance was made to her by a third person of a lot, the entire purchase price of which was paid by a mortgage on that lot and on the premises previously conveyed to her, is not admissible to show that the conveyances were in fraud of the husband's creditors.

Error to superior court, Cook county; Jonas Hutchinson, Judge.

Action by Robert Seaman against Lewis H. Bisbee. Jane E. Bisbee interpleaded, claiming attached property. Judgment for interpleader, and plaintiff brings error. Affirmed.

J. C. Patterson, for plaintiff in error. W. N. Gemmill, for Jane E. Bisbee, interpleader.

CARTWRIGHT, J. Plaintiff in error sued out a writ of attachment in aid of a pending suit against Lewis H. Bisbee, one of the defendants in error, and the writ was levied upon four lots in the city of Chicago. Jane E. Bisbee, the other defendant in error, filed her interpleader, alleging that she was the owner in fee simple of the property so levied on. Plaintiff replied that the property was not the property of Jane E. Bisbee, and also that the conveyances under which said Jane E. Bisbee claimed title to said real estate were made to disturb, hinder, delay, or defraud the plaintiff as a creditor of said Lewis H. Bisbee, and were, therefore, void. Issues were made up, and the cause was tried, resulting in a verdict finding the issues as to the interpleader for the said Jane E. Bisbee, and the right of property to be in her in fee simple. It is claimed that this verdict was against the evidence in the case, because it was proved that the Northwestern Mutual Life Insurance Company held a mortgage on the premises, and therefore the legal title was in the mortgagee. The claim is not sustainable. The mortgagor is the legal owner of the mortgaged premises against all persons except the mortgagee. *Hall v. Lance*, 25 Ill. 277; *Emory v. Kelghan*, 88 Ill. 482; *Barrett v. Hinckley*, 124 Ill. 32, 14 N. E. 863. The same question is raised upon objections to instructions to the jury, and must be disposed of in the same way. The court admitted in evidence an abstract of title to the premises, and it is claimed that this was wrong. The abstract was exhibited to a witness, who testified that a party who was taking a mortgage upon the premises objected to the title as appearing by the abstract, and requested a quitclaim deed from one Charles Proebsting, because it appeared from the abstract that he had made a trust deed on the lots. The abstract was admitted only to show that such conveyance did appear, and as affording a reason for obtaining a quitclaim deed from Proebsting. It was not wrong to admit it for that purpose.

It is also insisted that the court erred in excluding competent evidence tending to show the insolvency of Lewis H. Bisbee in 1884. The evidence offered consisted of a statement signed by him, and letters written by him, showing indebtedness to plaintiff of about \$40,000. It would be proper to examine into the general state of his affairs at any time when there was any evidence from which the jury might infer that a voluntary conveyance was made, for the purpose of determining whether he could have made such a conveyance with due regard to the rights of his creditors. But the evidence offered did not relate to any such period. The conveyances,

¹ Rehearing denied October 16, 1896.

the validity of which were challenged, were all made long before this indebtedness accrued, with the exception of deeds for one lot made in 1884 by Elias Trumbo and wife and Farlin Q. Ball and wife to Jane E. Bisbee. This lot was wholly paid for by mortgaging the entire premises. There was no evidence tending to show that Lewis H. Bisbee ever paid anything on that lot, and, if the previous transactions by which the title to the remaining three lots were vested in Jane E. Bisbee were valid, there was nothing tending to impeach the transaction as to the fourth lot, which was paid for by mortgaging it and the other lots. This evidence did not tend to prove indebtedness or financial condition of Lewis H. Bisbee at any time when the alleged voluntary conveyances were made or procured, and we think it was properly rejected. Seeing no reversible error in the record, the judgment will be affirmed. Judgment affirmed.

(163 Ill. 9)

VILLAGE OF METAMORA et al. v. VILLAGE OF EUREKA et al.¹

(Supreme Court of Illinois. June 13, 1896.)

REMOVAL OF COUNTY SEAT—CONTEST OF ELECTION—PARTIES—AMENDMENT—DISMISSAL.

1. Rev. St. c. 40, § 97, gives the circuit court jurisdiction of contested elections for removal of county seats, and section 117 requires the county to be made a party defendant in the contest of an election on any subject submitted to the vote of the county, and also that the statement of contest be filed within 30 days after the election. Held that, after the expiration of the 30 days, the county cannot, by amendment, be made a party defendant in the contest of an election for removal of the county seat.

2. The county being an indispensable party to a bill to contest an election for removal of the county seat, the bill will be dismissed on failure to make the county a party within the time within which contests of elections are required to be filed.

3. The court, on its own motion, may dismiss a bill to contest a county election for failure to make the county a party defendant.

Appeal from circuit court, Woodford county; N. E. Worthington, Judge.

Bill by the village of Metamora and others against the village of Eureka and others to contest an election for the removal of the county seat. From a decree dismissing the bill, complainants appeal. Affirmed.

W. L. Ellwood and Winslow Evans, for appellants. Stevens, Horton & Abbott, Thos. Kennedy, and J. A. Briggs (B. D. Meek and C. H. Radford, of counsel), for appellees.

CARTWRIGHT, J. On November 13, 1894, an election was held in Woodford county upon the question of removing the county seat from Metamora to Eureka, at which election 2,595 votes were cast in favor of such removal and 1,960 votes were against it. On the next day, before the vote was canvassed, the original bill in this case to contest the election and enjoin

the removal of the records was filed by appellants, and a temporary injunction was granted. The returns of the election were canvassed and the result declared, November 15, 1894. Afterwards the complainants, by leave of court, filed an amended bill. The complainants in these bills were the village of Metamora and sundry citizens and taxpayers of the county, and the defendants were the village of Eureka and certain officials of the county; but the county of Woodford was not made a party to either bill. On the same day that the amended bill was filed the village of Eureka moved to dismiss the bill and dissolve the injunction as to it. The motion to dissolve the injunction was sustained, but the court refused to dismiss the bill. On February 2, 1895, a demurrer of the village of Eureka to the amended bill was sustained, and the complainants asked and obtained leave to file their second amended bill, which was thereupon filed, making the county of Woodford a party defendant for the first time. The county of Woodford subsequently filed its motion to dismiss the bill as to it, assigning, among other grounds, that the suit was not commenced against it until the second amended bill was filed, February 2, 1895, which was more than 30 days after the result of the election was determined, and after the expiration of the time limited by the statute. The court sustained the motion, and dismissed the bill as to the county. The village of Eureka then demurred on the ground, among others, that the county was an indispensable party, and not before the court; and that, the limitation having run against the right to make the county a party, there could be no decree in the cause. The demurrer was sustained, and the bill dismissed as to the village. On the same day, suit having been dismissed as to the county and village, the other defendants filed their motion to dismiss as to them, assigning a want of jurisdiction and of necessary parties, so that no decree could be rendered according to the prayer of the bill. The motion was sustained, and the bill dismissed. Thereupon the court entered a decree in accordance with the rulings on the motions and demurrer, dismissing the bill as to all the parties defendant.

Prior to July 1, 1872, no method was provided for contesting an election upon the question of removing a county seat, but the courts of chancery took jurisdiction under their general powers to determine the legality and the result of such election. This was done because the matter was one of public concern, and the jurisdiction was entertained to relieve fraud, and to carry out the intention of the law in submitting the question to a vote of the people. Boren v. Smith, 47 Ill. 482; People v. Wiant, 48 Ill. 263; Board of Sup'rs v. Davis, 63 Ill. 405; Dickey v. Reed, 78 Ill. 261. On the day above mentioned two acts of the legislature relating to that subject went into force at the same time. Neither of them was necessary to confer jurisdiction, which had been exercised in numerous cases; but each purported to confer such jurisdiction, and regulated to some extent the ques-

¹ Rehearing denied October 16, 1896.

tion of parties and procedure. They are not in conflict with each other, and are to be construed as together embracing the entire legislative intent upon the subject. Chapter 46, Rev. St., relates to elections, and contains the following provisions:

"Sec. 97. The circuit courts of the respective counties shall hear and determine contests of the election of the judges of the county court of their counties and in regard to the removal of county seats, and in regard to any other subject which may by law be submitted to the vote of the people of the county."

"Sec. 117. Any five electors of the county may contest an election upon any subject which may be by law submitted to a vote of the people of the county, upon filing in the circuit court within thirty days after the result of the election shall have been determined, a written statement in like form as in other cases of contested elections in the circuit court. The county shall be made defendant, and process shall be served as in suits against the county; and like proceedings shall be had as in other cases of contested elections before such court."

"Sec. 118. In case the county board shall fail or refuse properly to defend such contest, the court shall allow any one or more electors of the county to appear and defend, in which case the electors so defending shall be liable for the costs in case the judgment of the court shall be in favor of the contestants."

The other act relates to the removal of county seats, and is found in chapter 34. The main purpose of section 12 of that act is to furnish a rule determining the number of legal voters of a county, and for investigating that question in case of a contest. It contains a provision that courts of equity shall have jurisdiction of all cases arising under the act, and that any of the legal voters and taxpayers of the county who may desire so to do, as well as the town, city, or village to or from which it is proposed to remove such county seat, may be made, or on their petition may become, parties to such suits, either as complainant or defendant. By these acts the jurisdiction before exercised by the circuit court under their general chancery powers was regulated. The question of the removal of a county seat is one which may by law be submitted to the vote of the people of the county, and it is expressly mentioned as such in the statute relating to elections; the person by whom, and the time within which, the contest must be inaugurated is therein fixed, and the county is required to be made a party defendant. That act provides that the court shall allow other electors to appear and defend, and a like privilege is given by the act for the removal of county seats, where it is extended to the town, city or village to or from which it is proposed to remove such county seat. The purpose of allowing other parties to take part in the contest is declared in the election law, and is plainly to be seen in the other act. It rests upon the ground that local and private feeling, if enlisted, insures full presentation of the merits.

It is not to be supposed, however, that, aside from the question of costs, the interests of such parties are to be affected by the decree to be rendered. The county is not only required, under the election law, to be made a party defendant, but it is an indispensable party in any view of the question. It is the owner of the county property, and is required to provide county buildings, records, and places for holding courts, and to make provision generally for the public business. No other party represents, or is authorized to represent, the public interests. In the case of *Lusk v. Thatcher*, 102 Ill. 60, a bill to contest an election for the purpose of incorporating a village was dismissed because there was no party representing the public interest, although no village officers had been elected upon whom service of process against the village could be had. Being a matter that concerned purely the public, it was held that a decree in regard to the election, not concluding the public, would conclude nobody. Cases are referred to where county-seat contests have been carried on in which the county was not made a party; but it does not appear in any of those cases that the question was raised or decided. So far as the county of Woodford was concerned, the suit was begun when the second amended bill was filed, February 2, 1895, more than 30 days after the canvass was made and the result of the election was declared. *Clark v. Manning*, 95 Ill. 580; *Bennitt v. Mining Co.*, 119 Ill. 9, 7 N. E. 498. The time limit fixed by the statute had elapsed, and the county was entitled to the benefit resulting therefrom. The suit was a new one as against the county, and, the right not having been availed of within the time prescribed, it was then too late. *Clark v. Manning*, supra; *Dumphy v. Riddle*, 86 Ill. 22; *Crowl v. Nagle*, Id. 437. For these reasons we think that the motion of the county to dismiss the bill as to it was properly sustained.

The suit having been dismissed as to the county, there remained no party before the court against whom a binding decree could be entered. The case is not one where several necessary parties may have been omitted, and would not be concluded by the decree, and yet with parties before the court who would be bound; but it is one where the indispensable defendant was omitted. The interest of the county was of such a nature that no final decree could be made without affecting it. The one indispensable defendant being omitted, no final decree could be entered against those who remained in the suit, and, as no decree could be entered, the bill was properly dismissed as to the remaining defendants.

Some objection is made to the bill being dismissed on motion as to some of these parties, but the defect is one that the courts will themselves take notice of, although no demurrer be interposed for want of proper parties; and it was immaterial how it was brought to the attention of the court. *Herrington v. Hubbard*, 1 Scam. 569. The decree of the circuit court will be affirmed. Decree affirmed.

(163 Ill. 144)

SHAW et al. v. CAMP.

(Supreme Court of Illinois. Nov. 10, 1896.)

WILLS—CONTEST—JURISDICTION—EXECUTION.

1. Where the probate of a portion of the will is erroneously denied, the circuit court, in a contest of the will, has jurisdiction to admit to probate such portion. 61 Ill. App. 68, affirmed.

2. The execution of a codicil is a publication of the whole will as it then existed, so as to include additions attached to the original will before the execution of the codicil. 61 Ill. App. 68, affirmed.

Appeal from appellate court, Third district.

Suit by Catherine Shaw and others against Norman H. Camp. From a decree of the appellate court (61 Ill. App. 68) affirming a decree for defendant, complainants appeal. Affirmed.

S. R. Reed, Buckingham & Schroll, and W. E. Lodge, for appellants. Henry G. Miller and Norman H. Camp, for appellee.

WILKIN, J. On July 23, 1888, Edward Swaney, of Platt county, wrote and signed his last will, which was duly attested under the provisions of section 2 of our statute of wills. 2 Starr & C. Ann. St. p. 2466. Afterwards he wrote an addition thereto, which is designated in this litigation as "Sheet B," which was neither dated, signed, nor witnessed, but was attached to the original will. On January 10, 1891, he executed a codicil to his will, which was properly witnessed. About 10 days prior to his death he gave William Camp, the executor named in the will, a sealed envelope, saying, "That is my will; take charge of it." Mr. Camp wrote across the end of the envelope, "To be opened at Dr. Swaney's death," and placed it in his safe-deposit box in a bank. The evening after the burial of the deceased, the envelope was taken from the bank to his house, and there, in the presence of relatives of the deceased, opened, and found to consist of the parts above mentioned, all fastened together. The executor read it aloud twice to those present, and, while doing so the second time, sheet B became detached. The county court of Platt county admitted to probate the will as originally written, and the codicil, but refused to recognize sheet B as any part of the instrument. Thereafter the heirs of the testator filed their bill in chancery, under section 7 of the statute of wills (2 Starr & C. Ann. St. p. 2469), in the circuit court of that county, to contest the will, on the ground of mental incapacity, making all parties interested under the original will and codicil, and also Norman H. Camp, the beneficiary under sheet B, defendants, and alleging that said sheet was not admitted to probate, and was no part of the will. Norman H. Camp, having answered, filed his cross bill, averring the validity of the bequest to him under that part of the will, and praying affirmative relief in that regard. To this cross bill a demurrer was sus-

tained, and the issue formed by the bill, answers, and replications was tried by a jury, resulting in a finding that the original will was the last will of deceased, and that neither sheet B nor the codicil was a valid part thereof. On that trial Norman H. Camp offered the testimony of the executor, William C. Camp, to the effect that, in December prior to his death, deceased called his attention to sheet B as part of the will, which, with the codicil, then unexecuted, was attached to the original will. This evidence was rejected. On appeal to the appellate court for error in holding this testimony incompetent, and because the verdict of the jury as to the validity of the codicil was contrary to the weight of the evidence, the finding below was reversed, and the cause remanded. Thereupon complainants, by leave of court, struck out of their bill all averments as to sheet B, and moved to dismiss the same as to Norman H. Camp, but the motion was denied. They then demurred to the cross bill of said Camp, in which he alleged the validity of said sheet, which demurrer was overruled, and answers filed. On the issue then joined, as well as that on the original bill, the cause was again submitted to a jury, and a verdict returned substantially like the first, which the court set aside. A third trial resulted in a finding sustaining the original will and sheet B, also sustaining the codicil, but finding that Curtis Camp and wife should take nothing thereunder, because of changes made therein by them. On this finding the court entered its decree, and to reverse so much thereof as sustained sheet B complainants prosecuted their appeal to the appellate court; and this is an appeal from a judgment of affirmance in that court.

It is first insisted that the Platt circuit court had no jurisdiction to pass upon the validity of sheet B, because it had never been admitted to probate. The argument is that, under our statute, only probated wills can be contested in chancery. In our view of the case, the question thus stated is not properly presented for decision. The will of Edward Swaney was probated. He made but one will, which consisted of certain parts. That will was admitted to probate, but the county court rejected a part of it as not being duly executed. Within three years after such probate the beneficiary under the clause or sheet stricken out filed his cross bill, in which he alleged, in effect, that the will as probated was not the will of the testator; that his will was not expressed in two parts, but in three. The case is not distinguishable in principle from that of Wolf v. Bollinger, 62 Ill. 368. There, after the execution of his will, Jacob Bizer attempted to substitute Wolf for Bollinger as his devisee, without having the instrument reattested or republished, and the will so altered was admitted to probate. Bollinger filed her bill, "alleging that the instrument in writing, so altered and admitted to probate, was not the last will and testament of Jacob Bizer, but that said

instrument in writing, as originally drawn up and executed, without said alteration, was his true last will, and praying that the instrument in writing so admitted to probate be declared null and void, and that the instrument as originally drawn up and executed be established as the true will of the testator, and that his estate be distributed among the devisees therein according to its provisions." From a decree granting the relief, Wolf appealed, and insisted, as is done here, that the circuit court had no jurisdiction of the case stated; but it was held otherwise. The appellant in that case contended that, in a proceeding to contest a will in chancery, under the statute, the court could only determine whether the instrument as probated was the will of the testator or not, and had no power to establish the instrument as originally executed as the true will; but the contention was overruled. As said in the opinion of the appellate court, and shown by the decisions there cited, the question is, what was the will? If, under the evidence, sheet B was legally a part of the will, we think it clear that the circuit court had jurisdiction to grant the relief prayed in the cross bill by establishing the whole instrument as the last will and testament of the deceased. The authorities fully sustain the position that it was attached to the original will at the time the codicil was signed and attested, and that the execution of the codicil acted as a publication of it, and a republication of the whole will as it then existed; also, that the condition of the instrument at that time, and what the testator's intention was as to what should constitute his will, might properly be shown by parol. *Beall v. Cunningham*, 3 B. Mon. 390; *Burge v. Hamilton*, 72 Ga. 568; *Van Cortland v. Kip*, 1 Hill, 590; *Mooers v. White*, 6 Johns. Ch. 360; 1 Redf. Wills, 288.

The jury was justified, by the evidence, in finding that the testator wrote and attached sheet B to the original prior to the execution of the codicil. That being so, the reference by the codicil to the will was also a reference to that sheet. That the three parts were fastened together when he delivered the will to his executor, and that this sheet became detached by accident while it was being read and examined, soon after the testator's death, can only be doubted upon the hypothesis that William C. Camp and other witnesses have sworn falsely; and of that there is no proof. We find no sufficient reason for holding, contrary to the courts below, that the true will of the deceased included sheet B, and that the circuit court properly exercised its jurisdiction in establishing it as such. This disposes of the substantial objections to the ruling of the trial court in giving and refusing instructions. There is no reversible error in that regard. Other grounds of reversal have been considered. They do not go to the merits of the cause before us, and are, in our opinion, without force. The judgment of the appellate court will be affirmed.

(163 Ill. 139)

FRANKLIN v. LOAN & INVESTMENT CO.

(Supreme Court of Illinois. Nov. 9, 1896.)

AGREEMENT BETWEEN VENDOR AND VENDEE—NOTICE TO MORTGAGEE—APPLICATION OF BORROWED MONEY—FINDING OF FACT—APPEAL.

1. Where the witnesses are all examined orally, and the testimony is conflicting, the chancellor's error in a finding of fact must be clear, to authorize a reversal.

2. A vendor conveyed lots by a warranty deed. To enable the vendee to obtain a loan, he delivered to the loan company (vendee's mortgagee) the warranty deed, a mortgage executed to him by the vendee to secure a part of the purchase money, but which it was agreed should be a junior lien, and an insurance policy covering a building on the lots, payable to himself as his interest might appear, but indorsed by him, "My interest in the within has ceased." The company had no actual notice of an agreement between the vendor and vendee that the borrowed money was to be paid to the vendor. *Held*, that the company was justified in paying it to its mortgagor, the vendee. 58 Ill. App. 230, affirmed.

Appeal from appellate court, First district.

Bill by Lesser Franklin against James A. McDonald and others to set aside a trust deed, and for other relief. From a judgment affirming a decree in favor of the trustee (58 Ill. App. 230), plaintiff appeals. Affirmed.

This cause was brought before this court at a former term, but was dismissed for want of jurisdiction. *Franklin v. Investment Co.*, 152 Ill. 345, 38 N. E. 921. A writ of error was thereafter sued out of the appellate court of the First district, and there the decree of the superior court of Cook county was affirmed. In disposing of the case, the appellate court filed the following opinion (Gary, J.):

"The real defendant in error here is the Loan & Investment Company of North America, which made a loan to McDonald upon a trust deed in the nature of a mortgage, made to secure an indebtedness of \$1,400. The company advanced him \$645 on the security, and he then ran away. The plaintiff in error conveyed the property to McDonald by warranty deed, and upon a policy of insurance to McDonald upon a house on the property, which policy contained a mortgage clause reading, 'Loss, if any, payable to Lesser Franklin as his interest may appear,' the plaintiff in error indorsed, 'My interest in the within has ceased,' with his signature. The deed of trust, warranty deed, and policy were all delivered to the company. Franklin filed this bill to have the trust deed set aside, upon the ground that McDonald never paid for the property, and had agreed that the proceeds of the loan should be paid to Franklin by the company, of which agreement Franklin alleged that the company had notice before it advanced the \$645 to McDonald. The court, upon a variety of circumstances and conflicting testimony, found that the company had no notice of such an agreement, nor of any right of Franklin to the proceeds of the loan, and, while giving relief to the extent of direct-

ing a reconveyance from McDonald to Franklin, yet directed that it should be subject to the trust deed, and dismissed the bill as to the company and the trustee in the deed of trust. To reverse that decree the plaintiff in error prosecutes this writ. Without setting out at length the evidence, we hold that the conclusion upon it to which the superior court came, as to notice to the company, was warranted by the evidence, and therefore the decree is affirmed." 58 Ill. App. 230.

Newman & Northrup, for appellant. Bates & Harding, for appellee.

BAKER, J. (after stating the facts). There was no error in the judgment of the appellate court affirming the decree of the superior court. The question whether the written order signed by McDonald, and addressed to the Loan & Investment Company, directing it to pay to appellant the moneys due on the loan, and the further question whether appellee had any notice otherwise that such moneys were so to be paid, were both controverted questions of fact at the hearing. The evidence of the witnesses upon these questions was conflicting, and wholly irreconcilable. It was simply a matter of the credibility of witnesses and the weight of evidence. The record shows that when the cause was heard by the chancellor the witnesses were all examined orally in open court. Under such circumstances the chancellor has the same facilities for judging of their credibility that a jury has in a trial at law, and the error in finding as to matter of fact, when the testimony is conflicting, must be clear and palpable to authorize a reversal. *Coarl v. Olsen*, 91 Ill. 273; *Johnson v. Johnson*, 125 Ill. 510, 16 N. E. 891; *Rackley v. Rackley*, 151 Ill. 332, 37 N. E. 1014; *Ellis v. Ward*, 137 Ill. 509-533, 25 N. E. 530. There was no such error here. It seems to be supposed by counsel that the doctrine of the case of *McLaurie v. Thomas*, 39 Ill. 291, when applied to the case at bar, necessarily leads to the conclusion that the bare fact that the warranty deed from Franklin was delivered to the Loan & Investment Company by the agents of Franklin charges appellee with notice of the rights and equities of appellant under his contract with McDonald. The case named, which is so largely relied on by appellant, is an authority against him, and not an authority in his favor. There Thomas, the first vendor, sold land to Barnes, and gave to him a bond for a deed, upon payment of \$2,000. Afterwards, at the request of Barnes, Thomas conveyed parcels of the land directly to Lincoln and to Leal and others, respectively; and thereafter McLaurie purchased from Barnes the remaining nine acres of the tract, taking either a bond for a conveyance, or an assignment of the bond of Thomas. It was held that all of the purchasers were chargeable with notice of the lien of Thomas for purchase money,—Lincoln, Leal, and others, because, on their purchases

from Barnes, they received their deeds from Thomas, the original vendor; and McLaurie, because he took either an assignment of the bond held by Barnes, or his bond for a conveyance, either of which would be notice. But it was also held in the same case that Thomas, by executing deeds to Lincoln, Leal, and others, released his lien as to the portions conveyed to them, because he made deeds to said purchasers from Barnes without giving them notice of his lien, and thereby enabled Barnes to collect from them the full purchase price of the land. So, here, appellant, the first vendor, by delivering to appellee, at the request of McDonald, vendee of appellant, and vendor and mortgagor of appellee, a warranty deed conveying the lots to said McDonald, together with the abstract of title, and the insurance policy on the house standing on said lots,—the latter with the words, "My interest in the within has ceased," and his signature indorsed thereon,—enabled McDonald to obtain from appellee the money secured by the trust deed that he (McDonald) executed to Tuthill as trustee. Of course, this is assuming the truth of the fact found by the decree,—that appellee had no actual notice that the moneys raised by the trust deed were, by arrangement between appellant and McDonald, to be paid to appellant instead of McDonald. It is true, appellee had in its possession, and had notice of, the trust deed of McDonald to appellant to secure \$300, and that it contained a clause to the effect that it was given to secure a part of the purchase money of the lots; but this fact is of no importance when it is considered that it was the understanding and intention of all parties that this trust deed for \$300 should be postponed to the trust deed to appellee for borrowed money, and be recorded only as a second mortgage on the lots. If appellee had no actual notice of the order given to appellant, or of the arrangement between appellant and McDonald that the former should receive the money borrowed from appellee, then the evidence afforded by the warranty deed and abstract of title, and the indorsement on the insurance policy, and the trust deed for \$300, obviated any occasion for further inquiry by appellee, and was amply sufficient to justify the payment of the money to McDonald. The judgment of the appellate court is affirmed. Affirmed.

(163 Ill. 285)

JOHNSON et al. v. SANITARY DIST. OF CHICAGO et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

SANITARY DISTRICT OF CHICAGO — DISCRETION IN LETTING CONTRACTS—RESPONSIBILITY OF BIDDER—INJUNCTION.

1. Under the provision of the act creating the sanitary district of Chicago (Laws 1889, p. 125, § 11) authorizing the trustees of such corporation to let contracts for work on the drainage canal "to the lowest responsible bidder," where the board advertised for bids for certain work, requiring bidders to furnish evidence of sufficient ability and financial resources to complete

the contract, in determining the sufficiency of such evidence, and in awarding the contract, the board acted judicially, and its discretion cannot be controlled by the courts.

2. In the absence of fraud, an action will not lie to compel the letting of the contract to the lowest bidder, or to enjoin the making of a contract with the bidder whose bid was accepted. 58 Ill. App. 306, affirmed.

Appeal from appellate court, First district.

Action in equity by Ernest V. Johnson and others against the sanitary district of Chicago and others. A decree dismissing the bill was affirmed by the appellate court (58 Ill. App. 306), and complainants appeal. Affirmed.

The sanitary district of Chicago, a municipal corporation engaged in building a canal between the waters of Lake Michigan and the Illinois river, is, by the provisions of the act under which it is organized, authorized to let contracts for the construction of that canal. Section 1 of the main channel had been contracted for construction by the board with one Alfred Harley, who failed to comply with the provisions of his contract, because of which it was declared forfeited. Section 1 was one mile in length. The board of trustees, in pursuance of the act under which it was organized, advertised for bids for again letting the contract for that section. Section 11 of the sanitary district act (Laws 1889, p. 125) provides as follows: "All contracts for work to be done by such municipality, the expense of which will exceed five hundred (500) dollars shall be let to the lowest responsible bidder therefor, upon not less than sixty (60) days public notice of the terms and conditions upon which the contract is to be let having been given by publication in a newspaper of general circulation published in said district, and the said board shall have the power and authority to reject any and all bids and readvertise." The advertisement for bids was in the form generally used by corporations, both municipal and private, and contained these express provisions: "No proposal will be considered unless the party making it shall furnish evidence satisfactory to the board of trustees of his ability to do the work, and that he has the necessary pecuniary resources to fulfill the conditions of the contract, provided that such contract shall be awarded him. Bidders are required to state in their proposals their individual names and places of residence, in full." Under this advertisement many bids were made, but for this discussion we need take into consideration but two,—that of appellants, which was in the aggregate \$1,141,107.94, and that of Griffiths & McDermott, in the aggregate \$1,286,219. These were the two lowest bids considered by the board of trustees, and were received April 18, 1894. The board, after patient investigation as to the financial responsibility and ability of the bidders to do the work, as well as their conception of the work to be

done, on May 23, 1894, rejected the bid of appellants, and let the contract to Griffiths & McDermott; and, three days afterwards, appellants, as taxpayers, residents, and legal voters of the district, filed this bill to restrain the sanitary district from rejecting their bid, and from executing the contract with Griffiths & McDermott, and against the bidder from performing any work on section 1. The prayer of the bill was for a mandatory injunction to compel the awarding of the contract to appellants. On hearing, a permanent injunction was refused, and the bill dismissed, which decree was affirmed on appeal to the appellate court.

Burnham & Baldwin, for appellants. George E. Dawson, C. C. Prickett, and Walker, Judd & Hawley, for appellees.

PHILLIPS, J. (after stating the facts). By the proposal for bids, as advertised, the board required evidence to be furnished of ability to do the work, and of necessary pecuniary resources to fulfill the conditions of the contract. It necessarily reserved to itself the determination of the sufficiency of that evidence. The act under which authority to advertise for bids existed expressly provided that the board should have power to let to the lowest responsible bidder, and to reject any and all bids, and readvertise. The board having reserved to itself the right to pass upon the evidence of the pecuniary resources and ability to do the work, and being, under the act, vested with the power to determine the lowest responsible bidders, they are by the act made the judges to determine the qualifications of the bidders. When the statute vests a discretion in a municipal body to determine a question, it is not the province of the courts to determine and control the discretion. The mandatory injunction applied for to compel the letting of the contract to appellants is in the nature of a mandamus, and is an attempt to control a discretion that is judicial in its nature. The duty of examining the proposals, determining the responsibility, and awarding the contract, is judicial in its nature and character; and the awarding the contract is a judicial act, which it is not within the province of the courts to control by mandamus or mandatory injunction. *Gaslight Co. v. Donnelly*, 93 N. Y. 557; *People v. Gleason*, 121 N. Y. 631, 25 N. E. 4; *Erving v. City of New York*, 131 N. Y. 133, 29 N. E. 1101; *State v. McGrath*, 91 Mo. 386, 3 S. W. 846; *State v. Commissioners of Shelby Co.*, 36 Ohio St. 326; *Douglass v. Com.*, 108 Pa. St. 559; *Hoole v. Kinkaid*, 16 Nev. 217. Nor can the courts, in absence of fraud, restrain the trustees from entering into such contract as they may award to the bidder. *Kelly v. City of Chicago*, 62 Ill. 279. On no principle can this bill be sustained. The decree dismissing the bill was not error, and the judgment of the appellate court is affirmed. Affirmed.

(163 Ill. 235)

SISSON et al. v. DRAINAGE COM'RS OF DIST. NO. 1.

(Supreme Court of Illinois. Nov. 9, 1896.)

APPEAL—ASSESSMENT UNDER DRAINAGE ACT—MUNICIPAL CORPORATIONS—DISCRETIONARY POWER.

1. Under the provisions of the farm drainage act (Laws 1885, p. 77, § 27), that an appeal from assessments of benefits on lands drained "shall be upon the ground only that such tax is a greater amount than the benefits to accrue to the land in question by the proposed drain," such question is the only one that can be raised on an appeal or be reviewed on proceedings in error from the judgment of a county court affirming an assessment.

2. The commissioners of a drainage district, being vested by the statute with a discretion as to the location and manner of construction of drains, are not bound by the plans and estimates of the engineer, and a change in such plans does not vitiate an assessment, as their discretion cannot be controlled by the courts.

Error to Kane county court; D. B. Sherwood, Judge.

Proceedings for assessment of benefits on lands under the drainage act in drainage district No. 1 in Kane county. From a judgment of the county court on appeal, Elizabeth Sisson and another bring error. Affirmed.

M. F. Nichols and R. G. Montony, for plaintiffs in error. M. O. Southworth, for defendant in error.

PHILLIPS, J. This drainage district was organized, and a special assessment made for benefits by classifying the lands. Notice for hearing objections having been given, at the time of hearing for review the classification as to appellants was left as first made, and an order entered to that effect. The special assessment roll or tax list was made out and filed in pursuance of the statute. One of appellants owned a 40-acre tract, which was classified and charged with benefits amounting to \$560. The other appellant owned a 20-acre tract, which was classified and charged with benefits amounting to \$400. From this assessment an appeal was prosecuted to the county court of Kane county, where a trial was had before a jury, and the assessment as to the 40-acre tract was sustained, and the benefits to the 20-acre tract were fixed at \$300. Upon an examination of the bill of exceptions it appears it does not purport to give all the evidence on the question of benefit to appellants' lands by the proposed improvement, but does give all the evidence on certain questions on which evidence was heard. By the evidence thus incorporated in the bill of exceptions appellants seek to bring before this court a record showing that the commissioners, after procuring the right of way, employed an engineer to make a survey, plans, profiles, and estimates, which being done, the commissioners subsequently determined to lay the tile fixed on to effect the drainage two feet deeper than proposed

by the plans of the engineer, which they did do; and appellants deny that the resolution to that effect was entered of record by the clerk of the commissioners, or filed in his office. It is further claimed by appellants that the assessments were made before the adoption of the resolution to place the tile two feet deeper than fixed by the plans of the engineer. The argument in appellants' brief is devoted to these questions. By the express provision of section 27 of the farm drainage act (Laws 1885, p. 77), an appeal such as this "shall be upon the ground only, that such tax is a greater amount than the benefits to accrue to the land in question by the proposed drainage." Under this provision of the statute, the questions sought to be raised on this record are excluded from consideration, and the failure to incorporate into the record all the evidence as to the benefits to the lands by reason of the improvement must result in an affirmance of this judgment. Counsel for appellants earnestly urge their views on the questions raised on this record. By section 17 of that act it is provided: "That upon the organization of a drainage district the commissioners shall go upon the lands and determine upon a system of drainage which shall provide main outlets of ample capacity for the district, having in view the future contingencies as well as present. * * * Unless the district is small and the plans are manifestly of easy determination, a competent engineer shall be employed to locate and advise upon the character of the work to be done, and report in writing with maps, profiles and estimates of costs, and in a general way the benefits to accrue to the lands in the several localities of the district. The maps and papers showing the final determination as to a system of drainage shall be filed in the clerk's office and recorded in the drainage record." This section vests in the commissioners a discretion, and it is for them to determine the manner of its exercise. They are required to go upon the land, and determine upon a system of drainage, etc. They are not bound by the plans of the engineer and his estimates. They had a right to determine to go to a greater depth than that shown by those plans. They alone must decide whether the plans are manifestly of easy determination, and, as this exercise of discretion vests in them, it cannot be controlled by the courts. In *Johnson v. Sanitary Dist.* (filed at the present term), 45 N. E. 213, we have discussed this question, and will not renew it here, but refer to that case. Whether their resolution to sink the tile to a greater or less depth is entered of record by the clerk is not a matter of defense to the assessment, nor can the time at which the plan of the work is finally determined be invoked as a defense. The statute peremptorily declares the only question to be determined on the appeal. No discretion exists in the courts.

The evidence incorporated in the bill of exceptions constitutes no defense, and the judgment of the county court of Kane county is affirmed. Affirmed.

(163 Ill. 298)

COULSON et al. v. ALPAUGH et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

CONSTRUCTION OF WILL—PRECATORY TRUST—ESSENTIALS OF—DEFINITENESS OF SUBJECT-MATTER.

1. A provision in a will which gives the widow of the testator all his property for her use while living, "requesting" her to have certain bequests paid to descendants of the testator named at her death, is sufficiently definite to create a trust in favor of such beneficiaries, which will be enforced by a court of equity on the death of the wife without having executed the power.

2. A will gave all the property of the testator to his widow, with full power to dispose of all or any of it, and reinvest the proceeds "for her use while living," and requested her, at her death, to make equitable distribution of what remained among the children of the testator, after payment of certain specific bequests. The wife died intestate, and without having disposed of the testator's real estate. *Held*, that the wife took only a life interest in the property, under the will, with power to dispose of it at her death, but that the precatory words of the will, except as to the specific sums to persons named, operating only on "what remained" on the death of the wife, were too indefinite as to the subject-matter to create a trust which could be enforced in equity, and that, on the death of the wife without having executed the power of disposition given her, all the property remaining, both real and personal, fell into the estate of the testator, and became intestate property.

Appeal from circuit court, Henderson county; J. J. Glenn, Judge.

Action for partition by Sarah R. Alpaugh and others against Alice M. Coulson and others. From the decree, the defendants appeal. Reversed.

This was a bill filed by appellees against appellants, asking for partition of the N. E. $\frac{1}{4}$ of section 10, township 8 N., range 4 W., fourth P. M., in Henderson county, Ill. The case involves the construction of the will of John Corzatt, deceased. John Corzatt, late of Henderson county, Ill., departed this life, testate, in said county and state, on or about the 5th day of July, 1877, and at the time of his death was the owner in fee of the said land. Deceased left surviving him his widow, Elizabeth Corzatt, and Sarah R. Alpaugh, Mary A. Voorhees, Catherine C. Johnson, Samuel Elwood Corzatt, Benjamin F. Corzatt, and William Nelson Corzatt, his only children, and John W. Corzatt, the only child of Peter F. Corzatt, a son of said John Corzatt, who died prior to the death of said John Corzatt, as his only heirs at law. His will reads as follows: "First. I order and direct that my funeral expenses and all just debts be paid. Second. I give and bequeath to my beloved wife, Elizabeth Corzatt, all the real and personal estate of which I may die possessed, with full power to use and dispose of, to sell, and reinvest the proceeds in lands or otherwise for her use while living,

requesting her to make at her death such equitable distribution of what remains among my children, giving first, before such disposition of the property that may at her death remain, to my sons William Nelson Corzatt and Elwood Corzatt each \$300, or a team of horses worth that sum, and the same to my son Benjamin Franklin Corzatt, and to pay my grandson, if he arrives at the age of 21 years (said grandson is John W. Corzatt) the sum of \$500; but said \$500 is not to be paid until after the death of my said wife, Elizabeth Corzatt. Lastly. I hereby appoint my wife, Elizabeth Corzatt, my sole executrix of this my last will and testament, hereby revoking all former wills by me made." The will was duly probated August 8, 1877. The widow, Elizabeth Corzatt, died May 28, 1895, without having disposed of the real estate, either by deed, will, or otherwise, and without making any distribution, as requested in said will, among the children of the testator. The three legacies of \$300 each have all been satisfied. The legacy of \$500 to John W. Corzatt has never been paid or satisfied. William Nelson Corzatt (former husband of Alice M. Coulson), one of the children of John Corzatt, died testate May 10, 1882, and left surviving him his widow, Alice M. Corzatt (now Alice M. Coulson), and no children or descendants of children. By his will, William Nelson Corzatt devised all his property, including his interest in his father's estate, to his widow, Alice M. Corzatt. The circuit court decreed partition of the land owned by John Corzatt among the complainants, Sarah R. Alpaugh, Mary A. Voorhees, Catherine C. Johnson, Samuel Elwood Corzatt, and Benjamin F. Corzatt, giving each one of them a one-fifth interest, and also decreed that defendants Alice M. Coulson and John W. Corzatt took no interest therein, and also decreed like distribution of the personal property. From said decree, appellants have appealed to this court, and ask that the decree of the circuit court be reversed.

O'Harra, Scofield & Hartzell, for appellants. R. Cooper and Kirkpatrick & Alexander, for appellees.

BAKER, J. (after stating the facts). By the will of John Corzatt, he gave and bequeathed to his wife, Elizabeth Corzatt, all his real and personal estate, "for her use while living." These latter words limit the gift, and show that what she took was not the fee-simple title, but an estate for life. In addition to this life estate, there was also donated to her a power "to sell" the fee, and "reinvest the proceeds," and likewise power "to use and dispose of" the entire interest in the property. It would have been entirely competent for the testator, upon creating this life estate, and giving the powers to sell and make disposition of the fee, to have limited a remainder after the termination of the life estate, either to his children, generally, or to such of them as should survive their mother. And he might have limited this remainder to the property not sold, dispos-

ed of, and used under the power by the first donee, or to so much thereof as might remain unexpended. *Hamlin v. Express Co.*, 107 Ill. 443; *Kaufman v. Breckinridge*, 117 Ill. 305, 7 N. E. 666; *Walker v. Pritchard*, 121 Ill. 221, 12 N. E. 336. The contention of appellees is that the testator substantially did this, by the precatory words found in the latter part of the second item of the will. The language relied on by appellees is this: "Requesting her to make at her death such equitable distribution of what remains among my children, giving first, before such disposition of the property that may at her death remain, to my sons William Nelson Corzatt and Elwood Corzatt each \$300, or a team of horses worth that sum, and the same to my son Benjamin Franklin Corzatt, and to pay to my grandson, if he arrives at the age of twenty-one years (said grandson is John W. Corzatt) the sum of \$500; but said \$500 is not to be paid until after the death of my said wife, Elizabeth Corzatt." In *Mills v. Newberry*, 112 Ill. 123, this court had before it the matter of a precatory will. It was there held that, to constitute a valid trust by a devise, three circumstances must concur: Sufficient words to raise it, a definite subject, and a certain or ascertained object; that, if the subject is not certain, no trust arises; and that if the will gives the first taker the power of withdrawing any part of the subject from the object of the wish or request, or of applying it to his own use, the subject cannot be considered certain, and a court of equity will not create a trust. The case then before the court was that the testatrix devised and bequeathed all her property to her mother, "upon the express condition" that she devise by will so much of the property "as shall remain undisposed of or unspent at the time of her decease" to a charity of a designated class. The mother refused to comply with the condition, and demanded and received the estate as the only heir at law of her daughter, upon the ground that there was no residuary clause in the will, and the estate was intestate. The court held, upon bill filed during the life of the mother, that the uncertainty as to the estate that might remain at the mother's death was such as that no trust could be declared. It was there said that the subject of the trust was so much of the property as shall remain undisposed of or unspent at the time of the decease of Mrs. Newberry, and that the uncertainty of the subject-matter of the trust attempted to be asserted presented an insuperable difficulty. And the court, after quoting from various like authorities, said: "The rule, which we believe to be amply supported by the authorities, is thus laid down in *Hill, Trustees*, 119: 'But any words by which it is expressed, or from which it may be implied, that the first taker has the power of withdrawing any part of the subject from the object of the wish or request, or of applying it to his own use, will prevent the subject of the gift from being considered certain.'" The

words "request" and "requesting" are, under many circumstances, precatory words sufficient to raise a trust; and under other circumstances it is otherwise. It depends, not only upon the sense in which the words are used,—whether intended as imperative, or as merely the expression of a wish or preference, the observance of which is left to the discretion of the first taker; but, even where it is clear the language was intended as mandatory, it also depends upon the fact whether the intention is defeated by the other provisions of the will. For it is just as essential to the creation of a trust that there should be certainty of object and certainty of subject-matter as it is that the words in which the intention is expressed should be imperative. *Knight v. Knight*, 3 Beav. 148; *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. 575; 2 Pom. Eq. Jur. §§ 1014-1016, and authorities there cited.

In respect to the will now in question, no claim is or could be made that the request to give to each of the three sons of the testator the sum of \$300, or a team of horses worth that sum, as also the provision to pay to the grandson, John W. Corzatt, the sum of \$500 if he arrives at the age of 21 years, did not create trusts that were binding upon the property in the hands of the first taker. As to those bequests, the necessary elements of certainty of both objects and subjects clearly appear in the will. In respect to the distribution to be made at the time of the death of the first taker, Elizabeth Corzatt, and after the payment of the bequests to the three sons and the grandson, the provision is, "requesting her to make at her death such equitable distribution of what remains among my children, giving first, before such disposition of the property that may at her death remain," etc. In this provision the words "at her death," "distribution," and "among my children," sufficiently indicate the objects of the testator's bounty. They manifestly are such of his children as are living at the time of the death of his wife, the first taker. But the difficulty in the way is the same that was found to be insuperable in *Mills v. Newberry*, supra, and it is the uncertainty as to the subject-matter of the trust. In that case the language of the will was, "so much of my property as shall remain undisposed of or unspent at the time of her decease," and the provision here is that the life tenant shall make, at her death, distribution "of what remains," and this language is emphasized by referring to that which is requested to be done as "such disposition of the property that may at her death remain." As we have already seen, the will gave the life tenant power to sell and dispose of the fee and use the proceeds, and it was only the property that should at her death remain that she was requested to make distribution of among the testator's children. The use of the expressions "what remains," and "the property that may at her death remain," conclusively shows that the testator contem-

plated and intended that his widow might or would expend all or a part of the money derived from a sale of the property under the power, and implies that distribution was to be made of only what she had not disposed of and used. And since, as laid down in the books and established by the authorities, in order to constitute a valid trust three things must concur,—sufficient words to raise it, a certain subject, and a definite object,—it follows that by the will in question, there being no limitation to any certain thing or part of a thing, the supposed devise and legacy to the surviving children of the testator is inoperative for want of a definite or ascertained subject-matter. True it is that the concluding paragraph of the opinion of the court in *Mills v. Newberry*, supra, seems to intimate that if, upon the death of the first taker, any of the property shall remain undisposed of, the trust can attach to it. But this was mere dictum, as no such question then was or could be before the court for decision. The authorities are otherwise, and we know of no case in which it has been held that a precatory trust was created where the will itself, at the time it first spoke, namely, at the death of the testator, did not show certainty as to the subject-matter.

Our conclusion is that the circuit court erred in decreeing partition of the land and distribution of the personal property among the five appellees, giving to each of them a one-fifth interest, and in decreeing that appellants Alice M. Coulson and John W. Corzatt took no interest therein. As the life estate of Elizabeth Corzatt, the life tenant, had fallen in, and as she had not executed the powers that her testator had donated to her, both the land and the personal estate were intestate property, and, after payment of the \$500 legacy, should have been partitioned and divided equally among the five appellees, children of said testator, the appellant John W. Corzatt, only child of Peter Corzatt, deceased, and grandson of the testator, and the appellant Alice M. Coulson, widow and devisee of William Nelson Corzatt, deceased, giving a one-seventh part to each. The decree is reversed and the cause remanded, with directions to enter a decree in conformity with the views herein expressed. Reversed and remanded.

(163 Ill. 467)

CITY OF STERLING v. WOLF et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

UNDERTAKING OF SURETY—PERFORMANCE OF CONTRACT—LIABILITY FOR MATERIALS.

1. In an agreement for the construction of a sewer, the contractor undertook to "furnish all labor, materials, and tools necessary to execute the entire work," and gave a bond with sureties for the faithful performance of his contract. *Held*, that the sureties were not bound to pay third parties for materials used in performing the contract. 61 Ill. App. 515, affirmed.

2. A contractor proposed to enter into a contract to construct a sewer for a city, and to "furnish such sureties for the faithful perform-

ance of such contract and the payment of materials contracted for * * * as may be approved by the city council." In one of the clauses attached to the contract, it was stipulated: "In consideration of the completion * * * of all the work embraced in the contract in conformity with the specifications and stipulations herein contained * * * (the) party of the first part agrees to pay to (the contractor) the prices named in the 'proposal' which is hereto annexed, and made a part of this contract." A bond was given, with sureties, for the faithful performance of the contract. *Held*, that the reference to the "proposal" to furnish sureties could not so extend the liability of the sureties as to make them liable for materials furnished by third parties.

3. The undertaking of a surety cannot be extended by implication or construction.

Appeal from appellate court, Second district.

Action by the city of Sterling against David Wolf and others on a bond. From a judgment reversing a judgment in favor of plaintiff (61 Ill. App. 515), plaintiff appeals. Affirmed.

C. L. Sheldon, for appellant. J. E. McPherran and A. A. Nolfersperger, for appellees.

WILKIN, J. Michael Real entered into a written contract with the city of Sterling to construct certain sewers for it. Appellees, with others, became his sureties to the city, in the sum of \$41,402, for the faithful performance of his contract. The city sued on this obligation, and obtained a judgment for the penalty of the bond, debt, and \$2.44 damages. Afterwards a breach was assigned, claiming damages for the Evans & Howard Fire-Brick Company for material furnished Real which he failed to pay for. Certain pleas to this new assignment were held bad on demurrer, and, the defendants failing to plead over, damages were assessed by a jury at \$3,615.90, and judgment for that amount accordingly entered. That judgment has been reversed by the appellate court. 61 Ill. App. 515. The appellate court agreed with the circuit court that the defendants' pleas were bad, but held that the assignment of breach showed no right of recovery in the parties for whose use it was made, and therefore the demurrer should have been carried back and sustained to it. This decision is based upon the ground that the contract between the city and Real does not bind him to pay third parties for material used in performing the contract, and therefore his failure to do so constituted no breach of the obligation of his sureties. Without reference to the question whether the contract of suretyship by appellees is such a bond as that, under section 21 of the practice act (Rev. St. p. 1074), a writ of inquiry could properly be sued out by these parties, the decision of the appellate court is, we think, clearly right, for the reason stated in its opinion. It is not claimed that the contract, in express terms, bound Real to pay for the materials. He agreed to "furnish all labor, materials, and tools necessary to execute the entire work";

but it is not pretended that, under that agreement, appellees can be compelled to pay for such labor, material, and tools. In a proposal by Real to the city, he agreed to enter into a contract to perform the work, and to "furnish such sureties for the faithful performance of such contract, the payment of materials contracted for, and for the payment of laborers' wages and liens that may arise therefrom, as may be approved by the city council." In one of the specifications attached to the contract, it was stipulated: "In consideration of the completion by said Michael Real, party of the second part, of all the work embraced in this contract, in conformity with the specifications and stipulations herein contained, and in strict accordance with the instructions of the engineer, the city of Sterling, Illinois, party of the first part, hereby agrees to pay to the said party of the second part the prices named in the 'proposal' which is hereto annexed, and which is hereby made a part of this contract." Counsel for appellant insist that by this reference the part of the proposal in which Real says he will furnish sureties for the payment of materials, etc., became a part of the contract between him and the city, and therefore appellees, by their bond, agreed to become liable for any failure on his part to perform that offer. They go further, and contend that the proposal to furnish sureties for the payment of all materials should be held binding upon appellees, as a contract between their principal and the city that he would pay for such material, etc. If the question was between the contractor and the city, it would be going very far to hold that the parties intended the proposal to become a part of their agreement, except in so far as it fixed the prices of the work; but to hold that they must have so intended, and then not only carry that intention into the contract of appellees, but enlarge the meaning of the language in the proposal, would be to violate the plainest rules of the law of suretyship. The rule has been reannounced by this court, in almost numberless cases, that the undertaking of a surety is strictly construed, and may not be extended by implication or construction; that he cannot be held beyond the express terms of his undertaking. The liability is *stricti juris*. In case of doubt, the doubt is generally resolved in his favor. To hold that it was intended by the parties that the sureties for Real were to become responsible to third parties for all the material, labor, and tools employed and used by him in the performance of his contract with the city would be to hold the sureties liable, not only beyond the letter of their contract, but make them liable by a most liberal and, we think, unjustifiable construction of their contract. The judgment of the appellate court is right, and will be affirmed. Affirmed.

CARTWRIGHT, J., took no part.

(163 Ill. 269)

SWIFT v. KLEIN.

(Supreme Court of Illinois. Nov. 9, 1896.)
STATUTES — LEGISLATIVE POWERS — INTOXICATING LIQUORS — EFFECT OF ANNEXATION — REGULATION OF LICENSES — MANDAMUS.

1. It is within the power of the legislature to provide that, where any incorporated town, village, or city is annexed to another town, village, or city, any ordinance in force in the town, village, or city, etc., annexed at the time of the annexation, prohibiting or regulating the licensing of dramshops within the territory so annexed, shall be continued in force.

2. Hurd's Rev. St. c. 24, § 228, relating to the annexation of territory to cities, provides that, when an incorporated town, village, or city is annexed to another city, etc., ordinances in force in such town, village, or city, prohibiting or regulating the issue of licenses to keep saloons within the territory so annexed, shall continue in force. In 1889 the village of Hyde Park was annexed to the city of Chicago, there being at the time an ordinance in force in said village regulating the licensing of saloons, and providing that the licensee shall not keep or be interested in any saloon at more than one place at the same time. *Held*, that the ordinance, in so far as it was otherwise unobjectionable, was continued in force after the annexation. *People v. Cregier*, 28 N. D. 812, 138 Ill. 401, followed.

3. A provision in an ordinance regulating the licensing of saloons, declaring that the licensee shall not keep or be interested in any saloon at more than one place at the same time, is reasonable and valid.

4. A petition for a license to keep a dramshop within the annexed territory of Hyde Park, which failed to allege that the applicant was not a keeper of, or interested in, any other dramshop at the time, was properly denied.

5. Mandamus should not be awarded unless the person applying therefor shows a clear right to have the thing sought by it done by the person or body sought to be coerced.

Appeal from superior court, Cook county; J. Goggin, Judge.

Application by F. W. Klein for a writ of mandamus against George B. Swift, mayor of the city of Chicago. From an order granting the writ, respondent appeals. Reversed.

A petition for mandamus in this case was filed by appellee in the superior court of Cook county to compel the issuing to him of a dramshop license to keep a saloon at 5014 Cottage Grove avenue in that part of the city of Chicago known as "Hyde Park." This portion of the city, previous to 1889, was a separate municipality, and was governed by a president and board of trustees. It had certain ordinances relating to the issuing of dramshop licenses, among which was the following: "The president and board of trustees by resolution may grant licenses to keep so many dram shops, saloons or beer wagons in the village of Hyde Park outside of prohibited districts as they may think the public good requires," and "the licensee shall not keep nor in any way be interested in any saloon or dram shop at more than one place at the same time." In 1889 the village of Hyde Park was annexed to the city of Chicago. There was in force at that time section 18 of "An act to provide for the annexation of cities, incor-

porated towns and villages," being section 228, c. 24, Hurd's Rev. St., and which provides as follows: "When a part or the whole of an incorporated town, village or city is annexed under the provisions of this act, to another city, village or incorporated town, and prior to such annexation an ordinance was in force prohibiting the issuing of licenses to keep dram-shops within said territory so annexed, or any part thereof, or providing that such licenses shall not be issued except upon petition of a majority of the voters residing within a certain distance of such proposed dram-shops, then such ordinance shall continue in full force and effect notwithstanding such annexation. * * * It is intended by this section to continue in full force and effect all ordinance of any municipality, the whole or part of which is annexed to another city, incorporated town or village, whereby the licensing of dram-shops is prohibited or regulated within said city." The city of Chicago, recognizing the force of this provision, and in contemplation of the proposed annexation of the village of Hyde Park, through its legislative body, on the 17th of June, 1889, passed the following ordinance: "That when any territory has heretofore or shall hereafter be annexed to the city of Chicago and within such territory so annexed or any part thereof the issuing of dram-shop licenses was prohibited or regulated by ordinances of the city, village or incorporated town of which such territory was before such annexation a part, then in such case no license shall be issued by the mayor to keep a dram-shop within any portion of the territory so annexed, wherein the issuing of dram-shop licenses was prohibited before such annexation by the corporate authorities of the municipality of which it was formally a part; or if within any such territory so annexed licenses to keep dram shops were prohibited, unless a petition therefor was filed and signed by a majority of the legal voters residing within one-half mile of the proposed location, then in such case, the mayor shall not issue a license to keep a dram-shop within such territory unless a petition shall be filed with him signed by a majority of the legal voters residing within one-half mile of the location of the proposed dram-shop." The ordinance in respect to the licensing of saloons in Hyde Park also, among other things, required that the application for a license "shall be signed by a majority of the property owners according to the frontage on both sides of the street in the block in which such dram-shop is to be kept, and shall also be signed by a majority of the bona fide householders and persons or firms living in or doing business on each side of the street in the block upon which such dram-shop shall have its main entrance." The ordinance of the city of Chicago, however, relating to the same subject-matter, is as follows: "The mayor of the city of Chi-

cago shall from time to time grant licenses for the keeping of dram shops within the city of Chicago to any persons who apply to him in writing upon said person furnishing sufficient evidence to satisfy him that he or she is a person of good character and upon furnishing bonds in such amounts as are provided for by the ordinance." The appellee's petition did not aver that the petitioner was not interested in any other dramshop or saloon. For this and other reasons the mayor declined to issue the license. The appellee thereupon brought his proceeding of mandamus to compel the issuing of the license. He sets out several sections of the ordinance of the village of Hyde Park in force at the time of annexation, and also section 1 of an ordinance of the city of Chicago, above quoted, now in force, and which was in force prior to and at the time. The petitioner avers that the applicant furnished satisfactory proof of his good character, and tendered the bonds required by the ordinance, and that the mayor, without any right, refused to issue the license. Appellee insists that the ordinance of the city of Chicago controls the action of the mayor, and not the ordinance of the village of Hyde Park in force at the time of annexation. The answer of the mayor admits the filing of the petition with the signatures of property owners and residents; admits the satisfactory proof of good character and the tendering of the bonds as required by the ordinance, but avers that by section 18 of the annexation act, approved April 25, 1889, and by an ordinance passed by the city of Chicago June 17, 1889, all of the ordinances of the village of Hyde Park in respect to the licensing or regulating of saloons or dram-shops were continued in full force and effect, and that the issuing of licenses to keep saloons or dramshops in that territory must be governed by the ordinances of that municipality in force at the time of annexation; that the applicant did not present a petition in form, as required by those ordinances, nor did it appear to the mayor that the public good required that a license should issue to keep a saloon or dramshop at 5014 Cottage Grove avenue; that the proposed location was a much-traveled thoroughfare in a residence district, and adjacent to a public park, and that a saloon at that place would be against the peace, quiet, and good order of that neighborhood. A demurrer was sustained to a part of the answer, and a replication admitting that the location was on a much-traveled thoroughfare, in a block adjacent to a public park, and that within 1,500 feet of the proposed location there were at least 80 families, aggregating about 400 people, but denying that a saloon or dramshop was an objection to such a condition, was filed to the remaining part of the answer. The replication also shows that less than a block south of the proposed location is a licensed saloon, and

another is around a corner, less than a block away. A demurrer filed to the replication was overruled, and a hearing had on the pleadings as above. Thereupon the court awarded a peremptory writ of mandamus as prayed for in the petition, from which order this appeal is prosecuted.

L. D. Thoman, for appellant. J. B. Barton, for appellee.

PHILLIPS, J. (after stating the facts). The record in this case presents for our consideration a number of questions. One of the first matters to be determined is whether the eighteenth section of the annexation act, heretofore referred to, had the effect of continuing in force the ordinances of the village of Hyde Park in respect to the licensing of saloons or dramshops after its annexation to the city of Chicago. The legislature has provided by section 228 of chapter 24 of the Revised Statutes that an ordinance relating to the prohibition or regulation of dramshops in force in a municipality which is annexed to another city shall continue in full force and effect, unless such ordinance be repealed in the manner provided in such section. The enactment of an act of this character was within the power of the legislature. Where a municipality generally of lesser dimensions and population is about to be annexed to a larger, whereby its legal power to protect itself by ordinances of prohibition or regulation of dramshop licenses might otherwise be taken from it, and vested in a body which might disregard the wishes and thwart the will of the annexed district, it is a provision entirely proper and consistent that its desires, expressed by its ordinance adopted by the representatives of its people, be carried out by the larger district to which it is annexed. In this case the city of Chicago, with knowledge that the village of Hyde Park was about to be annexed to it, and that certain restrictions regarding the issuing of dramshop licenses were in existence there, and recognizing the authority given by the act of the legislature in providing that such ordinances remain in force and be binding upon the city to which it was to be annexed, followed the act of the legislature by the passage of the ordinance heretofore referred to; it must be conceded without question that such ordinances, so far as they were otherwise not objectionable, were binding upon the city of Chicago. Whatever power or authority by virtue of such ordinances was legally invested in the town board of Hyde Park was succeeded to by the city council of the city of Chicago, and the power and authority before then vested in the president of the town board of Hyde Park became vested in the mayor of the city of Chicago. The question involving the construction and validity of section 18 of the annexation act, and its applicability to these particular Hyde Park ordinances, was before this

court in the case of *People v. Cregler*, 138 Ill. 401, 28 N. E. 812. In that case we found this statute to be valid, and that it had the effect of continuing in force these particular ordinances so far as they were otherwise unobjectionable, or might have been enforced by the proper authorities of Hyde Park before annexation. The seventh section of the ordinances of the village of Hyde Park set out in the petition provides that "the licensee shall not keep nor in any way be interested in any saloon or dramshop at more than one place at the same time." The provisions of this ordinance are reasonable. The municipal authorities have the right to presume that where a person is the keeper of or interested in, only one dramshop, it will receive his personal attention to an extent it would not were he interested in more; and thus derive assurance of a more careful conduct and management of his business, and a stricter observance of the laws enacted for its government and control. There may also be other good and sufficient reasons for such a provision, and we see nothing improper or unreasonable in such requirement, nor is our attention called to any. It is always incumbent on one who seeks to have an ordinance set aside as unreasonable to point or show affirmatively whereon such unreasonableness consists. *People v. Cregler*, supra. But nowhere in the petition nor in the amended petition does the appellee aver or show that he is not so interested in any other saloon or dramshop. The writ of mandamus is one of the extraordinary remedies provided by law, and should never be awarded unless the party applying for it shows a clear right to have the thing sought by it done, and by the person or body sought to be coerced. In doubtful cases it should not be granted. The petitioner is bound, like the plaintiff in an ordinary case, to state a case prima facie good. *Springfield & I. S. E. Ry. Co. v. Wayne County Clerk*, 74 Ill. 27. "The party applying for mandamus must show that he has a clear legal right to have the thing which is asked for done; (2) that it is the clear legal duty of the party sought to be coerced to do the thing he is called upon to do." *Railroad Co. v. Suffern*, 129 Ill. 274, 21 N. E. 824. "To entitle the relator to relief, it must appear that the defendant is under a legal obligation to perform the act sought to be commanded, and every material fact necessary to show such legal duty must be averred in the petition." *People v. Board of Sup'rs Madison Co.*, 125 Ill. 334, 17 N. E. 803. For a failure to aver in his petition, and to show that he did not keep, nor was in any way interested in, any other saloon or dramshop, the prayer of the petitioner should have been denied. Other questions are presented in the record, which go to the sufficiency of the number of names on the petition of appellee for license; but, as it is admitted by the answer of appellant to the petition for mandamus that he believes

the petition in that respect was requisite, and conformed to the Hyde Park ordinance, we do not deem it necessary to discuss the question. For the reasons indicated, the judgment of the superior court in awarding the peremptory writ of mandamus is reversed, and the cause remanded, with directions to dismiss the petition.

(163 Ill. 486)

ASHLEY WIRE CO. v. MERCIER.

(Supreme Court of Illinois. Nov. 9, 1896.)

**MASTER AND SERVANT—NEGLIGENCE OF MASTER—
EVIDENCE—APPEAL—HARMLESS ERROR
—INSTRUCTIONS.**

1. A guy rod supporting a crane ran through a brick wall into a cast-iron plate extending down from the top of the wall. The plate through which the rod ran cracked in the center, in sound iron, letting the rod through the wall, and causing the crane to fall and injure plaintiff. There was evidence that long before the accident the wall had bulged where the rod went through, and that the bulging was visible, and that timbers had been put up to strengthen it. *Held*, that the question of defendant's negligence was properly submitted to the jury.

2. In an action to recover for injuries received from the fall of a crane, testimony of a fellow employé that he had told defendant's superintendent on two occasions, shortly before the accident, that he was afraid to work under the crane, and that on the second occasion the superintendent told witness to go home,—that he had no more use for him,—is competent to show that defendant's attention was called to the unsafe condition of the crane.

3. Error in rejecting testimony embraced in that already given by the same witness is harmless.

4. A party cannot complain of the rejection of an instruction, where the court gave another instruction, in lieu thereof, embracing the principle invoked.

Error to appellate court, Second district.

Action by Frank Mercier against the Ashley Wire Company to recover damages for personal injuries. A judgment for plaintiff was affirmed by the appellate court (see 61 Ill. App. 485), and defendant brings error. Affirmed.

This is a writ of error brought by the Ashley Wire Company to reverse a judgment of the appellate court affirming a judgment of the circuit court of Will county for \$7,000 recovered by defendant in error, Frank Mercier, against said company for a personal injury. The following statement of the facts is taken from the opinion of the appellate court, and is sustained by the record: The Ashley Wire Company "was engaged in the manufacture of fence wire and nails at Joliet, Illinois. The material used was steel rods, which had to be annealed before they could be drawn to the required size. In the factory there was an annealing room, in which there were some sixteen or eighteen 'pots,' as they were called. They were long iron tubes, about three feet in diameter and twelve or fourteen feet long, and extended down from the floor, loosely set in brickwork. There was a furnace under them to heat them and their contents. The wire to

be annealed was wound in coils around an iron stem or spindle with an eye in one end, and the coils were taken to the pots and let down into them, and taken out, by means of a crane. The crane had a mast about twenty feet high, supporting a boom near its top, at right angles with it, extending thirty feet from it. The coils were carried to and from the pots by swinging the boom with a rope, and there was an apparatus which traveled on the boom so as to operate at different distances from the mast, also moved by hand power. The coils were lowered and hoisted by power communicated from the machinery. The operators would hook into the eye of a stem, and swing the coil to a pot, and put two in a pot, one above the other. When the pots were filled, they were covered and heated to a cherry red, and, after being allowed to cool, the coils were drawn out and distributed through the mill. The wire, when heated and soft, would frequently settle down and expand so as to stick to the sides of the pot, and the coils and pot would be lifted together. When this happened, one of the men would run an iron bar down the side of the pot, and loosen the wire from it so that it could be withdrawn. At the time plaintiff was injured, he and a fellow servant were operating the swinging motion of the boom by means of the rope. A boy was near the mast to apply the hoisting power, and a fourth employé connected the hook from the hoisting pulleys with the stems, and notified the boy when to apply the power. The coils on one stem stuck, and it would not come out, but the wire and pot were lifted together a short distance. The power was shut off, and the pot went back to its place. The employé who was connecting the apparatus and controlling the power took a bar, and attempted to loosen the wire as usual. He called for the power again, and it was applied, and the crane fell. The boom struck plaintiff and injured him, and killed his assistant. The crane fell because a guy rod opposite the pot, running from near the top of the mast to a brick wall, gave way and was pulled through the wall. The charge against defendant, under which it was claimed that it was liable, was a want of proper care in the support and fastenings of that guy rod. There were four guy rods to hold the top of the mast in place, and they ran to the walls at different places. The one that gave way ran to a brick partition wall about sixteen feet high and twelve inches thick. The rod ran through the wall at an angle of about forty-five degrees at a point where the wall had an additional thickness of four inches on each side, called 'pilasters,' making it twenty or twenty-one inches thick, and the rod came out on the further side in the angle of the main wall and pilaster. In that angle there was a cast-iron plate, thirty inches long, extending down from the top of the wall, with one flange, four inches wide, resting against the pilaster, and the other flange, eight inches wide, against the main wall. The rod ran through the plate at about

the middle, and was fastened with a nut. The plate cracked in the center, in sound iron, and let the rod go through the wall. * * * There was evidence that long before this accident the wall in question had bulged where the rod went through so as to destroy the even bearing on which the cast-iron plate should have rested, that the bulging was visible, and that timbers had been put up to strengthen it."

D. J. Schuyler, for plaintiff in error. Haley & O'Donnell, for defendant in error.

CARTER, J. (after stating the facts). Plaintiff in error contends that the trial court erred in refusing its motion to instruct the jury that the evidence was not sufficient to support a verdict for the plaintiff, and to find their verdict for the defendant. It is clear from the evidence that such an instruction would have been erroneous. The record contains sufficient evidence tending to prove the negligence of plaintiff in error, the Ashley Wire Company, as alleged in the declaration, to support the verdict. It is unnecessary to repeat the rule on that question here. Reference may be had, among others, to the following cases: *Simmons v. Railroad Co.*, 110 Ill. 340; *Railroad Co. v. Heinrich*, 157 Ill. 388, 41 N. E. 860; *Railway Co. v. Lyons*, 157 Ill. 593, 42 N. E. 55; *Railroad Co. v. Luebeck*, 157 Ill. 595, 41 N. E. 897; *Car Co. v. Laack*, 143 Ill. 242, 32 N. E. 285.

It is assigned for error that the trial court permitted the witness Hilley to testify to two conversations between him and the superintendent of the company, had shortly before the accident. The superintendent had requested Hilley, then an employé, to take the place under the crane and derrick of a workman who was absent on account of sickness. Hilley demurred, saying that he was afraid to work under that crane. The superintendent then said, "Try and draw them [the pots] to-day," and witness replied, "All right," and that he would do so. On the second occasion, which was only an hour or two before the accident occurred, witness and the superintendent were standing under the crane or derrick, when the superintendent again requested him to go to work drawing the pots under the crane, and witness replied to the request that he was afraid of the derrick. The superintendent then told him to take his coat and go home; that he had no more use for him (witness). It is claimed by plaintiff in error that this testimony was erroneous, and prejudicial to the defendant below, and principally for the reason that the witness did not, in this conversation, specify or point out to the superintendent any special defect in the crane or derrick which rendered it unsafe to those working under it, and that the mere fears of Hilley were wholly immaterial, but were injurious to the defense. It is very true that the mere fact that the witness was afraid to work under the crane would be improper

as evidence to the jury, but that was only a part of the conversation with the superintendent, which taken altogether, under the circumstances, tended, we think, to show to some extent that the attention of the company was called to the fact that this part of the machinery was not in a safe condition; and, as well said by the appellate court, it was "such as would cause a prudent man to inspect it, or to make some inquiry of the employé for the cause of the danger." The duty of those using machinery dangerous to human life, to observe at all times due care and caution to see that it is in a reasonably safe condition, ought to be strictly enforced by the courts. It is not an unreasonable inference to be drawn from the testimony that if the superintendent had made further inquiry, and an examination of the derrick and its fastenings, the serious accident which followed might have been averted. We are disposed to hold that no error was committed in the admission of this testimony. It is also insisted that the trial court erred in refusing to permit the witness Bates to answer certain questions as an expert mechanic, but we think the testimony called for, so far as it is proper at all, was embraced in other testimony given by him, and that plaintiff in error was not injured by the ruling of the trial court.

It is not contended by counsel that the jury were improperly instructed at the request of plaintiff below, but it is insisted that error was committed in refusing certain instructions offered by the defendant. In the first place, it is claimed that there was error in refusing two certain instructions offered by defendant below, which instructions, after stating the rule applicable to fellow servants, would have told the jury, in substance, that, if they believed from the evidence that the accident was caused by the negligence of the fellow servant of plaintiff, he could not recover. It is a sufficient answer to say that the court formulated and gave to the jury an instruction, in lieu of those asked by the defendant, covering the rule invoked, and which, in some respects, was more favorable to the defendant than those asked by it. Counsel say that this instruction of the court "omitted entirely the element held in all the authorities to be essentially necessary, namely, that the plaintiff must have been so associated with Murphy and Maloney as to exercise constant care and caution in the performance of their respective duties." And we are referred to the language used by this court in *Railway Co. v. Moranda*, 93 Ill. 302, where it was said: "Where servants of the same master are by their usual duties brought into habitual consociation, it may well be supposed that they have the power of influencing each other, by the exercise of constant caution in the master's work, by their example, advice, and encouragement, by reporting delinquencies to the master, in as great, and in most cases

a greater, degree than the master." Whether the instruction was erroneous in the respect mentioned or not, it is wholly unnecessary to consider, for the reason that the error, if any, was favorable to defendant below, rather than to the plaintiff. The instruction, as given, based upon the evidence, practically told the jury that the workmen engaged in the work at the crane were fellow servants of Mercier, and that, if the injury occurred because of the negligence of any of them, Mercier could not recover. Plaintiff in error cannot complain of an error beneficial rather than injurious to it. In refusing other instructions asked, we find no substantial error. Some were embraced in others given, and others were defective, and it is sufficient here to say that the jury were instructed as favorably for the defendant below as the law warranted. Finding no substantial error in the proceedings in the courts below, the judgment of the appellate court must be affirmed. Judgment affirmed.

(163 Ill. 238)

KEARNEY et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Nov. 9, 1896.)

SPECIAL ASSESSMENT—CERTIFICATE OF PUBLICATION—SUFFICIENCY—JURISDICTIONAL DEFECT.

1. Under Rev. St. c. 100, § 1 (2 Starr & C. Ann. St. [1st Ed.] p. 1674), which provides that, when any notice shall be required to be published, the certificate of the publisher, by himself or his authorized agent, with a copy of such notice annexed, shall be sufficient evidence of the publication, where the certificate of publication of a special assessment notice recites that J. R. D. "was and is the publisher of said newspaper," and that, "in witness whereof J. R. D., publisher, * * * has signed this certificate," but the certificate is signed, instead, "F. D. B., Publisher," the certificate is insufficient.

2. Where a sufficient certificate of the publication of an assessment notice is jurisdictional, error in rendering judgment on an insufficient certificate may be urged by a party against whom the judgment was rendered on default.

Error to Cook county court; O. N. Carter, Judge.

Writ of error by Thomas Kearney and another to reverse a judgment confirming a special assessment by the city of Chicago. Reversed.

Maher & Gilbert, for plaintiffs in error. J. D. Adair, for defendant in error.

WILKIN, J. This is a writ of error to the county court of Cook county to reverse a judgment confirming a special assessment by the city of Chicago, against property of plaintiffs in error, for the improvement of St. Louis avenue. The judgment below was rendered upon default. It will be necessary to notice but one ground of reversal insisted upon. The notice of the application for a confirmation of the assessment purports to have been published in the Chicago Mail. The certificate is in the usual form, but shows that Joseph R. Dunlop

"was and is the publisher of said newspaper," and concludes, "In witness whereof, Joseph R. Dunlop, publisher of said Chicago Mail, has signed this certificate, this 5th day of January, 1893." The certificate, however, instead of being signed by Dunlop, is signed, "Frank D. Biggs, Publisher." The statute makes the duty of the commissioners to file a certificate of publication of the notice "in like manner as is required in other cases of publication of notices." Section 1, c. 100, Rev. St. (2 Starr & C. Ann. St. [1st Ed.] p. 1674) provides "that when any notice shall be required by law, etc., to be published in any newspaper, and no other mode of proving the same is provided, the certificate of the publisher, by himself or his authorized agent, with a written or printed copy of such notice annexed, etc., shall be sufficient evidence of the publication therein set forth." In this case no attempt was made to prove the publication, except by the certificate of publication. This certificate does not purport to be signed by the publisher or by his agent. It states, in effect, that the one who signs it as publisher is not, in fact, its publisher. This certificate is of no more force than if it had not been signed at all. Without a proper and sufficient certificate of publication of the required notice, the county court was without jurisdiction to enter its judgment of confirmation, and the error in doing so may be properly availed of by the plaintiffs in error, although they were defaulted upon the hearing. We think, for the reasons stated, the judgment below must be reversed, and the cause remanded.

(163 Ill. 511)

DADY v. CONDIT.

(Supreme Court of Illinois. Nov. 9, 1896.)

CONTRACTS—RESCISSION—FRAUDULENT REPRESENTATIONS.

A party cannot avoid a contract for false representations made by the other party, which his own testimony shows he did not rely upon, nor act upon, in making the contract. 56 Ill. App. 545, affirmed. Baker, J., dissenting.

Appeal from appellate court, Second district.

Action in equity by Robert Dady against James M. Condit. A decree for plaintiff was reversed by the appellate court, and plaintiff appeals. Affirmed.

Cooke & Upton, for appellant. C. F. Beach and S. P. Shope, for appellee.

WILKIN, J. On the 14th of January, 1891, the parties to this litigation entered into the following contract: "In consideration of the sum of one dollar, the receipt of which is hereby acknowledged, to me in hand paid by James M. Condit, I, Robert Dady, agree to sell to James M. Condit, his heirs or assigns, 160 acres of land, located in section 32, Lake county, Illinois being the northwest quarter section, known as the 'Jack Dugdale Farm,' at the sum of \$150 per acre, on the following terms: \$500 cash when I furnish an ab-

stract showing a good and sufficient title; \$3,000 on or before August 1, 1891; one-fourth of the balance on or before August 1, 1894; one-fourth on or before August 1, 1897; one-fourth on or before August 1, 1900; one-fourth on or before August 1, 1903,—with interest on deferred payments at six per cent. per annum, payable semiannually. Upon payment of the \$3,000 on or before August 1, 1891, I agree to give a warranty deed to the above-described property, taking a mortgage on same for deferred payments. But, in case of failure on the part of J. M. Condit to make said payment of \$3,000, I agree to accept \$500 additional as liquidation of all damages to myself. In consideration of which, I, James M. Condit, agree to purchase the above-described property on the terms above mentioned, and in case of failure to make payment of \$3,000 on or before August 1, 1891, I agree to pay to Robert Dady, his heirs or assigns, \$500 additional, in liquidation of damages. R. Dady, James M. Condit, Milwaukee, January 14, 1891." Subsequently Dady refused to perform the agreement, and Condit brought his action for damages. Thereupon Dady filed this bill to enjoin the action at law, and to set aside the alleged agreement for fraud, and because it was never delivered. The circuit court found in favor of the complainant, and decreed accordingly. The appellate court of the Second district reversed that decree, without remanding the cause, and appellant, Dady, prosecutes this appeal.

On the former submission of the cause, we affirmed the judgment of the appellate court, adopting its opinion, which is reported in 56 Ill. App. 545. Subsequently a rehearing was granted, on the petition of appellant, and the cause again taken under advisement. Appellee having replied to the petition for rehearing, we have re-examined the evidence in the light of arguments, and reach the same conclusion announced in our former opinion. We still concur in the reasoning and conclusion announced in the opinion of Harker, J., above referred to, but, in order to avoid repetition, will briefly state in our own language these views.

The relief prayed in the bill is based upon two theories therein alleged: First, that the agreement was procured through fraud on the part of Condit, by making false representations and concealing certain facts; and, second, that the contract was never consummated by delivery thereof. It appears from the evidence that prior to, and at the time of, the execution of this agreement, there was a rumor in Waukegan and vicinity that the Washburn & Moen Manufacturing Company might locate its plant at that place; and the result of that rumor was to produce activity in the sale, or, rather, in the obtaining of options upon, real estate in that locality. Conversations between these parties in the months of November and December prior to the making of the contract had been had, but no definite agreement reached. A day or

two prior to January 14th, Dady went to Milwaukee for the purpose of purchasing cattle. On the morning of that day, Condit called at his house, near Waukegan, as he says, for the purpose of further negotiating with him about the land described in the contract. Learning his whereabouts, he immediately went to Milwaukee, where the contract was entered into. Dady claims—and the allegations of the bill as to fraud are based upon this claim—that, upon his inquiry, Condit informed him that there was no stir in real estate in the vicinity of Waukegan, and that the manufacturing company had not decided to locate there, and, further, that Condit, knowing that the manufacturing company had determined to come to Waukegan, and that he would be materially influenced by that fact in the price fixed upon the property, concealed the information from him. The other theory of the bill is that the contract never became effective, because it was not delivered. It seems to us clear, beyond controversy, that, on the testimony of the complainant himself, the question of fraud is eliminated from this case. He testifies over and over again that it was the understanding and agreement between himself and Condit that this contract was only to become effective, or, as he sometimes says, only to be made, upon his returning to Waukegan and ascertaining whether Condit's statements were true; that is, whether there was any stir in real estate, and whether or not the manufacturing company had decided to locate in Waukegan. Nothing is better settled than that, in order to entitle a party to rescind or set aside a contract for fraud, he must not only prove the fraud, but also that he relied upon the fraudulent representations, and acted thereon. *Kerr, Fraud & M.*, p. 73 et seq.; *Douglass v. Littler*, 58 Ill. 342; *Tuck v. Downing*, 76 Ill. 71. Therefore, even though the false representations and concealments averred in the bill were made (which are denied by the defendant), still, by his own positive proof that he did not rely upon those statements, and did not act upon them, in making the contract (in other words, that he did not believe the statements to the extent of acting upon them), complainant wholly failed to make out a case of fraud. And while, in the petition for rehearing, that branch of the case is insisted upon with earnestness, it was not so contended upon the former submission. The decree of the circuit court, then, if it can be maintained at all, must be upon the allegation that the contract was never delivered. This theory of the bill is not, as we understand, one of mere nondelivery, in the sense that the delivery of a deed is essential to its validity, but that, by agreement of parties, the contract was only to take effect upon both parties ordering Mr. Whitney, to whom it was delivered, to surrender it to Condit. After the contract was signed by the parties at Milwaukee, they agree, the question came up as to what should be done with it, and

It was finally put into an envelope, and directed to Mr. Whitney, at Waukegan, with the indorsement on the envelope: "Not to be opened until R. Dady and J. M. Condit call. Put in your safe." Dady's testimony is to the effect that it was thus placed in the custody of Whitney that he might, on his return to Waukegan, ascertain whether Condit had told him the truth in regard to real-estate transactions, and the location of the factory at Waukegan, and that the agreement was to take effect only upon his obtaining such satisfactory information, and consenting to the surrender of the agreement. Condit, on the other hand, testifies to the effect that the contract was consummated by the signing of the instrument in writing, and nothing remained to be done to perfect it, it being placed in the hands of Whitney merely as a custodian. The formal delivery of the paper was in no legal sense essential to its binding effect on the parties. It was a mere mutual agreement. It was no more necessary that Dady should deliver it to Condit, than that Condit should deliver it to Dady. It might, in the ordinary way of transacting such business, have been held by Condit, made in duplicate, and a copy retained by each party, or, as was done, placed in the hands of a third person, to hold for both contracting parties. Therefore sending the instrument to Whitney was perfectly consistent with its validity from and after its execution, and we are wholly unable to see how the directions to Whitney in any way indicated a contrary intention. The indorsement on the envelope certainly was no more consistent with Dady's contention that the contract of sale was only to be made upon his returning to Waukegan, than with Condit's claim that it was then and there fully entered into and executed, as it purported to be upon its face. It does not, as seems to be thought, corroborate Dady, rather than Condit. All that is said, then, about the agreement not being delivered, resolves itself into the question whether or not it was the understanding of the parties that the contract was not to take effect until Dady returned to Waukegan, and satisfied himself as to the situation there. On this issue the clear preponderance of the evidence is with Condit. The contract itself is a strong refutation of Dady's testimony, and we are able to discover nothing in the facts in this case to justify the giving of less credence to the evidence of Condit than that of Dady. Condit's testimony, to say the least, is consistent throughout, whereas that of Dady, in so far as it attempts to establish the allegation that he was induced to enter into this contract through fraudulent representations and concealments, and at the same time that he did not enter into it, but reserved the right to investigate for himself, is inconsistent, contradictory, and unreliable.

Considerable importance is attached to the circumstances of Condit going to Milwaukee, and there insisting upon and urging the con-

summation of the transaction. That circumstance, if entitled to weight, would go only to the question of fraud, which, as we have seen, is out of the case. Condit's testimony, however, is to the effect that on the 8th of January, prior, he called on Dady, and had some conversation with him in regard to the purchase; that Dady then offered to sell him the land for \$150 per acre; and that they then separated, he telling Dady that he would "be out in a few days." And in this testimony he is fully corroborated by a witness who accompanied him, named Loesby. It is in evidence that other parties were obtaining options upon real estate on the faith of the location of the manufacturing works in the city, and, while there is some testimony tending to show that this confidence in the location of the plant was stimulated about this time, there is no proof of positive information on the part of Condit, or such excitement in the neighborhood as to impress him or others with the belief of its location. At all events, in view of all the evidence, we do not regard the fact of Condit's going to Milwaukee, and there consummating the trade, as a circumstance of such controlling importance as that it should be allowed to discredit him as a witness. The parties undoubtedly each speculated more or less upon the probability of the location of the manufacturing works. Dady did not believe, as he himself says, that the location would be made; but he was willing to get, if he could, a high price for his land on the belief that others had in its location. Condit doubtless bought it expecting to realize a profit upon it in case the factory was located at Waukegan. It turned out as he hoped. The contract was a bad one for Dady, but we are unable to see how, upon this record, that contract can be set aside without violating plain and well-settled principles of law. The judgment of the appellate court is affirmed.

BAKER, J. I do not concur in this opinion and judgment.

CARTWRIGHT, J., took no part.

McCHESNEY et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Nov. 9, 1896.)

SPECIAL ASSESSMENT — PETITION FOR CONFIRMATION — SUFFICIENCY.

A petition for confirmation of a special assessment is insufficient if, instead of reciting an ordinance authorizing the improvement, it merely refers to an exhibit which purports to be a report of the commissioners of public works, submitting a draft of an ordinance to the council, and nothing appears in the certificate of the city clerk to such paper to show that the ordinance was ever passed. *Hull v. City of Chicago*, 40 N. E. 937, 156 Ill. 381, followed.

Appeal from Cook county court; O. N. Carter, Judge.

Petition by the city of Chicago for confirmation of a special assessment. A. B. McChes-

ney and others filed objections, and from an order overruling their objections and confirming the assessment they appeal. Reversed.

F. W. Becker, for appellant.

PER CURIAM. This appeal is prosecuted to reverse an order of the court below confirming a special assessment to defray the expense of laying a sewer pipe in Coles avenue, in the city of Chicago. On the hearing it was objected that the petition under which the assessment was made failed to set out any ordinance authorizing the improvement, but only referred to a paper marked as an exhibit. That exhibit was not an ordinance at all, but only a report of the commissioners of public works submitting a draft of an ordinance to the city council; nothing appearing in the certificate of the city clerk to show that it was ever passed. The objection was fatal to the assessment, and should have been sustained. *Hull v. City of Chicago*, 156 Ill. 381, 40 N. E. 937. The judgment of the county court will accordingly be reversed.

(163 Ill. 328)

BUNN et al. v. SCHNELLBACHER et al.
(Supreme Court of Illinois. Nov. 9, 1896.)

FRAUD—PURCHASE OF LAND—FALSE REPRESENTATIONS AS TO PRICE—SUBSEQUENT PURCHASERS.

1. Defendants solicited complainants to join with them in the purchase of a tract of land, representing that the price of the land was \$14,000, to which each should contribute an equal share. In fact, the purchase price was only \$10,500, and by means of the false representations complainants were induced to and did pay more than their share. *Held*, that the transaction was a fraud on the part of the defendants, for which they were liable to the extent of the excess so paid. 59 Ill. App. 222, affirmed.

2. Subsequent to the purchase of the lands it was divided between the owners, and one of defendants conveyed his share in payment of a pre-existing debt. *Held*, that the share thus conveyed could not be subjected to the payment of the amount for which defendant was liable by reason of his fraud. 59 Ill. App. 222, affirmed.

Appeal from appellate court, Second district.

Bill in equity filed by Jacob Schnellbacher and Isaac N. Feger against William E. S. Bunn and George W. Lyon. A decree in favor of complainants having been modified and affirmed by the appellate court (59 Ill. App. 222), the defendants appeal. Affirmed.

Foster & Carlock, for appellants. Jack & Tichnor, for appellees.

PER CURIAM. After a full consideration of this case and the arguments of counsel, we are unable to find any sufficient ground upon which to differ from the conclusion reached by the appellate court, or from the reasons given therefor in the opinion of that court delivered by Mr. Justice Cartwright. The opinion will therefore be adopt-

ed as the opinion of this court. It is as follows:

"The controversy in this case arose out of the purchase of a tract of land, containing about 14 acres, known as 'Selby Park,' adjoining the city of Peoria on the south, in which purchase the appellees, Jacob Schnellbacher and Isaac N. Feger, by their bill of complaint, charged that they were defrauded by the appellants, William E. S. Bunn and George W. Lyon, their associates in the purchase, who bargained for the tract, by false representations as to the amount paid. The charges were denied, and the cause was referred to the master, who reported in favor of appellees, and, with a slight modification of his findings as to the amount, the court confirmed the report, and decreed accordingly.

"The fraud charged consisted of alleged false representations by the defendants, William E. S. Bunn and George W. Lyon, that the purchase price of the tract of land was \$14,000, to which each of the four was to contribute an equal share, when, in truth, the purchase price was only \$10,500, and that by such false representations the complainants were induced to pay more than their share of the purchase money. It was shown, on the hearing, that said Bunn and Lyon had procured a written agreement, on September 19, 1887, from James Selby, for a conveyance to them from said Selby and Michael D. Spurck, the owners, of the tract of land, for \$14,000; that Selby, at the same time, gave them a writing that there was to be a rebate of \$3,500 from the price named in the contract; that they then paid Selby \$500 on the purchase, and afterwards tried to organize a company of 14 persons, to pay \$1,000 each, and buy the land for a race track, of which company complainant Schnellbacher agreed to become a member; that said scheme failed, and Bunn and Lyon, being unable to meet a payment coming due December 19, 1887, obtained from Selby an extension for 30 days; that afterwards complainants agreed with Bunn and Lyon to each take a one-fourth interest in the land, and on February 1, 1888, by agreement of the parties, Selby and Spurck conveyed the land to the complainant Schnellbacher, in trust for himself and the complainant Feger and said Bunn and Lyon, each owning one-fourth interest, and Schnellbacher, as trustee, executed four notes, of \$2,000 each, to Selby and Spurck, for deferred payments, and secured the same by mortgage on the tract; that the balance of the purchase price was \$2,500, to be paid in cash; and that complainants each paid \$1,500, making \$3,000, out of which the sum of \$2,500 was paid to Selby and Spurck, and Bunn and Lyon paid nothing at that time, but kept \$500 of complainants' money. Selby and Spurck retained \$225, out of the payment of \$500 in September, for interest accrued, and accounted to Bunn and Lyon for the balance.

"The complainants never knew anything about the contract, made in September, for a conveyance to Bunn and Lyon, or the separate agreement for a rebate, until the facts were developed on the hearing of this case. The testimony of complainants was that Bunn and Lyon applied to them to join in the purchase of the premises from Selby and Spurck, and represented that the purchase price to be paid Selby and Spruck was \$14,000, of which \$6,000 was to be paid in cash and \$8,000 was to be secured on the property, and that, in the belief that such representations were true, they each agreed to take a one-fourth interest, and paid their money, supposing that Bunn and Lyon were doing the same. Bunn and Lyon, while not claiming that they disclosed to complainants the existence of any contract, or the amount of the purchase price, denied making any misrepresentation as to the price, and claimed that they merely sold for themselves one-half of the land to complainants at a profit. All the circumstances, however, tend to corroborate complainants, and Adolph Barnewalt, who was to have taken an interest, and whose place was taken by complainant Feger, testified that Bunn and Lyon represented to him that they had an option on the tract for \$14,000, and proposed to let him have one-fourth for \$3,500. We think that the fraud was proved, and that the master and court were right in so finding.

"The complainant Schnellbacher held the title to the tract of land as trustee for himself and his associates, and rented it, and about three years after the purchase it was laid out and platted into 124 lots. There was a division of the lots among the owners, and each of them assumed one-fourth of the incumbrance. Said George W. Lyon had sold his interest, November 9, 1889, to his father, the defendant Aaron Lyon. In pursuance of the arrangement for division, Schnellbacher conveyed to said Aaron Lyon and the other parties the lots set off to them in severalty, and executed a mortgage to Selby and Spurck for his share of the incumbrance. This closed out the transaction, and severed all relations of the parties. There is some discussion whether the arrangement created a partnership, but we deem it immaterial whether the relation of partners existed or not. The purchase was for the mutual benefit of the parties, and the negotiations were carried out by Bunn and Lyon alone, professing to their associates to be acting for all. There was actual fraud by means of false representations, and it was not necessary that complainants should be partners with Bunn and Lyon to enable them to call for an accounting on account of such fraud. Complainants had no knowledge of the true consideration paid for premises until 1892, when they directed counsel to file the bill in this case.

"It is argued that the transaction on the part of Bunn and Lyon was legitimate busi-

ness and honest enterprise; but false statements, to induce investments of money, of the character here shown, can scarcely be so classed, and we think the court was right in requiring them to refund their gains acquired by such means, but we see no reason for subjecting the lots conveyed to the defendant Aaron Lyon to sale in satisfaction of the complainants' claim against George W. Lyon, who was guilty of the fraud. Aaron Lyon did not participate in the purchase or in the fraud, and knew nothing about it. He took the property from his son, in payment of indebtedness due him, and surrendered notes of his son, and the lots were conveyed to him by the trustee. He was a bona fide purchaser, for a valuable consideration, without notice that any fraudulent representations had been made; and no reason occurs to us why he should be compelled to make the representation good. The averments of the bill that he paid no consideration for the lots conveyed to him, and that they were subject to complainants' equities, were not supported by any proof, but were disproved by the evidence. The decree will be reversed as far as it charges payment of the amount found due upon lands of the defendant Aaron Lyon, and authorizes a sale of the same, and will be affirmed in all other particulars. The cause is remanded for further proceedings in accordance with this opinion. Affirmed in part, and reversed in part."

The judgment of the appellate court is affirmed. Judgment affirmed.

(163 Ill. 530)

UPHAM et al. v. RICHEY et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

SALE OR PLEDGE.

P., having borrowed \$7,000, and given a note therefor, signed by himself and one F., gave to the latter what purported to be an absolute bill of sale of a stock of merchandise, for the stated consideration of \$7,000, but this instrument was accompanied by an agreement providing that P. should retain possession of the goods, conduct the business in his own name without cost to F., keep up the stock, pay all clerk hire, freight bills, taxes on stock, etc., and apply all profits to the payment of the \$7,000 indebtedness. Held a pledge, and not a sale, so as to render P. liable as principal for goods thereafter purchased by P. 61 Ill. App. 650, affirmed.

Appeal from appellate court, Second district.

Assumpsit by Upham & Gordon against Clarence G. Richey and another, executors of George M. Foote, deceased, and Ira Putney, to recover for goods sold and delivered. The suit was dismissed as to defendant Putney, and a judgment for the other defendants was affirmed by the appellate court (see 61 Ill. App. 650), and complainants appeal. Affirmed.

December 4, 1889, Ira Putney, doing a mercantile business under the name of Ira Put-

ney & Co. at Stronghurst, borrowed \$7,000, for which he and one George M. Foote gave their joint promissory notes. On the same day, in consideration of the said sum of \$7,000, Putney made a bill of sale, by which he sold to Foote a stock of general merchandise and unbalanced book accounts, the parties at the same time entering into an agreement in writing as follows:

"December 4th, 1889. Know all men by these presents that we, Ira Putney & Co., of Stronghurst, in the county of Henderson, and state of Illinois, in consideration of the sum of seven thousand dollars, to us paid by George M. Foote, of said county, at and before the sealing and delivering of these presents, have bargained, sold, and delivered, and by these presents do bargain, sell, and deliver, unto the said George M. Foote, all of our stock of general merchandise; that is to say, dry goods, boots and shoes, clothing, notions of every kind and nature, crockery ware, and every kind of goods in the building known as the 'Thorner Building,' except owned by Anna Penny. Also all unbalanced accounts on books to be included in this bill of sale. To have and to hold the said goods unto the said George M. Foote, his executors, administrators, and assigns, to his and their own proper use and benefit forever. And we, the said Ira Putney & Co., for ourselves and heirs, executors and administrators, will warrant and defend against all persons whomsoever. Witness our hands and seals. Ira Putney & Co."

"This agreement, made this 4th day of December, A. D. 1889, between George M. Foote of the first part and Ira Putney of the second part, witnesseth: That the said George M. Foote, in consideration of covenants of the party of the second part hereinafter contained, doth agree with the party of the second part to allow him the privilege of using the stock of merchandise and goods, the privilege of buying and selling, but not to incur any indebtedness on the stock. All goods purchased to be paid for on receipt of same, and at all times on demand of party of first part to show all books and accounts. The party of second part, in consideration of covenants of party of the first part, agrees to do all the matters and things connected with the business of a merchant without cost to party of the first part, and to apply all profits of the business to the payment of the indebtedness of seven thousand dollars. The notes indicating said indebtedness are signed by Ira Putney and George M. Foote. It is further agreed between the parties that the goods shall not be removed from the store they now occupy without the consent of George M. Foote. Said party of the second part to pay all clerk hire and all freight bills, taxes on stock, etc. Said business of general merchandising to be run or carried on under the name of Ira Putney. The principal and interest on said notes for seven thousand dollars to be paid by Ira Putney as required or

specified in said obligations. Party of the first part to have what goods and merchandise he uses at wholesale cost price. This sum of seven thousand dollars to be applied and used in this trade. Ira Putney. George M. Foote. December 4th, 1889."

The business was carried on under this arrangement until January, 1891, when the stock of goods was partially destroyed by fire. Foote received \$3,000 insurance for that loss, of which he retained \$600; the balance, with the remaining goods and notes and accounts belonging to the business, being used in re-establishing the same. The foregoing agreement for the conduct of the business by Putney was again entered into with a modification as to the removal of the goods, made necessary by the burning of the former place. From February 13, 1891, to November 20, 1892, Putney purchased of appellants goods for the firm business, amounting to \$2,228.58, which was reduced by credits to \$1,275.48. For this amount suit was brought, and judgment obtained, in the circuit court of Henderson county against Putney and Foote jointly. On appeal to the appellate court of the Second district a judgment of reversal and remandment was entered. (Decided with case of Foote v. Off, 45 Ill. App. 516.) At the March term, 1894, of the circuit court the case was redocketed. Foote having died in the previous January, these appellees were made defendants as his executors, and the suit dismissed as to Putney. The case was then tried before the court without a jury, and judgment rendered for the defendants, and that judgment has been affirmed by the appellate court. 61 Ill. App. 650.

J. J. & G. Tunncliffe and J. A. McKenzie, for appellants. Kirkpatrick & Alexander, for appellees.

WILKIN, J. (after stating the facts). Appellants' contention is that by the terms of the written agreement between Putney and Foote the latter was the owner and proprietor of the business, the former being merely his agent for conducting and carrying on the business, and that Foote became liable to them under the rule that the principal is liable for debts contracted by his agent, and on the trial of the case they asked the court to hold certain propositions as the law of the case intended to present that theory, which were refused. The correctness of that ruling is the only question of law presented for our decision. With controverted questions of fact we have nothing to do. Counsel seem to understand that, unless the transactions between the parties, as evidenced by their written agreements, amount in law to a valid chattel mortgage of the stock of goods from Putney to Foote, the former must be held the absolute owner of the property, and hence liable to appellants; but that position, in our view of the

case, cannot be maintained. Appellants are not seeking to reach the stock of merchandise for the satisfaction of their debt. If they had sued Putney, to whom they sold the goods, and levied upon this particular property in his possession, no argument would be needed to show that they could hold it against any claim of Foote under a chattel mortgage; but the question upon this record, whether Foote became the absolute owner of the stock of goods, or only obtained a lien upon it to indemnify him as security for Putney, is only material in so far as the determination of that will settle the particular question, is he liable as principal for goods purchased by his agent, Putney? the vital question, as before indicated, being, did Foote, by these written agreements, become the proprietor of the store? If he did not, then he never became liable to appellants, no matter whether he had a valid lien upon the property or not. One of two constructions of the contract, when read in the light of the bill of sale executed at the same time, is inevitable; either Foote became the owner and proprietor of the business, with Putney as his agent to carry on and manage the same, or else Putney continued to be the owner and proprietor, simply giving Foote a pledge of the goods, and profits of the business, as security for the payment of the \$7,000 in notes upon which he had become security. It may be admitted that the effect of the language of some parts of the contract is to show a sale of the property to Foote, he simply agreeing to allow Putney to manage and control the business for him; but there are some parts of the contract wholly inconsistent with that construction. To say that Putney was to be merely the agent or manager of the business for Foote, and still, in the language of the contract, to do so without cost to his principal, to pay all clerk hire, and all freight bills, taxes on the stock, etc., is unreasonable. It is also evident, from the whole contract, that the principal purpose of the whole transaction was to secure the payment of the \$7,000 indebtedness, Putney agreeing to apply all profits of the business to the payment of the notes as required or specified in the obligations.

The evidence introduced upon the trial explanatory of the circumstances under which the money was borrowed, and the contemporaneous contracts entered into, make it clear to our minds that the intention of the parties was to provide indemnity to Foote against loss as security upon these notes, and not to make a sale and transfer of the property. It is not pretended that Foote paid anything for the goods when he received the bill of sale. It certainly cannot be seriously contended that the parties contemplated that Putney should conduct the business at his own expense, keep up the stock of merchandise, pay off the entire \$7,000 indebtedness, and Foote be the owner of the entire stock and business after all this was done. We

think it clear from the proper construction of the agreements themselves, and especially under the competent evidence as to the facts and circumstances under which they were made, the propositions submitted to the trial court did not announce correct propositions of law, and were properly refused. The judgment of the appellate court should be affirmed. Affirmed.

CARTWRIGHT, J., took no part.

(163 Ill. 372)

MORAN et al. v. PEOPLE.

(Supreme Court of Illinois. Nov. 9, 1896.)

HOMICIDE—RES GESTÆ—DYING DECLARATIONS—SHOOTING ESCAPING PRISONER—MISLEADING INSTRUCTIONS—CREDIBILITY OF WITNESSES.

1. Deceased was shot and mortally wounded by a police officer while attempting to escape from arrest. After being wounded, and while still lying in the street, the deceased, in the presence of the defendant, said: "I am dying. I did no wrong." *Held*, that the declaration was admissible as part of the res gestæ.

2. Defendant and another (policemen) arrested deceased for knocking down one of them. After the arrest, while waiting for a patrol wagon, deceased escaped. In the attempt to recapture him, the officers fired their revolvers, as they testified, to frighten him, but he was shot and mortally wounded. The only issue raised by the defendant was that the arrest was lawful, and that the shooting, if done by him, was accidental. *Held*, that an instruction as to justifiable homicide in self-defense, or in defense of persons or property, was improperly given, as tending to mislead the jury to apply the evidence to a defense that had not been pleaded and could not be maintained.

3. The giving of an instruction which, though correct as an abstract proposition, was not based on any evidence in the case, and had a tendency to mislead the jury to the prejudice of the party against whom the verdict was rendered, is ground for reversal.

4. On trial for homicide, evidence was introduced that one of the witnesses for the state had made statements and had testified before the coroner's jury contrary to his testimony at the trial. The defendant requested the court to charge: "The credibility of a witness may be impeached by proof that he made statements out of court contrary to the testimony he has given on trial; and if the jury believe any witness has made statements, upon a material fact, out of court, contrary to his statements made upon the trial, you would be justified in rejecting the testimony of such witness, if, from all the evidence, you believe it untrue." *Held*, that such instruction was properly refused. Carter, J., dissenting.

Error to criminal court, Cook county; O. H. Horton, Judge.

Thomas J. Moran and Michael J. Healy were convicted of manslaughter, and bring error. Reversed.

J. O. King and J. W. Byam, for plaintiffs in error. M. T. Moloney, for the People.

CARTER, J. At the January term, 1895, of the criminal court of Cook county, the plaintiffs in error, Michael J. Healy and Thomas J. Moran, who had been jointly indicted for the murder of Swan Nelson, were

convicted of manslaughter, and sentenced to the penitentiary for a period of 14 years each. At the time of the homicide, which occurred about 3 o'clock in the morning of the 25th day of December, 1893, the plaintiffs in error were policemen of the city of Chicago, and were engaged in the performance of their duties as such officers. Their beats were adjacent to each other, and after 12 o'clock at night, in obedience to the commands of their superior officer, they were accustomed "to double up, and travel their beats together." At No. 3217 Archer avenue, upon one of these beats, was a saloon kept by one Nothelfer. Swan Nelson, the deceased, was unmarried, and lived and kept a small cigar store at No. 3205 Archer avenue; and in a house in the rear of his premises, and on the same lot, lived Otto Bjorkman and his wife, Josephine Bjorkman, and one Shay, who boarded with the Bjorkmans. Nelson, Shay, and several other friends of the Bjorkmans had spent the evening of December 24th, and up to a late hour—about 2 o'clock—in the morning of the 25th, at the latter's house; passing the time in conversation, social amusement, and beer drinking. Nelson left Bjorkman's house about 2 o'clock Christmas morning. Bjorkman himself had retired to bed at half past 1, and was not awakened until after 5 o'clock, and knew nothing of the circumstances of the tragedy in which Nelson lost his life. Where Nelson went immediately after leaving Bjorkman's is not disclosed by the evidence, but, some time between 2 and 3 o'clock,—there being some difference in the testimony of the witnesses as to the precise time,—Nelson entered Nothelfer's saloon. A half dozen or more men, who testified as witnesses on the trial, had spent the night, up to the time of the tragedy, in the saloon, drinking, and in such pastime as the place afforded. Some of these were asleep or intoxicated, and were apparently unable to give a very clear account of what occurred in the saloon. But according to the substance of the testimony as given by them, excepting that of Martin Wickert, which corroborated the version given of the affair by the plaintiffs in error, they (the plaintiffs in error) came into the saloon with Nelson, and Nelson treated them, one of them taking a cigar, and the other a glass of beer. That, while they were standing at the bar, Nelson took a pencil and piece of paper, and seemed to be taking down the number of the policemen's stars. That the policemen went out, and soon after one of them (Healy) came back, and took Nelson by the shoulder, and pushed him out of the saloon; and soon after some of the persons in the saloon, hearing a noise on the outside, went out at the front door, and saw plaintiffs in error have Nelson under arrest, taking him along the sidewalk, when, after proceeding from 100 to 150 feet, Nelson appeared to lie down and refuse to go, whereupon one of the officers went to the patrol box, leaving Nelson in charge of the other, when Nelson sprang to his feet and

ran to the east, along Archer avenue. He was pursued by the two officers, both of whom commenced firing their pistols in the direction of the fleeing man, who about that time disappeared in the darkness down the steps at No. 3205 Archer avenue, where it was afterwards learned that he lived, and which was about five feet below the level of the street. The officers returned without being able at that time to rearrest or find Nelson. Soon thereafter Mrs. Bjorkman appeared on the outside of her residence with a lantern in her hand, and was heard to call some one, who, upon going where she was, found Nelson lying under the steps at or near her house. On being taken out from under the steps, he was found to be wounded, and his clothes were bloody. He was removed to the street by Healy and Caspar Saeler, the bartender at the saloon, and laid upon the sidewalk, where he remained some minutes, surrounded by a number of persons, who, attracted by the affair, came up and remained until he (Nelson) was taken away by the patrol wagon to the Geering street station, from whence he was afterwards taken to the hospital, where he died that day. The post mortem examination showed that a bullet had entered his back about six inches above the lower end, and a little to the left, of the spinal column, ranging slightly upward, and had penetrated the body through the stomach and intestines, and had lodged under the skin of the abdomen. The bullet was slightly flattened at one end, as if it had struck some hard substance and been deflected from its course. It was what was called a "38 caliber, short," and weighed 122.6 grains. One witness testified, as an expert, that it was a deflected bullet, but had lost no material part of its substance; that a bullet 38 caliber, short, fired from a Colt's 38-caliber revolver, would be sufficiently strong to pass through two human bodies at the distance plaintiffs in error were from Nelson when the shots were fired.

The pistols used by plaintiffs in error were Colt's revolvers, 38 caliber, and adapted to 38-caliber, long, cartridges, the bullets of which weighed from 150 to 152 grains, and plaintiffs in error testified that they had and used no other kind of cartridges than the 38-caliber, long. There is a material conflict in the testimony as to what occurred at Nothelfer's saloon, relative to the question as to whether the arrest of Nelson by plaintiffs in error was a lawful or an unlawful arrest, and as to what was said by plaintiffs in error when Nelson lay, mortally wounded, first at the steps at Mrs. Bjorkman's, and next on the sidewalk, after having been brought out upon the street. Plaintiffs in error testified: That, about 25 minutes past the hour of 8 o'clock of the morning in question, they were walking west on Archer avenue, and, as they came Nothelfer's saloon, they saw a man, whom they did not know, apparently peeping in at the window, over the inside blind. That Healy ask-

ed him what he was doing there, and he replied: "It is all right. I am looking in to see if this man is open,"—and stepped up to the door, and asked them to come in and have something. That Healy said "No," and the man (who, after he was shot, they learned was Nelson) went inside. That when they saw the man looking in the lamp in the saloon was turned about halfway down. That they walked 50 or 60 feet west of the saloon, talked the matter over, and returned to the saloon to order the proprietor to close up, as it was after hours. That they went inside, and Nelson and the bartender and Wickert were at or near the bar, and the rest of the inmates (five or more) were asleep about the room, in or upon chairs. That the bartender had a box of cigars in his hand, and passed them to plaintiffs in error, who each took one. That they did not take a drink with Nelson, or have any conversation with him, in the saloon; did not know him, except that they saw he was the same man they had seen looking in from the outside. That they did not see him have any paper or pencil, or take or attempt to take their numbers, and did not either of them push Nelson out of the saloon, or have anything to do with him in the saloon whatever, but that, after being in the saloon but a moment, they went out, saw the proprietor on the outside, sick, at the water trough, and told him they would have to report him for being open after hours, and that Healy informed him about the man looking in over his curtains, and said it looked suspicious. That they then went west to Wood street, to the patrol box, and made their report to headquarters, as they were required to do every hour. That they then went east on Archer avenue, and when they again came near the saloon they saw two men fighting on the sidewalk in front. That they stepped up quickly, and Healy ordered the men to go home. That one of them, who had no coat or hat on, turned and went away, but the other called Healy a vile name, and said, "You couldn't run anybody in," and followed the remark by a blow with a billy, or something of that kind, which knocked Healy down upon the street, off of the sidewalk. That thereupon Moran took hold of the man, who proved to be Nelson, placed him under arrest, and, in the struggle, pushed him against the saloon building, and held him there until Healy, who had lain for a moment unconscious from the blow, regained his feet, whereupon they (one on each side of Nelson) took him and started up the street with him. That, after proceeding a short distance, Nelson "laid down on them," and they, being unwilling to carry him, let him lie down upon the sidewalk; Healy standing by watching him while Moran went to the patrol box to call the patrol wagon. That upon Moran's return he went into the middle of the street to be ready to stop the wagon when it should come up, and, while there, Nelson sprang to his feet and ran to the east. Healy testified that when Moran went into the middle of the

street he (Healy) took out his handkerchief to wipe the blood from his face, that flowed from the wound made upon his head when Nelson knocked him down, and that, while he was wiping his face, Nelson made his escape. Healy and Moran ran after Nelson, and they admitted that they fired their revolvers as testified by other witnesses, but testified that they had no intention of shooting Nelson, but endeavored to fire at an angle in the air, and to frighten him into obedience to their commands to halt, so they might recapture him; that they fired but two shots each; that they had arrested Nelson for knocking Healy down, and for nothing else. As to what occurred at the saloon they were corroborated to a considerable extent by the witness Wickert, who was called by the people, and testified that Nelson came into the saloon alone, and that the officers came in from three to five minutes afterwards, and Nelson asked them to drink with him; that they took something,—thought it was cigars,—and Nelson paid for it; that the officers went out; that he did not see Nelson have any pencil or paper, taking their numbers; that he did not know how Nelson got out, but later he heard a noise on the outside, and went out, and saw Healy lying upon the ground about 22 feet from the door of the saloon, and Moran holding Nelson; that Healy got up, and he and Moran started away with Nelson.

Caspar Saeler, the bartender, in his testimony for the people contradicted the version of the affair as given by plaintiffs in error and Wickert, in some material respects; but, either from ignorance, or from intoxication or inattention at the time of the trouble, or some other cause, his testimony was greatly deficient in clearness and certainty. On his direct examination he testified that Healy took Nelson out of the saloon, and that Moran was outside, and that the officers there "licked Nelson with clubs," and that Nelson cried out, and the officers then took him away to where he lay down on the street. But he afterwards testified that he did not see any blows struck, and did not go outside until Wickert and others went out, and that the first thing he saw was Nelson lying on the sidewalk some 80 to 100 feet from the saloon. This witness had testified at the coroner's inquest, and from the testimony of the coroner, which was given on the trial for the defense, tending to impeach Saeler, his testimony was materially different as given on the two occasions. Other witnesses testified as to certain statements made by Healy and Moran, and also by Nelson when he lay mortally wounded, and within a few minutes after the shooting,—one, that Healy said that Nelson shoved him off the sidewalk, and he shot him; that Healy said that Nelson hit him a good whack on the head. Another witness testified that one of the officers said, "We shot him," and that Nelson said: "Have I no friends here? Gentlemen, I am dying. I did no wrong." And Mrs. Bjorkman, that Nelson said, when

Healy was taking him from under the steps, in reply to her question as to what he had done, that he did nothing at all; that he treated the policemen in the saloon, and, when he did not want to treat them any more, they shot him. These several statements, however, were contradicted to a considerable extent by several witnesses besides the plaintiffs in error, and need not be further referred to here, except in connection with the contention of counsel that the trial court erred in admitting as evidence to the jury the said statements of Nelson. We are of the opinion that no error in this regard was committed. While Nelson was then mortally wounded, and seemed fully conscious of the fact, yet even under such circumstances he could only testify to the facts and circumstances of the killing, and would not be permitted, any more than any other witness, to testify to his own mere conclusion that he "did no wrong." That was one of the questions at issue before the jury, involved in the lawfulness of his arrest; and we are of the opinion that it was not admissible as a dying declaration, but that it was admissible against the defendant in whose presence and hearing it was made, and as a part of the *res gestæ*, as held by the learned judge in the trial court. Plaintiffs in error did not know who the man was whom they testified they saw fighting with Nelson in front of the saloon. Nor was any evidence offered tending to corroborate their statements in regard to such fight, or tending to identify the man who, as they said, left and went east on Archer avenue without coat or hat on, except that a Mr. and Mrs. Bergan, living near the Bjorkmans, testified that they were awakened that morning and heard two pistol shots; that they got up and looked out of the window, and saw a man running away, apparently from Bjorkman's lot, without hat, coat, or vest on, looking back, as if he were frightened; that he went on toward Paulina street. And except, also, that a Miss Mulgaven, who lived above the premises occupied by Bergan, testified that she was awakened and went to the door, and heard pistol shots, which appeared to her to come from the rear of the premises occupied by Bjorkman. The shots fired by the policemen came from the front of the lot, and, if any shots were fired from the rear, they must have been fired by some other person. There was a conflict in the evidence between the witnesses as to whether or not plaintiffs in error fired only four shots, as insisted on by them. There was testimony tending to prove that the marks of five bullets were found on the Bjorkman house, and other buildings near,—some high up, and others low down. There was some evidence tending to prove that one of the plaintiffs in error was intoxicated. It seems to have been established that Healy had a contusion or bruise on the side of the head on Christmas morning. Proof of good character was also made on behalf of plaintiffs in error. Other facts and circumstances were shown, having some tend-

ency to prove or to disprove the guilt of the plaintiffs in error; but the principal facts are as we have stated, and from them it sufficiently appears that the case was one requiring great care on the part of the court in its rulings during the progress of the trial, and in instructing the jury as to the law of the case.

It is insisted by plaintiffs in error that the court erred also in giving to the jury, at the instance of the people, the following instructions: "The court instructs the jury, in the language of the statute, if a person kill another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear, also, that the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given." "Justifiable homicide is the killing of a human being in necessary self-defense, or in the defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a known felony, such as murder, rape, robbery, burglary, and the like, upon either person or property, or against any person or persons who manifestly intend to endeavor, in a violent, riotous, or tumultuous manner, to enter the habitation of another for the purpose of assaulting or offering personal violence to any person dwelling or being therein. A bare fear of any of these offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge." These instructions are mere transcripts of sections 148 and 149 of the Criminal Code, barring the mistake of using the phrase "manifestly intend to endeavor" for "manifestly intend and endeavor," and while otherwise correct as abstract propositions of law, or as applicable where self-defense or justifiable homicide is relied upon as a defense to the indictment, were not only wholly inapplicable to the case at bar, but were calculated to lead the minds of the jury away from the defense, as made, to another, not attempted, and in support of which no evidence whatever was offered. So far as the record shows, it was not contended or even suggested by any one that the accused were justified under the provisions of the statute embodied in these instructions. Both defendants testified, and no inference can be drawn from their testimony that they claimed to act in their necessary self-defense, or in defense of habitation, property, or person. The court instructed the jury as to the law involving the rights and duties of public officers in making arrests, and in recapturing

escaping prisoners, as applicable to the case on trial, and upon other phases of the case, and in so doing was required to pass upon a great volume of instructions offered by counsel for the respective parties, and doubtless, in the pressure of the work thus imposed, gave the instructions mentioned to the jury through inadvertence. Upon what theory the state asked these instructions, we are not informed.

It has been held, times without number, that it is not error to refuse instructions which contain mere abstract propositions of law. It is also true that, as a general rule, it is not error to give them. *Ryan v. Donnelly*, 71 Ill. 100; *Upstone v. People*, 109 Ill. 169. But instructions should be based upon the evidence. *Coughlin v. People*, 18 Ill. 266; *Belk v. People*, 125 Ill. 584, 17 N. E. 744. If they are not based upon the evidence, and also tend to mislead the jury to the injury of the party against whom the verdict is rendered, the judgment will be reversed, although they are correct as abstract propositions. 11 Am. & Eng. Enc. Law, 248; *Beaver v. Taylor*, 1 Wall. 637; *State v. Bailey*, 57 Mo. 131. We are referred to *Upstone v. People*, supra, as holding that it is not error to give an instruction which states an abstract principle of law, not applicable to the case, unless the principle stated is erroneous. The instruction there referred to is not set out in the report of the case, but it could not have been intended by what was there said to lay down any general rule; for it cannot be doubted that an abstract proposition of law, correctly stated, but having no proper application to the case on trial, may be of such a character, when applied to the evidence before the jury, as to mislead them, and be instrumental in calling forth a verdict which would not otherwise be rendered. In the case at bar there was testimony which, if believed by the jury, showed that Nelson made a violent assault upon Healy, and knocked him, senseless, down upon the street; but there was no evidence whatever that the shooting was done either to avoid this assault, or in a spirit of revenge because of it. This evidence by and on behalf of plaintiffs in error tended to prove the lawfulness of the arrest, and that they were in discharge of their duty as officers of the law, in attempting to recapture the escaping prisoner, but had no bearing whatever upon any question of self-defense. And it was error for the court to give instructions, the only effect of which would be to cause the jury to misapply this evidence; that is, to take it from its proper relation to and bearing upon the defense as made, and apply it to another, not attempted and not maintainable. As well said in *Thompson v. Shannon*, 9 Tex. 536: "The fair test of the propriety of a charge cannot be whether, in the abstract, it is right. It must be taken in view of the evidence of the facts charged, on which the jury is to respond. A charge in the abstract, as a mere legal propo-

sition, might be perfectly inoperative and harmless, when, however, referred to a certain set of facts and circumstances in the proof, it might have a most important and conclusive influence on the jury in forming their verdict." There was much in these instructions, coming from the court, to a jury unlearned in the law and unfamiliar with legal phraseology, calculated to prejudice in their minds the defense of plaintiffs in error. This instruction told the jury, among other irrelevant things, that: "A bare fear of any of these offenses, to prevent which the homicide is alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge." Who can tell what the jury understood was meant by this part of the charge of the court? It cannot be supposed that they would not rely upon these instructions as having some important bearing upon the case. If we could see that, whether relied upon or not, they could have produced no injury, then it would follow that the error was harmless. But it cannot reasonably be said that the accused were not prejudiced. On the contrary, in view of the defense made, we think these instructions, although given as copies of the statute, were calculated to mislead the jury to the injury of the defendants on trial for so grave a charge.

As before pointed out, there was evidence, properly given and before the jury, tending to impeach the witness Saeler, and the court was asked by plaintiffs in error to give to the jury the following instruction: "The court instruct the jury that the credibility of a witness may be impeached by proof that he or she has made a statement or statements out of court contrary to the testimony given by such witness on the trial. If the jury believe from the evidence that any witness who has testified in this case has made a statement or statements, upon a material fact in the case, out of court, contrary to the statements made by such witness upon the trial, then the contradictory statements would tend to impeach such witness; and you would be justified in rejecting the testimony of such witness, if, from all the evidence, you believe it to be untrue." The writer of this opinion is unable to see any valid objection to this instruction, and is of the opinion that it should have been given, but this view is not concurred in by a majority of the court. It seems to the writer that as this instruction was applicable to the case, and as no other instruction was given covering the same ground, plaintiffs in error were entitled to have the jury instructed on this phase of the case, and that it was error to refuse this instruction. Counsel for the people cite *Evans v. George*, 80 Ill. 53, and contend that this instruction is erroneous, and was properly re-

fused, "inasmuch [to use their language] as it would have given the jury the power to absolutely reject all the testimony of a witness who might have made former contradictory statements, whether any portion of it had been corroborated or not." The instruction is not, in the opinion of the writer, subject to this criticism, but is saved therefrom by its last clause, viz. "If, from all the evidence, you believe it to be untrue." The testimony of an impeached witness may be corroborated, but false testimony cannot be corroborated by any credible evidence in the case; and if, from all the evidence, the jury should believe the testimony in question to be untrue, no room was left for corroboration. Without passing on other objections urged by plaintiffs in error, the judgment will be reversed and the cause remanded. Reversed and remanded.

(163 Ill. 334)

CLARK v. BURKE et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

INSOLVENT ESTATE—ASSIGNMENT—COUNTY COURT
— JURISDICTION — PROCEEDINGS IN CON-
TEMPT — COLLATERAL ATTACK.

1. Where a court has jurisdiction of the subject-matter, and over the persons of the parties, it may enforce obedience to its orders by proceeding against them as for contempt.

2. Such a proceeding is a civil one, for the benefit of those interested in the enforcement of the judgment and orders of the court.

3. Starr & C. Ann. St. c. 72, entitled "Voluntary Assignments," provides, in section 14, that "full authority and jurisdiction is hereby conferred upon county courts, and the judges thereof, to execute and carry out the provisions of this act." Section 7 gives that court full jurisdiction and power over the assignee, and authorizes it, by citation and attachment, to compel him to proceed in the faithful execution of the duties required by the act. *Held*, that the county court, in the settlement of assigned estates, is a court of exclusive jurisdiction, and may enforce obedience to its judgments by proceedings as for contempt.

4. In a proceeding for contempt in failing to obey an order of the court, the respondent may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void.

5. Where the assignee of an insolvent estate is ordered by the court to pay a certain claim, and objects to the order as erroneous, his remedy is by appeal or writ of error. 62 Ill. App. 252, affirmed.

Appeal from appellate court, First district.

Petition by A. J. Burke and others in the matter of the Southern Hotel Company, insolvent, requesting that their allowed claims be paid. An order was granted as prayed. Clark failed to obey the order, and was proceeded against as for contempt. From an order committing him to the county jail, Clark appealed to the appellate court, and from its judgment of affirmance (62 Ill. App. 252) he appeals. Affirmed.

On the 16th day of July, 1894, the Southern Hotel Company, a corporation operating the Southern Hotel, in Chicago, filed in the county court of Cook county its voluntary assignment,

naming one Davis as assignee. On the 24th of that month, Davis resigned, and appellant, Wallace G. Clark, was appointed by the court as his successor. A number of claims were filed and allowed against the estate, and on December 10, 1894, appellees filed their petition in that court, charging, among other things, the receipt by the assignee of certain sums of money and property which he had failed to administer upon and distribute, and praying for an order directing him to pay their claims. The assignee answered, denying in the main the allegations of the petitions. The court, however, found in favor of the petitioners, and ordered him to pay the claim, aggregating a sum about \$1,400. The assignee, having failed to obey that order, on the 18th of June, 1895, on the motion of said claimants, was ordered by the court to show cause why he should not be attached for contempt. In response to this order he filed his sworn answer, setting forth his transactions with the estate, and alleging that he had no money in his hands, as assignee, with which to comply with the order. The court held this answer insufficient, and ordered him committed to the county jail for a period of 30 days. From that order he prosecuted an appeal to the appellate court of the First district, and this appeal he now prosecutes from a judgment of affirmance in the latter court.

Wilbur & Horner, for appellants. Henry A. Hickman, for appellees.

WILKIN, J. (after stating the facts). It is insisted that the county court was without jurisdiction to adjudge the assignee guilty of contempt, and impose the punishment inflicted upon him. It is well settled that courts having jurisdiction of the subject-matter, and over the person of parties, may lawfully enforce obedience to its orders by proceeding against them as for contempt. In such case the proceeding is not a criminal one, as in case of punishment for conduct committed in the presence of the court, or for contempt of its process, but is a civil proceeding for the benefit of those interested in the enforcement of the judgment and orders or decrees of the court. Our statute (1 Starr & C. Ann. St. c. 72, § 14, entitled "Voluntary Assignments") provides, "Full authority and jurisdiction is hereby conferred upon county courts, and the judges thereof, to execute and carry out the provisions of this act." Section 7 of the same chapter (Id. p. 1305) gives that court full jurisdiction and power over the assignee in the insolvent proceeding, and authorizes it, by citation and attachment, to compel him to proceed in the faithful execution of the duties required by the act, "and to obey the order of such court when in session, or the said judge when not in session, in relation to the complete and final settlement, distribution and paying over of the proceeds derived from said trust, or any part thereof, until a final settlement and distribution is made." We have

held, in *Freydendall v. Baldwin*, 103 Ill. 325; *Hanchett v. Waterbury*, 115 Ill. 220, 32 N. E. 194; and other cases,—that the county court, under these provisions, has complete control over the settlement of assigned estates, and that other courts have no power to interfere with the exercise of that jurisdiction. In other words, the county court, in the settlement of insolvent estates, under this statute, is not, as seems to be assumed by counsel for appellants, a court of limited jurisdiction, but on the contrary, in such matters, is not only a court of general, but of exclusive, jurisdiction. No reason, therefore, appears why it may not, as courts of general chancery and common-law jurisdiction, enforce obedience to its judgments and decrees by proceedings of this character.

It is contended, however, that the assignee was not bound to obey the order directing him to pay the claim in question, because that order was not authorized by the allegations in the petition, etc., and because the order went beyond the scope and prayer of the petition. It is well settled that, in a proceeding for contempt in failing to obey an order of the court, the respondent may question the order which he is charged with refusing to obey only in so far as he can show it to be absolutely void, and cannot be heard to say that it is merely erroneous, however flagrantly it may appear to be so. *Leopold v. People*, 140 Ill. 552, 30 N. E. 348, and cases there cited; *People v. Weigley*, 155 Ill. 491, 40 N. E. 300. This results from the well-settled rule that judgments of courts cannot be attacked collaterally for mere irregularities in the proceeding, however erroneous they may be. In this case, exemption from obedience to the order is not claimed because of inability to comply with it, arising from anything that has occurred since the order was made, but wholly upon the ground that the court erroneously entered that order. To sustain that defense would amount to no less than allowing the party to be the judge in his own case. In all such cases the remedy of the complaining party is by appeal or writ of error, and not by attempting to stand in defiance thereof. We have been able to discover no reversible error in this record, and the judgment of the appellate court will be affirmed.

(163 Ill. 401)

MARSH et al. v. VILLAGE OF FAIRBURY et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

COMMON-LAW DEDICATION—RIGHTS OF GRANTOR—EFFECT OF SUBSEQUENT INCORPORATION—PURCHASE OF LOTS FROM PLAT—ESTOPPEL—ACCEPTANCE OF DEDICATION—PUBLIC AND PRIVATE RIGHTS—REVOCAION—DOWER.

1. In 1859 complainant's ancestor platted an addition to a then unincorporated town, and in such plat reserved one block as a public square. By the certificate, the streets, alleys, and the public square so reserved were dedicated to the use of the public forever. The statute in force at the time the plat was made required such

plats to be acknowledged before a justice of the supreme court, a judge of the circuit court, or a justice of the peace; but the plat in question was not so acknowledged. *Held*, that the plat was nevertheless effective as a common-law dedication.

2. Under such dedication, the fee of the streets, alleys, and public square remained in the grantor, subject to the rights acquired by the public therein by virtue of such dedication.

3. Upon the incorporation of the town the rights acquired by the public under the dedication became vested in the municipality.

4. Subsequent to such dedication the grantor sold the lots so platted with reference to the plat, representing to purchasers that the plat and dedication were bona fide; and for the lots facing on the public square a higher price was asked and obtained. *Held*, that the purchaser of such lots thereby acquired a right appurtenant to their lots to have the streets and public square remain open to public use.

5. The right of the purchasers of such lots to have the square maintained as a public square was not affected by the failure of the municipality to formally accept the dedication.

6. The rights of the town and of the purchasers in the public square are sufficiently similar to entitle them to maintain a joint bill to prevent an invasion thereof by the heirs of the grantor.

7. The grantor built a fence around the public square thus dedicated, planted trees therein, and to some extent used it as a pasture. *Held* that, in view of the fact that he also maintained turnstiles, so as to leave the square open to the free use of the public, his acts could not be regarded as an open, notorious, and exclusive resumption of possession adverse to the public.

8. Upon a bill brought by the town and the purchasers of lots to prevent the heirs of the grantor from invading their rights in the streets and public square, the rights of the widow to dower therein cannot be adjudicated.

9. Neither the town nor the purchasers were bound by any agreement between the heirs and widow of the grantor, to which they were not parties, fixing the widow's rights of dower.

Appeal from circuit court, Livingston county; T. F. Tipton, Judge.

Bill for injunction and other relief, brought by the village of Fairbury and others against John L. Marsh, Jr., and others. From a decree for complainants, defendants appeal. Affirmed.

C. C. Strawn, for appellants. C. F. H. Carithers and E. A. Agard, for appellees.

PHILLIPS, J. In 1857 a tract of land owned by Patton & Canute was platted, acknowledged, and recorded as the original town of Fairbury, in Livingston county, Ill. In July, 1859, John L. Marsh, Sr., the owner of the land adjoining the original town, caused it to be surveyed into blocks, lots, streets, alleys, and public grounds. The plat was certified by the surveyor and himself, and he acknowledged the same before the clerk of the circuit court, and had the same recorded. At the time this plat was acknowledged and recorded, the statute then in force required such plat to be acknowledged before a justice of the supreme court, a judge of the circuit court, or a justice of the peace. On the plat so made and recorded, block 10 is not laid off into lots, and is noted on the plat as a public square. By the certificate, the streets, alleys, and public square

are dedicated to the use of the public forever by the owner, who platted the same. At the time this plat was filed, there was no incorporated town, village, or city of Fairbury. The town of Fairbury was incorporated in 1864, and included the territory within both of these plats. After its incorporation the proper town authorities took charge of the streets, alleys, grounds, etc., improved the streets, and did other work of a public nature, and for the public benefit. John L. Marsh, Sr., resided in block 11, opposite the public square, from the time of the incorporation of the town and prior thereto, until his death, in 1885. After filing this plat for record, lots were sold by Marsh with reference to it, and some of those sold fronted on the public square, and representations were made to the purchasers that that was a cause for their being more valuable and desirable. The conveyances made described the lots as being in Marsh's addition to the town of Fairbury. In all the acts of Marsh he recognized the plat as valid. Some time before the commencement of this suit, the defendant John L. Marsh, Jr., a grandson of John L. Marsh, Sr., who was the proprietor of said addition, acting for himself, this mother, and sister, Mrs. Fleming, threatened to put up buildings upon block 10, and exclude the public from said square, whereupon the village filed the original bill herein for an injunction, and to have its rights to said public square adjudicated. Subsequently certain lot owners who had purchased lots fronting said square obtained leave to come in as co-complainants in said bill. After issue joined, the cause was referred to the master to take proofs, and report the same, with his conclusions. The master took the proofs, and found the facts and the law to be in favor of the complainants, and a decree was entered by the court in accordance with the report of the master. Elizabeth G. Marsh, one of the defendants, was the wife of John L. Marsh, Sr., at the time the plat was recorded, and still survives. No taxes were levied or assessed on block 10. Much evidence was taken to show the control exercised over block 10 by John L. Marsh in his lifetime. After the death of John L. Marsh, it is claimed his widow and heirs assigned dower by mutual agreement. The defendants assign as error the decree finding block 10 is held by the village of Fairbury for public use.

Under the facts appearing in this record, individual private rights as well as those of the public to the public square platted as block 10 of Marsh's addition to the town of Fairbury are involved. Different principles apply to the rights acquired by individuals and those acquired by the public where lots are sold, and a plat is made and exhibited at the time of the sale of the lots to the individuals, and the right acquired by a dedication or grant to the public. By surveying, platting, acknowledging, and recording a

plat in pursuance of the statute, the legal title to the streets, alleys, and public grounds are vested in the municipality in trust for the public. A common-law dedication to public use may be made by grant or other written instrument, by acts or declarations, by a survey, and plat recorded without being acknowledged. Whatever evidences a purpose on the part of a proprietor of lands to set off certain parts thereof for the use of the public will be sufficient to evidence an intention to dedicate to such use. Where a common-law dedication is made, the legal title to the land so dedicated remains in the proprietor, charged with the same burdens which it would have if the fee was in the corporation for the use of the public. An owner of land may exhibit a plan of a town laid out with designated streets and alleys, and sell lots to individuals, representing to them that it is the plan of the town; and if he sells with reference to such plan, and a purchaser of a lot acquires it under such representations, then every easement, advantage, and privilege which the plan represents which is appurtenant to such particular lot will belong to it, and a grant or covenant of the existence and use of such streets, alleys, and public grounds so appurtenant will be implied to the extent indicated on the plan. Such appurtenant streets, alleys, and public grounds, as to such purchaser, must remain open forever to the use of the public. Such purchaser's rights against a proprietor may be enforced as an individual right, because the law considers the conduct of the vendor in such case to be such that it is, in effect, an estoppel in pais against a private right in such vendor to close such streets, alleys, and public grounds. The plat in this case was not acknowledged before the officer designated by the statute. But for that defect it would have been a statutory dedication. Notwithstanding this defective acknowledgment, it amounted to a dedication at common law of block 10 in Marsh's addition to the village of Fairbury.

The objection that there was no municipality capable of taking the grant can have no force. If the statutory dedication had been effected, the fee of the streets and block 10 would have remained in abeyance, and have vested in the municipality when the town was incorporated. *Canal Trustees v. Haven*, 11 Ill. 554; *Waugh v. Leech*, 23 Ill. 488; *Gebhardt v. Reeves*, 75 Ill. 301; *Village of Princeville v. Auten*, 77 Ill. 325; *Village of Brooklyn v. Smith*, 104 Ill. 429. Not being strictly a statutory dedication, the fee of the streets, alleys, and block 10 remained vested in Marsh, burdened with the right of the public to use the same by reason of his acts being a dedication at common law. *Manly v. Gibson*, 13 Ill. 308; *Chicago, R. I. & P. R. Co. v. City of Joliet*, 79 Ill. 25; *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866; *City of Cincinnati v. White's Lessees*, 6 Pet. 431. Whatever rights existed in the

public by this common-law dedication became vested in the municipality when it became incorporated. But, in connection with these public rights, those who purchased lots fronting on this park took with reference to the plat, and had an appurtenant right therein which was their own property as a right appurtenant, and that was to have the streets and block 10 remain open for public use. The vendor, or those privy to his title, would, by his acts in platting and selling lots by this plat, be estopped from inclosing block 10 as private grounds. Such being the case, the question as to whether the village authorities accepted the dedication of that block would not defeat the right of individual purchasers from asserting their rights to have the same open forever for the use of the public. The rights of the village of Fairbury as trustee for the public, and the rights of individual lot owners in their own interests, are, in their results, of such a similar character that they may unite as complainants in one bill to prevent an invasion of their rights by the acts of the defendants. *Green v. Oakes*, 17 Ill. 251; *Gage v. Chapman*, 56 Ill. 311; *Trustees, etc., v. Cowen*, 5 Paige, 510; *Maywood Co. v. Village of Maywood*, *supra*.

The evidence shows that Marsh erected a fence around block 10, and used it as a pasture, planted trees thereon, etc. It is shown he was desirous of inducing others to build on his addition, and to adorn and beautify that addition by planting trees in the public square would not be inconsistent with public use; and while he was depasturing that block there were turnstiles, or other openings, to allow the public access to the same. He had not been in open, exclusive, notorious possession of the block since the original plat was made. Regardless of the question of the rights of dower in the widow of the original proprietor, it is apparent from this evidence that the heirs of that proprietor could not, as to this block, enter into an agreement assigning dower, affecting the rights of the village and others interested, without their being parties to the agreement. Whatever rights of dower, if any, exist in the widow of the original proprietor, under the issues in this case could not be settled. From a consideration of this record we find no cause to disturb the decree of the circuit court, and it is affirmed. Affirmed.

(163 Ill. 416)

HECHT v. HALL et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

REVIEW ON APPEAL — WAIVER OF OBJECTIONS — FINDINGS OF FACT.

1. Assignments of error not argued on appeal will be regarded as waived.
2. The findings of the appellate court upon questions of fact will not be reviewed.

Appeal from appellate court, First district.

Assumpsit by Newman G. Hall and others against Frank A. Hecht. A judgment for plaintiffs having been affirmed by the appellate court (62 Ill. App. 100), defendant appeals. Affirmed.

Renny & Mann, for appellant. Smith, Helmer, Moulton & Price, for appellees.

PHILLIPS, J. Appellees sued in assumpsit in the circuit court to recover commissions alleged to be due them on a sale of real estate. A jury was waived, and a trial had before the court. Judgment was rendered against appellant for \$2,500. On appeal to the appellate court the judgment was affirmed, whereupon this appeal is prosecuted to this court. There are no questions presented on this record which can be considered in this court. No propositions of law were presented, and consequently none given or refused. One of the assignments of error in this court is on the admission of improper evidence, and refusal to admit proper evidence by the trial court; but, as the matter is not argued in this court, we necessarily conclude it has been abandoned. In fact, an examination of the record shows there was no such error. There are, then, no questions of law to be considered. The only questions remaining are those of fact, which are settled by the judgment of the appellate court. The judgment of the appellate court is affirmed. Affirmed.

(163 Ill. 477)

CHICAGO CITY RY. CO. v. ROOD.

(Supreme Court of Illinois. Nov. 9, 1896.)

CARRIERS — INJURIES TO PASSENGER ON STREET CAR — BURDEN OF PROOF.

The concurrent facts of the happening of an accident to a passenger on a street car and the exercise by the passenger of ordinary care do not raise a presumption of negligence against the carrier, so as to shift the burden of proof on it to show that it was not guilty of negligence, where plaintiff's evidence shows that the accident was due to a wagon driven so close to an open car as to strike plaintiff's foot. 62 Ill. App. 550, reversed.

Appeal from appellate court, First district.

Action by William H. Rood against the Chicago City Railroad Company for personal injuries caused by defendant's negligence. From a judgment of the appellate court (62 Ill. App. 550) affirming a judgment in favor of plaintiff, defendant appeals. Reversed and remanded.

This was an action by appellee, Rood, against the appellant company, to recover damages for a personal injury. The declaration contains four special counts, the first three of which charge negligence on the part of appellant's servants in the operation of the car of appellant upon which appellee was riding at the time he was injured. The fourth count charges negligence in the construction and

equipment of the car. The trial resulted in a verdict for \$4,500 in favor of appellee. The appellee remitted \$2,000, and motion for a new trial was overruled, and judgment rendered for the balance, \$2,500. This judgment has been affirmed by the appellate court, and the present appeal is prosecuted from such judgment of affirmance. The material facts are substantially as follows: About 9 o'clock on the morning of August 26, 1892, appellee boarded the grip car of a train of cars of appellant, operated by the cable system, upon Cottage Grove avenue, Twenty-Second street and Wabash avenue in Chicago. Appellee boarded the car at the corner of Twenty-Fifth street and Cottage Grove avenue. The train was going north on Wabash avenue, upon the east track, the cars going south being upon the west track of the road. Appellee sat on the second seat from the front, at the outer end of the seat, facing the front of the car. After taking his seat, he took out his newspaper, and commenced reading. He placed his arm around the upright, or post, supporting the roof of the car, holding his newspaper before his eyes. He was on the west side of the car, which was an open one. The lower part of his right leg was laid across the left foot below the knee. His right foot extended beyond his left, and beyond the edge of the floor, about six inches, and his left foot rested on the edge of the floor. While in this position, with his arm around the post, and his legs crossed, and foot extended in the manner stated, some object, which the testimony tends to show to have been a large wagon, carrying coal, brushed past his arm, and, as the team passed going southward, part of the harness struck his foot, and pulled it back, drawing him partly out of the seat. His left leg was bruised by coming in contact with the iron side or arm of the seat. His body was pulled out of the seat, and, by catching hold of the back of the seat in front of him, and holding onto the upright or post with his hand, he was partially turned around sideways. The accident occurred near the corner of Twelfth street and Wabash avenue, where the thoroughfare was quite crowded. Appellee did not see the team or wagon before it struck him, but saw, as he turned around, a coal wagon, or a heavy wagon of that nature, about the length of a car or two cars, going south. Appellee states that the wagon was drawn by two horses to the best of his recollection. The car was not stopped, nor was its motion slackened at the time of the accident, but it was going at the regular gait at which the cars travel on Wabash avenue. Plaintiff had been in the habit of riding on appellant's cars frequently, and was aware that Wabash avenue was a crowded thoroughfare. On behalf of the plaintiff, the trial judge gave, among others, the following instructions to the jury: "The court instruct the jury that, if they believe, from the evidence in this case, that the plaintiff, Rood, on August 26, 1892, boarded the cable car of the defend-

ant, at or about Twenty-Fifth street, in this city, on his way down town, and paid the price of transportation, to wit, five cents, and that, while riding as a passenger, and observing ordinary care for his personal safety, plaintiff's foot was brought in contact with a horse, harness, or wagon passing or standing at or near the tracks of defendant, along which said cable car was being operated by defendant's servants, then, to avoid liability for such injuries, the defendant must prove, by a preponderance of the evidence, that its servants exercised the highest degree of care for the personal safety of the plaintiff in the operation of said cable car at the time said injuries were inflicted." "The court instructs the jury that, if they believe, from the evidence, that on August 26, 1892, the plaintiff in this case became a passenger, and paid his fare for transportation, upon one of defendant's Wabash avenue cable cars, and that, while so riding as such passenger, and observing ordinary care for his personal safety, his foot and leg were injured by being brought in contact with something standing or passing near the tracks of defendant, upon which said car was being operated by defendant's servants, then it is for the defendant to explain how said injury occurred, and to show, by a preponderance of the evidence, that the alleged injuries of plaintiff were not the result of any lack or failure to exercise the highest degree of care and diligence on the part of its servants in the operation of said cable car."

W. J. Hynes and H. M. Martin, for appellant. Mann, Hayes & Miller, for appellee.

MAGRUDER, C. J. (after stating the facts). By the giving of the instructions set out in the statement preceding this opinion, the court submitted the case to the jury upon the theory that, if the appellee proved that he was in the exercise of ordinary care at the time of the accident, there was a presumption that appellant was guilty of negligence, and, accordingly, that the appellant had the burden of proving, by a preponderance of evidence, that it was not negligent. The question presented for our consideration is whether, in case of the happening of an accident to a passenger upon a street car, the two concurrent facts of the accident and the exercise of ordinary care by the injured party raise a presumption of negligence against the carrier, so as to shift the burden of proof upon it to show that it was not guilty of negligence. The weight of authority seems to be in favor of the position that the mere happening of the accident, together with the exercise of ordinary care by the plaintiff, does not alone raise the presumption of negligence on the part of the defendant carrier. The rule is thus stated by Booth, in his work on Street-Railway Law (section 361): "The mere fact that a passenger has been injured en route, without any evidence whatever as to the manner in which the accident occurred, does not raise a pre-

sumption of negligence against either of the parties; but the burden of proof shifts where the accident proceeds from an act of such a character that, when due care is taken in its performance, no injury ordinarily ensues from it, or where it is caused by the mismanagement of a thing over which the defendant has immediate control, or for the management or construction of which it is responsible." Where the injury occurs by reason of any defect in the machinery or cars or apparatus or track of the carrier, or where there is anything improper or unskillful or negligent in the conduct of its servants, or unsafe in the appliances of transportation, the presumption then arises in favor of the negligence of the carrier, and the burden of rebutting this presumption is thrown upon it. But if the plaintiff's own evidence shows that the accident was due to a cause beyond the control of the carrier, as the presence of vis major, or the tortious act of a stranger, tending to produce the accident, no such prima facie case is made out as will throw the burden upon the carrier of showing that it was not guilty of negligence. The presumption in question comes from the nature of the accident, and the circumstances surrounding it, rather than from the mere fact of the accident itself. These circumstances must be such as tend to connect the carrier with the cause of the injury. If the circumstances surrounding the accident are such as to indicate that it would not probably have occurred if the company had been in the use of suitable machinery or safe apparatus, or if it had employed proper and competent servants to manage such machinery or apparatus, then the burden of proof will be shifted to the carrier. Such presumption of negligence has been held to exist against the carrier in cases of the overturning of a stagecoach, or of the derailment of a car, or of the sudden jerk of a train, or of a blow from part of a passing train, or of a collision between two trains belonging to the same carrier, or of the breaking down of a bridge upon the line of a railway. *Bradner, Ev. pp. 422, 424; Ray, Neg. Imp. Dut. pp. 690-697; Hutch. Carr. §§ 799-801; Patt. Ry. Acc. Law, p. 438; Smith v. Railway Co., 32 Minn. 1, 18 N. W. 827; Holbrook v. Railroad Co., 12 N. Y. 236; Le Barron v. Ferry Co., 11 Allen, 312; Stokes v. Saltonstall, 13 Pet. 181; Transportation Co. v. Downer, 11 Wall. 129; Stern v. Railroad Co., 76 Mich. 591, 43 N. W. 587; Whart. Neg. § 661.* It is reasonable that a presumption of negligence should arise against the carrier in cases where the cause of the accident is under its control, because it has in its possession the almost exclusive means of knowing what occasioned the injury, and of explaining how it occurred, while the injured party is generally ignorant of the facts. But, where the cause of the accident is outside of and beyond any of the instrumentalities under the control of the carrier, its means of knowledge may not be, and are not necessarily, better than those of the passenger.

In the present case, the car in which the appellee was riding was traveling along the public street of a city, which the owners of other vehicles had as much right to use as the owners of the cable cars. Plaintiff's own testimony showed that he was injured by a wagon traveling along the public street, and passing the car in which he was riding. The accident may have been due, so far as plaintiff's evidence showed, to careless driving on the part of the driver of the wagon. Plaintiff's proof was equally consistent with the absence, as with the existence, of negligence on the part of appellant. *Hutch. Carr. § 799.* At any rate, such evidence left it doubtful whether appellant was guilty of negligence or not, and the presumption that the accident was unavoidable was as reasonable as that it was due to appellant's negligence. *Stern v. Railroad Co., supra.* Under such circumstances, the nature of the accident was not such as to throw the burden of proof upon the appellant. In *Railway Co. v. Gibson, 96 Pa. St. 83*, a passenger on the car of a street-railway company was struck and injured by a passing wagon, loaded with hay, while sitting in the street car by an open window, with his left arm resting on the window ledge, it not being shown whether it projected beyond the ledge or not; and it was held by the court that the approximate cause of the injury, at least in part, was the act of a third party, to wit, the driver of the wagon, over whom the railroad company had no control, and that, under the circumstances, the presumption of negligence on the part of the company did not arise, but that the duty rested on the passenger to prove the negligence of the company. There was there no privity of contract between the company and the driver of the wagon, as there is none in the case at bar. *Hawkins v. Railway Co., 3 Wash. St. 592, 28 Pac. 1021; Saunders v. Railway Co. (S. D.) 60 N. W. 148; Potts v. Railway Co., 33 Fed. 610.* The same doctrine announced in the authorities hereinbefore referred to is the doctrine of this court, as will be seen by reference to the following cases: *Railway Co. v. Cotton, 140 Ill. 486, 29 N. E. 809; Railroad Co. v. Blumenthal, 160 Ill. 40, 43 N. E. 809; Hart v. Park Club, 157 Ill. 9, 41 N. E. 620.* In *Railway Co. v. Cotton, supra*, the facts showed that the plaintiff, at the time he was injured, was a passenger on one of the defendant's street cars run by a cable, and was standing on the rear platform of the car, and while in that position, as he was passing through the La Salle Street tunnel, he was run into by another of the defendant's cars, following on the same track, and thereby received the injuries complained of. In that case it will be noticed that the collision was between two cars, both of which belonged to the defendant company, and that the collision was not between one of the defendant's cars and a vehicle which was not under the control of the defendant. In that case we said: "There seems to be a very general concurrence of authority that, where there was an absence of 'vis major,' and it is shown that the injury happened

from the abuse of agencies within the defendant's power, it will be inferred, from the mere fact of the injury, that the defendants acted negligently." In *Railroad Co. v. Blumenthal*, supra, it was held that a prima facie case of negligence on the part of the railroad company arises when a passenger on a freight train, in charge of cattle, is injured by being caught between two cars while he is descending the ladder to look after his cattle during stoppage of the train for water. But there the cars, and their couplings or bumpers, and the ladder upon which the passenger was descending, belonged to and were under the control of the defendant company; and we said that a prima facie case of negligence was made out in view of the manner and circumstances of the accident, it appearing that the injury to the passenger was caused by apparatus wholly under the control of the carrier, and furnished and applied by it. It was there held that the nature and circumstances of the accident were such as to throw upon the railroad company the burden of proving that the injury was not its fault. In *Hart v. Park Club*, supra, we also held that "the presumption of negligence arises, not exclusively from the fact that the accident happened, but that it happened under given conditions and in connection with certain circumstances." Where the accident is one which would not in all probability happen if the person causing it was using due care, or the instrumentality causing the accident is solely under the management of the defendant, then the occurrence of the accident, together with proof of the exercise of due care on the part of the plaintiff, is sufficient prima facie proof of negligence to impose upon the defendant the onus of rebutting it.

For the reasons above stated, we think that the instructions given for the plaintiff, in stating the rule without the qualifications herein indicated, stated it too broadly. There was no instruction given for the appellant which cured the error involved in the instructions thus given for the appellee. The jury might well have believed that the mere fact of the injury did not create a presumption of negligence against the defendant or its agents, and yet may have believed that the fact of the injury, coupled with the exercise of due care by the appellee for his personal safety, did create such presumption. In view of the error herein pointed out, the judgments of the appellate and circuit courts are reversed, and the cause is remanded to the circuit court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(163 Ill. 216)

GRIFFIN v. GRIFFIN.

(Supreme Court of Illinois. Nov. 9, 1896.)

VENDOR AND PURCHASER — RESCISSION OF CONTRACT — RELEASE — EQUIT — JURISDICTION — LACHES.

1. Certain heirs agreed on a distribution of the estate, but one of them objected to the price fixed on certain land assigned to him, and refused to assent to the division. One of the oth-

er heirs thereupon agreed to take such land from him at the price affixed, giving a note secured by mortgage for the price, and also agreed to pay to certain of the other heirs money which, otherwise, the objecting heir would be compelled to pay. Held, that the purchaser was not entitled to rescind the contract of purchase because the objecting heir refused to convey on tender of the mortgage, where the payments which the purchaser had agreed to make for the benefit of such objecting heir had not been made.

2. Where an action is brought to compel specific performance of a contract of sale, and to enforce a vendor's lien, the court having jurisdiction will retain the same for the purpose of stating an account between the parties, and giving relief by a settlement of the whole matter.

3. The written contract by defendant for the purchase of the land provided that the note to be secured by mortgage was to be paid January 1, 1892. The bill to enforce a vendor's lien was filed early in 1893. Held, that laches were not imputable to complainant.

4. Defendant was not entitled to be released from such contract because complainant contested his reports as administrator, and caused him to expend large sums for counsel fees, costs, etc.; it not appearing that complainant waived any right to contest such reports, and such contest not being a violation by him of any contract.

Appeal from circuit court, Marshall county; T. M. Shaw, Judge.

Bill by George W. Griffin against Charles Griffin to establish and enforce a vendor's lien. From a decree in favor of complainant, defendant appeals. Affirmed.

In June, 1889, David Griffin died intestate, leaving, as his only children and heirs at law, three sons, George, Charles, and David F., and three daughters, Mary Hunt, Ann M. Dillman, and Caroline M. Peterson. His estate consisted of real and personal property, and Charles was appointed administrator. All the heirs, except Ann M., met in Winona in October, 1889, and attempted to agree on a partition and division of the estate. The proposed division was as follows: It was agreed by and among all of said heirs that said David F. Griffin should have of said estate \$10,000; and Mary Hunt \$7,200 from said estate, less \$600 paid to her by the said George W. Griffin; and that the said Ann M. Dillman should have of said estate the W. $\frac{1}{2}$ N. W. $\frac{1}{4}$ section 4, township 30 N., range 1 E. of third P. M., and 23 acres of the N. W. $\frac{1}{4}$ section 7, township 30 N., range 1 E., lying east of the west 75 acres of the north 140 acres of said N. W. $\frac{1}{4}$ of section 7, and also should have of said estate \$1,500; and the said Caroline Peterson should have of said estate the E. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ of section 4, township 30 N., range 1 E., also 23 acres of land lying immediately east of the said 23 acres above to Mrs. Dillman, and should have \$600 in money, to be paid to her from said estate; and that the said George W. Griffin should have the N. W. $\frac{1}{4}$ S. E. $\frac{1}{4}$ section 5, township 30 N., range 1 E., and 45 acres lying, to wit, east of the west 30 acres of the north 140 acres of the N. W. $\frac{1}{4}$ section 7, township 30 N., range 1 E., and that he (said George) should pay Mrs. Hunt \$600, as so much of the \$7,200 to be

paid to her,—all which was agreed would make said heirs even; and that any of said estate, left after paying and distributing as above, and paying all claims against said estate and expenses of administration, should be distributed equally among the same heirs; and said Charles Griffin consented to waive any claim as an heir. Ann M. afterwards assented to the proposed division and partition. The appellee, George Griffin, did not assent to this agreement. He insisted that the 40-acre tract was valued at too great a price when placed at \$40 per acre. Seeking to consummate the proposed partition and division of the estate, George, Charles, and David F. met, and several agreements and contracts were made to induce George to consent to the proposed division and partition. By one of those contracts David F., in consideration of George's assent to the division, promised that his interest in the amount to be divided under the last clause of the agreement should be paid by the administrator to Mrs. Mary Hunt, to aid in liquidating the payment to be made her by George, and Charles guaranteed that the shares of David F. and George in that residuary estate should be \$400 each, and Charles was to pay Mrs. Hunt \$600 for George out of those two shares, and was to buy the 45 acres of land at \$40 per acre, and execute note secured by mortgage, etc. This agreement in reference to the sale and purchase of the land was in writing. The other parts of the agreement were in parol. Appellee filed his bill, setting forth the division in accordance with the agreements, the execution of deeds, etc., the settlement of the estate, and tendering a deed for the 45 acres to Charles, and asking for a decree for a vendor's lien for the amount of the purchase money, with interest, and for the payment of the sum guaranteed, etc. Charles filed his answer, substantially admitting the partition, distribution, agreement for sale, and the several other contracts, and averred he had tendered a note and mortgage as provided in the written contract, and the complainant refused to accept the same; and it was further claimed the complainant had failed to comply with his contract, and had accepted his distributive share of the estate not partitioned, amounting to the sum of \$254.04, and had thereby abandoned the agreement for sale. The evidence shows that, to induce George Griffin, who had never signed the agreement for the partition, to comply with the proposed partition and division of the estate made in June, 1889, David F. promised that his residuary share should be, by the administrator, the appellee, paid to Mary Hunt, who was to receive from George Griffin \$600 as owely in effecting the partition, and Charles agreed to purchase the land at \$40 per acre. By this written agreement between George and Charles as to the purchase and sale of the land, the oral agreement as to the payment of the portion of the undistributed estate of David F., and the guaranty of Charles that the distributive share of

George and David F. in the undistributed estate should each be \$400, together constituted the agreements and contracts under which the assent of George to the partition and division was made. In pursuance of these agreements and contracts, deeds were made, by which the conveyance of the land was to be effected. In the deed to George Griffin, the acknowledgment of three of the signers was omitted. Joseph Griffin, a son of George, filed a bill for a conveyance of the lands which in that partition were conveyed to Caroline Peterson, which finally resulted in a decree in favor of the latter; and, while that litigation was so pending, Charles tendered the deed to George, together with the notes and mortgage, which the latter declined to accept. Afterwards distribution was made of the estate not divided, and the share of each heir was \$254.04, of which George received and receipted for his portion, as did the others, except David F. Charles did not comply with his contract to pay Mary Hunt the full \$600 for George, but it was, after the commencement of this suit, paid by the latter. A decree was entered finding the amount due for the land, principal and interest, was the sum of \$2,608.66, and decreeing a sale of the land, and for the further sum of \$511.73, less the amount received by George on his distributive share of that not divided. From that decree this appeal is taken, and the errors assigned are: There is a remedy at law, the decree was not authorized by the evidence, and complainant was not entitled to relief because of laches.

Barnes & Barnes, for appellant. F. S. Potter, for appellee.

PHILLIPS, J. (after stating the facts). Appellant did not comply with his agreement, and pay to Mary Hunt \$600, but retained the share of David F. in that part of the estate not divided, neither paying it to the latter nor to George Griffin, the appellee. In this he was in default in failing to comply with his contract. The tendering the deed to appellee by appellant conveying this land, in accordance with the agreement for the partition, and at the same time tendering a note secured by a mortgage, which was declined by appellee, did not constitute a full performance of the contract on the part of the appellant. He owed the duty of performing or offering to perform his contract fully before the vendor would be in default. The land which was the subject of the proposed conveyance was inclosed with other lands of the appellant, and he exercised certain acts of ownership over the land by cutting brush, etc.; and it does not appear the vendor exercised any control over the land after the execution of this contract. It does not appear that appellant ever offered to comply with his agreement in paying Mary Hunt \$600, or any other sum, on this contract. He had a sum amounting to \$254.04 in his hands, which he had promised and

agreed should be \$400, to be used for that purpose. While he was in default as to this part of his contract, he could not rescind the agreement for a failure on the part of the appellee to comply with another part of the agreement. While the agreement as to the purchase and sale of the land was in writing, and did not name the guaranty of the amount the shares should be, nor the agreement of David F., nor that out of those sums the appellant should pay Mrs. Hunt the sum of \$600, yet the several contracts made one contract, as the full agreement for which George W. Griffin assented to the partition and division of the estate. Here were three distinct contracts, one of which was in writing. The other two constituted each separate distinct contracts. It is not a case of a part of a contract existing in writing and a part by parol, but a case where three contracts constitute one consideration for another contract. Where a contract is reduced to writing, it cannot be varied by parol, nor can part of a single contract exist partly in writing and partly by parol. But there may be several contracts, some in writing and others in parol, which may, altogether, be the consideration of another separate and independent contract. *Bradshaw v. Combs*, 102 Ill. 428. The appellant being in default, in failing to tender a sufficient deed from the heirs, and failing to pay Mrs. Hunt the \$600, prevented his right to declare a rescission of the contract as to the land. George W. had complied with his agreement in the execution of deeds to the heirs to effect the partition, and had parted with his interest in the land; so that the appellant would have no right to rescind his agreement until he had, as a condition precedent, strictly performed all he was to do. *Wallace v. McLaughlin*, 57 Ill. 53; *Hunt v. Smith*, 139 Ill. 296, 28 N. E. 809.

The consideration for all the promises of the appellant was done and performed by appellee, who conveyed his interest in lands, and consented to the paying to others of a large sum of money in which he believed he had an interest. He was to be compensated by the compliance on the part of the appellant and David F. with their contracts. David F. authorized the payment of his distributive share, as guaranteed by appellant to Mrs. Hunt, for the benefit of appellee. David F. has never received that money, and it has been retained by appellant. The appellant owed the duty of complying with his several contracts, and a court of equity has jurisdiction to decree performance of those contracts, and to enforce a vendor's lien, and, having jurisdiction for the purpose of decreeing a vendor's lien, would retain that jurisdiction for the purpose of determining and stating the account between the parties, and giving relief by a settlement of the whole matter. By the terms of the written agreement, the note, to be secured by mortgage, was to be paid January 1, 1892, with interest at 6 per cent. from January 1, 1890. The bill

in this case was filed early in 1893, so that laches cannot be imputed.

It is insisted in the argument in behalf of appellant that appellee contested his reports as administrator, and caused the expenditures of large sums of money for counsel fees, costs, etc., that should release appellant from these contracts. It nowhere appears in evidence that the appellee waived any right to so contest the administrator's report, and his right to so except thereto was a violation of no contract on his part. Inasmuch as the deed was not tendered by appellee to appellant until after the filing of this bill, the chancellor properly awarded costs against appellant, until it was done, and appellee had paid Mrs. Hunt the full amount yet due her. We find no error in the record, and the decree is affirmed. Affirmed.

(164 Ill. 110)

DOBSON et al. v. MOORE.

(Supreme Court of Illinois. Nov. 9, 1896.)

CORPORATIONS—OFFICERS—POWER TO BIND CORPORATION.

1. One who seeks to hold a corporation liable on its general manager's guaranty of a third person's note must show special authority on the part of such officer to make the guaranty. 62 Ill. App. 435, affirmed.

2. A by-law authorizing the general manager of a corporation to bind the company by contract for merchandise, and to sign notes, drafts, and acceptances and execute checks for the payment of corporate indebtedness, does not authorize him to bind the corporation by a written guaranty of a third person's note.

Appeal from appellate court, First district.

Action by John Dobson and another against Clair E. Moore, assignee of the Wilson & Bayless Company, insolvents. A judgment sustaining exceptions to the claim was affirmed by the appellate court (see 62 Ill. App. 435), and claimants appeal. Affirmed.

This is an appeal from a judgment of the appellate court affirming a judgment of the county court of Cook county sustaining exceptions to the claim of appellants against the insolvent estate of the Wilson & Bayless Company. The claim is based upon the guaranty by the Wilson & Bayless Company of five certain promissory notes of George Wilson, Jr., and Theodore P. Bayless, executed February 5, 1889, payable to the order of John and James Dobson, the appellants, for \$3,627.05. The form of guaranty of each note is as follows: "For value received, we hereby guaranty the payment of the within note at maturity. Wilson & Bayless Company. George Wilson, Jr., General Manager." The assignee of the insolvent company filed with the clerk of the county court, as required by statute (Rev. St. c. 10a, § 4), a report showing this claim among others. He also filed exceptions to the claim, stating therein that it was excessive, and was not valid against the estate or the corporation, and was against the firm of Wilson & Bayless, "and not against said firm of Wilson & Bayless Company." Upon

such exceptions being filed, the clerk issued a summons to the appellants, as required by section 5 of said chapter. The county court afterwards proceeded to hear the proofs and allegations of the parties, and rendered a judgment sustaining the exceptions and disallowing the claim. It appears from the evidence introduced in the county court that on or about the 25th day of September, 1888, the insolvent corporation was incorporated for the purpose of manufacturing and selling furniture and house-furnishing goods, with a capital stock of \$80,000; that prior to this time Wilson and Bayless had been in partnership, doing a furniture business, and while so in partnership contracted the indebtedness for which they gave their notes as above stated. On or about October 8, 1888, the firm of Wilson & Bayless turned over to the insolvent corporation merchandise which inventoried about \$36,000 for \$36,000 of the capital stock of the insolvent company, which was issued to George Wilson, Jr., and Theodore P. Bayless. Other parties subscribed for the balance of the capital stock of the company. On or about the last of January, 1889, the appellants placed their claim in the hands of attorneys, and threatened to institute attachment proceedings and levy on the goods in the hands of the Wilson & Bayless corporation. Thereupon Wilson and Bayless executed the notes and guaranty above stated.

Dent & Whitman and L. S. Hodges, for appellants. Bulkley, Gray & More, for appellee.

CRAIG, J. (after stating the facts). At the time the guaranty was executed George Wilson, Jr., was president and general manager of the Wilson & Bayless Company, and Bayless was vice president and treasurer. Section 6, c. 32, of the Revised Statutes, under which this corporation was organized, among other things, provides: "The officers of the company shall consist of a president, secretary and treasurer, and such other officers and agents as shall be determined by the directors or managers, and the directors or managers may adopt by-laws for the government of the officers and affairs of the company provided they are not inconsistent with the laws of this state." Under this provision of the statute the corporation adopted the following by-law: "The practical conduct of the business of the company and the supervision of the details shall be intrusted to some discreet person, who shall be appointed by the board of directors, and who shall be known as the 'general manager.' Such general manager shall have the direct supervision and control of the store, warehouses, and offices of the company, shall employ, and at his pleasure discharge, all of the porters, truckmen, clerks, and shall fix their compensation; and shall also act as the purchasing agent of the company, and shall have power to bind it by his contracts for merchandise. He shall have authority to sign notes, drafts, and acceptances in the

name of the company, and to make checks upon the company funds in bank, for the payment of any proper indebtedness of the company." Under the by-law, George Wilson, Jr., was authorized to bind the company by contract for merchandise, and to sign notes, drafts, and acceptances and execute checks for the payment of the indebtedness of the company; but the language of the by-law confers no authority whatever on him to bind the company as a guarantor for the indebtedness of another. There was no action of the board of directors of the company authorizing him to bind the company as security, or as guarantor for the debt or obligation of another. It is true that Wilson executed the guaranty as general manager, but the powers of an agent of a corporation to enter into contracts for and in behalf of the corporation are limited to those matters concerning which the charter and by-laws of the corporation authorized it to enter into. *Downing v. Road Co.*, 40 N. H. 235. *McLellan v. File Works (Mich.)* 23 N. W. 321, is a case quite similar to the case under consideration, and in the decision of the case Chief Justice Cooley, among other things, said: "The case was such that the plaintiffs must be deemed to have accepted renewals of the notes with knowledge of all the facts. They held partnership notes, and they accepted corporation notes in renewal, and they must be deemed to have known that an officer of a corporation can have no general authority to give the notes of the corporation to take up the outstanding obligations of members. Special authority would be required to empower him to do so; and those persons who should venture to take such notes from him must, at their peril, ascertain that the special authority has been conferred. In cases like *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 Doug. (Mich.) 457, *Littell v. Fitch*, 11 Mich. 526, *Carrier v. Cameron*, 31 Mich. 373, and other cases cited on behalf of the plaintiffs to the point that notes given by the proper officer of a corporation, or by a partner in the name of the corporation or partnership in the regular course of business, must be deemed given with due authority, have no application here, for the very obvious reason that a corporate note given for an individual obligation is not given in the regular course of business, but presumptively is ultra vires. An officer of a corporation can never have implied authority to give such notes. They are presumptively accommodation notes, given to take up the notes of third parties; and in order to support them it would be necessary to overcome the presumption against authority by express affirmative showing, the general authority to make notes for the corporation being insufficient for the purpose. *West St. Louis Sav. Bank v. Shawnee Co. Bank*, 95 U. S. 557; *Perry v. Manufacturing Co.*, 37 Conn. 520." See, also, *National Park Bank v. German-American Mut. Warehousing & Security Co. (N. Y. App.)* 22 N. E. 567; *Mor. Priv. Corp.* § 423.

In *Lucas v. Transfer Co.*, 70 Iowa, 546, 30 N. W. 771, it was held that, where a party makes with the officers of a corporation a contract beyond the power of the corporation as shown by its charter, such third party cannot recover, because he acts with knowledge that the officers have exceeded their power; and between him and the corporation or its stockholders a ratification of the authority to make the contract would not make it valid. Here the president and manager of the corporation had no authority from the board of directors to enter into a contract of guaranty on behalf of the corporation, and, in the absence of such authority, he could not bind the corporation beyond the scope of the business in which the corporation was engaged. Appellants knew, when Wilson made the contract of guaranty, that the contract was not within the scope of the business in which the corporation was engaged, a contract beyond his power to make, and, having knowledge of such fact, they cannot recover. The judgment of appellate court will be affirmed. Affirmed.

(183 Ill. 346)

WILLIAMS v. LINDBLOM et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW
—CONFLICTING EVIDENCE.

1. The defense of res judicata cannot be raised for the first time on appeal.

2. In an action for an account, the supreme court will not disturb the finding of the court below merely because it might, as an original proposition, have found the facts differently, as to one or more of the items in the account.

3. Generally the findings of fact by a master in stating an account are conclusive, unless a clear mistake or fraud is shown.

Error to appellate court, First district.

Bill by R. Lindblom against W. S. Williams and others for a settlement of a partnership alleged to have existed between the parties, and to have been dissolved by mutual consent, which was referred to a master to make a statement of account between the partners, and report the same to the court. There was a judgment of the appellate court (60 Ill. App. 465) affirming a judgment overruling exceptions by defendant Williams to the report of the master, and a decree in accordance with such report, and defendant Williams brings error. Affirmed.

This cause originated in the superior court of Cook county upon a bill by defendant in error Lindblom against plaintiff in error and Nelson Van Kirk and N. G. Miller to settle a partnership alleged to have theretofore existed between the parties, and dissolved by mutual consent. The bill prays for the appointment of a receiver, and that an account between the partners be stated. It makes no attempt to state the condition of the firm business, or the state of the indebtedness existing between the partners. Answers were filed by the defendants, which, in effect, admit the al-

legations of the bill as to the existence and dissolution of the firm, and concur in asking for the appointment of a receiver and a statement of the account. They, like the bill, make no attempt to state the rights of the parties. Replications being filed to these answers, the cause was referred to a master to take the proofs and make a statement of account between the partners, and report the same to the court. The master subsequently, in obedience to this order, made his report, finding that there was due Robert Lindblom from Miller and Williams, jointly, the sum of \$12,410.49; and Nelson Van Kirk, \$4,180.99; and that there was due Williams from Miller the sum of \$17,909.10. The parties being notified of the completion of this report, Williams appeared before the master, and filed objections thereto, which, being overruled, were also presented to the court as exceptions, and there overruled by the chancellor, and a decree entered accordingly. Plaintiff in error prosecuted his appeal to the appellate court of the First district, where the decree of the superior court was affirmed, and from that judgment this writ of error is prosecuted.

A. C. Barnes, for plaintiff in error. William Law, Jr., and W. M. Johnson, for defendants in error.

WILKIN, J. (after stating the facts). It is insisted that the appellate court refused to consider the cause upon its merits because of the insufficiency, as it held, of the exceptions to the master's report. The record proper of that court does not sustain the contention. While it does appear from the opinion that the merits of the cause were not gone into there, we are not at liberty to so treat the cause, it having been frequently held by this court that the opinion of the appellate court is no proper part of its record; and so we must say, as we said in the late case of *Minchrod v. Ullmann* (in which an opinion was filed at Ottawa May 12, 1896) 44 N. E. 865, where a like contention was made, "The record does not sustain the statement of counsel, but the judgment of the appellate court shows that the matters assigned for error were duly considered." It is certainly true that the objections to the master's report, afterwards filed as exceptions thereto, of themselves afford little or no assistance to the court in determining whether or not the master's conclusion upon the facts was justifiable. This difficulty is but partially, if at all, removed by the printed argument of counsel filed, pointing out the evidence upon which the exception is based. In fact, the argument is not confined to the specific objections filed, but is a general discussion of several objections to the report, under different headings, and it is only by looking through the numerous exceptions that we can determine whether or not the argument is based upon any particular exception. The embarrass-

ment attending the consideration of the cause, by the manner in which it is presented, cannot be exaggerated. The master states in his report that the evidence taken before him consists of more than 1,000 pages in typewriting; that the argument of counsel before him on the objections filed consumed some three weeks; and it appears that several days were occupied in the argument before the chancellor on the exceptions. The 30 exceptions are directed against no specific and definite finding of the master, and are, as the appellate court, in substance, say, no more than that the master came to a wrong conclusion upon all questions upon which he reported. This difficulty results largely from the fact that the parties were not required to file with the master written statements of their respective claims, so that the matters in dispute might have been definitely stated, and the evidence directed to those matters alone, and the master's report confined to such matters. *Patterson v. Johnson*, 113 Ill. 580, citing *Remsen v. Remsen*, 2 Johns. Ch. 501; 2 Daniell, Ch. Prac. § 1222. Had that proper practice been adopted, very much of the difficulty here encountered might have been avoided. Plaintiff in error, however, is as much responsible for that improper practice as any one else; and while unnecessary labor is thus cast upon the court, and the practice one which cannot be approved, in view of the points of controversy as presented, we deem it best for all parties to dispose of the questions raised, rather than to send it back to the court for the correction of those irregularities in mere matters of practice.

It is first contended that the questions adjudicated in this court are res adjudicata between the parties, by reason of an action in the state of New York brought by plaintiff in error against Lindblom and others, involving the settlement of this same partnership. It is sufficient to say, in answer to this point, that the evidence relied upon as establishing this contention was not presented to the master, nor did he pass upon it; and hence there was no objection before him on that question, and no exception on that ground made to his report. The chancellor, therefore, made no decision whatever upon it, and the attempt is to present the question for the first time here. Clearly, that cannot be done.

By the terms of the agreement to form the partnership, Lindblom and Van Kirk were to put into the capital of the firm \$150,000. It was contended before the master by plaintiff in error that they had failed to perform their part of that contract, and were chargeable with interest upon a deficit, amounting to several thousand dollars. In answer to this contention it was insisted that they had paid into the firm assets the full sum of \$150,000, by turning over to it funds of a partnership to which the present one is successor, to which plaintiff in error consented. This consent he denied, but the master, upon consideration of the evidence, found the fact

against him, and we think that finding was fully warranted by the proofs in certain correspondence in relation thereto. Lindblom telegraphed plaintiff in error, referring to a balance sheet which showed the assets of the old firm transferred to the new, "We guaranty the balance sheet we sent you, and anything bad on it is ours, not yours." Plaintiff in error, upon this guaranty, insisted that a large amount of those assets proved worthless, and that the amounts thereof should have been deducted from the \$150,000, which the master failed to do. The master did state the account on the basis that all worthless accounts so turned over should be charged to Lindblom & Van Kirk. In his report, speaking of these accounts, he says: "These worthless accounts which were never paid amount to the sum of \$36,917.94. They were afterwards mostly charged to Lindblom & Van Kirk, and such of them as were by error charged to profit and loss of the new firm. I have, in this accounting, credited back to profit and loss, and charged through the account of V. & L. to the individual accounts of Lindblom and Van Kirk." The objection that the amount thus deducted from the \$150,000 did not include all the worthless accounts turned over is not sustained by the proofs. As to this and other objections to the allowance of items in favor of Lindblom, and the refusal to charge him with certain alleged liabilities, it need only be said that the evidence, at most, is conflicting. As we said in *Lehman v. Rothbarth*, 159 Ill. 279, 42 N. E. 780, speaking of an account stated by a master in chancery, "It is well settled that this court will not disturb the finding of the court below, in a case of this kind, merely because it might, as an original proposition, have found the facts, as to one or more of the items in the account, differently." And as said in *Ford v. Manufacturing Co.*, 73 Ill. 50, quoted in the above case: "The facts have been considered and weighed by the court below. They have undergone close scrutiny, and it cannot be expected that an appellate court will take up each item of account in dispute, and endeavor to rectify every supposed error attributed to the court in its finding." To hold otherwise would require this court to restate every account to which objection was made on the ground that it was contrary to the evidence. As a rule, it may be stated that the findings of fact by a master (in stating an account) are conclusive, unless a clear mistake or fraud are shown. 14 Am. & Eng. Enc. Law, p. 940, and cases cited in note 3.

We have endeavored to examine the several questions raised in the argument, only to the extent of ascertaining that they involve controversies of fact, and that the master has committed no mistake or fraud in consideration thereof. In fact, so far as we are able to see, his findings are each fully justified by the preponderance of the testimony. Our conclusion, therefore, is that the superior

court committed no error in affirming his report, and the judgment below will be affirmed. Affirmed.

(163 Ill. 389)

PRIMLEY v. SHIRK.

(Supreme Court of Illinois. Nov. 9, 1896.)

FORECLOSURE — SECOND LIENHOLDER — HARMLESS ERROR — ATTORNEY'S FEE.

1. A second lienholder is not entitled to a reversal of a decree foreclosing the first mortgage because it includes excessive interest, or other erroneous items, where the property has been sold, leaving a deficiency on the first mortgage debt greater than the amount of such items. 60 Ill. App. 312, affirmed.

2. The holder of a second lien on property taken expressly subject to a prior mortgage which provided for an attorney's fee cannot complain of the allowance of a fee to the plaintiff's attorney on the foreclosure of such mortgage, where the sum allowed was smaller than that stipulated for in the mortgage.

Error to appellate court, First district.

Action of foreclosure by Elbert W. Shirk against Jonathan P. Primley and others. A decree for plaintiff was affirmed by the appellate court, and defendant Primley, who was a junior lienholder, brings error. Affirmed.

Defrees, Brace & Ritter, for plaintiff in error. Ullmann & Hacker, for defendant in error.

BAKER, J. This was a bill filed by the defendant in error, Elbert W. Shirk, in the superior court of Cook county, to foreclose a trust deed in the nature of a mortgage made by Ira Holmes and Charles W. Rigdon to Frederick Ullman, to secure the payment of a note for \$290,000, payable one year after its date, with interest thereon at the rate of 7 per cent. per annum. The decree was in accordance with the prayer of the bill. Plaintiff in error, who is a subsequent incumbrancer, took the cause to the appellate court, where the decree below was affirmed. To reverse said judgment of affirmance this writ of error was sued out.

Shirk had been the owner of the premises described in the trust deed. These premises Holmes and Rigdon desired to purchase. Accordingly, it was agreed between them that Shirk should convey the property to Holmes and Rigdon in consideration of the sum of \$275,000; and it was further agreed that Shirk should advance the sum of \$15,000 for the purpose of perfecting the title to an alleyway adjoining the property. In pursuance of this agreement Shirk conveyed said property to Holmes and Rigdon, and they executed to him, in payment therefor, their promissory note for \$290,000, secured by the trust deed above mentioned. After the maturity of the note, no part of the principal, and only a portion of the interest, having been paid, this suit was brought to foreclose the lien of the trust deed. Prior to the transaction above set forth, Holmes and Rig-

don had obtained, in the superior court of Cook county, a decree against Shirk in a suit in regard to this same property, from which the latter had appealed to this court. That appeal was still pending at the time of the execution of the note and trust deed, and it was a part of the agreement between the parties that Shirk should dismiss it. This he has never done, and the appeal is still undisposed of. Plaintiff in error contends that there is consequently a partial failure of the consideration for the note, for which an allowance ought to have been made in the decree. This position cannot be sustained. That question was merely one between the parties to the appeal as to who should pay the costs thereof, and one in which plaintiff in error is not at all concerned, for dismissing or failing to dismiss the appeal could in no way affect his rights. The \$15,000 for the purchase of the alleyway was not advanced by Shirk at the time of the execution of the note, although the note included that sum. The agreement in relation thereto was that if, at any time prior to the maturity of the note, a good and perfect title to the alley in question could be procured by the payment to the owners thereof of a sum not exceeding \$15,000, Shirk would advance and pay that amount; but, should no money be advanced for that purpose, then \$15,000 should be credited upon the note as of the date of payment thereof; and, should he advance less than said amount for that purpose, then the difference between \$15,000 and the sum so advanced should be so credited on the note. Shirk did not advance this \$15,000, or any part thereof, because he was never called upon to do so. The decree credits said sum upon the note, but charges interest on the full amount of the note up to the date of the entry of the decree. Charging interest on this \$15,000, it is insisted, was error, for the reason, it is said, that Shirk had the use of said money during the entire period for which interest is charged. The express contract was that interest should be paid on the entire sum of \$290,000, named in the note, and that the credit should be made "as of the date of payment." The contract evidently contemplated that Shirk should set apart that sum, and hold it in readiness, to be used for the purpose indicated. Evidence to prove that he did this was offered, but excluded by the court. The presumption, therefore, is that the \$15,000 was so held in readiness. Shirk, then, did not have the use of the money, and he was consequently entitled to interest upon it.

It is next claimed that the decree is for one day's interest too much. This is true, and the decree accordingly excessive to the amount of \$56.03. But, inasmuch as the value of the entire property was insufficient to pay the sum actually due defendant in error, and there was a deficiency decree for over \$1,600, plaintiff in error was not in-

jured by the error in that regard, and it should, therefore, not work a reversal of the decree. And especially should it not since the parties against whom the decree was entered have made and are making no complaint.

The deed of trust provided for an attorney's fee, in the event of foreclosure, of 5 per cent. of the amount due. This would have amounted to some \$14,000. There was considerable controversy in the trial court as to this fee. Finally, by stipulation of parties, it was agreed that an attorney's fee of \$5,000 should be allowed defendant in error. Thereupon that sum was added to the amount due on the note, and included as a part of the decree. Interest was charged on the amount found due, including this \$5,000, from the date of the decree. It is claimed that it was error to allow interest on the attorney's fee. However that may be, plaintiff in error is not in a position to make the objection, for the decree in that regard does him no injustice. The fee agreed upon, including the interest charged, was less than one-half the amount of the attorney's fee provided for in the trust deed, to which plaintiff in error's second lien was expressly made subject. And again, the deficiency decree far more than covers the excess in interest previously referred to, together with the interest on this \$5,000 from the date of the decree to the date of sale. The judgment of the appellate court will be affirmed. Affirmed.

(163 Ill. 547)

BACH et al. v. MAY.

(Supreme Court of Illinois. Nov. 9, 1896.)

HOMESTEAD—SALE UNDER EXECUTION—SETTING ASIDE—PRIMA FACIE SHOWING.

1. Where premises occupied as a homestead are levied on under an execution against a judgment debtor, and the sheriff does not appraise and set off the homestead, as required by Rev. St. c. 52, §§ 1, 10, a sale for an inadequate price will be set aside, on the petition of the debtor, where the amount for which the premises were sold, with interest, is deposited in court for the benefit of the purchaser.

2. Where a judgment debtor, whose premises have been levied on under an execution, shows that he is the head of a family, is a householder, and owned and occupied the premises as a residence when the judgment was rendered, and that the right of homestead has not been released, he has brought himself prima facie within the homestead act.

Appeal from circuit court, Cook county; Elbridge Hanecey, Judge.

Bill by Henry May against Abel A. Bach and another to set aside a sale of premises claimed as a homestead. From a judgment in favor of plaintiff, defendants appeal. Affirmed.

Hollett & Tinsman, for appellants. Rubens & Mott, for appellee.

CRAIG, J. This was a bill, brought by Henry May, in the circuit court of Cook

county, against Abel A. Bach and Theron H. Beckwith, to vacate and set aside a sale of lot 5, block 3, of a certain subdivision in Chicago. The defendants put in an answer to the bill, and also filed a cross bill, and on the hearing on the pleadings and evidence the court entered a decree dismissing the cross bill and vacating the sale of the premises as prayed for in the bill. The facts, so far as they are necessary to be stated, as shown by the record, are substantially as follows: On the 11th day of December, 1890, and for several years before that time, the complainant owned and occupied the premises, with his wife and family, as a homestead. On December 11, 1890, the defendants obtained a judgment in the superior court of Cook county against the complainant and his wife for the sum of \$70 and costs, amounting, in all, to \$120.20. Execution was issued on said judgment, and on the 17th day of December, 1890, was placed in the hands of the sheriff for collection. On the 2d day of February, 1891, the sheriff levied upon the premises, and on February 24, 1891, sold the premises for \$133.10 to Abel A. Bach, and issued to him a certificate of sale in the usual form; and on the 26th day of May, 1892, no redemption having been made from the sale, the sheriff issued to Bach his certain sheriff's deed, which was recorded May 28, 1892, in the Cook county records. It also appears that at the time of the sale no steps were taken to set off a homestead or appraise the property, as required by the statute, although the premises were occupied by complainant as a homestead. These, in substance, were the facts found by the master, and his finding is sustained by the pleadings and the evidence.

Section 1 of chapter 52 of our statute, entitled "Exemptions," provides "that every householder having a family, shall be entitled to an estate of homestead, to the extent in value of \$1,000, in the farm or lot of land and buildings thereon, owned or rightly possessed, by lease or otherwise, and occupied by him or her as a residence; and such homestead, and all right and title therein, shall be exempt from attachment, judgment, levy or execution, sale for the payment of his debts, or other purposes, and from the laws of conveyance, descent and devise, except as hereinafter provided." Section 10 provides that, in case the creditor or officer holding an execution against the householder is of opinion that the premises are worth more than \$1,000, three householders shall be summoned as commissioners to appraise the premises, and if, in their opinion, the premises can be divided without injury to the interest of the parties, they shall set off so much of the premises, including the dwelling house, as in their opinion shall be worth \$1,000, and the residue may be advertised and sold by the officer on the execution. Where the homestead premises are not worth more than \$1,000, a judgment

against the owner is no lien, and he may sell the premises to any person he desires, and the purchaser who goes into possession will hold the premises free from the vendor and all claims of his creditors, by judgment or otherwise. But where the premises are worth over \$1,000, a judgment or decree rendered against the homestead debtor will be a lien on the value of the premises in excess of \$1,000; but such lien must be enforced in the manner prescribed by the statute, or in a court of equity. *Asher v. Mitchell*, 92 Ill. 488. Here no steps whatever were taken by the sheriff to set off the homestead, but, disregarding the statute, he went in and sold the premises in the same way he would have done if the premises had not been occupied as a homestead. Moreover, the premises were sold for the sum of \$133.10, when the evidence tends to prove that the premises, at the time of sale, were worth from \$3,500 to \$4,000. Under such circumstances, we do not think a court of equity would be justified in upholding a sale. It may be conceded that inadequacy of consideration alone will not, as a general rule, be sufficient ground to set aside a judicial sale; yet, when inadequacy is coupled with circumstances of irregularity or fraud, the sale may be set aside. *Hobson v. McCambridge*, 130 Ill. 367, 22 N. E. 823; *Dutcher v. Leake*, 44 Ill. 398; *Smith v. Huntoon*, 134 Ill. 24, 24 N. E. 971. Here the premises were sold, contrary to the plain provision of the statute, for a very small sum of money in comparison with the true value; and we think it would be an act of gross injustice to allow a sale of that character to stand. The court required the amount for which the premises were sold, with interest, to be deposited in court for the benefit of the purchaser at the sale. This was all that appellants were entitled in equity to ask. Indeed, the decree is fully sustained by the rule laid down in *Leupold v. Krause*, 95 Ill. 448, where, in the discussion of a similar case, the court said: "If, by reason of the irregularity of selling without having the homestead set off, the property was sold at a sacrifice, complainant should permit the sale to be set aside upon payment of his judgment, if the parties interested in the land are willing to pay the same."

It is, however, said the debt for which the premises were sold was incurred for the improvement of the premises, and upon this ground the sale should be sustained. This fact is not set up in the bill or cross bill, nor was it proven on the trial. The only evidence claimed on the argument to establish the fact is that of Mrs. May, wife of complainant, who testified, in cross-examination, that the "judgment obtained by Bach and Beckwith was for work done on our house." When the work was done, what amount of work, under what contract, or upon what house, does not appear. This was too indefinite to establish the fact that the judgment on which the premises were sold was a debt

incurred for the improvement of the premises involved. But it is said the burden was on complainant to prove that the judgment was not for a debt incurred for the improvement of the premises. This court has held otherwise. *Stevenson v. Marony*, 29 Ill. 533, and *White v. Clark*, 36 Ill. 285. In the case last cited it is said: "When the defendant shows that he was the head of a family, is a householder, and owned and occupied the lot of ground as a residence, when the judgment was rendered or the deed or mortgage given, and the right to claim the benefit of the act has not been released, he has brought himself *prima facie* within the provisions of the law. And, to overcome this *prima facie* case, the plaintiff must show that it falls within some of the exceptions which render it liable." The court, in its decree, upon setting aside the sale, required the complainant to deposit with the clerk of the court \$153.52, the amount for which the premises were sold, and interest thereon, to be paid to the defendants at any time they might call for the amount. This part of the decree was very favorable to the defendants, and, so far as we are able to discover, they have no just ground of complaint. The decree of the circuit court will be affirmed. Affirmed.

(163 Ill. 387)

FISHER v. NUBIAN IRON ENAMEL CO.

(Supreme Court of Illinois. Nov. 9, 1896.)

SUPREME COURT—APPEAL—TRIAL ON ISSUE OF FACT.

Appellate Court Act, as amended by Laws 1887, p. 157, provides that in actions where there was no trial on an issue of fact in the lower court, appeals and writs of error shall lie from the appellate courts to the supreme court where the amount claimed in the pleading exceeds \$1,000. *Held*, that in an action for personal injuries in which the damages claimed exceed \$1,000, and the court directs a verdict for defendant, there was a "trial on an issue of fact," and an appeal to the supreme court does not lie.

Appeal from appellate court, First district.

Action by Walter Fisher, by Mary Fisher, his next friend, against the Nubian Iron Enamel Company, for personal injuries, caused by defendant's negligence. From a judgment of the appellate court (60 Ill. App. 568), affirming a judgment entered on a verdict directed by the court in favor of defendant, plaintiff appeals. Dismissed.

Wilcox & Gettys, for appellant. J. T. Hamra, for appellee.

WILKIN, J. Appellant brought this action in the circuit court of Cook county to recover damages for a personal injury alleged to have been received from the negligence of the appellee. In his declaration he claimed damages for more than \$1,000. A plea of general issue was filed, and the case was submitted to a jury. After the plaintiff had introduced all his evidence, the defendant asked the court to instruct the jury to return a verdict for it,

which request was allowed, and the jury so instructed. A verdict, in obedience to that instruction, of not guilty, having been returned by the jury, judgment was entered for the defendant against the plaintiff for costs of suit. On appeal to the appellate court of the First district that judgment was affirmed, and the plaintiff below now prosecutes this appeal, without any certificate from the judges of the appellate court that the case involves questions of law which should be passed upon by this court.

The first question discussed in the briefs of counsel for the respective parties is whether this court has jurisdiction of the case. It is clear that under the appellate court act as it existed prior to the amendment approved June 3, 1887, the case was not, as a matter of right, appealable to this court, the judgment of the circuit court being for less than \$1,000, although the amount claimed in the declaration exceeded that amount. *Smith v. Harris*, 113 Ill. 136; *Tucker v. Board*, 154 Ill. 593, 39 N. E. 563. We think it equally clear the amendment referred to has not changed the law in this respect, as applied to the facts of this case. The proviso relied upon by appellant as giving him the right of appeal to this court is as follows: "And provided further, that in all actions where there was no trial on an issue of fact in the lower court, appeals and writs of error shall lie from the appellate courts to the supreme court; where the amount claimed in the pleadings exceeds one thousand dollars (\$1,000)." *Laws 1887*, p. 157. The contention of counsel is that, inasmuch as the court below instructed the jury to find for the defendant, "no trial on an issue of fact" was had in that court, and therefore the amount claimed in the declaration determines the right of appeal. We do not think the proposition is one admitting of discussion. That there was a trial on an issue of fact is too clear for argument. All that can be said is that that trial resulted in a finding against the plaintiff because of a peremptory instruction of the court, rather than from general instructions as to the law of the case. Clearly, no right of appeal to this court is given the plaintiff, except upon a certificate of importance, as provided by the statute, and the appeal will be dismissed. Dismissed.

(163 Ill. 117)

SPENCER v. WORLD'S COLUMBIAN EXPOSITION.

(Supreme Court of Illinois. Nov. 9, 1896.)

INSOLVENT LESSEE—RECEIVER—CONTINUANCE OF BUSINESS—ACCEPTANCE OF LEASEHOLD FOR CREDITORS—ELECTION.

1. A receiver was appointed for an insolvent corporation having the concession of an allotted space within exposition grounds for restaurant purposes in consideration of a percentage of its gross receipts. Half of the term remained, and the concession was of itself the principal thing of value to the creditors. Under an order of the court, the creditors consenting, the

receiver conducted the business which the insolvent had been unable to continue. There was no act of disaffirmance, or notice that the receiver would not be bound by the contract of concession. He completed the term, and received the profits. *Held*, that he could not repudiate the contract at the end of the term, and pay the exposition company on the basis of a quantum meruit only. 58 Ill. App. 637, affirmed.

2. To bind the receiver it was not necessary that he should be put to an election by the lessor whether to accept or refuse the leasehold for the benefit of creditors.

Appeal from appellate court, First district.

Appeal by Earl B. Spencer, trustee, from an order directing the payment of certain moneys to the World's Columbian Exposition in the matter of the New England Clambake Company, insolvent. From an affirmation by the appellate court (58 Ill. App. 637) he further appeals. Affirmed.

The World's Columbian Exposition, as first party, and John S. Morris, as second party, entered into a written contract of date March 16, 1892, which, so far as material to this controversy, was as follows: "That the said party of the first part (The World's Columbian Exposition), for and in consideration of the promises and agreements of the said party of the second part (John S. Morris), hereinafter set forth, hereby promises and agrees that it will, and it hereby does, set apart for the exclusive use of the party of the second part, from the 1st day of May, 1892, until forty-five (45) days after the close of the World's Columbian Exposition, the following described tract or parcel of land in Jackson Park, in the city of Chicago, Illinois, to wit [describing a parcel of land within the Exposition grounds]. Said party of the first part further agrees and promises that it will permit said party of the second part to erect and maintain on said tract certain buildings, structures, and appurtenances, and to use the same for the purpose of this contract, and to charge persons who do not hold a ticket for clambake and other food for admission to said tract, not exceeding 10 cents, if, in the opinion of the chief of construction, the same is necessary for the protection of the said party of the second part from crowds or disorder: provided, that if the said holder of an admission ticket, only, should, after admission, purchase anything, the said admission fee shall be credited upon the charge for said purchase. The said party of the first part promises and agrees that it will conduct its water, sewerage, and steam, gas, and electric light systems, to said tract, so as to enable said party of the second part to make the necessary connections therewith, and will allow the use of said systems and of the cold-storage system on the same basis as given to others holding similar rights. Said party of the first part also promises and agrees that it will permit said party of the second part to conduct on said tract what is known as the 'New England Clambake,' and to charge for a clambake complete, in sea-

son, not exceeding one dollar (\$1.00). [Then follow numerous details concerning the business to be carried on, etc.] The said party of the first part further promises and agrees that it will permit said party of the second part to post without and within said building such advertising signs relating to its own business as may be approved by the said chief of construction of said party of the first part. Said party of the second part, for and in consideration of the promises and agreements hereinbefore set forth, promises and agrees that he will erect and maintain on said tract all buildings and appurtenances, with their equipment, called for by this contract, and supply them with everything necessary for the purpose of carrying out the same. * * * The said party of the second part promises and agrees that he will erect all said structures, and supply them with everything called for in this contract, and conduct the business therein at his own expense; and it is understood by and between the parties hereto that said party of the first part is not to be liable for any indebtedness incurred by said party of the second part in and about the matters and things hereinbefore provided for. * * * Said party of the second part promises and agrees that he will faithfully account for and pay over to the said party of the first part twenty-five (25) per cent. of all his gross receipts under this contract, settlements to be had and payment to be made each day for the previous day's business, at such times as shall be designated by the party of the first part. Said party of the second part promises and agrees that the method of issuing and selling tickets, and collecting admissions and of tickets, and of arriving at the amount of the gross receipts of the said party of the second part hereunder, shall be such as are approved by the said party of the first part, which may prescribe the same, should it so elect. Said party of the second part also promises and agrees that he will keep full and true accounts of all the hereinmentioned receipts, and that said account shall be open to inspection by said party of the first part, through its officers or agents, at any time during business hours. * * * It is understood by and between the parties hereto that a corporation may be organized, to which corporation this contract may be assigned, and which corporation, upon accepting said agreement, will succeed to all the rights and privileges and assume all the obligations of the said party of the second part hereunder, but said party of the second part shall not be released from said obligations; and that this contract, nor any part thereof, shall not be otherwise assigned, transferred, sublet, or disposed of, and any other assignment, transfer, subletting, or disposition thereof shall be void." Early in May, 1893, the New England Clambake Company was incorporated, and acquired the clambake concession and contract from

Morris by assignment. For the purpose of raising money to carry on its business, it made two trust deeds upon its property then owned and afterwards to be acquired to appellant, as trustee, to secure \$100,000 of its bonds. This company carried on the business under the contract until August 8, 1893, when appellant took possession, under a provision in the trust deeds, of all the property and effects of the company, and retained possession until the next day, when the Equitable Trust Company was appointed receiver, and took possession, the said trustee consenting thereto, under a bill in chancery filed by certain judgment creditors of the clambake company. The order appointing said receiver provided, among other things, as follows: "It is ordered that the Equitable Trust Company be, and it is hereby, appointed receiver of all the property and assets of the New England Clambake Company, with the usual powers of receivers in such cases; and that said receiver proceed at once to take possession of all the property of said company, and reopen its said restaurant at the World's Fair, and continue, until further order of court, to conduct the business thereof as near as may be in the manner in which it has been heretofore conducted, and for that purpose to make such purchases and employ such help as may seem needful. It is further ordered that said Spencer do forthwith deliver up to said receiver the possession of said restaurant, and of all other property of said company held by him under said mortgages or trust deeds, without prejudice to any rights he may have by virtue of such possession, but all his rights shall be preserved to the same extent as if he had retained his said possession." The receiver carried on the business and retained possession of the property thus acquired until the close of the Exposition in the fall of 1893, and had so acquired the gross receipts from the business, \$57,974.95. Appellee claimed 25 per cent., or \$14,493.74, of these gross receipts, under said contract, and filed its intervening petition in the said cause in the circuit court wherein said receiver was appointed for an order directing the receiver to pay to it said amount. The order was made as prayed for, and has been affirmed on appeal to the appellate court, and appellant now prosecutes this appeal to reverse that order.

Willits, Case & Odell, for appellant. Walker & Eddy, for appellee.

CARTER, J. (after stating the facts). We agree with the appellate court in holding that the contract between appellee and Morris, and which he assigned to the New England Clambake Company, partook of the nature of a lease by which a certain space in the World's Fair Grounds, 50 by 250 feet, was set apart to the clambake company, to be used by it for a restaurant, under the conditions

specified, during the continuance of the Exposition, for the stipulated price or rental of 25 per cent. of the gross receipts. When appellant, as trustee under the two deeds of trust executed by the company, took possession of the property, effects, and premises on the 8th day of August, about one-half of the term had expired, and the company was then in arrears to appellee to the amount of \$2,763.85. The Equitable Trust Company, on August 9th, under a bill filed by judgment creditors of the clambake company, was appointed receiver, and by order of the court and consent of appellant took possession of the premises, and of all the property and effects then in the hands of appellant as trustee. It is not, of course, claimed that the receiver, by the mere fact of its appointment and taking possession, became bound to perform the contract; but the question is whether, after it had taken possession, and under the order of the court carried on the business as it had theretofore been carried on by the insolvent company, until the end of the term, and received all the benefits and profits of the contract from thenceforward, it should not also, in view of the circumstances shown in the record, be required to assume the burdens and pay the stipulated price for the part of the term it so carried on the business and received the receipts. The total gross receipts of the receiver were \$57,974.95, and the court ordered that one-fourth of this amount be paid to appellee, but refused to order the receiver to make good out of this fund the default of the insolvent company. It is difficult to see any just grounds on which to base objections to this order. But appellant insists that, if the receiver was bound to pay anything, it was bound to pay only a reasonable compensation for the privileges enjoyed, and was in no wise bound by the price stipulated in the contract; and insists that it is shown by the pleadings upon which the question arises that the contract price was unreasonable and excessive, and that the court erred in refusing to refer the cause to the master to take proof as to the reasonable value of the privileges the receiver enjoyed. This position cannot be sustained on this record. The contract with the appellant was the principal thing of value in the assets of the company, and its value consisted in the continuance of the use of the premises set apart and of the privileges conceded by the contract. This was recognized by the bill under which the receiver was appointed, and it seems to have been one of the purposes of the bill to continue the contract in force, and prevent the discontinuance of the business under it, and the closing up of the restaurant. It contained this allegation: "And your orators show that the creditors of the said company are pressing it for payment, and especially the World's Columbian Exposition is demanding immediate payment of certain sums claimed to be due it from the said clambake company, and is threatening to close up the restaurant and the

business of said clambake company for want of such payment; and your orators show that, if said restaurant is closed, the said clambake company has no substantial assets with which its indebtedness can be paid. If a receiver is appointed, and allowed to conduct and close out said business, and reduce its assets to money in due course, your orators believe that a large part, if not the whole, of the indebtedness of said company will be paid." And this prayer: "That a receiver may be appointed of the property, assets, and estate of said company, who shall take possession thereof, and convert the same into money, and distribute the same according to law; and in the meantime, for the purpose of more effectually realizing the proper returns from such assets, the said receiver may be authorized, by a further order of court, to conduct and manage the business of said New England Clambake Company, and keep said restaurant and clambake in operation; that an injunction may issue, pursuant to the practice in this court, enjoining all parties from interfering with said receiver or his possession," etc. And in the order of the court appointing the receiver, among other things, was the following: "And that said receiver proceed at once to take possession of all the property of said company, and reopen its said restaurant at the World's Fair, and to continue, until the further order of the court, to conduct the business thereof as near as may be in the manner in which it has been heretofore conducted, and for that purpose to make such purchases and employ such help as may seem needful." Appellant, who was then in possession as trustee under the deeds of trust, was not hostile to these proceedings, but consented thereto, and voluntarily delivered possession to the receiver, with a provision in the order that all his rights should be preserved to the same extent as if he had retained possession. It was not by any of the parties at that time suggested to the court that the contract price was excessive, and that the receiver ought not to continue the business on the same basis as it had been carried on by the insolvent; nor did the receiver, in any of his reports to the court, make any complaint of the contract. Nothing, however, was paid to appellant, although the receiver paid all the rest of the expenses of the receivership; and appellee, on September 14th, filed its intervening petition for an order directing the receiver to pay the percentage stipulated in the contract. The petition was answered by appellant on the 16th of October, and the allegation in the petition that the receiver was authorized by the court to conduct the business under the contract was then denied; and for the first time, so far as the record discloses, the position was taken that the percentage reserved in the contract was unreasonable and unfair to the other creditors; and it was not until after the close of the Exposition, and then by amendment to the answer, that it was alleged or claimed that

the contract price was in excess of the reasonable value. By this amendment it was alleged "that said percentage is greatly in excess of the fair and reasonable value of the premises and privileges used and enjoyed by said receiver for the conduct of said restaurant business." It would seem that from such a state of facts all parties must at the time have understood that the receiver, under the order of the court, had elected to perform the contract undertaken by the clam-bake company, and to realize and take for the benefit of its creditors all there was of value to them to be derived from such performance. The general principle contended for by appellant, that a receiver has, subject to the order of the court, the right to elect whether he will perform the contract or not, and is entitled to a reasonable time after taking possession in which to make such election, is not denied. It is so laid down by many authorities. *Quincy, M. & P. R. Co. v. Humphreys*, 145 U. S. 82, 12 Sup. Ct. 787; *St. Joseph & St. L. R. Co. v. Humphreys*, 145 U. S. 105, 12 Sup. Ct. 795; *Park v. Railroad Co.*, 57 Fed. 799; *New York, P. & O. R. Co. v. New York, L. E. & W. R. Co.*, 58 Fed. 268; *United States Trust Co. v. Wabash W. Ry. Co.*, 150 U. S. 287, 14 Sup. Ct. 86; *Central Trust Co. v. Wabash, St. L. & P. Ry. Co.*, 34 Fed. 259. See, also, *Express Co. v. Railroad Co.*, 99 U. S. 191; *Ellis v. Railroad Co.*, 107 Mass. 1; *In re Metz*, 6 Ben. 571, Fed. Cas. No. 9,509; *In re Hamburger*, 12 N. B. R. 277, Fed. Cas. No. 5,975; *In re Lynch*, 7 Ben. 26, Fed. Cas. No. 8,634. But we have been referred to no cases holding that, where the lease or contract is of itself a thing of value to the creditors, and the receiver, under the order of the court, takes possession of the premises, and conducts the business which the insolvent had been unable to continue, and, without any act of disaffirmance or notice that he would not be bound by the contract, completes the term, and receives profits, and all the benefits, from such possession and continuance of the business, the receiver may then repudiate the contract, and pay only on the basis of a quantum meruit.

It is, however, contended by appellant that the receiver was not his receiver, or one appointed on his application, and that the lessor must himself be the actor in such cases, and must put the receiver to his election, and that, unless he does so, the receiver is bound to pay only the reasonable value; and in support of this proposition cites some of the cases above mentioned. We shall not stop here to analyze these cases, but an examination will show that they do not sustain the proposition insisted on by appellant to the extent that in all cases, or under facts similar to those in the case at bar, the receiver will not be bound by the terms of the lease unless put to his election by the lessor. As was said by this court in *Smith v. Goodman*, 149 Ill. 81, 36 N. E. 621, in reference to

an assignee under the act concerning voluntary assignments: "The assignee is entitled to a reasonable time in which to ascertain whether the leasehold estate can be made available for the benefit of creditors or not. * * * There is not entire uniformity of decisions as to when the assignee will be held to have accepted the lease, and bound himself to perform its covenants, and no general rule can be laid down as to the effect of specific acts of the assignee in determining whether there has been an election to take the leasehold as a part of the assigned property. An examination of the adjudged cases is valuable only as fixing the general principle by which the case is to be governed, which would seem to be that the assignee will not be held to have accepted the lease unless it be shown that he has done so expressly, or, by unequivocal acts inconsistent with the right of entry by the landlord, has indicated an election to appropriate the leasehold estate." No reason is perceived why the receiver may not either expressly elect, or by unequivocal acts, inconsistent with the right of entry by the landlord, indicating an election to appropriate the leasehold estate, be held to have done so impliedly, without any act on the part of the landlord whatever putting the court or receiver to an election. Under the facts shown by this record, it would be inequitable to allow the receiver, or appellant for the receiver, to repudiate the contract; and the courts below were correct in holding that the receiver must be held to have elected to adopt the contract.

In view of the above-recited facts we do not deem it important whether appellee had a right of re-entry or not for nonpayment of the percentages reserved in the contract, or whether or not it had the right to declare a forfeiture; for, if the receiver, by the consent of the creditors, elected to take the place of the insolvent, and to perform the contract for the remainder of the term, and did so, receiving the benefits therefrom, a court of equity would not permit its said receiver, at the end of the term, when it would be too late for the other party to take any action it might think proper for the protection of its own interests, to say that it had not assumed the obligation to pay at the contract price. The judgment of the appellate court is affirmed. Judgment affirmed.

(163 Ill. 518)

SHEFFER v. WILLOUGHBY et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

NEGLECTANCE OF RESTAURANT KEEPER—BURDEN OF PROOF.

1. In an action against a restaurant keeper for damages for negligently furnishing plaintiff with unwholesome, poisonous food, whereby plaintiff became sick, etc., the plaintiff testified that she was served with an oyster stew, and that, after eating a portion thereof, she became ill, and so continued for several weeks; that her symptoms were those of copper poisoning; and that the oyster stew was cooked in a copper

kettle. *Held*, that the evidence was insufficient to throw the burden on defendant to relieve himself of the imputation of negligence.

2. The keeper of a restaurant is not subject to the rule of law making innkeepers *prima facie* liable for injuries to their guests. 61 Ill. App. 263, affirmed.

Appeal from appellate court, First district.

Action by Maggie Sheffer against Charles L. Willoughby and David K. Hill to recover damages for injuries resulting from eating poisonous food in defendants' restaurant. A judgment for defendants having been affirmed by the appellate court (61 Ill. App. 263), plaintiff appeals. Affirmed.

This was an action on the case brought by appellant against appellees to recover damages for injuries resulting to the appellant from eating an oyster stew served by them in their restaurant in Chicago on the 5th day of February, 1891. It was alleged in the declaration that the defendants were the proprietors of a public restaurant known as the "Boston Oyster House," furnishing to patrons, among other things, oyster stews; that on the 5th of February, 1891, they received the plaintiff as a guest and patron, and furnished to her a certain dish of food, known as an "oyster stew," for a certain charge paid by plaintiff, and it then became the duty of the defendants to carefully prepare the stew, of healthy and wholesome material, yet the defendants, disregarding their duty in this behalf, did carelessly, negligently, and unskillfully, and through the carelessness, negligence, and unskillfulness and default of the defendants and their servants, and for want of due care and attention to their duty, prepare and deliver to the plaintiff, to be by her eaten, an oyster stew that was not good or wholesome, but deleterious, dangerous, and poisonous; that the plaintiff, though using all due care, and without fault, then and there ate the stew, and immediately thereafter, and as the immediate and direct consequence thereof, and of said negligence and carelessness of the defendants, became and was poisoned and became sick, and was sick, and suffered terrible bodily injury, and endured great physical and mental pain, and became permanently injured, and was obliged to and did lay out and expend large sums of money in endeavoring to get healed, and claiming damages. It appears from the evidence introduced by plaintiff that she on the morning of February 5, 1895, being then in good health, accompanied by her friend Mrs. Thompson, left her home in Chicago, and spent the forenoon in shopping, and about 12 o'clock entered the restaurant of the defendants. Each ordered a stew; Mrs. Thompson eating hers; the plaintiff eating, according to her testimony, only the broth of her stew. While eating the oysters, Mrs. Thompson observed a peculiar taste in her mouth,—as she described it, "a brassy taste." This was observed soon after beginning to eat,

and again about the time of finishing. Some oysters being left in the plaintiff's dish, the ladies observed that they were green, and called the attention of the waiter to the fact. He insisted, however, that the oysters were all right. After finishing their meal, they paid for the oysters and left the restaurant. As soon as they got on the steps, Mrs. Thompson began to feel sick, and both went across the street to a physician's office. Before leaving the restaurant they wrapped two of the oysters in a piece of paper, and showed them to the doctor. At the doctor's office plaintiff was taken sick; was in great agony and pain; had burning sensation and hot feeling; was sick and faint. An emetic was given to each, and they remained in the office some time; Mrs. Thompson becoming materially better; Mrs. Sheffer improving so that they were able to start home. On the street car, going home, plaintiff was taken worse. She was bloated, and her clothes had to be opened. She was removed to the platform of the car, and then to a drug store. After remaining in the drug store for some time, she was removed to her home, at State and Thirty-Seventh streets, where, from her sickness, she was confined to her bed for some three weeks. The evidence tends to show that she has never recovered from her sickness. It also appeared that from eight to nine hundred oyster stews were served in the restaurant during the noon hour. At the close of plaintiff's evidence, the court, at the request of the defendants, instructed the jury to return a verdict in favor of the defendants, and it is claimed that the court erred in giving this instruction.

Edwin F. Abbott, for appellant. Duncan & Gilbert, for appellees.

CRAIG, J. (after stating the facts). Whether the plaintiff became sick from eating the oyster stew at the defendants' restaurant was a question for the jury, and while the evidence produced by plaintiff that eight or nine hundred persons were served with oyster stews at the same time and place, none of whom became sick, would seem to be a strong circumstance tending to establish that the plaintiff's sickness was attributable to other causes, yet we are inclined to the opinion that, if plaintiff had made out her case in other respects, it would have been the duty of the court to submit this question to the jury. It will be observed that the plaintiff, in her declaration, averred that the defendants, as restaurant keepers, served appellant with oysters, and "carelessly, negligently, and unskillfully, and through carelessness," did "deliver to the plaintiff, to be by her eaten, an oyster stew that was not good or wholesome, but deleterious, dangerous, and poisonous," etc., whereby appellant became sick. This was, no doubt, regarded by the plaintiff as a material averment; and it was a material averment, one upon which

the right of recovery of appellant rested; and, unless the evidence fairly tended to establish negligence on the part of the defendants, plaintiff could not recover. But it is said in the argument that innkeepers are prima facie liable for losses which happen to the goods of their guests, and, on the same principle, restaurant keepers should be prima facie liable for injury resulting from unwholesome food furnished by them. The law is well settled that the keepers of public inns are required to safely keep the property of their guests, and in case such property is lost the innkeeper can only relieve himself from liability by proving that the loss occurred without any fault on his part, or that the loss occurred through the fault of his guest; and the burden of proof to exonerate the innkeeper is upon himself, for the reason that the law, in the first instance, will attribute the loss to his default. *Johnson v. Richardson*, 17 Ill. 304. As respects the goods of a guest, which he takes with him when he stops at an inn, the innkeeper is practically an insurer; and, where an action is brought to recover for goods lost, the guest is only required to show the existence of the relation of innkeeper and guest, and the loss, to authorize a recovery. But as to food served at a restaurant, such as oysters, ice cream, and the like, we are not aware that a similar rule establishing liability ever existed. There is no similarity between the two cases, and the principle that governs one does not apply to the other. If a person keeping a public restaurant fails to exercise ordinary care in furnishing food to his patrons, and damage results, he would be liable, if his business should be conducted in a careless or negligent manner, and through such negligence a patron is injured, the proprietor of the restaurant should be held liable. But, where an action is brought to recover damages, the burden is upon the person bringing the action to establish carelessness or negligence.

Appellant claims that, having proven that she ate the oyster broth at the defendants' restaurant, and in consequence became sick, her case is made out, or at least the burden of proof is shifted on the defendants. If this rule was adopted, the plaintiff would be relieved from proving the most important element of her declaration, the negligence of defendants, which is really the foundation of the action. This would, in effect, make the restaurant keeper an insurer. Such a rule is not correct in principle, nor has it been sustained, so far as we are advised, by any respectable authority. In *Wiedeman v. Keller*, 58 Ill. App. 382,—a case cited by appellant,—where the plaintiff brought an action against a retail dealer in meats to recover damages resulting from eating pork containing trichinæ, sold to him by the dealer. In deciding the case the court held that when a vendor of provisions has no notice of, and cannot, by the exercise of reasonable

or ordinary care, ascertain, the unwholesomeness or unsound condition, there is no implied warranty of the soundness of provisions not prepared or manufactured by such vendor. Here there is no pretense that the defendant manufactured either the oysters or the milk, the two ingredients of the oyster stew, and, under the rule laid down in the case cited, there could be no liability. Appellant has cited *Van Bracklin v. Fonda*, 12 Johns. 467, as authority. But that was an action brought against a person for selling a quarter of beef as good and sound, when it was bad and unwholesome; but it was proven that the vendor knew when he sold the beef that it was diseased, and, while the rule laid down in that case is proper, under the facts, it has no application to this case. Here the plaintiff called but one witness to prove negligence or carelessness on the part of the defendants, and, upon an examination of the evidence of the witness, it will be found that the evidence, when fairly considered, does not tend to show that the defendants were guilty of any negligence or carelessness.

As the plaintiff failed to introduce any evidence tending to prove the most material averment of her declaration, the instruction of the court to find for the defendants was correct. The judgment of the appellate court will be affirmed. Affirmed.

(163 Ill. 256)

TRADERS' INS. CO. et al. v. CATLIN.

(Supreme Court of Illinois. Nov. 9, 1896.)

INSURANCE—CONDITIONS OF POLICY—INCREASE OF RISK—EFFECT OF CHANGES IN PROPERTY—EVIDENCE.

1. It is the settled law of the state that, under provisions in an insurance policy that it shall be void in case of a change made in the property increasing the hazard, if such changes are made but the policy has not been declared forfeited, and the changed conditions cease to exist, leaving the risk no more hazardous than before, the policy again becomes in force. 59 Ill. App. 162, affirmed.

2. Whether changes made in insured property in devoting it to a different and more hazardous use, which, however, had been discontinued, affected the risk at a subsequent time when a loss occurred, is a question of fact, on which the testimony of expert witnesses is admissible; and the effect of the changed condition on the rate of premium which would be charged by underwriters generally for the insurance of the property may be shown as bearing on the issue, though it is not conclusive. 59 Ill. App. 162, reversed.

Appeal from appellate court, Second district.

Actions by Thomas D. Catlin against the Traders' Insurance Company and the National Fire Insurance Company to recover on insurance policies. Judgments for plaintiff were affirmed by the appellate court (59 Ill. App. 162), and defendants appeal. Reversed.

This record is brought to this court seeking to reverse the judgment of the appellate court of the Second district, in which the judgment of the circuit court of Will county was

affirmed in two cases wherein a judgment was rendered in favor of appellee against the appellants severally for \$3,014.08 each. In January, 1893, appellees requested each of the appellants to issue policy of insurance upon certain property described as follows: "\$160 on the frame granary, with shingle roof, situated about one hundred and fifty feet from above-described carriage house [referring to a building which was not destroyed, and which is not in controversy here]; \$160 on boiler and engine, machinery, shafting, and belting and connections, and \$2,600 on the frame hay and stock barn, with gravel roof, including basement and foundations, situated one hundred and forty feet from above-described granary; all situated on stock farm on section 16, township 33 N., range 14 east of the third principal meridian, in Will county, Illinois. Permission granted to make repairs and alterations." Each of these companies issued policies as requested, without inspection. After these policies were issued, a part of the barn was converted into a canning factory, with a capacity of 2,500 cans a day, where gasoline was used, and much machinery was placed therein. Between the granary and the hay and stock barn, and about 72 feet from each, was placed in the ground, about 5 feet below the surface, an iron tank, with a capacity for five barrels of gasoline. The machinery of the canning factory was connected with the gasoline tank by a pipe; and by means of a fan, operated by the machinery in the granary, air was forced through one pipe into the tank, thereby generating a gas which passed through another pipe to the connecting machinery into six several jets, to be ignited for soldering purposes when canning corn. The canning machinery had been operated some 10 days canning corn, and then work was suspended, and had been for 5 days, when the building and its contents were consumed by fire, on September 14, 1893. The policy issued by the Traders' Insurance Company contains this provision: "If the building described * * * shall be appropriated to any other purpose than herein specified, * * * or the risk increased * * * by any means within the control or knowledge of the assured, or if petroleum or any of its products * * * are under any circumstances * * * in the building * * * insured, * * * this policy shall, without the written consent of this company, and indorsed hereon, become absolutely void. * * * Generating or evaporating within the building, or within one hundred feet thereof, of any substance for burning gas, or the use of gasoline for lighting or fuel, is prohibited, unless permitted in writing hereon." The policy of the National Fire Insurance Company provides, among other things: "If the assured shall fail to make known to the company at once any fact or circumstance which rendered the risk more hazardous than at the time of insuring, or if the hazard be increased by any means

within the control of the assured, or if gasoline or petroleum or any of its products are deposited, used, or kept, or burning gas is made, generated, or carburetted within the building, or contiguous thereto, then, and in every such case, this policy shall be void, unless consent is indorsed by the company thereon." When the property was insured, no flame or jet of any kind was used in the hay and stock barn. The fire which destroyed the building commenced about 9 o'clock in the evening, at a point in the barn about 100 feet from the canning machinery. Its origin is unknown. The buildings insured as a hay and stock barn were at the customary rates of 1¼ per cent. The rate for canning factories was 2½ to 3 per cent. for one year. With the Traders' Insurance Company canneries are prohibited risks. The assured had notice of the changed conditions. On the trial, eight witnesses who had experience in the insurance business, the inspection, examination, and classification of risks, investigating the cause of fires, etc., testified the changed use of a part of the hay and stock barn increased the hazard; that, while the increased hazard was great when the machinery was in operation, it was, if possible, even greater when the machinery was idle. The testimony was heard subject to objection,—the trial being before a judge without a jury,—but was held incompetent and excluded on the final finding by the judge. Certain propositions were asked by appellants to be held as law, which were refused. The questions presented on this record and assigned as error are as to the exclusion of the expert evidence, the refusal to hold as law propositions asked, and in holding the policies were in force at the time of the fire.

Darrow, Thomas & Thompson and L. O. Collins, for appellants. D. B. Snow, for appellee.

PHILLIPS, J. (after stating the facts). The question of primary importance on this record is, were these policies in force at the time the property was destroyed by fire. Insurance Co. v. Wetmore, 32 Ill. 221, is a case where the conditions in the policy provided that if, after insurance, the insured buildings should be occupied in any way so as to render the risk more hazardous than at the time of insuring, or if the risk be increased by any means whatever within the control of the assured, such insurance should be void, so long as the premises shall be so appropriated, applied, or used. In the application for insurance in that case the premises are described as a dwelling house with some boarders. The evidence showed that for a period some time previous to the fire—but not when the fire happened—a room attached to the main building had been used as a stable for a horse, and the main building for a saloon. At the time this insured property was destroyed it was vacant. On this state of facts it was urged

the use of the property as a stable increased the risk, etc. It was held: "Stables are special hazards, for the insuring of which a higher premium is demanded than for a dwelling or boarding house, but the proof shows that the fire did not occur whilst the small room was so used. The premises had been vacant some months before the fire, and there is no proof going to show that the use of the room increased the risk, or contributed in the remotest degree to the loss. Had the fire occurred whilst it was used as a stable, then doubtless the policy would have been avoided. The meaning of the condition is, If the house or premises shall be appropriated to any prohibited use, then so long as it is so appropriated the policy shall cease to bind the insurers." It was in that case further held: "The import of this language,—the contract in the policy,—it seems to us, is most clear, not that this policy shall be absolutely void to all intents and purposes, if the premises are misappropriated, but only while they are so improperly used the insurance shall have no effect. * * * By the express language of the condition * * * the policy was to be void and of no effect only as long as an improper use of the premises shall exist. When it ceases to exist, then the policy is in full force." This is a leading case in this state, and the court recognizes that it is not in accord with the decisions of New York, yet declares the rule to be as stated. This was followed by *Schmidt v. Insurance Co.*, 41 Ill. 295, where the condition in the policy was: "No fire in or about said building, except under kettle securely set in masonry (used for heating water), and made perfectly secure against accidents." With this condition the contention of the company was that it was a warranty that there shall be no fire except under the kettle, and a breach would avoid the policy. It was held the words were used and should be construed with reference to these conditions of the property at the time of the insurance. A further condition of the policy was: "If, after insurance is effected, either by the original policy or by the renewal thereof, the risk be increased by any means, or occupied in any way as to render the risk more hazardous than at the time of insuring, such insurance shall be void and of none effect." The evidence showed the building insured in that case was destroyed by fire, and at the time there were two stoves, one on the first, the other on the second, floor, in which fire had been after the insurance, but none in that on the first floor for eight days previous to the destruction of the building. In the stove on the second floor a fire was kindled about 6 a. m., and extinguished about 8 or half past 8 p. m., and about 11 p. m. the next night the destruction of the insured property occurred. The question was whether there was increased risk because of these stoves at the time of the fire, and it was held, following the *Wetmore Case*: "The true construction of a clause like this was that the

policy became inoperative only while the increased risk was in existence, and when it terminated the liability of the company would recommence." This case was followed by *Insurance Co. v. McDowell*, 50 Ill. 120, where it was held: "It is likewise insisted that as to a portion of these policies, appellees, by making repairs on the property after the insurance was effected, have violated one of the conditions which prohibited them from doing any act which should increase the hazard. In the case of *Insurance Co. v. Wetmore*, 32 Ill. 245, it was held that an increase of the hazard only suspended the policy during the continuance of the increased hazard, and when it terminated the liability of the company commenced. This rule is recognized and applied in the case of *Schmidt v. Insurance Co.*, 41 Ill. 295. If the hazard was increased by making these repairs, it had fully terminated, and the liability had recommenced long before the fire occurred." In the case of *Insurance Co. v. Garland*, 108 Ill. 220, the policy contained this provision: "If the assured shall allow the building herein insured to become vacant and unoccupied, and so remain, without the consent of the company, the policy shall become void." For a long time before the fire which destroyed the insured building it had been vacant, and was at the time of its destruction, and it was held there could be no recovery; but it was further said: "It is well settled, if the company should not exercise this power [to declare the policy forfeited] while the accused is in default, and the premises should again become occupied, its right to do so would cease, and its liability on the policy would again attach." This principle is sustained by *Insurance Co. v. Klewer*, 129 Ill. 599, 22 N. E. 489. We are asked to overrule these decisions as not being in line with the current of authority. These decisions, while in conflict with the courts of New York and some other states, have so long been the rule in this state that we are not disposed to qualify or in any manner depart from the rule announced therein. That rule is, though there be a change of risk by reason of an increased hazard which would avoid the policy if declared forfeited by the company, yet, where the company has not declared the policy forfeited, and the cause for the increased hazard no longer exists, and there is no increased hazard by reason of former changed conditions, then, the policy being for insurance for a certain period, the contract of insurance will be construed, and the fact determined whether there was increased risk at the time of the fire which in any manner was conducive to the loss. If a loss occurs during the increased hazard, it would defeat a recovery. If a former increase of hazard has ceased to exist, and that increase of hazard at that former time in no way has affected the risk when the loss occurs, no reason exists why a forfeiture should result from a cause which occasions no damage. The insurance companies insert clauses and condi-

tions for their own protection, and dictate their terms and conditions, and on every principle of construction such clauses are construed most strongly against those who dictate and insert them. No violence is done the language used by the construction we have adopted, and no injustice is done either party to the contract.

It never has been held by this court that, if the change of condition has effected results which continue, and cause an increase of hazard to exist at the time the property is destroyed, the removal of the cause of the increase of hazard would prevent the company from showing the result and effect of the former act changing conditions. In the *Wetmore Case*, it was held: "Even if it was an unauthorized use of the premises, it had ceased long before the fire. But the question of increase of risk by such use of the premises was submitted to the jury, and they have by their findings ignored the claim and pretenses of the appellants, and, believing they have found correctly on this point, we are not disposed to disturb their verdict." In the *Schmidt Case* it was held: "The point for the consideration of the jury was, not whether an increase in the number of fires in a building does or does not ordinarily increase the risk, but whether, in the case then before the court, the risk to the building at the time it was destroyed at 11 o'clock at night was not increased by the two stoves, in one of which there had been no fire for eight days, and in the other none after eight and a half o'clock of the preceding morning." Both these cases recognize the right of the company to show that the act of the assured increased the hazard at the time of the loss. If the hazard was not increased at the time of the loss, it is fatuous to say that long before some act was done that increased the risk then, but did not affect the risk at the time of the loss. Whether there was any increase in the hazard which affected the risk at the time of the loss was a question of fact. If, as a matter of fact, there was no increase of hazard, the policy was in force, and of binding effect, and the plaintiff had a right to recover thereon. This construction and rule, to which we adhere, is more consonant with sound reason than is the rule adopted by those courts with which we are not in accord. That a recovery on a policy on a building in the center of the burned district in Chicago's great fire should be defeated because a gallon of gasoline was therein kept and used a year before that time does not commend itself as a reasonable rule. If the policy was rendered void by that act, that would have resulted, even though it was in no way conducive to the loss.

The next question for consideration is, was the evidence of the witnesses offered as expert testimony admissible? The rule is stated (*Rice*, Ev. par. 194): "The governing rule as to the admission of expert testimony decided from the cases permitting the opinion

of witnesses is that the subject must be one of science or skill, or one of which observation and experience have given the opportunity and means of knowledge which exists in reason, rather than in descriptive facts, and therefore cannot be intelligently communicated to others by one not familiar with the subject, so as to possess them with a full understanding of it." In *Cornish v. Insurance Co.*, 74 N. Y. 295, it was held: "There can be no doubt that the judge was right in treating the question of increase of risk as one of fact. The authorities are not so harmonious as to whether it is a question to be determined by the testimony of experts, though the weight of authority is in favor of the admission of such testimony to guide the jury as to the materiality of circumstances affecting the risks, especially when the determination of the question calls for a degree of knowledge not likely to be possessed by an ordinary jury." In *Insurance Co. v. Rowland*, 66 Md. 236, 7 Atl. 261, a case where the rates of insurance charged upon burr flouring mills and roller mills, respectively, are held admissible in evidence, to be considered in connection with other facts in determining the question whether the risk was increased by changing the machinery of a mill from a burr to a roller process, the court said: "We do not mean to say that the rates of insurance are to be considered a decisive test as to the risk, but it is evidence to go to the jury, to be considered in connection with other facts, in determining the question of increase of risks." *Luce v. Insurance Co.*, 105 Mass. 297, is a case which further exemplifies the rule already stated in *Rice on Evidence*, that proof by experts in the business of insurance is admissible; that it is the usage of insurance companies generally to charge such premiums. The court said: "But whether such a change in the occupation is material to the risk might also be tested by the question whether underwriters generally would charge a higher premium. That is discussed in *Merriam v. Insurance Co.*, 21 Pick. 162. That being a matter within the peculiar knowledge of persons versed in the business of insurance, testimony of such persons on that point is admissible. * * * But the testimony of witnesses having a requisite knowledge and experience that it was the custom of insurance companies generally to charge extra premiums upon dwelling houses understood or known to be unoccupied is competent." *Litch v. Insurance Co.*, 66 N. Y. 100, was an action upon marine insurance. The testimony of underwriters as experts was held admissible upon the question of materiality of circumstances affecting the risk, and, while evidence of this kind is necessary for the reason that the fact is not sufficiently obvious to enable the court to decide it without such aid, the testimony is to be treated the same as that in reference to any other fact; and, if there is no conflict, the fact of materiality

or immateriality must be held as the witness testified. The court said: "It is well settled that the testimony of experts, and especially of underwriters as such, is admissible upon the question of materiality of circumstances affecting the risk. This was so decided in *M'LANAHAN v. Insurance Co.*, 1 Pet. 170; 3 Kent, Comm. 284. When evidence of this character is necessary for the reason that the fact is not sufficiently obvious to enable the court to decide it without aid, the testimony is to be treated as the testimony of credible witnesses upon any other fact; and, if there is no conflict, the fact of materiality or immateriality must be held as all the witnesses testified. If there is difference of opinion, it then becomes a question of fact for the jury." This principle is sustained in *Insurance Co. v. Steiger*, 109 Ill. 254; *Schmidt v. Insurance Co.*, supra. The rule deducible from these opinions is that, where a policy of fire insurance provided against an increase of risk, expert testimony is admissible where the question of materiality of circumstances as affecting the risk arises, especially where its determination calls for a degree of knowledge not likely to be possessed by an ordinary jury. We hold the expert testimony should have been admitted, and it was error in the trial court to refuse to consider the same.

What we have here said sufficiently disposes of the question on the holdings. For error in excluding and refusing to consider the expert testimony the judgments of the appellate court of the Second district and of the circuit court of Will county are each reversed, and the cause remanded. Reversed and remanded.

CARTWRIGHT, J., took no part.

(163 Ill. 149)

LAWRENCE et al. v. SMITH et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

WILLS—DEVISE IN TRUST—RULE AS TO PERPETUITIES—SPECIFIC LEGACIES—DISINHERITANCE.

1. Testator bequeathed his property in trust to his executors to pay to his daughter an annuity of \$600, and on her death to her children an annuity of \$300 each until they arrived at the age of 25 years, at which time there should be paid to each child, as he arrived at that age, \$10,000. If, at the death of the daughter, any of her children were of the age of 25 years, the said sum should be paid in lieu of the annuity. At the termination of the trust as to all the beneficiaries and remainder-men, the property should be divided among the grandchildren then living. *Held* that, as the trust might, in case children were born to the daughter after testator's death, be extended beyond a life in being and 21 years thereafter, it was void, as contrary to the rule against perpetuities.

2. The will cannot, in the absence of anything to show such intention, be construed as excluding after-born grandchildren, so as to avoid the rule against perpetuities.

3. The trusts being connected, so as to constitute one scheme, cannot be held valid as to the annuities provided for the benefit of the

daughter and grandchildren living at the time of testator's death.

4. Where a will, after devising certain specific legacies, bequeathed the balance of the property in trust, and is declared void, as to the trust, in that it violates the rule as to perpetuities, the specific legacies, not being dependent on the trust, will not be affected by its invalidity.

5. Testator bequeathed the bulk of his estate in trust, which, however, was declared void, as violating the rule against perpetuities. By a clause in the will he disinherited one of his children. *Held*, that such disinheritance could not affect the right of the child to share in that portion of the estate as to which, by reason of the invalidity of the trust, the testator died intestate.

Error to circuit court, Cook county; T. G. Winds, Judge.

Bill by Amina E. Smith and others against Theodore F. Lawrence and another, as executors, to set aside the last will of Alonzo C. Wood. From a decree for complainants, the defendants appeal. Affirmed in part, and reversed in part.

Appellees, the children and heirs at law of Alonzo C. Wood, deceased, filed their bill in equity in the circuit court of Cook county, to set aside, as null and void, the last will of said Wood, on the ground that, in all its substantial provisions, it violated the rule against perpetuities. The circuit court, upon a hearing upon bill, cross bill, answers, and replications, granted the prayer of the bill, and entered a decree declaring the will void, except as to the sixth and seventh clauses, and the provision nominating executors. The trustees appointed by the will, who were the same persons named as executors, took this appeal. The will is as follows:

"In the name of God, amen. I, Alonzo C. Wood, of the city of Chicago, county of Cook, and state of Illinois, being of sound mind and memory, do make, publish, and declare this to be my last will and testament, in the words and figures following, to wit: My father and mother are both dead. I am a widower, my last wife, Louisa H. Wood, having died some years ago. I was born in Canada, but have been a resident of Chicago since 1834.

"First. I make, constitute, and appoint Theodore F. Lawrence and Samuel Baxter Foster, both of the city of Chicago, the executors of this, my last will and testament, and trustees of my entire estate, of whatever kind, and the survivor of them, or their appointed successors, to have and to hold the same, upon the trusts, and subject to the conditions and limitations, hereinafter mentioned.

"Second. I hereby waive, as I have a right to do, under the statute in such case made and provided, the giving of any bonds or security by my said executors and trustees. I trust the management of my estate to my executors and trustees, knowing that, as they have been true friends of mine in life, so they will be when I am dead, and I know that my wishes will be fully carried out. It is my wish that my executors and trustees shall only be held accountable for whatever they receive, and

not be charged with any loss, unless it happens by their careless neglect or faulty inattention. And I will direct that they shall be paid, for the execution of this trust, reasonable fees and compensation, together with all costs and expenses which are incurred in carrying out the provisions of this will.

"Third. I direct that, in case of the death, inability, or refusal to act of both of the foregoing executors and trustees, that the chief justice of the superior court of Cook county shall appoint two executors and trustees, as soon as convenient, after said death, inability, or refusal to act of both of said executors and trustees, which appointment shall be made in writing, and be approved in writing by the judge of the probate court of Cook county, Illinois.

"Fourth. I give and bequeath unto my said executors and trustees all of my property and estate, of whatever name or nature, real, personal, or mixed, and wherever situated, in trust, nevertheless, that is to say, upon the following trusts and conditions, to wit: To sell and dispose of all of my said property and estate, and convert the same into cash, at such time or times and upon such terms and conditions as to my said executors and trustees shall seem meet, and to make, execute, and deliver all deeds of conveyance and other kinds of instruments in writing as may be deemed necessary and proper for that purpose; to invest and reinvest all or any of my property aforesaid; and to do all things in and about the management of my estate in the same manner as I might do if living, and as shall seem expedient and just to them, to enable them to carry out the purposes and intent of this my last will and testament.

"Fifth. I direct my said executors and trustees to pay all my just debts and funeral expenses within a reasonable time after my decease.

"Sixth. I ask that I may be buried by the side of Amelia Wood in Graceland Cemetery, Chicago, in the lot owned by me.

"Seventh. The books, pictures, furniture, clothing, and jewelry belonging to me I give and bequeath to my daughters, Amina Smith, Julia De Haven Jones, and Harriet Furber, to be divided by themselves.

"Eighth. I hereby authorize and empower my said trustees to set apart so much of my estate, or invest such a sum of money, as they may in their judgment think necessary and proper, and to pay from the income thereof all costs and charges and expenses arising in the course of the execution and administration of this will and its trusts.

"Ninth. I direct my said trustees to pay, from the principal trust estate herein created, as soon after my decease as convenient, the sum of \$500 in cash to my brother Samuel Wood, now living in the state of Kansas.

"Tenth. I direct my said trustees to pay, from the principal trust estate herein created, as soon after my decease as convenient, the sum of \$500 in cash to my sister-in-law

Mrs. Franklin Wood, widow of my brother Franklin Wood. She is now a resident of Granby, province of Quebec, Canada.

"Eleventh. I direct my said trustees to pay, from the principal trust estate herein created, as soon after my decease as convenient, the sum of \$500 in cash to my sister-in-law Mrs. Philip Wood, widow of my brother Philip Wood. She is now a resident of Knowlton, province of Quebec, in Canada.

"Twelfth. I direct my said trustees to pay, from the income of the principal trust estate herein created, an annuity of \$600 to my daughter Amina E. Smith, wife of Joshua Smith, Chicago, during her natural life. In the event of the death of my said daughter, I direct my said trustees to discontinue the annuity of \$600 given her above, and in that case, or, in the event of the death of my said daughter before my decease, to pay to each of the children of my said daughter Amina E. Smith then living at the time of her death the sum of \$300 each year, until they arrive at the age of twenty-five years, at which time I direct my said trustees, from the principal of the trust estate herein created, to pay over and deliver to each of the said children of my said daughter, when he or she shall arrive at the age of twenty-five years, the sum of \$10,000, discharged of all trust. If, at the time of the death of my said daughter, either or any of her said children are of the age of twenty-five years, then, in that event, the said \$10,000 shall be paid by the said trustees to each of the said children so being of the age of twenty-five years, instead of the annuity of \$300 above mentioned.

"Thirteenth. I direct my said trustees to pay, from the income of the principal of the trust estate herein created, an annuity of \$600 to my daughter M. Jones, widow of Charles De Haven Jones, during her natural life. In the event of the death of my said daughter, I direct my said trustees to discontinue the annuity of \$600 given her above, and in that case, or in that event of the death of my daughter aforesaid before my decease, to pay to each of her children then living at the time of her death the sum of \$300 each year until they arrive at the age of twenty-five years, at which time I direct my said trustees, from the principal of the trust estate herein created, to pay over and deliver to each of the said children, when they arrive at the age of twenty-five years of age, the sum of \$10,000, discharged of all trusts. If, at the time of the death of my said daughter, either or any of her said children are of the age of twenty-five years, then, in that event, the said \$10,000 shall be paid by the said trustees to each of the said children so being of the age of twenty-five years, instead of the annuity aforesaid.

"Fourteenth. I direct my said trustees to pay, from the income of the principal trust estate herein created, an annuity of \$600 to my daughter Harriet C. Furber, wife of WU-

Ham Furber, of Chicago, during her natural life. In event of the death of my said daughter, I direct my said trustees to discontinue the annuity of \$600 given to her above, and to pay to each of the children of my said daughter then living at the time of her death, the sum of \$300 each year until they arrive at the age of twenty-five years, at which time I direct my said trustees, from the principal of the trust estate herein created, to pay over and deliver to each of the said children of my said daughter, when he or she shall arrive at the age of twenty-five years, the sum of \$10,000, discharged of all trust. If, at the time of the death of my said daughter, either or any of her said children are of the age of twenty-five years, then, in that event, the said \$10,000 shall be paid by the said trustees to each of the said children so living of the age of twenty-five years, instead of the annuity of \$300 above mentioned.

"Fifteenth. I direct my said trustees to pay, from the income of the principal of the trust estate herein created, an annuity of \$600 to my son Philip S. Wood during his natural life.

"Sixteenth. I direct my said trustees to pay, from the income of the principal of the trust estate herein created, an annuity of \$600 to my son Edward C. Wood during his natural life.

"Seventeenth. I direct my said trustees to pay, from the income of the principal of the trust estate herein created, an annuity of \$300 to my daughter Fannie Wood, also sometimes known as and called Fannie Starrin, who now resides in Troy, New York state, during her natural life.

"Eighteenth. I direct my said trustees to pay over and deliver the entire principal sum remaining after all the above sums are paid, with its accumulations, if any, discharged of all trusts, to my grandchildren then living, to be equally divided among them, provided the trust created by this will has terminated to all the before-named beneficiaries and remainder-men. If the trust has not so terminated, then I direct my said trustees to hold said property until such termination, when I then direct them to divide the same, discharged from all trusts, among said grandchildren, as above directed.

"Nineteenth. I have another son, by the name of Fred L. Wood, who is now confined in a penitentiary on a life sentence for the crime of murder. During his boyhood and early manhood I had given him many more advantages than I had given any of my other children; but all my love and care for him only seemed to make him more reckless and wicked. For many years previous to his arrest and conviction for murder, he had repeatedly threatened me that he would take my life, and that of some of his brothers and sisters; and it is my express wish and desire that he shall have nothing whatever from my estate, and I make this state-

ment, in this, my last will and testament, that there may be no question as to whether or not it was my intention to leave my said son anything.

"Twentieth. I hereby revoke any and all wills heretofore made by me.

"In witness whereof, I have hereunto set my hand and subscribed my name to this, my last will and testament, containing of six sheets of paper, written on both sides, making twelve sides written, on this — day of July A. D. 1890.

"[Signed] Alonzo C. Wood."

Duncan & Gilbert, for plaintiffs in error.
Holden & Buzzell, for defendants in error.

CARTER, J. (after stating the facts). Able and exhaustive arguments have been made by counsel on both sides of this case, and so directed that, with the opinion of the learned chancellor who heard the case in the court below, we have been relieved of much labor that would otherwise have been imposed upon us. Separate briefs have been filed by the several counsel for appellants, in all of which it is conceded, and which appears plain, that the will, in some of its provisions, violates the rule against perpetuities, though counsel differ somewhat as to which one or more of the provisions is or are affected with that vice, and also as to some of the essential grounds upon which a correct conclusion must be based. The questions raised are questions of law, the facts being brief and undisputed. The testator died March 18, 1892, owning real and personal property in Cook county valued at about \$90,000. He left seven children, all mentioned in the will, viz.: Amina E. Smith, Julia M. Jones, Harriet E. Furber, Philip S. Wood, Edward C. Wood, Frederick L. Wood, and Frances S. Wood, sometimes called Fannie Starrin,—the first five of whom were of the respective ages of 53, 52, 49, 45, and 41 years. The last two, being children of the testator's second wife, were younger, but of mature age. He left, him surviving, also, five grandchildren, viz.: Amina E. Smith, Jr., and Jessie Smith, daughters of Amina E. Smith, and of the respective ages of 24 and 21 years; Alonzo De Haven Jones and Gertrude M. Jones, children of Julia M. Jones, and of the respective ages of 17 and 15 years; and Thedolia Furber, daughter of Harriet C. Furber, and of the age of 9 years. The children of the testator, except the first three above named, were unmarried. The contention of the complainants below, appellees here, briefly stated, is that the twelfth, thirteenth, fourteenth, and eighteenth clauses of the will violate the rule against perpetuities, because the legacies there provided to be paid by the trustees to the grandchildren may not vest in possession or become payable within the period of a life or lives in being and 21 years thereafter. It is next contended that, as the en-

tire estate is given and devised to the trustees, to be managed and administered during a period of time extending until the death of all of the testator's children, and until the youngest child of any of his first-named three daughters, including any that may be hereafter born, becomes 25 years of age, at which time the trust estate as it may then exist is to be divided among all the testator's grandchildren then living, the rule against perpetuities is clearly violated, and that such trust is therefore void, and that all provisions of the will directing the trustees to make payment of different sums out of the trust estate so created are also void.

We are inclined to this view of the case in the main, and to hold that the learned chancellor of the circuit court rendered the proper decision on the final hearing, except as to divisions 9, 10, and 11 of the will, which will be noticed at another place. "No interest subject to a condition precedent is good, unless the condition must be fulfilled, if at all, within 21 years after some life in being at the creation of the interest." Gray, Perp. § 201; *Howe v. Hodge*, 152 Ill. 252, 38 N. E. 1083. "It is not enough that a contingent event may happen, or even that it will probably happen, within the limits of the rule against perpetuities; if it can possibly happen beyond those limits, an interest conditioned on it is too remote." Gray, Perp. § 214. The eighteenth or residuary clause of the will provides that the entire principal sum remaining, with its accumulations, after all the previously mentioned sums are paid, and after all the trusts created by the will in favor of the "beneficiaries and remainder-men" have terminated, shall be equally divided between all the testator's grandchildren then living. These previously mentioned sums, and the trusts created in favor of the beneficiaries mentioned in the will, include those provided for all children of the testator's three first-mentioned daughters, who may outlive their respective mothers, whether born before or after the testator's death, and whether of the age of 25 years at their mother's death or not; and the distribution could not, of course, be made, if the intention of the testator be carried out, until those sums payable by the will should be paid, if payable at all, and the trusts created by the will terminated. The consequence would be that it would be quite within the range of possibility that a large part, if not the bulk, of the estate, could not be distributed until after the time limited by the rule, but would then be distributed to grandchildren of the testator, born after his death, who, by the terms of the will, could not receive their portion within 21 years after any life or lives in being at the death of the testator. Besides, as the gifts provided for in the residuary clause are clearly gifts to a class, and the amount each would receive would depend on the

number of grandchildren then living, the possibility that the class may be composed of those born too late to take under the rule, by the authorities, the gift cannot take effect as to any. Gray, Perp. 369.

It is contended by appellants that the residuary clause should be construed as to require distribution to the grandchildren living when all the valid legacies shall have been paid,—that is, when the payments shall have all been made by the trustees "that are lawfully directed to be paid,"—which, of course, would not include any payments to after-born grandchildren, coming within the twelfth, thirteenth, and fourteenth clauses, who were not 25 years old at the death of their mother. But such was not the intention expressed by the testator in his will, and such a construction would tend to abrogate the rule against perpetuities altogether; whereas, it is the duty of courts to give it effect, and not to destroy its efficacy by adverse construction. *Coggin's Appeal*, 124 Pa. St. 36, 16 Atl. 579; *Post v. Rohrbach*, 142 Ill. 606, 32 N. E. 687; *Lincoln v. New Castle*, 12 Ves. 235; *Vaughan v. Burslem*, 3 Brown, Ch. 92; *Scarsdale v. Curzon*, 1 Johns. & H. 50. We are clearly of the opinion that the residuary clause is in violation of the rule, and is therefore void. It is admitted to be so by one of the distinguished counsel for appellants, was so held by the learned chancellor of the circuit court, and we see no escape from the same conclusion.

But it is argued with much force that, conceding the invalidity of the eighteenth or residuary clause; and conceding, also, that, in so far as the twelfth, thirteenth, and fourteenth clauses undertake to make provision for any child or children of the first three mentioned daughters of the testator who may be born after his death, and who may not be 25 years old at the death of his, her, or their mother, those clauses are also within the rule, and invalid,—still it is insisted that, as the will must speak from the period of the testator's death, and should be construed in the light of circumstances then existing, and that, as the only grandchildren then living were the five children above mentioned, who were the children of said three daughters, and the provision for each such child being separate, and in no wise dependent on the provision made for or amount to be paid to any other child, those clauses should so far be held valid, and also the trust provisions of the will so far as they are necessary to carry them and other valid provisions of the will into effect. Each of the twelfth, thirteenth, and fourteenth clauses first directs the trustees to pay from the income of the trust estate an annuity of \$600 a year to the testator's daughter therein mentioned during her life. It next directs the payment of an annuity of \$300, upon her death, to each of her children then living under 25 years of age, until that age is reached, and then, out of the principal of the trust estate, to pay such child the sum of \$10,000 when he or she shall ar-

rive at the age of 25 years. It next provides that each of such children as shall have arrived at the age of 25 years at the death of his or her mother, shall be paid the said sum of \$10,000. It is clear, from the provisions of the will, that, while the testator intended to prefer the children of his three daughters mentioned in the twelfth, thirteenth, and fourteenth clauses, over any other grandchildren he might have, yet he intended to make no distinction between those born before and those that might be born after his death; that after-born grandchildren, if any, would come equally within the bounty of the testator as expressed in his will. And, as no presumption can be indulged, from the evidence, or otherwise, that no children would be born to these three daughters, or to either of them, after the death of the testator, and as such grandchildren now living may die before the happening of the contingency upon which they can take, and others may be born who under the will might take, it is clearly possible that, to carry out these provisions of the will, the payments therein directed to be made would have to be made to grandchildren who could not take because of the rule against remoteness; for it would seem indisputable that, as to any child which may hereafter be born to either of these three daughters, and who shall not have reached the age of 25 years at the death of his or her mother, the gift contingently made to it might not take effect in possession within a life or lives in being and twenty-one years. And as these several sums could not be accumulated and distributed by the trustees, under the residuary clause, because of its invalidity, there would be a failure of the most substantial provisions of the will, not because the contingency upon which the payments were to be made did not happen, but because it happened after the time limited by the rule. The possibility that the contingencies mentioned in the twelfth, thirteenth, and fourteenth clauses may not happen within the time allowed by the rule is sufficient to make them invalid under the rule.

We think, also, that to declare those clauses of the will valid as to such of the children of these three daughters as were born before the testator's death, or as to them and such as may be 25 years old at their mother's death, and invalid as to any others, would be to make a different will from the one made by the testator, who intended equality among the members of this class of his grandchildren; and especially would this be the result when it is seen that such after-born grandchildren would be excluded altogether by the invalidity of the residuary clause. Then, again, the execution of these provisions of the will, thus emasculated, would be dependent upon the carrying into effect the trust scheme devised by the will. But this trust itself violates the rule by making provisions for tying up the estate for a longer period than that fixed by the rule, and cannot, therefore, be sustained. From a careful reading of the will set out in

the statement of the case, it clearly appears that the trust created by the testator was one entire scheme, upon which the execution, in the main, of the various provisions of his will was made to depend. Aside from the books, pictures, etc., bequeathed to the aforesaid three daughters by the seventh clause of the will, the validity of which is unquestioned, there is no bequest made directly to any beneficiary, but directions only are given to the trustees to make certain payments out of the trust estate,—some out of the principal, others out of the income. In *Tilden v. Green*, 130 N. Y. 29, 28 N. E. 883, it was said: "The appellants invoke the aid of the principle that, where several trusts are created by a will, which are independent of each other, and each complete in itself, some of which are lawful, and others unlawful, and which may be separated from each other, the illegal trusts may be cut off, and the legal ones permitted to stand. This rule is of frequent application in the construction of wills, but it can be applied only in aid and assistance where it would lead to a result contrary to the will, or work injustice among the beneficiaries, or defeat the testator's scheme for the disposal of his property. The rule as applied in all reported cases recognizes this limitation: that, when some of the trusts in a will are legal, and some illegal, if they are so connected together as to constitute an entire scheme, so that the presumed wishes of the testator would be defeated if one portion was retained and the other portions rejected, or if manifest injustice would result from such construction to the beneficiaries, or some of them, then all the trusts must be construed together, and all must be held illegal, and must fail." We see no way by which a division of the trust created by this will can be made, and part held valid, and the rest invalid, without doing violence to the intention of the testator. It is all one entire scheme, and, although the trust is an instrument to effect the beneficial purpose of the testator, it is made the most prominent feature of the will.

It is said that, at least as to the three payments, of \$500 each, in the ninth, tenth, and eleventh clauses of the will, directed to be paid by the trustees to his brother and sisters in law soon after his decease, the trust must be sustained; but it is inconceivable that the testator would have created a trust for such a purpose, as such payments can as well be made in due course of administration of the estate in the probate court, and we think they should be so made, and that the court below erred in holding those provisions void. It is true they direct the trustees to pay these sums from the principal trust estate; but, as the payments are to be made soon after the death of the testator, the trust estate might be regarded as the same as the estate in the hands of the executor. These provisions do not seem to be necessarily dependent on the other provisions of the will, held invalid, and there is nothing in them of themselves in violation of

any rule of law. It would also seem to have been clearly the intention of the testator that these beneficiaries should have these gifts independently of any other disposition of this estate. Besides, it is a rule of construction that, where effect cannot be given to the entire will, a part of the will may be sustained which conforms to the rules of law, and where no violence is thereby done to the general intention of the testator. 2 Jarm. Wills, 843; *Oxley v. Lane*, 35 N. Y. 340.

It is contended by counsel for appellants that this principle should be extended to other clauses which have been held invalid, but we think the contrary. So far as the annuities to the testator's children are concerned, they are payable out of what will be their own estate, and as they will, under the statute of descents, take the principal, that will carry with it the income. By the nineteenth clause, the testator, for reasons therein given, intended to exclude his son Frederick from all interest in his estate; but, as the bulk of the estate must pass by the statute to the heirs at law, and no disposition of it is made by this clause, it cannot have any effect. An heir cannot be disinherited unless the estate is given to some one else. *Coffman v. Coffman*, 85 Va. 459, 8 S. E. 672; *Boisseau v. Aldridges*, 5 Leigh, 222; *Doe v. Lanius*, 3 Ind. 441; 56 Am. Dec. 518, note. Compare *Stephenson v. Doe*, 8 Blackf. 508.

The decree of the circuit court will be reversed in so far as it holds the ninth, tenth, and eleventh clauses or divisions of the will void; and it is in all other respects affirmed, and the cause is remanded, with directions to modify the decree in accordance with the views herein expressed. Appellants will pay the costs in this court out of funds of the estate in their hands. Affirmed in part. Reversed in part.

(163 Ill. 424)

UNION BREWING CO. et al. v. MEIER.

(Supreme Court of Illinois. Nov. 9, 1896.)

DOWER—LEASE—RES JUDICATA—EJECTMENT—DEFENSE.

1. A widow cannot lease her dower interest before it has been assigned to her.

2. A lessee who is made a party to a proceeding for the sale of a decedent's land for payment of debts is bound, as against the purchaser, by a decree that the land be sold free of the lease, so long as such decree is unreversed.

3. Defendant in ejectment cannot show that the deed from a third person, under which plaintiff claims, is without consideration.

Appeal from circuit court, Peoria county; T. M. Shaw, Judge.

Action by Frank Meier against the Union Brewing Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

I. J. Levinson, for appellants. Winslow Evans, for appellee.

BAKER, J. On May 29, 1893, one Demeter Treudle died seised in fee of certain prem-

ises in the city of Peoria, and left, him surviving, Lena Treudle, his wife, and several minor children, his only heirs at law. On February 14, 1894, his widow, who had a dower and homestead interest therein, leased said premises to the Union Brewing Company for the term of five years, and the company took possession and paid rent according to the terms of the lease. On the day of the execution of the lease, Mrs. Treudle agreed with the lessee, by a memorandum in writing, to acquire the legal title to the property she had leased. On June 22, 1895, the administrator of the estate of Demeter Treudle applied to the probate court for permission to sell the said premises to pay the debts of his intestate. The Union Brewing Company filed an answer to the petition, claiming to hold under the lease from Mrs. Treudle. The court, however, ordered the premises sold, subject only to the widow's dower and homestead interests, and free from said lease. At the sale, appellee bought the premises, and the widow immediately quitclaimed to him her dower and homestead interests therein. Appellee thereupon brought this action of ejectment against the Union Brewing Company and its tenant, the appellants herein, for the possession of the property he had purchased. To the declaration the general issue was pleaded. The cause was tried in the circuit court of Peoria county, before the court without a jury, and judgment was rendered against the appellants, who bring this appeal.

When the lease to the Union Brewing Company was executed, the dower and homestead of Mrs. Treudle had not been assigned or set off to her, and the lease therefore conveyed no estate whatever to that company. For it is a rule of property that a surviving husband or wife cannot sell and convey the right of dower and homestead to a person other than the owner of the fee, or lease the same, before the dower and homestead have been set off and assigned. *Best v. Jenks*, 123 Ill. 447, 15 N. E. 173. Again, the appellant company was a party to the proceeding wherein it was decreed that the said premises should be sold free from the lease, and, not having reversed that decree, is bound by it.

The memorandum wherein Mrs. Treudle agreed to purchase the legal title to the property was a mere executory contract, and gave no right of possession. If it conferred any equitable right, it would have to be enforced by suit in equity. And for its breach the only legal remedy would be suit for damages.

It is urged that since the statute (section 19, c. 45, Rev. St.) provides that a defendant in ejectment may plead the general issue, and, under such plea, may give in evidence any matter that may tend to defeat the plaintiff's action, except as in the chapter otherwise provided, therefore the trial court erred in excluding evidence tending to show that

appellee purchased the premises with means procured from Mrs. Treudle, and took title in his own name for the purpose of defrauding appellant out of his lease. As we have seen, appellants had no valid lease. The supposed fraud only goes to the consideration that was paid for the premises, and therefore was not an element of inquiry, or admissible in proof, in this action of ejectment. *Escherick v. Traver*, 65 Ill. 379; *Reece v. Allen*, 5 Gilman, 236. The case suggested by the proffered testimony was not one of a deed that is a nullity because of fraud used in its procurement. The excluded evidence was immaterial, and there was no error in the action of the court. The judgment is affirmed. Affirmed.

(163 Ill. 288)

ILLINOIS CENT. R. CO. v. CITY OF WENONA.

(Supreme Court of Illinois. Nov. 9, 1896.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—ASSESSMENTS.

Act June 21, 1895 (Laws 1895, p. 100), amending Act April 10, 1872, and granting a trial by jury, in proceedings for confirmation of an assessment, to determine whether the assessment for a city improvement was excessive or not, applies to proceedings pending at the time the act went into effect.

Appeal from circuit court, Marshall county; *E. V. Richmond*, Judge.

Proceedings by the city of Wenona against the Illinois Central Railroad Company. From a judgment for petitioner, defendant appeals. Reversed.

V. Warner and Barnes & Barnes, for appellant. George Baine and I. C. Pinkney, for appellee.

PHILLIPS, J. On June 10, 1895, the appellee, city of Wenona, filed in the county court of Marshall county, Ill., a petition averring that on June 3, 1895, its city council passed, and its mayor approved, an ordinance providing that there be constructed in said city "a connected system of water main pipes and hydrants," as therein located and described, claiming to file with and as part of said petition a copy of such ordinance; that the whole cost of the construction of said improvement should be paid for out of a fund to be raised by special taxation upon the real estate contiguous to said improvement, according to its superficial area, which was by said ordinance so assessed upon said real estate; that on June 3, 1895, the commissioners appointed by said city council to make an estimate of the cost of the improvement provided for by such ordinance made a report to said council, which was afterwards approved by said council, estimating said cost at \$15,084.48, a copy of which report, said petition avers, is thereto attached, and made a part thereof; and praying that the cost of said improvement be assessed in the manner prescribed by

law. The ordinance provides, as shown by the copy attached to and made part of appellee's petition, that the pipes, hydrants, valves, boxes, and connections of the proposed "connected system of water main pipes and hydrants" shall be constructed in accordance with several specifications mentioned, and the "map of the line of pipe" prepared by the engineer, and made a part of the ordinance. Appellant appeared, and filed numerous objections, which were all overruled by the court. Without entering into a discussion of the various objections, some 30 in number, it is sufficient to say we are of opinion no error was committed by the court except in overruling the twelfth objection, which was that "under the constitution and laws of this state appellant was entitled to have the question of benefits to the property taxed passed upon by a jury, and demands a jury to pass on the question of special benefits, if any, to its property sought to be taxed by said assessment." This proceeding was commenced when section 17 of article 9 of "An act to provide for the incorporation of cities and villages," approved April 10, 1872 (1 Starr & C. Ann. St. c. 24, p. 491), was in force, and under which the assessment of the commissioners was conclusive on the question of benefits to the property assessed; but the appellant was not required to answer the petition herein, and neither of said assessment rolls was presented to the county court for confirmation, and judgment thereon, until July 1, 1895, and after said original section 17 had been modified by the amendment thereto of June 21, 1895, in force July 1, 1895 (Laws 1895, p. 100). By the amendment by the last-mentioned act it was provided no special tax should be levied or assessed upon any property to pay for any local improvement in an amount in excess of the special benefit which such property shall receive, and the question of benefit and the amount of such special tax shall be subject to the review and determination of the county court, and tried in the same manner as a proceeding by special assessment. Before the passage of this act a valid ordinance was conclusive of the benefits as cast in the assessment roll under special taxation. By the amendment the question whether the assessment as cast in the roll was greater or less than the benefits received by the property by reason of the improvement may be determined as a question of fact by a jury. On June 3, 1895, the ordinance was adopted. On June 10, 1895, the petition was filed. On July 1, 1895, the county court entered a rule requiring objections to be filed July 5th, on which day certain objections were filed, and certain other additional objections were by leave of court filed on July 17, 1895. On August 19, 1895, the county court overruled appellant's objections, and appellant demanded in writing a jury to pass upon the question whether the taxes assessed against its property exceeded the special benefits thereto. This was also denied, to which exception was taken.

The filing of the petition in the county court, the giving notice in pursuance of the statute, and the confirmation of the assessment roll were all necessary acts to constitute a valid judgment of assessment. When the court acted on this question, the act of 1895 was in force. There was in the provisions of the act of 1872, with reference to special taxation, nothing in the nature of a contract or grant. A power was conferred as to a method of special taxation. There was in a city or village no vested right as to such method. It was by the act of 1872 a mere procedure to accomplish a certain result. There being no vested right in the city or village, the legislature had the right to change the procedure. Where there is no saving clause as to existing litigation in a repealing act which provides a new procedure, all rights of action will be enforced under the new procedure, without regard to whether they accrued before or after such change in the law, and without regard to whether suit had been instituted or not. *Dobbins v. Bank*, 112 Ill. 553; *Winslow v. People*, 117 Ill. 152, 7 N. E. 135; *Holcomb v. People*, 79 Ill. 409. There being no saving clause in the amendatory act of 1895, all proceedings for confirmation after July 1, 1895, when that act went into effect, must be in accordance with its provisions. Under it appellant had a right to have determined by a jury whether the assessment as made on his property as a special tax exceeded the special benefits that property derived from the proposed improvement. The denial of that right was error. The judgment of the county court of Marshall county is reversed, and the cause is remanded.

(163 Ill. 428)

PEOTONE & MANTENO UNION DRAINAGE DIST. NO. 1 et al. v. ADAMS.

(Supreme Court of Illinois. Nov. 9, 1896.)

MANDAMUS—DUTY OF DRAINAGE COMMISSIONERS.

Laws 1885, p. 83, § 17, providing that on the organization of a drainage district the commissioners shall determine upon a system of drainage which shall provide main outlets of ample capacity for the waters of the district; and section 41, declaring that, if the commissioners find the lands are not drained as contemplated, they shall use the corporate funds to carry out the original purpose,—are mandatory; and a person who receives no benefits from the improvement, by reason of an error in constructing the drain, may compel the commissioners, by mandamus, to alter such drain so as to properly carry off the water from his land. 61 Ill. App. 435, affirmed.

Appeal from appellate court, Second district.

Mandamus by John Adams against the Peotone & Manteno union drainage district No. 1, etc., and Henry Lankan and others as commissioners of said drainage district, to compel defendants to alter a drain. A judgment awarding a peremptory writ was affirmed by the appellate court (see 61 Ill. App. 435), and defendants appeal. Affirmed.

Haley & O'Donnell, for appellants. Cowling & Young, for appellee.

CRAIG, J. On the trial of this case in the circuit court, the jury found the facts against appellants. They found that the lands of John Adams, the appellee, cannot be drained into the outlet provided by the drainage district. That finding was approved by the appellate court. In speaking of the evidence on this branch of the case, the appellate court said: "We are of the opinion that it sufficiently appears that appellee had necessity for a tile drain on his own land for near a quarter of a mile, and that the fall was nothing on his land towards the main tile drain, but in that distance the fall was the other way about seven inches. This would show that, by carrying back of a fall the length of the proposed tile ditch, he could not give his tile grade from the upper end sufficient to drain his land without running out at the top of the ground before reaching the upper end. He would not have ample capacity, according to the original intention, for the drainage of the waters from his land, comprising about seventy acres. Any one with but little experience would know that, from a reading of the evidence, which we think was clearly sufficient to support the verdict of the jury." Under the statute, the facts in favor of appellee are settled by the judgment of the appellate court affirming the judgment of the circuit court. The only question, therefore, to be determined here, is whether the court decided correctly on questions of law.

It is claimed by appellants that whether the drainage commissioners would lower the drain as requested by appellee involved a question of discretionary power, which courts are not authorized to interfere with by mandamus, and this is the only question presented by the record. The drainage district in which appellee's lands were located was organized under the farm drainage act, approved June 27, 1885 (Laws 1885, p. 83). Section 17 of the act provides, "Upon the organization of a drainage district the commissioners shall go upon the land and determine upon a system of drainage which shall provide main outlets of ample capacity for the waters of the district, having in view the future contingencies as well as the present." This section of the statute, requiring the drainage commissioners to provide outlets of ample capacity for the waters of the district, is mandatory. Where the landowners in the district have been assessed and taxed for the purpose of constructing drains or ditches of sufficient depth and capacity to drain their lands, they have a right to insist that the commissioners shall do what the statute says they shall do; that is, determine upon or adopt a system of drainage which shall provide main outlets of ample capacity for the waters of the district. If a system or plan of drainage is adopted which will not afford

outlets of sufficient capacity to drain the lands of the district, the landowner will derive no benefit whatever from the taxation imposed upon him. This was never contemplated by the legislature. But, if there was any doubt in regard to the obligation and duty imposed on the drainage commissioners, that doubt would be removed by a reference to section 41 of the act, which is as follows: "After the completion of the work the commissioners shall thereafter keep the same in repair; and if they find by reason of error in locating or constructing the ditches, or any of them, or from other causes, the lands of the district are not drained or protected as contemplated, or some of them receive but partial or no benefit, they shall use the corporate funds of the district to carry out the original purpose, to the end that all the lands, so far as practicable, shall receive their proper and equal benefits as contemplated when the lands were classified: * * * provided in all such cases if sufficient funds are not on hand, the commissioners shall make a new tax levy." Here, as appears from the evidence, after the drains had been completed there was an error, in not constructing the drain deep enough, in consequence of which the lands of appellee could not be drained, and his lands received no benefit from the improvement, although he had been taxed to make the improvement. Under the section of the statute supra, where an error has been committed, can the drainage commissioners shield themselves behind what they term a "discretionary power," and thus leave the landowner without any remedy whatever? If they could, the law ought to be repealed at once, in order to prevent others from being imposed upon by its unjust provisions. But we think the statute gives a negative answer to the inquiry. The statute nowhere says that a discretion exists where a wrong has been committed on one of the landowners, but, on the other hand, it says they shall use the corporate funds of the district to carry out the original purpose, to the end that all lands shall receive their proper benefits, as contemplated when the lands were classified. Under these two sections of the statute, we do not think any discretion is vested in the commissioners, but, on the other hand, the duty enjoined is imperative. It may be conceded that the drainage commissioners have a discretion in regard to the location of the drain, and in regard to many of the details of the work, but this fact does not change the duty resting on the commissioners to provide sufficient outlets for the waters in the district. High, in his work on Extraordinary Legal Remedies (section 413), says: "Where, by act of the legislature, the duty is plainly and imperatively incumbent upon the common council of a city to make certain street improvements, the writ will issue for the enforcement of the obligation. Nor does the fact that certain incidents and details of the work

are left discretionary with the authorities, as regards the manner of their execution, render the duty less mandatory, or constitute a bar to relief by mandamus." In *Brokaw v. Commissioners*, 130 Ill. 482, 22 N. E. 598, the same doctrine is laid down. It is there said: "It is urged that, as the commissioners have charge of the roads in their town, they have a discretion in respect to the matter of their management, and that the courts will not coerce them by mandamus in regard to matters that are placed under their control, and left to their discretion. Many of the powers given to the commissioners are discretionary, but, in our opinion, the power here in question is not of that character. By section 2 of the act [Rev. St. 1889, c. 121], it is made their duty to keep the roads of their town in repair, and section 5 requires them to exercise such care and supervision over such roads as the public good may require. The language of section 71 is 'that the commissioners after having given reasonable notice,' etc., '* * * may remove any such fence or other obstruction,' etc. We think it is intended by the statute to impose upon the commissioners the imperative duty to remove obstructions from the public highway, and that the word 'may' is to be construed as 'shall.' * * * The duty on them to act is imperative, and the discretion given them is merely in respect to a matter which is incidental to the performance of their duty." The judgment of the appellate court will be affirmed. Affirmed.

(163 Ill. 631)

SMITH v. DENNIS et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

HOMESTEAD—WHAT CONSTITUTES—PARTITION AMONG HEIRS.

1. Testator bequeathed his homestead to his wife for life, directing that the remainder of his property be divided between his wife and children. The testator owned a part of a block, which had been divided into sublots, but without streets or alleys. On one corner of the block was a house, with outhouses and well, rented by testator for business purposes. On the other corner was a dwelling house occupied by testator and his family, with outhouses. The family used the well appurtenant to the other house. *Held*, that the term "homestead," as used in the will, must be construed as including only that portion of the block occupied exclusively by the dwelling house and its appurtenances.

2. Testator bequeathed his homestead to his wife for life, directing that the remainder of his property be divided between his wife and children. Upon a bill brought by the children the homestead was set off, and the remainder of the land partitioned. *Held* that, in the absence of any prayer to that effect, the failure of the court to decree a partition of the homestead was not error.

Appeal from circuit court, Henry county; J. J. Glenn, Judge.

Bill by Alta M. Dennis and others against Evaline Smith, widow of Thomas Smith, deceased, for a partition of real estate under

the will of the decedent. From a decree for complainants the defendant appeals. Affirmed.

Thomas Smith, of Galva, Henry county, this state, died testate on February 1, 1893. He left surviving him appellant, his widow, and an infant daughter, Cecil; also appellees, four adult daughters by a former wife. By his last will he disposed of his property as follows: "(1) I give and bequeath to my beloved wife, Evaline Smith, my homestead, during her life, and all of my household and kitchen furniture of every kind and description, to her sole use. (2) I give and bequeath to my wife, Evaline Smith, in trust for the support of my daughter Cecil Smith, fifty dollars per year until she shall become of the age of eighteen years of age. (3) I give and bequeath to my wife, Evaline Smith, and my daughters Lucinda Scott, Ida B. Reynolds, Carrie J. Lane, Alta M. Smith (now Dennis), and Cecil Smith the remainder of my real and personal property, goods and chattels of what nature or kind soever, to be divided equally between them, share and share alike, after all my debts and funeral expenses are paid, and the foregoing legates are all settled." The adult daughters filed this bill for partition, making the widow and her infant child defendants. At the date of the will, and when he died, the testator owned a part of block 19, in the village of Galva, fronting west on Church street 175 feet, extending north to First street, running due east and west, and south to Main street, running back 88 feet on First street, and about 146 on Main; the latter street extending in a northeast and southwest direction. Testator had purchased this property, as sublots, platted irregularly, without streets or alleys, numbered from 8 to 14, inclusive. At the time he bought it, there was a frame house on the southwest corner, fronting on Church street, which had been built without reference to the sublots, part of it being on subplot 13 and part on subplot 14. A well had been dug a short distance north, on subplot 12; and in a northeasterly direction, back from the house, was a closet and coal house on another subplot. Soon after the purchase he erected a dwelling house on the northwest corner of the property, also fronting on Church street. This house occupied parts of sublots 9, 10, and 11. A new coal house and closet were built for this new residence. Testator moved into the new house upon its completion, and continued to reside there until his death. The well was used for both the old and the new buildings. Deceased never occupied the old house, but rented it for an hotel, restaurant, and other purposes. The principal controversy between the parties here is as to how much of this property passed to the wife under the first clause of the will. Complainants allege in their bill that she is entitled only to the family residence in the northwest corner, with so

much of the land as lies north of a certain line running northeasterly through the property, some 60 feet north of the southeasterly line, thus setting off a lot of about that width, with the closet and the well and coal house used with her dwelling. The widow claims the whole property. On the hearing, the circuit court found with the complainants, and ordered that the widow was entitled to the dwelling house and the above-described portion of the ground, valued at \$2,500, for life, and that the minor child, Cecil, is entitled to a statutory homestead therein until she arrives at the age of 21 years; and ordered partition of the remainder of the real estate of which the testator died seised, including that part of said block 19 lying south of said line, set off with the old house, but expressly decreeing that partition of the said homestead be not made. From that decree this appeal is prosecuted.

John Root and N. F. Anderson, for appellant. E. A. Corbin and Thompson, Shumway & Wasson, for appellees.

WILKIN, J. (after stating the facts). It is insisted by counsel for appellant that the division of the property as made by the court below is an arbitrary one, unsupported by the evidence, and they contend that by the terms of the first clause in the will the widow took, as the homestead of her deceased husband, all of the property described in block 19. We think it must be admitted that at the time of the execution of the will and at the death of the testator he owned two distinct pieces of property on block 19; that is to say, there were two distinct houses and two sets of outhouses on the block. That which renders the meaning of the testator uncertain as to whether he meant to give his wife a life estate in only a part of the whole of the land arises from the fact that these two distinct pieces of property were not separated by any street, alley, or lot line. If a line had been platted where the court fixed it by its decree, or if the testator had, prior to making his will, established that line by building a fence thereon, or staking it off, no one would hesitate to say that by the language "my homestead" he meant only that part of the property north of the line. No question is made as to the competency of the evidence tending to show that, notwithstanding that line was not established by any physical act on his part, he recognized it as the dividing line. Without reviewing the evidence bearing upon that question, we think it satisfactorily shows that he treated the two houses and appurtenances as distinct property, and that in renting the old house, through his agent, he let with it a certain amount of ground, including that on which the closet and coal house stood; and the evidence of the agent is to the effect that so much of block 19 as lies south of the line fixed by the court was treated as belonging to that house. The wa-

ter closet built and used in connection with that house could only be set apart with it by drawing the line where the court established it, the north side of the closet being substantially on that line. Neither could the water closet built and used in connection with the new house be set apart to it without so fixing the line, the south side of that closet also being on or very near the line. We think the mere fact that the well, connected with the old house, was used by the family occupying the new one, is not a controlling consideration in determining what part of the property the testator treated as belonging to his homestead. The well was appurtenant to the old house, and was used simply for convenience with the new one. In fact, the evidence shows that the testator stated that a new well would be provided for his residence in case the other property was sold. The term "homestead," as used in this will, means "the dwelling house at which the family resides, with the usual and customary appurtenances, including out-buildings of every kind necessary and convenient for family use, and lands used for the purposes thereof." *And. Law Dict.*, 512. Within this meaning it can scarcely be claimed that the testator intended to will to his wife the two houses, one the family residence, and the other a house devoted to other purposes. We think the acts of the testator in improving the north part of the property, together with the manner in which the south part was rented, sufficiently show his intention to give his wife, as her life estate, only that part of the property decreed her by the circuit court. *Perkins v. Jewett*, 11 Allen, 9; *Brown v. Saltonstall*, 3 Metc. (Mass.) 423.

No substantial error was committed by the court below in the admission or exclusion of testimony. The point that it was error to decree that no partition should be made of the homestead willed to the wife is, we think, without force. On the pleadings no partition of that part of the estate was asked, complainants in their bill expressly praying that it be not partitioned, and defendants not asking for a partition either in their answer or by cross bill. The decree of the circuit court is in harmony with the views here expressed, and it will be affirmed. Affirmed.

(163 Ill. 277)

McMAHILL v. TORRENCE et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

MORTGAGES—FORECLOSURE—ADVERSE POSSESSION—CO-TENANTS.

1. A purchaser at a foreclosure sale acquires only the title of the mortgagor, as against a co-tenant of the mortgagor, though the mortgage assumes to convey the entire fee.

2. Adverse possession by one co-tenant as against another is not shown by mere possession, payment of taxes, and appropriation of the rents and profits.

Appeal from circuit court, Warren county; J. J. Glenn, Judge.

Bill for partition by Charles Torrence and others against George W. McMahonill. There was a judgment for complainants, and defendant appeals. Affirmed.

A bill in chancery was filed by appellees, afterwards amended, which prayed for the partition of the S. E. $\frac{1}{4}$ of section 30 and 10 acres off the east side of the S. W. $\frac{1}{4}$ of section 30, both in town 8, range 1, in Warren county. Harry J. Hewitt was the original owner of this land, and died intestate in the year 1850, leaving his widow, Miriam Hewitt, and as his only heirs six children, two of whom were Miriam H. Hewitt Schreeves and Oscar L. Hewitt. The bill avers that Miriam H. Schreeves had conveyed to her two brothers, Oscar L. and H. H. Hewitt, her interest in the undivided two-thirds of these and other premises left by her father, but retained her interest in the undivided one-third which would represent the land covered by her mother's dower; that afterwards the W. $\frac{1}{2}$ of said S. E. $\frac{1}{4}$ of section 30 and the 10-acre tract were set off as dower to her mother. It represents that the mother died in 1891, after which Mrs. Schreeves conveyed her remaining interest to Charles Torrence and Nathan O. Tate, appellees. The bill avers that O. L. Hewitt has a homestead interest in five-sixths of 13 acres in the northwest corner of said premises, and that appellant in this case owned the undivided seventeen-eighteenths interest in the balance, and appellee the one-eighteenth acquired from Miriam H. Schreeves; and prays partition, and assignment of homestead to O. L. Hewitt. The answer of appellant, McMahonill, denies the ownership of appellees in 115 acres off the east side of the southeast quarter, but does not deny their claim in the other 45 acres of this quarter section, or to the 10-acre tract, nor the homestead interest of O. L. Hewitt. It sets up and relies on the statute of limitations as to the 115 acres, and the sole contention in the case is as to this particular number of acres. It is conceded that Harry J. Hewitt was the common source of title. A few years after his death, his daughter Miriam H., by quitclaim deed, conveyed to her two brothers, H. H. and O. L. Hewitt, the undivided two-thirds interest in this and other lands of which her father died seised. She was one of six heirs, and therefore conveyed two-eighteenths interest, the evident intention being that, as the mother, then living, was entitled to dower, no part of the fee in the dower land should pass. By conveyances from the other heirs Oscar L. acquired their interest, and also received a quitclaim deed from his mother; but on the same day of that conveyance he executed an instrument in writing under seal, by which he acknowledged an incumbrance on the west half of the 160 acres and on the 10-acre tract, which was

to be equivalent to her dower in all; and this writing was filed for record in the recorder's office. In 1883, Oscar L. Hewitt mortgaged 115 acres off the east side of the quarter section in controversy to Charles Wilson to secure an advance of \$2,800. The land was sold by the executor of the Wilson estate under a decree of foreclosure, and a certificate of purchase ripened into a master's deed on September 28, 1886. The purchaser received possession March 1, 1887, and on April, 29, 1887, sold and conveyed it to appellant, McMahill, who went into possession and paid taxes for the years 1887 to 1893, inclusive. Appellees, however, claim this possession was not adverse to that of Miriam H. Schreeves, and consequently not to her grantees, the appellees, who received a conveyance from her of all her interest in this land after her mother's death, which occurred in 1891. It is attempted to be shown that during the period of time appellant was in possession and paying taxes he on several occasions negotiated for the purchase of Mrs. Schreeves' interest, thus recognizing her title. It is also insisted that the title acquired by appellant under the foreclosure proceedings was that of Oscar L. Hewitt, a co-tenant of Mrs. Schreeves, and that the possession of a co-tenant or his grantee under such circumstances could not be adverse to that of another co-tenant. The circuit court, on a hearing, granted a decree in conformity with the prayer of the amended bill, and found that the complainants, appellees here, were entitled to an undivided one-eighteenth of said land, including the 115 acres, and appellant seventeen-eightieths, and decreed partition on that basis. To reverse that decree appellant prosecutes this appeal.

Kirkpatrick & Alexander, for appellant.
Grier & Stewart and C. A. McLaughlin, for appellees.

PHILLIPS, J. (after stating the facts). The principal question presented and argued by appellant as reason for the reversal of the decree of the circuit court is that the rights and interests of Miriam H. Schreeves, and consequently of her grantees, appellees, are barred by the seven-year statute of limitations. No question is raised as to their interest in 55 acres of this land, the sole controversy being on the 115 acres, title of which was acquired by appellant through foreclosure proceedings. It may be stated as a proposition of law which needs no citation of authority, that a purchaser at a foreclosure sale acquires no greater title than had the mortgagor. Miriam H. Hewitt, by her deed of conveyance to her brother Oscar L. Hewitt, only conveyed two-thirds of her undivided interest, leaving one-eighteenth still invested in herself. We find nothing in this record to indicate that the possession of Oscar L. Hewitt was in any way adverse

to that of his sister, Mrs. Schreeves, who was a tenant in common with him. Possession by him and payment of taxes, however long continued, would not constitute a bar under the statute, as one tenant in common cannot set up the statutory bar against his co-tenant. *Stevens v. Wait*, 112 Ill. 544; *Comer v. Comer*, 119 Ill. 170, 8 N. E. 796. The reason for this rule is that the possession of one tenant in contemplation of law is the possession of the others, and this is especially so where all the parties derive title from the same deed, or from the same ancestor. *Dugan v. Follett*, 100 Ill. 581; *Ang. Lim.* §§ 422, 423. The possession of one co-tenant will not be adverse to the other where there is a mere possession of the premises, and an appropriation of the rents. Something more is required. *Todd v. Todd*, 117 Ill. 92, 7 N. E. 585. "It is not sufficient that he continues to occupy the premises, and appropriates to himself the exclusive rents and profits, makes slight repairs and improvements on the land, and pays the taxes; for all this may be consistent with the continued recognition of the rights of his co-tenants. To constitute a disseisin, there must be outward acts of exclusive ownership of an unequivocal character, overt and notorious, and of such a nature as, by their own import, to impart information and give notice to the co-tenants that an adverse possession and an actual disseisin are intended to be asserted against them." *Busch v. Huston*, 75 Ill. 347; *Ball v. Palmer*, 81 Ill. 370.

The title acquired by appellant was limited to the title held by Oscar L. Hewitt at the time he executed the mortgage. After the acquiring of this title, appellant sustained the same relation as did Oscar L. Hewitt, viz. that of tenant in common with Miriam H. Hewitt, and entered into possession under such title; and, so far as it appears from this record, he never gave notice that he was claiming under any other or different title. He did nothing to apprise her that he was claiming to be the absolute owner of these premises, except to receive the rents and profits and pay the taxes. If a party who acquires by deed of purchase the interest of a tenant in common be held to the same rule as his grantor regarding the application of the statute of limitations,—as we hold he must,—then such party cannot acquire any rights against his co-tenant by possession only, and by payment of taxes, where he has given no actual notice that his possession is adverse. *Sontag v. Bigelow*, 142 Ill. 143, 31 N. E. 674. Appellant then sustained the same relation as co-tenant to Miriam H. Schreeves as did Oscar L. Hewitt, whose title he acquired. In the consideration, then, of the question as to whether or not the statute of limitations will be a bar in this case, appellant must be put on the same plane as was Oscar L. Hewitt, whose title he acquired. To sustain his defense, then,

under the plea of the statute of limitations, appellant shows without question that he has been in possession of these premises for seven years, and paid all taxes thereon, and that he has received the rents and profits. It may be conceded further,—which the record shows is a fact,—that Oscar L. Hewitt, in executing his mortgage on these premises, conveyed by general conditions of warranty to Wilson the entire title, without any indication that his sister, Mrs. Schreeves, had any interest. Appellant also says that in purchasing this land from Williams, who acquired title from the master under foreclosure proceedings, he supposed he was getting complete title of all parties interested. His own testimony, however, shows that he had known this family of Harry J. Hewitt for over a quarter of a century. He had lived in the neighborhood for more than that length of time, and knew personally all the heirs of this estate. The record disclosed the extent of the title conveyed by Mrs. Schreeves, and he must be bound by that. Moreover, there is strong evidence in the record to indicate that appellant, within the period of seven years, had negotiated for the purchase of the interest of Miriam H. Schreeves, thus recognizing her title therein, and which fact would have the effect of interrupting the running of the statute of limitations. In 1 Am. & Eng. Enc. Law, 272, it is said: "An offer on the part of defendant to purchase the property which he is holding adversely from the plaintiff within the statutory time is a clear recognition of plaintiff's title, and will interrupt the running of the statute." The same rule is reiterated in *Railroad Co. v. Mead*, 63 Cal. 112, where there was evidence tending to show an offer on the part of defendant to purchase the property from the plaintiff within the statutory period, and the court, in the opinion, says: "Such an offer, if made, was a clear recognition of plaintiff's title, and a perfect answer to the defendant's claim of adverse possession." To the same effect, also, is *Tyler, Ej.* 921, the text of which is: "An offer to purchase land by a party of another is such a recognition of the title of the latter as will bar the defense of adverse possession. * * * And generally it may be affirmed that one who, while in possession of land, recognizes the title of another, and offers to purchase from him, cannot set up his own possession as adverse." In *Lovell v. Frost*, 44 Cal. 471. "The offer to purchase or rent the property, and not merely to purchase an outstanding or adverse claim or title to quiet his possession, or protect himself from litigation, amounts to a clear and unequivocal recognition of the defendant's title." Where a party is in possession under color of title in good faith, exercising such outward acts of exclusive ownership, overt and notorious, and which are of such a character as by their own import to impart information and give notice

to the world that his possession is adverse to all, then he may negotiate for an outstanding title, and thus protect his rights. He may prefer to buy his peace by purchasing such outstanding title without admitting such title or claim to be valid. *Warren v. Bowdran*, 156 Mass. 280, 31 N. E. 300; *Northrop v. Wright*, 7 Hill, 476. This rule, however, is not applicable to the case at bar, for the reasons heretofore stated, which show appellant's knowledge and recognition of this outstanding title, and the fact that his possession was not of such a character as to invoke the bar of the statute against his cotenant and her grantees. There was clearly no error in the decree of the circuit court, which refused to recognize this defense as a bar, and which decreed to appellant a one-eighteenth interest in this land. The decree is therefore affirmed. Affirmed.

(164 Ill. 133)

AMERICAN EXCHANGE NAT. BANK v. WALKER.

(Supreme Court of Illinois. Nov. 9, 1896.)

ASSIGNMENT FOR BENEFIT OF CREDITORS — PURCHASE OF CLAIMS—PREFERENCES—TRANSFER OF THE ASSIGNED ESTATE IN TRUST — RIGHTS OF CREDITORS—LIABILITY OF TRUSTEE.

1. An insolvent, after an assignment for the benefit of creditors, agreed with a creditor bank that, if the latter would furnish the funds to pay off the claims of all other creditors who would agree to compromise, the assigned property should be transferred to the bank, for the payment of its claim and the amount so advanced, in full. Over 90 per cent. of the claims were thus compromised. Thereupon an order was entered in the county court discontinuing the proceedings under the assignment, and directing the conveyance of the assets to such person as the bank should designate, and in accordance with such order the assets were conveyed to an agent of the bank. *Held* that, the transaction being an appropriation of the assets of the estate to a purchase of a majority of the claims against the estate, and a payment in full of some creditors to the exclusion of others, it was, in effect, giving a preference to one set of creditors, and, as such, fraudulent and void. 60 Ill. App. 510, affirmed.

2. An insolvent, after an assignment for the benefit of creditors, agreed with a creditor bank, if the latter would furnish the funds to pay off the claims of all other creditors who would agree to compromise, the assigned property should be transferred to such bank, for the payment of its claim and the amount so advanced, in full. Over 90 per cent. of the claims were thus compromised, and the bank, after paying the amount advanced and its own claim in full, reconveyed the property to the insolvent. *Held*, that such reconveyance was a fraud on the rights of a creditor not accepting the compromise, rendering the bank liable for the amount of its claim to the extent of the property so transferred.

3. At the time the assets were transferred to the bank an order of discontinuance was entered in the county court discontinuing the proceedings under the assignment. At that time the three months allowed by statute for creditors to file their claims had not expired. *Held*, that a creditor who refused to accept the compromise did not lose his rights by a failure to file his claim within the time limited.

4. The fraudulent character of the transaction was not avoided by the fact that, upon

the acceptance of the compromise, and the discontinuance of the assignment proceedings, the assets were reconveyed to the insolvent, and by him to the bank.

5. The bank, having been an active participant in the scheme to defraud creditors in consenting to the compromise, cannot escape liability on the ground that, as a creditor, it had the right to secure its claim.

6. As the claims of the consenting creditors were extinguished by the acceptance of the compromise, the bank cannot escape liability by setting up against the funds reconveyed the full amount of such claims.

7. The fact that the bank did not formally agree with the insolvent to account for any surplus remaining after its claims were paid does not release it from liability for the fraud.

8. The burden is on the bank to show that the assets reconveyed by it to the insolvent were insufficient to pay the complainant's claim in full.

Appeal from appellate court, First district.

Creditors' bill brought by James H. Walker against the American Exchange National Bank. A decree for the plaintiff having been affirmed by the appellate court (60 Ill. App. 510), the defendant appeals. Affirmed.

Swift, Campbell, Jones & Martin, for appellant. Willits, Case & Odell, for appellee.

CARTWRIGHT, J. Appellee filed his creditors' bill, based on a judgment recovered by him, June 4, 1890, against the Q. W. Loverin Company, for \$1,874.82 and costs, and in said bill alleged that appellant entered into a fraudulent scheme with said company, and other defendants therein named, by which the proceedings in a voluntary assignment of said company in the county court of Cook county were discontinued, and the assets of the insolvent were turned over to appellant, and by it converted in part to its own use, and given away in part without consideration. It was charged that the assets so turned over were received by appellant in trust for appellee as a creditor of the insolvent, and the bill prayed for a decree against appellant for the amount of said judgment. The circuit court granted the relief prayed for, and the appellate court affirmed the decree.

The facts proved were substantially as follows: On July 25, 1889, the Q. W. Loverin Company, a corporation engaged in general mercantile business in Chicago, executed a voluntary assignment to John Roper for the benefit of its creditors. The assignee qualified, took possession, and continued the business. As soon as the officers of the insolvent corporation decided what they could do in the way of offers of compromise and settlement with the creditors, a plan was formulated, and an arrangement made to that end. Mr. Edgar B. Tolman, acting as attorney for the insolvent, negotiated with Mr. David B. Dewey, the president of appellant, for the requisite funds to carry the proposed arrangement through, if accepted by a sufficient number of creditors. Appellant was the largest single creditor, the original amount of its claim being \$10,500. The proposition was to

offer the other creditors 40 cents on the dollar cash, or 20 cents in cash and 40 cents in time paper, running 9 and 18 months. Dewey satisfied himself, by investigation, that the assets in the hands of the assignee would be sufficient to pay appellant's claim in full, and its advances to settle with the other creditors, if the assets were applied to that purpose. It was then agreed, between him and Tolman, as attorney for the insolvent, that Tolman should make the proposition, and get assignments from all the creditors who would accept, and hold them for the bank; that, when sufficient creditors had accepted, an application should be made to the county court for a discontinuance of the assignment proceedings; and that, upon such discontinuance, the assets in the hands of the assignee should be conveyed absolutely to such party as appellant should designate. The president of the Q. W. Loverin Company saw quite a large number of the creditors with regard to the proposition, and, by his efforts and those of Tolman as attorney, the proposition was accepted by nearly all of the creditors, and they assigned their claims to Tolman. On October 10, 1889, a petition was filed in the county court for a discontinuance of the assignment proceedings, together with the written consent of 160 of the creditors, amounting to 94 per cent. in number and 92 per cent. in amount of the creditors and claims, mostly signed by Tolman, as assignee. The county court thereupon entered an order discontinuing the proceedings, and directing the assignee to turn over the assets to such person or persons as the said Q. W. Loverin Company might direct. The assignee turned over the assets to the Q. W. Loverin Company, and that company at the same time conveyed them, by direction of appellant, by bill of sale, to William T. Van Arsdale, who executed a declaration of trust that he held them for the benefit of appellant, and subject to its direction. Van Arsdale carried on the business as trustee for appellant until February 25, 1890, when appellant had realized enough to pay its original claim in full, with interest, and to reimburse itself for its advances, with interest and its expenses. The advances were about \$17,139.20, and its claim about \$12,000. Being fully satisfied for all it claimed, appellant's president, Dewey, sent for Tolman, and told him that it was ready to convey the remaining assets to Van Arsdale, being properly protected against outstanding indebtedness. Thereupon, on said date, Van Arsdale, by the order of appellant, conveyed the assets, except book accounts, to E. H. Janes, and the book accounts to John Brown. These transfers were made by direction of Tolman or some officer of the Q. W. Loverin Company. There was no consideration for the assignment of the book accounts to Brown. The conveyance to Janes was in consideration of the assumption by him of outstanding indebtedness of Van Arsdale in the business, and the payment of

from \$200 to \$300, on orders of Van Arsdale, to different persons for merchandise.

Appellee was a creditor who did not assign his claim to Tolman or consent to the discontinuance. He had been notified by the assignee, as creditor, to present his claim against the insolvent; and appellant was fully informed of his claim and rights at the time of the transaction. It does not appear whether appellee ever filed his claim with the assignee, in pursuance of the notice given him, and appellant insists that his failure to aver and prove such fact is fatal to the maintenance of his bill. The statute gave him three months in which to file his claim. The estate of the insolvent had been taken into the custody of the law for the benefit of all creditors who should file their claims within that time, and there was no priority or advantage to be gained by the first in point of time. The order of discontinuance was entered before the expiration of the time for filing claims. While appellee still had a right to file his claim, and participate in the assets so held in trust for all such creditors, the transaction had been completed, the trust fund had been removed from the custody of the court, and the assignee discharged. It would have been but an idle and useless form to attempt the filing of his claim with an assignee discharged and against an estate removed from the control of the court. He is not now seeking to restore the jurisdiction of the county court, or to enforce the assignment in that court, but to obtain redress against parties charged with defrauding him of his rights. Whether an order of discontinuance could be lawfully entered within the three months need not be considered. If it could, appellee, as a creditor, with the right to file his claim, must be counted in calculating the number and amount of creditors assenting. As he must be counted in a discontinuance, he had an interest in it, and a right of objection to it, which he may protect against a fraudulent or unauthorized discontinuance. He must be regarded the same as creditors who had already exercised their right; and, if a fraudulent discontinuance deprived him of a right of participation in the fund withdrawn from the court, he would be entitled to relief against the injury done him equally as though the claim had been already filed. He had a right to pursue the trust fund or the wrongdoers.

The principal question is whether, in case of a voluntary assignment, the assigned estate can be used to procure the assent of a majority of the creditors by buying up their claims, and be subsequently applied to payment for such assent, and by this means a discontinuance be procured, where there is no restoration of the estate to the debtor except in form, but it is put beyond the reach of creditors not assenting. This question has been fully answered in *Howe v. Warren*, 154 Ill. 227, 40 N. E. 472, and *Terhune v. Kean*, 155 Ill. 506, 40 N. E. 481. The reasoning upon which the conclusion rested need not be repeated. Such

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a transaction is fraudulent and void. Counsel for appellant, while conceding that the power to obtain a discontinuance is capable of very great abuse, claim that this transaction was unobjectionable, and that it is distinguishable from the above-mentioned cases. Several supposed grounds of difference are pointed out, but in none of them can we see any substantial ground for a distinction between the peculiar acts of fraud in the different cases. The form adopted was somewhat different, but the substance was the same. The property was put under the protection of the county court, and out of reach of appellee and the other creditors. Then, as soon as the officers determined what they could offer as a settlement, the proposition was made. Most of the creditors accepted, and nominal sales and assignments of the claims were made to the attorney of the debtor, who was enabled to pay by the debtor, through him, pledging the assigned estate in the custody of the law to the bank for the money. The estate was used up in the arrangement, and the bargaining was done while the law shielded the property from its ordinary process. The obvious nature and effect of this transaction was the same as in the other cases.

One alleged ground of distinction specially insisted upon is that the estate reverted to the Q. W. Loverin Company, on the discontinuance, and was conveyed by it to the bank; that is to say, that while it is fraudulent to use the estate directly, it is not fraudulent to do so indirectly, by carrying out a preconcerted plan to devote it to the use. It was agreed between Tolman and Dewey that, upon the discontinuance, the assets in the hands of the assignee should be conveyed to such party as the bank should direct. The petition for discontinuance prayed for such an order, and the order of discontinuance directed the assignee to turn over the assets to such person or persons as the company might direct. The discontinuance was not for the purpose of re-investing the title in the debtor, and it was not intended that it should have control of the estate, or any power of disposition, except to convey or order a conveyance to appellant. The fact that the transfer of the estate was made from the assignee, through the debtor, to the bank, and that the arrangement was carried through by that process, rather than by the assignee conveying directly to the bank, can make no difference. Nor does the fact that the bank advanced the money before it got possession of the assets affect the question. They were pledged to it before it made any advances, and it is immaterial when or how the agreement for the conveyance was completed. The claim that this case should be distinguished from the others is also placed on the ground that appellant was a creditor, and therefore entitled to engage in the scheme for the purpose of obtaining payment, although a person without such a motive would not be so entitled. It was the privilege of appellant, as a creditor, to enter into any

fair competition with other creditors to secure its claim; but this transaction was not of that character. Appellant became an active participant in a scheme to defraud nonconsenting creditors of their rights in the trust estate. This was not one of its privileges as a creditor. The transaction was fraudulent, and did not extinguish the trust created by the assignment, nor cut off the right of appellee to look to the property in appellant's possession for satisfaction of his debt.

It is claimed, however, that, assuming a liability to exist, the decree is excessive in amount, that the bank occupies only the position of a too diligent creditor, and that the equities of the parties in the fund are equal. It is argued that appellant is only accountable to appellee for the pro rata share that he would have realized if the assignment had been carried out in the county court, and that the decree should have ordered an accounting of the assets and total amount of claims, and awarded to appellee only his percentage. The argument is, in substance, that appellant merely attempted to secure priority, and, the priority being set aside, the equities are equal. Whether that is so or not is of no consequence, because, so far as appears, all claims against the fund had been fully satisfied, and appellant gave away sufficient remaining assets belonging to the fund to pay appellee's claim. Appellant had been reimbursed for its advances, and also paid its own claim in full. It was not shown that there was any other claim unpaid, and no reason appears why whatever was left should not be applied to the payment of appellee's debt. It is insisted that the appellant could set up against the fund the claims assigned to Tolman, and by him to appellant, for their full amount; but this claim is groundless. As between the debtor and appellant, the claims were extinguished as claims against such debtor, and appellant was entitled to nothing more than its advances. It understood that its claim was satisfied when it was reimbursed, and it must be so held.

The circuit court found that the value of the assets given to Brown after appellant had obtained satisfaction of its claims exceeded the amount of appellee's judgment. This finding is attacked, but we think there is ample justification for it in the record. The book accounts were of the face value of from \$6,000 to \$7,000. Brown was the father-in-law of Q. W. Loverin, and had held a claim, but had settled, and assigned it to Tolman, for 40 cents on the dollar. He had no claim against the company, and it was a perversion of the trust to give the book accounts to him. If they were not of their face value, appellant had the burden of reducing its liability for their wrongful disposition by showing that fact. The first examination of Q. W. Loverin gives some support to the claim that they were shown not to be equal in value to appellee's claim, but his second examination justifies the belief that more than that amount

was actually collected by Brown. If that were not so, the amount collected would hardly furnish a criterion of value. E. H. Janes, to whom the merchandise was conveyed, was a brother of the vice president of the Q. W. Loverin Company, and this vice president found employment in the new business. Janes expected to do business with some of the old customers who owed book accounts, and it was understood between the parties that the person to whom the book accounts were transferred should not use any harsh methods of collection, or proceed to collect in an arbitrary manner, so as to offend the debtors. This understanding was, doubtless, carried out. But, even with that understanding, enough was collected by Brown to pay appellee in full.

There was no formal agreement on the part of appellant to account for any surplus, and in form the conveyance was absolute and unqualified. But we cannot see that it makes any difference what the form of the transaction was. The estate, while in the hands of the assignee, was devoted to pay appellant its claim and advances, and was applied to such use; and, whatever the bargain was, as formally made or tacitly understood, that disposition of the estate was a fraud upon the rights of appellee. We approve of the decree, and the judgment of the appellate court will be affirmed. Affirmed.

(164 Ill. 51)

FORTUNE v. BARTOLOMEI.

(Supreme Court of Illinois. Nov. 9, 1896.)

CONFESSION OF JUDGMENT—RENT.

1. Under Rev. St. c. 110, § 86, providing that any person, for a debt bona fide due, may confess judgment by himself or attorney duly authorized, either in term time or vacation, without process, a valid judgment by confession can be entered on a lease for rent where the power has been given and strictly followed. 62 Ill. App. 290, affirmed.

2. A lease provided for payment of rent in monthly installments, and contained a power of attorney to confess judgment "from time to time for any rent which may then be due by the terms of the lease." *Held*, that a confession of judgment for 32 installments of rent due was valid.

3. A lease provided for payment of rent in monthly installments; that all water rents and gas bills levied on the premises should be paid by the lessees; that, in case they should not be paid when due, the lessor should have the right to pay them; and that all amounts so paid, and the amounts paid by the lessor for cleaning the premises, should "be so much additional rent," and "be due and payable with the next installment of rent due under this lease." It also contained a power of attorney to confess judgment "from time to time for any rent which may then be due by the terms of the lease." *Held*, that a confession of judgment on such lease for the several installments of rent, not including the "additional rent," was valid. 62 Ill. App. 290, affirmed. *Little v. Dyer*, 27 N. E. 905, 138 Ill. 272, distinguish-
ed.

Appeal from appellate court, First district.

Action by Frank Bartolomei against Peter Fortune to recover rent due on a lease, in which there was a confession of judgment in favor of plaintiff under a power contained in the lease. From a judgment of the appellate court (62 Ill. App. 290) affirming a judgment overruling a motion of defendant to set aside and vacate such judgment, defendant appeals. Affirmed.

Barton & Reichmann, for appellant. Frederick S. Moffett, for appellee.

CRAIG, J. This is an appeal from a judgment of the appellate court affirming a judgment of the superior court of Cook county entered on the 11th day of May, 1895, overruling a motion of appellant to set aside and vacate a judgment entered in said court on February 21, 1895, by confession for rent due on a lease containing a warrant of attorney authorizing judgment by confession. The lease, a copy of which was attached to and filed as a part of the declaration, contained the following: "First. To pay as rent for said premises the sum of \$3,533.33, payable in thirty-six installments of \$100 each in advance, upon the first day of each month of said term. * * * Fifth. To pay (in addition to the rents above specified) all water rents and gas bills levied and charged upon said demised premises for and during the time this lease is granted, and, in case no water rents are levied specifically upon said premises, to pay all of the water rents levied or charged upon the building in which said demised premises are situate; and, in case said water rates and gas bills shall not be paid as soon as the same are due, that the said party of the first part shall have the right to pay the same, which amounts so paid, together with any amounts paid by first party for cleaning catchbasins, or by reason of notice from the proper authorities to keep the said demised premises in a clean and healthy condition, as hereinbefore specified, are hereby declared to be so much additional rent, and shall be due and payable with the next installment of rent due thereafter under this lease." The warrant of attorney to confess judgment, so far as the same has any bearing on the decision of the case, was as follows: "The party of the second part hereby irrevocably constitutes F. I. Sallsbury, or any attorney of any court of record in this state, attorney for them, in their name, on default of any of the covenants herein, to enter their appearance in any court of record, waive process and service thereof, and confess judgment against the party of the second part in favor of said party of the first part for forcible detainer of the premises, with costs of said suit, or to confess judgment from time to time for any rent which may then be due by the terms of this lease, with costs, and to waive all errors and right of appeal from any such judgment and judgments." Under the pow-

er contained in the warrant of attorney a declaration was filed by the lessor containing one count, wherein it was, in substance, averred: For that whereas, etc., on 19th of May, 1892, plaintiff leased premises to defendants; term from May 20, 1892, to April 30, 1895; total rent of \$3,533.33, payable in 36 installments of \$100 on the 1st day of every month in advance; and that by virtue of said demise defendants entered into possession on the 20th day of May, 1892, and were possessed thereof from the 20th day of May, 1892, until the 20th day of January, 1895, when a large sum of money, to wit, the sum of \$3,200, became due for 32 months' rent, according to the terms of said lease; and that the same is still in arrears and unpaid to the said plaintiff; whereby an action has accrued to the said plaintiff to have and demand of and from the said defendants \$3,200, part of the said sum above demanded; and said defendants are still in possession of said premises. Yet the said defendants, etc. Ad damnum, \$6,000.00. Under this declaration, in pursuance of the power, a judgment was confessed in open court in favor of the lessor against the lessee for \$3,200. This amount was composed solely of monthly installments of rent, —32 monthly installments of rent, provided for by the terms of the lease. No other matter or thing entered into the judgment. It will be observed that by the terms of this lease the lessees took the premises from the 20th day of May, A. D. 1892, to the 30th day of April, A. D. 1895, and therein covenanted to pay as rent for the premises for the term the sum of \$3,533.33, payable in installments of \$100 each, monthly, in advance, on the 1st day of each month of the term. Under this provision of the lease, so far as the rent agreed upon was concerned, the amount and the manner of its payment were definitely fixed and settled; and, as nothing entered into the judgment but the rent, the only question presented by this record is whether a valid judgment can be entered by confession on a lease for rent where the power has been given and strictly followed.

Section 66, c. 110, of our Revised Statutes, provides: "Any person for a debt bona fide due may confess judgment by himself or attorney duly authorized either in term time or vacation without process." By the terms of the lease, at the time the judgment was entered here, there was a debt of \$3,200 bona fide due, and the power of attorney duly executed authorized the attorney to confess judgment; and, unless the language of the statute is to be ignored and disregarded, no reason is perceived why the judgment might not be confessed for the amount then due on the lease. It is true, the power of attorney does not say that the attorney may confess judgment for \$3,200, or any other definite amount, but it does say the attorney "may confess judgment from time to time for any rent which may

then be due by the terms of the lease." Under this language, if \$3,200 was due when the attorney appeared in court,—and it is not disputed that such amount was due,—he was empowered to confess judgment for that amount. Suppose, when the first monthly installment of rent, \$100, had become due, the attorney had appeared in court, and filed the proper papers, and offered to confess judgment for that amount; could it seriously be contended that he was not authorized to confess a judgment for that sum? And if he could do that, why not, if 12 months' rent was due, add the sums together, and confess a judgment for that amount; or if, as was the case, 32 months' rent was due, add the monthly installments together, and confess a judgment for the whole amount then due by the terms of the lease? The law favors consolidation of actions or causes of action, in order to avoid, when it can be done, a multiplicity of suits. This is so whether the action is predicated upon installments in a lease, in a note, or in several notes. There is no more trouble or difficulty in entering a judgment by confession on the lease for several monthly installments due than there would be to enter a judgment on a promissory note where there had been a payment entered on the note, or where it might be necessary to compute interest on a note. If a power of attorney is executed, authorizing the confession of judgment on a certain promissory note, describing it, for the amount due thereon, and there are credits upon the note, upon application to confess judgment the court would be authorized to deduct the payments, and enter a judgment for the balance due. The same rule would apply to a lease when application is made for judgment. The lease would be examined, and the credits deduced, and a judgment entered for the remaining balance, whatever it might be. As has been seen, the lease, in addition to providing for the payment of a stipulated rent each month, contained this provision: "That all water rents and gas bills levied and charged upon the demised premises are to be paid by lessees, and that, in case the same shall not be paid when due, the lessor shall have the right to pay the same; and that all amounts so paid, together with any amounts paid by, lessor for cleaning catchbasins and keeping said premises in a clean and healthy condition, are hereby declared to be so much additional rent, and shall be due and payable with the next installment of rent due under this lease." And, as the amount accruing as rent under this provision of the lease was an uncertain and unliquidated amount of money, the power of attorney to confess judgment for that part of the rent was void, and no judgment could be entered for rent under it.

Some of the covenants in a lease may be valid and others void. So with bonds and documents of all kinds; some parts may be good, while others are invalid. But, so long as the different parts of a lease or other writing are severable, those provisions which may

be void can be regarded as surplusage, and those provisions which are valid may be sustained and enforced. Conceding, therefore, that the provision in the lease relating to water rents, gas bills, and cleaning catchbasins, and keeping the premises in a healthy condition, is void in so far as an attempt might be made to confess a judgment under the power of attorney invoked for any rent arising under that provision of the lease, that would have no bearing whatever on the other provision of the lease under which the lessee agreed to pay \$3,533.33 in installments of \$100 each month. This provision was separate and distinct from the other, and no reason is perceived why this could not be enforced and the other rejected. That course was pursued here in obtaining judgment by confession. Nothing was claimed under the objectionable feature of the lease, but a judgment was confessed for the definite and fixed amount of rent mentioned in the lease. Appellant, however, relies mainly on *Little v. Dyer*, 138 Ill. 272, 27 N. E. 905. In that case the lease contained the same provision that is found in the lease in the case under consideration, but in that case, as we understand, the second judgment was confessed not only for the rent specified in the lease payable in monthly installments, but also for water rents, gas bills, and for keeping the demised premises in a clean and healthy condition; and the court held, as the judgment included rent for these items as well as the amount specified in the lease, it could not be sustained. But whether the judgment could be sustained had it been confessed for the monthly installments of rent, leaving out those items, did not arise, and was not decided. This is apparent from the following statement, found in the opinion of the court in deciding the case: "The rent covered by the power in this lease includes not only the \$36,000, and the installments of \$300 each, mentioned in the indenture, but also the unliquidated sums that may be paid by the lessor for water rates, for gas bills, and for keeping in a clean and healthy condition the demised premises and appurtenances; and therefore the question whether a power to confess judgment for an installment of a certain fixed rent, and for such installment only, is a valid power, does not arise in this case, and for that reason we refrain from the expression of an opinion in regard thereto." We adhere to the rule laid down in *Little v. Dyer*, supra, but that case presented a different question from this, and it cannot control here. The judgment of the appellate court will be affirmed. Affirmed.

(163 Ill. 409)

NASH et al. v. OLASSON.

(Supreme Court of Illinois. Nov. 9, 1896.)

MEASURE OF DAMAGES—BREACH OF CONTRACT.

In an action for corn delivered by plaintiff to defendants, it appeared that plaintiff left it with defendants under an agreement that whenever he desired to sell he should receive five cents less than the price in the Chicago

market at that date; that, when plaintiff determined to sell, the market reports for that particular day were not received by defendants; that plaintiff referred to a morning paper, giving the quotations for the closing market of the evening before, and that the prices given by such paper were reliable authority. *Held*, that it was not error to permit the jury to use such price as a basis in the computation of plaintiff's damages.

Appeal from appellate court, First district.

Action by Class Classon against Nash, Wright & Co., Charles T. Nash, and others, for the price of certain corn sold and delivered by plaintiff to defendants. From a judgment of the appellate court (55 Ill. App. 356) affirming a judgment for plaintiff, defendants appeal. Affirmed.

Prior to 1880, H. S. Gilbert operated several grain elevators in the vicinity of Ottawa, one of which was located at Wedron, in La Salle county. The general office, where the business of the several elevators was mostly transacted in paying for grain, etc., was in the city of Ottawa, and the superintendency of the business in the several elevators was directed by Gilbert from that general office. Several years prior to the date above mentioned, Gilbert was the owner of these several elevators, but, becoming embarrassed financially, conveyed them to appellants Nash, Wright & Co. After that conveyance was made, Nash, Wright & Co. entered into a contract whereby the business at those elevators was to be run for their benefit, and under their control, and with money furnished by them; and by that contract allowed Gilbert the right to redeem the property upon the payment of the amount of his indebtedness to the appellants and the interest thereon; and during the time Gilbert was to manage and control the business of these elevators appellants were to pay him a salary of \$150 per month. They were to have another agent at that office, and that second agent was one Perrin, who was the bookkeeper. Appellants opened a deposit with the First National Bank of Ottawa, and checks were drawn against that fund in their name, signed by Perrin. Other agents were employed at other elevators, and payments for grain there purchased were usually made by checks drawn by appellants in the name of Nash, Wright & Co. Gilbert, by the announcement on the sign at his office, had the same marked "H. S. Gilbert, Agent. Grain and Commissions." On about the 3d of November, 1891, the appellee, at the Wedron elevator, made a contract for the sale of corn, which was made with one Smith, an agent of Nash, Wright & Co. By that contract appellee was to shell and haul his corn, and, when ready to sell at any time during the month, was to receive within five cents per bushel of the price quoted in Chicago for the same grade of corn. Between the 5th and 14th of November appellee delivered at the warehouse

in Wedron 6,379 bushels and 28 pounds of corn, and on the 28th day of November appellee went to the warehouse in Wedron, and stated to Smith that he was then ready to sell. Smith replied that he had not received all the market reports that day, but had the Chicago Tribune of that morning, and showed to appellee the quotation of prices. A discussion then came up whether appellee would be entitled, under the contract, to the price on the 27th of cash corn, or the price at which futures closed. On the 27th cash corn closed at 70 and future at 74. Smith directed appellee to see Gilbert, saying he knew all about it. When appellee called on Gilbert at Ottawa, the latter refused to recognize the contract and settle for the corn. The chief controversy in this case is whether there was a contract made by any one authorized to make it on the part of appellants with appellee; and, second, there was no proof of the price of corn on the 28th. In the trial court a verdict for plaintiff and judgment thereon for \$4,641.96 was entered. That judgment was affirmed by the appellate court of the First district. 55 Ill. App. 366.

Duncan & Gilbert, for appellants. Fowler Bros., for appellee.

PHILLIPS, J. (after stating the facts). The first proposition submitted by appellants as a defense to this action and as the reason urged for the reversal of the judgment of the appellate court is that the record contains no evidence legally sufficient to establish any liability on the part of defendants. Incidentally, under this head, we are asked to construe the contract entered into between appellants and Gilbert for the purpose of determining whether or not the relation of principal and agent existed between them; thus also determining whether or not Smith was the agent of appellants, and authorized to enter into the contract of purchase of the corn from appellee on behalf of appellants. Ordinarily, the construction of a contract in writing is for the court, and not for a jury. 3 Am. & Eng. Enc. Law, p. 167, and cases cited. The court should construe the written instrument and instruct the jury as to its legal effect. *Sigsworth v. McIntyre*, 18 Ill. 127; *Lintner v. Millikin*, 47 Ill. 179. In a case, however, where it is sought to establish the question of agency by parol proof of various acts, conduct, and business transactions of the parties, and a written instrument is offered, not for the express purpose of proving the agency, but as an element tending to prove it, and in corroboration of parol proof, no construction need to be given it by the court, but it is a question for the jury as to whether all the evidence, taken as a whole, establishes the relationship of principal and agent.

If a contract or other instrument in writing be offered for the express purpose of

proving the relation of partnership agency or like character, and the allegation be founded on such instrument, then, as before stated, the construction of the instrument is for the court. In this case that part of the contract between appellants and Gilbert which is material to the issues involved is as follows: "Whereas, it is understood and agreed between the parties hereto that the said party of the second part shall engage in and conduct the business of buying and selling grain at the stations of Ottawa, Grand Ridge, Wedron, Serena, Utica, and Buffalo Rock, all of said places being in said county of La Salle, under the conditions and limitations hereinafter expressed; that is to say: Said party of the second part shall conduct said business under the direction and supervision of said parties of the first part, who shall be represented in the management of said business by an agent of their selection; such agent to handle and control all the money used in the conduct of said business, and to exercise a supervisory control over said business in general. Said parties of the first part covenant and agree to furnish and supply to said party of the second part, in the amount above stated, the amount of money necessary for the proper conduct and operation of said business; and said party of the second part covenants and agrees to pay to said parties of the first part all moneys so advanced by them, together with interest thereon at the rate of eight per cent. per annum, payable monthly; to ship all grain purchased by him prior to the time of making above-named payments to said parties of the first part at Chicago or elsewhere, as said parties may direct. It is covenanted and agreed between the parties hereto that there shall be paid out of the earnings of said business a salary not to exceed \$100 per month to the agent of said parties heretofore mentioned; that said second party shall be allowed, out of the net earnings of said business, the sum of \$150 per month, and all other earnings after the payment of the necessary expenses of the business shall apply upon, and go towards the payment of, the said sum of \$20,000." Followed by this was proof that the sign of Gilbert read "H. S. Gilbert, Agent. Grain and Commissions." This was the central office at Ottawa of this system of elevators. The elevator at Wedron was in charge of Smith. The evidence of Perrin, who is the admitted agent of appellants, is as follows: "I paid Smith for his services. Got the money from the First National Bank of Ottawa. It was Nash, Wright & Co.'s money." In the transaction of the business of the Wedron elevator were used slips or tickets in the following form, which were passed out and given to those selling grain. "Wedron Warehouse.—Office of Nash, Wright & Co. H. S. Gilbert, Agt. Grain and Commission. Nash, Wright & Co., 517 Rialto Bldg., Chicago." All the grain was ship-

ped to appellants, and checks signed by them were given in payment.

Some proof is offered questioning the fact as to whether appellants had knowledge of the fact that their name was being used, and that they instructed Gilbert, on learning of the fact, repudiating it, but the evidence of Gilbert indicates this was after the present trouble. On this state of facts the jury in the trial court found, in substance, that Smith, in the purchase of this corn, was the agent of appellants. Whatever knowledge Smith had regarding the use of appellants' name in the business, and the knowledge possessed by Perrin, who was the acknowledged agent of appellants, must be charged against appellants. In general, notice to the agent as to the transaction in which he is engaged is notice to the principal. *Bryan v. Primm*, Breese, 59; *Doyle v. Teas*, 4 Scam. 202; *Williams v. Brown*, 14 Ill. 200; *Manufacturing Co. v. Holdford*, 30 Ill. 455. Smith's apparent duties were to buy and handle grain for appellants, and, in the absence of any express limitation, his authority to make contracts therefor must be presumed. The principal is bound equally by the authority which he actually gives his agent and by that which, by his own acts, he appears to give. *National Furnace Co. v. Keystone Manuf'g Co.*, 110 Ill. 427; *Goelg v. Out-house*, 95 Ill. 346; *Thurber v. Anderson*, 88 Ill. 167. After the proposition by appellee to sell was made, Smith says he consulted with Gilbert, and then told appellee it was all right. The corn was delivered to him, and it must be presumed was accepted under this contract. The appellate court has found that Smith, in this transaction, was the agent of appellants; and by this finding we are bound, and, in addition to that, we cannot readily perceive how on the evidence offered in the trial court the finding could have been otherwise.

It is also urged that the evidence offered in support of the price appellee was entitled to recover was insufficient. It is clear from the evidence that in the early and middle part of November he hauled his corn, and left it with the agent of appellants, with the agreement that whenever he desired to sell he should so announce, and should receive five cents less than the price in the Chicago market at that date. When he did determine to sell, the market reports for that particular day were not received by appellants' agent. He himself referred to a morning paper giving the quotations for the closing market of the evening before. This court will be presumed to take notice of the usual and customary manner in which the general commercial business of this country is carried on; and that in the purchase of grain or other commodity the purchaser, as a general rule, is governed by the last available information or quotations in his possession. In this case that information was a morning paper, giving the quotations of the evening

before. The proof offered by appellee to show these prices was admitted by appellants as being reliable authority. On that the jury have based the amount appellee was entitled to recover, and the appellate court have in this matter also affirmed their verdict. We see no error in the computation of appellee's measure of damage on this basis.

Various objections are raised to instructions given for appellee and refused for appellants. Counsel for appellants say in their brief: "If this court should take the same view of the evidence [as the appellate court], and should conclude that the facts were so clear that no errors of law could justify a different verdict, it would be quite useless for us to discuss the instructions and other rulings of the trial court." We do take the same view of the evidence, and are in a great measure bound by the findings of the appellate court in this case. We believe that the verdict of the jury could not, under the law and the facts, have well been otherwise, and that the instructions, taken as a whole, are correct. Those offered by appellants and refused by the court were all based on the theory that no agency existed to bind appellants. That fact having been determined, renders unnecessary a discussion of the instructions. The judgment of the appellate court is affirmed. Affirmed.

(163 Ill. 333)

JELE v. LEMBERGER.

(Supreme Court of Illinois. Nov. 9, 1896.)

WILLS—PROBATE—CONTEST—PLEADING—ALIENS.

1. A bill by an alien to set aside the probate of a will, merely alleging that his decedent died leaving certain land, excludes any presumption that personal property was left by him, and therefore he is not entitled to maintain the suit without showing his right, through treaty, to inherit; Laws 1887, p. 5, prohibiting aliens from inheriting land.

2. An answer to a bill to contest the probate of a will, merely alleging that defendant does not deny the relationship of complainant to the decedent, is not an admission of such relationship, so as to excuse complainant from introducing evidence thereof.

3. Under Laws 1895, p. 327, authorizing "any person interested" to contest by bill in equity the probate of a will, the court is without jurisdiction, where it appears from the record that complainant is not interested in the estate, being an alien incapable of inheriting.

Error to superior court, Cook county; Phillip Stein, Judge.

Bill by Joseph Lemberger against Anna Jele and others to contest the probate of a will. There was a decree for complainant, and defendant Jele brings error. Reversed.

Joseph Lemberger, the defendant in error, filed in the circuit court of Cook county his bill of complaint, the commencement of which is as follows: "Your orator, Joseph Lemberger, of the empire of Germany, by Mary Lemberger, his attorney in fact, respectfully represents unto your honors that one Joseph Lemberger, also known as Jo-

seph Lemberger, the uncle of your orator, Joseph Lemberger, late of the county of Cook and state of Illinois, but now deceased, on, to wit, the 16th day of August, 1892, executed a certain instrument of writing purporting to be his last will and testament; and afterwards, and on, to wit, the 12th day of September, 1892, said Joseph Lemberger departed this life, leaving the following named persons, besides your orator, his heirs at law and legal representatives, to wit, Walpurga Weinfurter, a niece, and George Lemberger, a nephew, defendants hereinafter named." The bill then states, in substance, that the said Joseph Lemberger, deceased, in and by the said instrument in writing, purporting to be his last will and testament, professedly bequeathed all his property to one Anna Jele, and that said will was probated, and Anna Jele appointed executrix under the same. It also states that the deceased was at the time of his death the owner and in possession of a certain described house and lot in Cook county, of the value of \$4,000, and that since his death the said Anna Jele has been enjoying the rents and profits of said premises. The bill charges that the testator, Joseph Lemberger, deceased, at the time of making the will in question, was in his dotage; that his mind was impaired; that he was frequently intoxicated; that he was illiterate, and spoke English imperfectly; and that he was under the undue influence of said Anna Jele, to whom he was not related. Anna Jele, Walpurga Weinfurter, and George Lemberger were made defendants to the bill. The prayer of the bill is that the supposed last will and testament be declared not to be the last will and testament of Joseph Lemberger, deceased, that his estate be distributed among his heirs, and for other and further relief. The answer of Anna Jele states "that she does not deny the relationship existing between Joseph Lemberger, of the empire of Germany, to Joseph Lemberger, now deceased." It admits that she is a beneficiary under the will, denies all charges of improper influence over the deceased, and denies that he was not of sound mind and memory, at the time of making said will, or that he was incapacitated by intoxication. The co-defendants, Walpurga Weinfurter and George Lemberger, say in their answer: "These defendants, for answer unto said bill, say that they neither confess nor deny any of the allegations therein contained, but call for such proof in regard thereto as the said complainant desires to make." Replications were filed to the answers. Certain issues were at last made up and submitted to the decision of a jury. The jury in their verdict found that the writing read in evidence is not the last will and testament of Joseph Lemberger, deceased, and, further, that, at the time of the execution and attestation of said writing, said Joseph Lemberger was not of sound mind and memory.

The decree of the superior court was as follows: "This cause having come on to be heard upon the bill of complaint herein, the answers of the defendants thereto, and the replication of the complainant to such answers; and the court having heretofore directed an issue of law to be made up, whether the writing, referred to in the pleading, and purporting to be the last will and testament of Joseph Lemberger, deceased, was the last will and testament of said Joseph Lemberger or not, and whether said Joseph Lemberger, at the time of the execution and attestation of said writing, read in evidence, purporting to be the last will and testament of said Joseph Lemberger, was of sound mind and memory; and a jury, to wit [here follow names of jurors], having been called, elected, and sworn to try the said issues; and the said jury having heard," etc., and having found by their verdict that said writing was not the last will and testament of said Joseph Lemberger, deceased, and that the said Joseph Lemberger, at the time of the execution and attestation of said writing, was not of sound mind and memory; and the defendant Anna Jele having interposed a motion in this cause to set aside the said verdict and for a new trial; and the court having heard the grounds and arguments in support thereof, and, being fully advised in the premises, overruled said motion,—“It is further ordered, adjudged, and decreed by the court that the said instrument in writing purporting to be the last will and testament of said Joseph Lemberger, deceased, and the probate of said will in the probate court of Cook county, and the proceedings thereunder, be, and the same are hereby, set aside, and be, and the same are hereby, declared null and void. It is further ordered and decreed that the costs of this proceeding be taxed against the defendants, and that execution may issue therefor in due course.”

Among the assignments of error on the record are these: That the superior court of Cook county had no jurisdiction of the subject-matter of the suit; that it was error to entertain the suit, and to enter the decree, in that the complainant is an alien, incapable of inheriting real property; that the entire record fails to show any interest of complainant in the subject-matter of the suit; that there is no finding, either in the verdict or decree, that complainant is an heir of Joseph Lemberger, deceased, or has any interest whatever in the lands set forth in the bill; that there is no finding of facts in the decree sufficient to support it.

A. W. Thomas and J. F. Geeting, for plaintiff in error. Wilbur & Hauze, for defendant in error.

BAKER, J. (after stating the facts). In his bill of complaint defendant in error designates himself as "Joseph Lemberger, of the empire of Germany." The inference from

such designation must be that he is a citizen or resident of such empire, and, in respect to the state of Illinois, a nonresident alien. And in her answer plaintiff in error likewise designates the complainant as "Joseph Lemberger, of the empire of Germany," and this is, in effect, an admission on the record of such nonresident alienage. *McVey v. McQuality*, 97 Ill. 93. So, there being no finding in the decree to the contrary, and no evidence tending to prove otherwise, the only conclusion deducible from the record is that the complainant in the bill is a nonresident alien. Nor is there any averment in any of the pleadings, or any finding in the decree, or evidence in the record showing the existence of any treaty between the government of the United States and either the empire of Germany or the government of any country forming a part of such empire, and of which such complainant is a citizen or resident, conferring upon the citizens or residents of such empire or country the right of acquiring title to, or taking or holding real estate within, the United States. It follows, then, that defendant in error is within the inhibition of the law of this state which declares that a nonresident shall not be capable of acquiring title to or taking or holding any lands or real estate in this state by descent, devise, purchase, or otherwise. *Laws 1887*, p. 5. Even if Joseph Lemberger, the deceased, died intestate, yet under this act of 1887 his real estate within this state did not descend to his nonresident alien kindred; and therefore defendant in error, being incapable of inheriting, has no right, title, or interest in the house and lot described in his bill. *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195; *Beavan v. Went*, 155 Ill. 592, 41 N. E. 91. And there is no averment in the bill, or finding in the decree, or evidence to show that the deceased, when he died, was the owner or holder of any money or personal property within this state. The averment that, at his death, he was the owner and in possession of the described house and lot, excludes any presumption that he owned the other property. It is a proper place for the application of the rule "*Expressio unius, exclusio alterius*." That which is implied and is general is restricted by that which is expressed and is particular and specific. The rents, issues, and profits mentioned in the bill grew out of and went with the house and lot.

Again, assuming the statement in the bill, that "said Joseph Lemberger departed this life leaving the following named persons, besides your orator, his heirs at law and legal representatives, to wit, Walpurga Weinfurter, a niece, and George Lemberger, a nephew," to be a sufficient allegation that he (the complainant himself) is an heir, and also a sufficient allegation that he and the other two parties named are the sole heirs, yet there is neither admission, nor finding, nor proof that either the complainant or Wal-

purga Weinfurter or George Lemberger is either a nephew, or niece, or next of kin, or heir to the deceased. The answer of plaintiff in error did not admit the relationship. It simply stated "that she does not deny the relationship existing between Joseph Lemberger, of the empire of Germany, to Joseph Lemberger, now deceased." And the answer of the other defendants merely was "that they neither confess nor deny any of the allegations in the bill contained, but call for such proof in regard thereto as the said complainant desires to make." These several answers neither admitted nor denied the relationship and heirship alleged in the bill; and the rule is that, when material averments in a bill are neither admitted nor denied in the answers, they must be established by proof. *Litch v. Clinch*, 136 Ill. 410, 26 N. E. 579; *Morgan v. Herrick*, 21 Ill. 481; *Wilson v. Kinney*, 14 Ill. 27. It is incumbent upon the party seeking to sustain a decree in chancery to preserve the evidence in the record, either by a recital in the decree of the facts essential for its support, or in one or another of the modes recognized by the chancery practice in this state. *Balrd v. Powers*, 131 Ill. 66, 22 N. E. 796; *Marvin v. Collins*, 98 Ill. 510. In the case at bar, there is not even a general finding that the allegations of the bill are true, and no questions of kinship and heirship were involved in the issues upon which the jury returned their verdict.

Under the general equity powers of a court of chancery, and independent of statutes, a bill will not lie to set aside a will or its probate. *Gainess v. Fuentes*, 92 U. S. 10; *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166. In this state the jurisdiction of a court of equity to set aside and annul a will and the probate thereof is conferred by section 7 of the act in regard to wills. That section, as amended in 1895 (Laws 1895, p. 327), provides that, if any person interested shall, within two years after the probate of any will, testament, or codicil, appear, and by his or her bill in chancery contest the validity of the same, an issue at bar shall be made up whether the writing produced be the will of the testator or testatrix or not, which shall be tried by a jury in the circuit court of the county wherein such will, testament, or codicil shall have been proven and recorded, according to the practice in courts of chancery in similar cases. And in *Luther v. Luther*, supra, this court said: "As the jurisdiction of the courts of chancery in this state to entertain bills to set aside the probate of wills is derived exclusively from the statute, such jurisdiction can only be exercised in the mode and under the limitations prescribed by the statute. 'If any person interested shall, within three years after the probate,' etc. * * * If such person does not appear within three years, an issue at law cannot be made up. The appearance

within three years is a jurisdictional fact, and is necessary in order to put the machinery of the court in motion so as to test the validity of the will. The court has no power to entertain the bill after the three years have passed." Under the doctrine of this case, it is just as essential to the jurisdiction of the chancery court, that the bill should be exhibited by "a person interested," as it is that the bill should be filed within the limited number of years from and after the original probate of the will. The right, given by the statute, to contest by a bill in chancery the validity of a will, is a right that is not necessarily confined to heirs at law; for the right is given to "any person interested," which may embrace a devisee as well as an heir at law. *Wolf v. Bollinger*, 63 Ill. 368. And in *McDonald v. White*, 130 Ill. 493, 22 N. E. 599, we held that a person not directly and peculiarly interested in the estate of a deceased person at the time of the probate of the will of such decedent is not entitled to file a bill in chancery for the purpose of contesting the will. Here, the superior court was without jurisdiction to entertain the bill, because it affirmatively appears upon the face of the record that defendant in error was a nonresident alien, incapable of taking or holding real estate in Illinois, by descent or otherwise, and therefore not "a person interested" in the subject-matter of the suit, within the meaning of the statute. And defendant in error cannot maintain his decree for the still further reason that it does not appear from the record that he is any way related to the deceased, by consanguinity or otherwise, so as to give him, even in the absence of an incapacity growing out of his alienage, any interest in the estate. For the reasons stated herein, the decree is reversed. The cause is remanded. If the facts dehorn the record are such as that counsel shall advise an amendment of the bill, then leave to amend may be taken. Reversed and remanded.

(163 Ill. 438)

MCDOLE v. KINGSLEY et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

COMPROMISE—CONSIDERATION—REVOCATION.

1. Mutual concessions for the prevention of litigation are a valid consideration for a compromise settlement between the heirs and the legatees of a decedent.

2. A compromise between the heirs and the legatees of a decedent is not revocable because it provides for arbitration as to the value of improvements placed on land of decedent by one of the heirs, the value of which was to be allowed to him.

3. Where a bill for specific performance of a verbal contract for sale of land claims the land alone, the value of improvements placed thereon by complainant cannot be recovered, on decree for defendant.

Error to circuit court, Kane county; Henry B. Willis, Judge.

Suit by J. McDole against M. E. Kingsley and others. There was a decree for defendants, and complainant brings error. Affirmed.

A. C. Little, for plaintiff in error. Hopkins, Thatcher & Dolph, for defendants in error.

CARTWRIGHT, J. Plaintiff in error filed his bill, December 1, 1891, in the circuit court of Kane county against defendants in error, as executor and devisees of Rodney McDole, deceased, to compel specific performance of an alleged verbal agreement made by his father, the said Rodney McDole. That agreement was alleged to have been made in 1880, and to have provided that complainant should go into possession of about 230 acres, part of the home farm of his said father; that his father should help to move a small tenant house from another part of the farm, and contribute \$100 to repair and rebuild it so that he could occupy it; that he should work the land while his father lived; that each should furnish half the stock and seed, and each have half the proceeds until his father's death, when he should have the land upon payment of \$2,500 to the estate within two years from such death. Complainant went into possession of the premises, and continued in such possession until his father's death, May 13, 1891; and he averred that his possession was taken and held under the alleged contract, and that he had made permanent improvements on the land under such contract. The answers denied the making of any contract, and insisted that complainant took and held possession as tenant of his father. The defendants also set up, as a bar to the claim, a contract of settlement of the matters in controversy in respect to the land, made by all the persons interested, after the death of said Rodney McDole, for the purpose of finally settling and determining their respective rights, claims, and interests. The bill was amended so as to allege that complainant had revoked the contract of settlement after it was entered into by him. There was a hearing, and the bill was dismissed for want of equity.

It will not be necessary to consider the question whether complainant proved the alleged verbal contract, for the reason that the compromise and settlement made after his father's death, before the filing of his bill, disposed of any claims he may have had, and constituted a bar to any relief under the alleged contract. Rodney McDole left a last will and testament. Besides a few miscellaneous provisions, he gave to complainant \$500, and to complainant's brother Frank \$500, and all the rest, residue, and remainder of his estate to his five daughters. He directed his home farm, of which the land in question was a part, to be sold by his executor, and the proceeds were to be equally divided between his said five daughters. Frank was claiming the re-

mainder of the home farm, not claimed by complainant, under a like verbal contract with their father, made at the same time, on condition that Frank should pay \$4,500 to the estate after his father's death. There had been litigation between Frank and his father, and the father had disputed that contract. The disposition of the land by the will was inconsistent with any right or claim of complainant or his brother Frank in the land. The five sisters claimed under the will, and denied all rights of complainant and Frank under the alleged contracts. For the purpose of adjusting and settling amicably all differences between the parties, the contract in question was entered into May 30, 1891, by all who had or claimed any interest in the premises or their proceeds, or in the controversy. It recited that the disposition of the estate by the will was not entirely satisfactory to all the parties, that there had been talk among some of them of contesting the will; that, to settle all differences with reference to the division of the estate and property, and their respective shares and interests in the same as heirs at law or legatees, it was mutually agreed that the will might be probated; and that, instead of abiding by the will in the distribution, all the several amounts given and bequeathed to all should be placed in a gross sum by the executor, and divided by seven. Each agreed, in lieu of his or her respective rights or interests in or to said estate, as heirs at law or legatees under the will, to accept one-seventh of said gross sum in full of all claims against said estate. It also recited that complainant and Frank claimed that they had made lasting and valuable improvements on the farms occupied by them, the title of which was stated to be in fee simple in said Rodney McDole, deceased; and the parties mutually agreed that complainant and Frank should receive the value of such lasting and valuable improvements, to be paid by the executor. Three persons were named to fix the value of such improvements. By this contract, executed under seal, the parties, each in consideration of the waiver of the claims of the others, waived his or her claims to more than one-seventh of the estate, and agreed upon a settlement and division accordingly. It was apparently entered into in a spirit of fairness, and for praiseworthy motives; and there is neither charge nor proof tending to cast suspicion upon it. No fraud, compulsion, or other thing, that could affect the contract in its procurement or execution, has been alleged or proved; and there is no reason to suspect that it was not the product of complainant as much as any other party to it. The evidence shows that complainant's right, to say the least, was questionable, and his claim was in dispute. The questions between the rival claimants were fair subjects of compromise and settlement. The mutual concessions for the prevention of litigation afforded a valid consideration for the agreement. 1

Pars. Cont. (5th Ed.) 438; Bish. Cont. § 57; 1 Add. Cont. § 14. And such a consideration is not only sufficient, but is looked upon with great favor in a court of equity, and will be enforced. *Hall v. Hall*, 125 Ill. 95, 16 N. E. 806.

Two reasons are given by counsel for claiming that the contract was not binding. The first is that complainant, after its execution, withdrew from it or revoked it, and gave notice of the revocation before the amount due him for improvements had been fixed by the arbitrators. This excuse was set up by the amendment to the bill. The notice proved stated that he withdrew from the arbitration, and revoked each and every stipulation and agreement, and each and every act of his in relation thereto. The claim that the contract was thereby canceled is put upon the ground that the authority of arbitrators may generally be revoked at any time before an award is made. But the attempted withdrawal from the arbitration, if effectual, could not affect other matters, settled in the contract by the parties, and not submitted to arbitration. It could hardly be seriously contended that a matter about which parties have agreed upon sufficient consideration could be changed or revoked, because there was some other matter submitted to arbitration. It would be absurd to say that a lease, agreement of partnership, or other contract would be revocable because it provided for a valuation of property, or that a policy of insurance could be revoked because of a provision for an estimate of loss or damage by arbitrators. The contract did not submit to arbitration the question whether complainant or his sisters should have the farm or the improvements. The parties settled that question finally and absolutely for themselves, and the question whether complainant could revoke the agreement as to arbitration has no relevancy in a suit to obtain title to the farm. How the value of complainant's improvements should be determined was foreign to the issue.

The other reason offered why the contract should not be allowed to stand is that it was unjust, because what complainant would receive under it would not be as much as he would get if he should succeed in establishing his alleged contract, and should secure the farm. Counsel furnish an estimate of the value of the farm and of the assets and liabilities of the estate in support of this argument. The same figures show that the sisters gave up something when they waived the provisions of the will giving them the proceeds of the home farm, and agreed to share it with their brothers. If they had insisted upon their rights under the will, and had succeeded, he would have got less than he receives under the contract. The fact that each gave up some part of his or her claim affords the best reason for enforcing the contract.

It is also argued that the contract did not embrace the farm, because it related to the estate of Rodney McDole, and the interest acquired by complainant under his alleged contract did not belong to the estate, and was not comprehended in the terms of the contract. This argument scarcely needs an answer. The disposition of the land by the will, and the claims of complainant's sisters thereunder, were inconsistent with any right or claim of his in the land. The agreement provided for putting the legacies, to be raised in part by a sale of the farm, into a gross sum, to be divided between the parties, and for allowance for improvements on the farm the title of which is admitted to be in fee simple in Rodney McDole, deceased. The argument is unsound.

Finally, it is claimed that complainant was entitled to a decree for the value of his permanent improvements in this suit. If he was not entitled to a deed of the farm. He could not have such a decree, because it would be inconsistent with the averments and prayer of his bill. By this bill he claimed the land, and nothing else. The decree of the circuit court is affirmed. Affirmed.

(163 Ill. 471)

O'DONNELL & DUER BAVARIAN BREWING CO. v. FARRAR et ux.

(Supreme Court of Illinois. Nov. 9, 1896.)

RESCISSION OF CONTRACT—FALSE REPRESENTATIONS—WAIVING RIGHT TO RESCIND—RECOVERY ON RESCISSION.

1. False representations that a saloon is doing a profitable business, and that the income therefrom is \$20 per day, will entitle the purchaser to rescind the sale for fraud.

2. Representations that a saloon is first-class in every respect, and well fitted up, and that the business will yield a profit of \$4,000 in two years, though false, will not entitle the purchaser to rescind the sale for fraud.

3. A purchaser who attempts to rescind a sale for fraud, and, on refusal of the seller to acquiesce in the rescission, continues to exercise acts of ownership over the property, waives his right to rescind.

4. On rescission of the sale of a saloon business for fraudulent representations of the seller, the purchaser is not entitled to recover money paid to such seller for beer furnished during the existence of the contract, under an agreement which, though made at the time of the sale, was independent thereof.

62 Ill. App. 471, affirmed.

Appeal from appellate court, First district. Bill by Leander C. Farrar and another against the O'Donnell & Duer Bavarian Brewing Company to rescind a sale. A judgment for complainants was modified by the appellate court (see 62 Ill. App. 471), and defendant appeals. Affirmed.

This is a bill by appellees (husband and wife) against appellant to rescind a contract and set aside certain judgments. In August, 1894, they purchased from appellant brewing company a certain saloon, stock, and fixtures, in the city of Chicago, agreeing to pay therefor \$1,100. Four hundred dollars

of the consideration was paid in cash, and two notes were given for the remainder,—one for \$600, due in 30 days, and the other for \$100, due in one year. Both notes were secured by a chattel mortgage on the property purchased, the mortgage containing the usual clauses giving the mortgagee the right to take possession upon a failure to pay the notes when due, or if it should feel insecure, etc. At the same time, appellees entered into a contract for a lease of the premises in which the saloon was kept from the date of the purchase to April 30, 1897, agreeing to pay a rental of \$200 per month, with a proviso that they should have a rebate of \$100 a month if they bought all their beer from the appellant company. The lease contained a clause giving the lessor the right to take possession and relet the premises, if the same should be abandoned by the lessee, on such terms as it might deem expedient, such reletting not to operate as a waiver of any right which the lessor would otherwise have to hold the lessee responsible for the rent reserved. Appellees went into possession of the property in June, 1894, and conducted the saloon business until the 29th of September following, when they abandoned the business and premises, tendering the keys to appellant, which it refused. On that day the \$600 note fell due, and on the 8th of August following, appellant caused a judgment to be entered up for the amount of \$764.68, being the amount of the principal and interest then due on the note, and \$50 attorney's fee. On the 13th of October, that judgment remaining unsatisfied, appellants took possession of the saloon, fixtures, and stock of goods, under the mortgage, advertised the property for sale, and sold it for \$500, crediting the amount upon appellees' indebtedness. On January 1, 1895, they relet the premises for a rental of \$75 per month for the remainder of the term for which they had leased it to appellees. During the time appellees conducted the saloon, they became indebted to appellant in the sum of \$187 for beer sold and delivered to them, and that amount remains unpaid.

Lockner & Butz, for appellant. William R. Burleigh, for appellees.

WILKIN, J. (after stating the facts). On the 1st day of October, 1894, appellees filed this bill, alleging that they were induced to enter into the contract of purchase and the lease through the fraudulent representations of appellant, the allegation being: "For the purpose of inducing complainants to purchase a saloon and take a lease thereof, represented that the saloon was first-class in every respect, and was well fitted up; was doing a fine and profitable business, which was mostly glass trade; that the income was \$20 a day, and that the net profit would be \$4,000 in two years; that the only reason for the sale was the ill health of the manager's wife." That, relying upon such representations, the

purchase was made, and a lease entered into. That said representations were false. That complainants, learning that fact, offered to return to the defendants the saloon and property, provided defendant would release them from the obligations of the lease. The answer denies all the allegations of fraud. On the hearing of the cause, the witnesses being examined in open court, a decree was rendered according to the prayer of the bill, ordering the defendant to surrender up the lease, releasing all claim on appellees for rent, vacating and setting aside the judgment of \$764.68, ordering the defendant to release to complainants all claim for the \$187.30 indebtedness for beer as above stated, and also ordering it to repay to the defendants the sum of \$500, being the \$400 cash payment and the \$100 rent paid. On appeal to the appellate court that decree was affirmed, except as to the order in regard to the \$187.30 indebtedness for beer, which was reversed, and the appellant now prosecutes this appeal. It is insisted by appellant that the decree below is erroneous for three reasons: First, that the evidence fails to show that the alleged false representations were made; second, that there is no proof of the falsity of any representations which in law entitle the complainants to rescind the contract; and, third, conceding complainants to be otherwise entitled to the relief prayed for, they have waived any right to rescind the contract by failing to take steps to do so promptly upon the refusal of the defendant to consent to the rescission.

As to the first question, there is a direct and positive conflict between the parties as to the representations set up in the bill; complainants testifying that they were made, and induced the purchase, whereas two members of the defendant company testify to the contrary. The circuit court saw the witnesses, and heard them testify, and found the facts against the defendant. That finding having been affirmed by the appellate court, we do not feel inclined to a contrary conclusion.

As to the second question, it is undoubtedly true that some of the representations set up in the bill amount to no more than the expression of an opinion as to the value of the property and business, or a recommendation of the property of the seller. Certainly, whether the saloon was first-class in every respect, and was well fitted up, were matters about which the purchaser could judge as well as the seller; and whether the business would yield a profit of \$4,000 in two years was the expression of an opinion, which the law would not treat as fraudulent. On the other hand, whether the saloon was doing a profitable business, mostly glass trade, and especially that the income was \$20 per day, were statements of fact, which, if false, as they were found to be by the court below, would entitle the complainants, upon discovery of the real facts, to a rescission of the contract. *Allin v. Millison*, 72 Ill. 201; *Hicks v. Stevens*, 121 Ill. 194, 11 N. E. 241.

The third question is one which must be disposed of as a mixed question of law and fact. It is undoubtedly the law that, if a party seeks to rescind a contract on account of fraud, he must act promptly, and, upon a refusal of the other party to acquiesce in the rescission, do no act which will amount to treating the contract as valid. As, for instance, a party attempting to declare a rescission of the contract, who afterwards exercises acts of ownership over the subject-matter of the contract, treating it as his own, will be held to have waived his right to rescind. "In order that this effect may be produced, the acquiescence must be with knowledge of the wrongful acts themselves, and their injurious consequences. It must be voluntary, not the result of accident, and it must last for an unreasonable length of time, so that it will be inequitable, even to the wrongdoer, to enforce the peculiar remedies of equity against him after he has been suffered to go unmolested, and his conduct apparently acquiesced in." 2 Pom. Eq., Jur. § 817. Under this rule of law, counsel for appellant contend that after complainants offered to return the keys to the defendant, and it refused to receive them, they continued to carry on business in the property, and thereby waived any right which they had at the time of the offer to return the keys and rescind the contract. If there were no other facts connected with the transactions between the parties, this position would be well taken. The evidence, however, shows that continued efforts were made by complainants to bring about an adjustment and settlement of the matters in dispute. We think it is fairly inferable from all the testimony that the complainants did not determine definitely to rescind the contract until about the time of bringing this suit, and that their previous conduct, after discovering the alleged fraud, was not such as should estop them from insisting upon it as they did in their bill.

It is quite clear that the order of the circuit court releasing complainants from their indebtedness to defendant for beer purchased during the conduct of the business was erroneous, both because no claim of that kind was made in the bill, and because that transaction was wholly independent of the contract which it is claimed was induced by fraud. We find no reversible error in the record, and the judgment of the appellate court must be affirmed.

(153 Ill. 238)

WIGGINS FERRY CO. v. ILLINOIS & ST. L. RAILROAD & COAL CO.

(Supreme Court of Illinois. Nov. 11, 1896.)

TITLE TO LAND—EVIDENCE—SURVEYS—COPIES OF FIELD NOTES—OBJECTIONS ON APPEAL.

1. A paper purporting to be a copy of field notes of a survey, and to have been made 15 years before from records at Springfield, is not proved to be a copy of the record, and rendered inadmissible, under Rev. St. c. 51, § 18, as a copy

examined and sworn to by a credible witness, by testimony of a witness that it was the paper he received in reply to a demand on the custodian of surveys at Springfield for a copy of such survey, and that the field notes corresponded with field notes copied by witness 40 years before, when the surveys were at St. Louis.

2. Where commissioners report that they have allowed a relocation of land appropriated by congress for a village common, and refer to an annexed plat for the limits and position thereof as relocated, and congress approves the report, and confirms title in the village to the land as so relocated, evidence that land, claimed by plaintiff in ejectment through such grant, is not within it, arising from the fact that it is not included in such annexed plat, is not overcome by subsequent surveys and field notes of county and private surveyors, not shown to have come to the notice of the government, or to have been recognized or authorized by it, which locate the land within the relocation survey.

3. Where the evidence shows that plaintiff in ejectment was one of the corporations that consolidated and formed a new corporation, objection that the new corporation had succeeded to any right plaintiff had in the land may be raised for the first time on appeal.

Error to circuit court, St. Clair county; A. S. Wilderman, Judge.

Ejectment by the Illinois & St. Louis Railroad & Coal Company against the Wiggins Ferry Company. Judgment for plaintiff, and defendant brings error. Reversed.

Charles W. Thomas, for plaintiff in error.
Hamill & Bordus, for defendant in error.

CARTWRIGHT, J. Defendant brought suit in ejectment against plaintiff in error to recover a strip of land 280 feet wide off the north end of a tract of land designated as "U. S. Survey 759," in St. Clair county. There was a recovery on a trial by the court without a jury. Survey 759 belonged to the commons of the village of Cahokia. Adjoining it on the north was survey 579. The controversy in the case related to the location of the boundary line between them. Plaintiff claimed title from the government, and offered in evidence section 5 of the act of congress of March 3, 1791 (1 Stat. 221), appropriating certain lands used by the inhabitants of the village as a common, to be used by them as such until otherwise disposed of by law. Plaintiff also offered the report of commissioners appointed under an act of congress to report on the commons, which is found on page 194, 2 Am. St. Papers, as follows: "On the Commons. By the fifth section of the law of congress of 1791, it is provided that 'a tract of land, * * * including the villages of Cahokia and Prairie Dupont, and heretofore used by the inhabitants of the said villages as a commons, be and the same is hereby appropriated to the use of the inhabitants of Vincennes and of the said villages, respectively, as a common.' As the limits of the said commons were left by the said law undefined, and could not be found described in the ancient records, it became a subject of compromise and agreement between the citizens of the said villages and the acting governor of the territory about the year 1797; and, by their consent, two tracts,

containing in the whole five thousand four hundred acres, ordered to be laid off for this purpose, were surveyed accordingly by a surveyor appointed by Governor St. Clair. But, on examination into this business, the commissioners have discovered that the said surveys have been inaccurately and improperly made; that for Cahokia, in particular, containing, instead of about four thousand acres, as it ought to have contained, about twenty thousand acres. This circumstance, and the situation of the said tracts not now accommodating the inhabitants, this board have thought proper, at their request, to permit a new location to be made for each of the said villages, on lands more conveniently situated for them. The limits and position of that part which has been relocated will be found described in the annexed plats. We have more readily done this, as the land which the inhabitants abandon is of more value to the United States than that which they have taken." The report gives no description of the commons, but refers to the annexed plat for their location and boundary. That plat was in evidence, and it was proved that the report of the commissioners relocating the commons was approved, and the title confirmed accordingly, as so relocated, by section 3 of the act of congress of February 20, 1812 (2 Stat. 678). Plaintiff also introduced certified copies of a lease executed by a supervisor of the village of Cahokia to the St. Clair Railroad & Coal Company, which was admitted to be the same corporation as plaintiff, by another name, and of a deed of the same premises executed by a supervisor of said village to plaintiff. These instruments were authorized by acts of the general assembly of the state of Illinois. Whether the lease and deed were proved to cover all the land in dispute is the subject of argument, by counsel, but, assuming that such was the fact, the land so described and in dispute was not included in the plat offered in evidence by plaintiff, annexed to the report of the commissioners. This was proved by the testimony of plaintiff's witness (the surveyor) Hilgard, and a comparison of the plat with others introduced shows the same thing. That plat, as stated in the report, showed the limits and position of the land which the inhabitants of Cahokia had agreed to take, and which congress confirmed to them. So far as appears, no other land was granted or confirmed to the inhabitants of Cahokia, from whom plaintiff claimed title. The plat or map annexed to the report was made and certified to by William Rector, surveyor, in May, 1808; and plaintiff offered in evidence what purported to be a copy of field notes of said William Rector of survey No. 759, of part of the commons of Cahokia, dated the same month. This paper was not certified, and was objected to by defendant for that reason, but the objection was overruled. The claim made for its competency now is that the witness Pitzman afterwards testified that he asked the custodian of the United States surveys of this state, at Spring-

field, to send him a certified copy of survey 759, and that was the paper he received in reply. He further said that the field notes corresponded with his field notes, copied by him between 1856 and 1860, when the surveys were in St. Louis. The copy appeared to have been made in 1881. It is claimed that this evidence made the paper admissible as a copy examined and sworn to by a credible witness, under section 18, c. 51, Rev. St. The evidence did not meet the requirements of the statute, or cure the error in the admission of the paper. Testimony that field notes shown on a paper made 15 years ago from records at Springfield correspond with field notes copied from records at St. Louis about 40 years ago, and with no evidence of the identity of the field notes at St. Louis and Springfield, will not suffice to prove the paper a copy of the record.

There was also evidence given of surveys of survey 759, located by notes of Surveyors Deneen and Holbrook. Deneen was a county surveyor, who surveyed the land, and planted corners, somewhere from 1850 to 1860, and Holbrook made a survey in 1859 or 1860. The field notes and surveys of Deneen and Holbrook were not in evidence, but surveyors testified to following them, and finding original corners. By so doing, they found the tract in dispute located within the survey, and the lines so ascertained perhaps corresponded with the alleged copy of field notes erroneously admitted in evidence. So far as appears, these field notes and surveys never came to the notice of the government, and were never recognized or authorized by it. The testimony was insufficient to overcome the evidence afforded by the government plat and grant.

At the request of plaintiff, the defendant admitted on the trial that plaintiff was one of the corporations consolidated in May, 1889, forming the Louisville, Evansville & St. Louis Consolidated Railroad Company, and plaintiff proved that the new corporation was in the hands of receivers. By the consolidation a new corporation was formed, which succeeded to the property and rights of the constituent corporations, and, if plaintiff had any right in the land in question, it passed to the new corporation. It is argued that this objection comes too late, because, if made below, the corporation having the right might have been made plaintiff. We think, however, that the objection is good. The fact of consolidation not only showed that plaintiff had been merged in another corporation, and had ceased to exist as a corporation, but the further fact that, even if it had a corporate existence, it had no title to the land. It was like proving a conveyance from plaintiff to another, and showed that plaintiff had no title.

There was an objection to the introduction of secondary evidence of a lease and deed, but the question will not be likely to arise on another trial, and it will not be noticed. It was not shown that plaintiff or its grantor had ever been in possession of the land in dispute,

and it could only recover by showing some title, which it failed to do. The judgment will be reversed, and the cause remanded. Reversed and remanded.

(163 Ill. 542)

ENGLISH v. WILKINS et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

PLEADING—TIME FOR FILING DECLARATION—CONSTRUCTION OF PRACTICE ACT.

The practice act (2 Starr & C. Ann. St. p. 1779, § 8) provides that, where a summons is not served 10 days before the return day, the defendant shall be entitled to a continuance, and shall not be compelled to plead until the succeeding term. Section 18 provides that, if the plaintiff shall not file his declaration 10 days before the court at which the summons is made returnable, defendant shall be entitled to a continuance, at plaintiff's costs, if the summons was served 10 days before the term, and, if not, without costs; and that, if the declaration is not filed 10 days before the second term, defendant shall be entitled to judgment as in case of nonsuit. *Held*, that the term to which the summons which is actually served is made returnable is the first term after the commencement of the action, within the meaning of the statute, whether or not the summons is served 10 days before its commencement, and the declaration must be filed 10 days before the succeeding term, or the defendant is entitled to judgment. 60 Ill. App. 344, reversed.

Appeal from appellate court, First district.

Action by Charles W. Wilkins and another against William J. English. A judgment for defendant was reversed by the appellate court (60 Ill. App. 344), and defendant appeals. Reversed.

English & Hefferan, for appellant. Rich & Stone, for appellees.

CARTER, J. This suit was begun in the circuit court of Cook county October 5, 1894. The summons was made returnable to the October term, beginning on the third Monday, which was the 15th day of the month, but was not served until October 10th, only five days before the first day of the term. There is a term of that court beginning on the third Monday of each month. The plaintiffs in that suit, who are the appellees here, did not file their declaration in the cause until November 24th, which was 5 days after the beginning of the November term, but more than 10 days before the first day of the December term. No further action was taken in the cause until the February term, 1895, when, on motion of the plaintiffs, the defendant was defaulted, and judgment rendered against him for the amount of the plaintiffs' demand. Afterwards, at said February term, upon motion of the defendant, supported by affidavit claiming that he had a complete defense to said cause, the court set aside the default and judgment, and dismissed the plaintiffs' suit, at their costs, on the ground that the declaration was not filed within the time required by law; that is, was not filed 10 days before the November term, 1894, which, according to the ruling of

the court, was the second term after the commencement of the suit. On appeal the appellate court reversed the judgment of the circuit court, and remanded the cause, with directions to set aside and vacate the order setting aside and vacating the default and judgment and dismissing the suit, thereby leaving the judgment against the defendant in full force and effect. From this judgment of reversal said defendant prosecutes this appeal.

The question here is, which was the "second term of the court," within the meaning of the statute,—the November term, as held by the trial court, or the December term, as held by the appellate court? The eighth section of the practice act provides that: "If it shall not be in the power of the sheriff or coroner to serve a summons ten days before the return day thereof, he may execute the same at any time before, or on the return day; but if not served ten days before the return day thereof, the defendant shall be entitled to a continuance, and shall not be compelled to plead before the next succeeding term." 2 Starr & C. Ann. St. p. 1779. The eighteenth section of the practice act, so far as applicable to the case, is as follows: "If the plaintiff shall not file his declaration, together with a copy of the instrument of writing or account on which the action is brought, in case the same be brought on a written instrument or account, ten days before the court at which the summons or capias is made returnable, the court, on motion of the defendant, shall continue the cause at the cost of the plaintiff, unless it shall appear that the suit was commenced within ten days of the sitting of the court, in which case the cause shall be continued without costs, unless the parties shall agree to have a trial; and if no declaration shall be filed ten days before the second term of the court, the defendant shall be entitled to a judgment, as in case of a non-suit." *Id.* p. 1783. In *Herring v. Quimby*, 31 Ill. 153, it was held that the summons referred to in the statute is the process which is served on the defendant, and not necessarily the first process issued in the cause, but may be an alias or pluries or a subsequent writ. The effect of that decision is that the plaintiff must file his declaration 10 days before the next term after the term to which the process which is served on the defendant is made returnable. In that case there were successive writs issued, which were not served, and the only question was whether or not the statute should be construed as referring to the first writ issued, though not served, or to the subsequent one which was served, and it was there said: "What event was referred to, after which the second term shall occur, ten days before which the declaration shall be filed? There can be no doubt that the same event is referred to in this last clause as in the first, which requires the declaration to be filed ten days before

the first term of the court, to save a continuance. That event is the issuing of the summons or *capias*,"—that is, the summons or *capias* actually served. In other words, the "summons" mentioned in said section of the statute was construed to mean the summons which was served, and not any prior process which had not been served. But, as the summons there held to have been the one meant by the statute was served more than 10 days before the term to which it was returnable, the precise question here was not presented or considered; and it could not have been intended, by anything that was there said, to decide that the term to which the summons served was returnable would not be the first term, unless the summons was served 10 days before that term. We are satisfied that by the phrase "second term of the court" the statute means the next term after the term to which the process which becomes effective by service is returnable. This view is in harmony with what was said in *Downey v. Smith*, 13 Ill. 671, that "the object of the statute is to hasten proceedings, and not allow a plaintiff to keep a defendant attending on court from term to term without apprising him of the nature of the complaint against him." And it was there held that the plaintiff was not excused from filing his declaration 10 days before the second term of the court because such second term was not in fact held. The question involved was, in effect, decided by this court in *Howell v. Insurance Co.*, 62 Ill. 50. Several different suits were disposed of by the decision rendered in that case. The process served in each suit was issued October 1, 1870, and was returnable to the November term of the La Salle circuit court, the first day of which term was November 7th. Some of these writs were served on the 28th and some on the 29th day of October. Those served on the 28th were served 10 days, and those served on the 29th only 9 days, before the October term. It was there said: "The same question is presented in all the foregoing cases. Appellants commenced their several suits against the insurance companies, and had summons issued in each case, returnable to the November term, 1870. The cases were then in court. * * * The next term after the term to which the summons was made returnable, was held on the 7th day of February, 1871. No declaration was filed, either at the November term, or ten days before the February term." At the February term, and before the filing of the declarations, the defendant moved to dismiss the suits, and the decision of the circuit court in sustaining these motions was approved by this court, and it was further said: "Under the facts, it was the manifest duty of appellants to file their declarations ten days before the February term. Such is the fair construction and plain requirement of the statute. Their omission to do so, by operation of law, must result in a judgment

against them. They knew the term at which the summons was made returnable, and should have guarded against the consequences of their negligence. There was no error, therefore, in the dismissal of the suits." In *Waldner v. Pauly*, 141 Ill. 442, 30 N. E. 1025, the construction given to the statute in *Herring v. Quimby*, supra, was approved. It is said by appellees that the defendant was not in court for any purpose at the October term to which the summons was made returnable, for the reason that the process was not served on him 10 days before the first day of that term; and that, because he could not be compelled to appear and plead at that term, the next, or November, term, was the first term at which he might have been defaulted or proceeded against in any manner, and that, therefore, the November term would be the term meant by the first clause of the statute, and the December term the "second term of the court" under the second clause of the statute, and the one 10 days before which the declaration must have been filed to avoid "a judgment, as in case of nonsuit." The argument of counsel might be sufficient to induce a change in the statute by the department having the power to make such change, but we regard the statute, and the interpretation of it by previous decisions of this court, as too plain to authorize a different construction than the one here given to it. All statutory provisions of this character are, in application to particular cases, apt to appear more or less arbitrary. It may, however, be said that, as it is the object of the statute to hasten the proceedings, no just reason can be seen why the plaintiff should not file his declaration at least 10 days before the second term, notwithstanding the defendant may have been served with process less than 10 days before the first term. The judgment of the appellate court is reversed, and the judgment of the circuit court is affirmed. Judgment of appellate court reversed.

(163 Ill. 459)

FRASER & CHALMERS v. SCHROEDER.

(Supreme Court of Illinois. Nov. 9, 1896.)

MASTER AND SERVANT—VICE PRINCIPAL—NEGLIGENCE—EMPLOYING INCOMPETENT SERVANT—EVIDENCE.

1. A servant directed to take other servants, to be selected by him, and unload heavy machinery from a dray by means of a crane, may act in such work as a vice principal, though he has no authority to discharge the servants under him. 60 Ill. App. 519, affirmed.

2. Proof that a servant was wholly inexperienced in the performance of the work of moving the lever of a crane by which the lifting gear was shifted, and that he failed to perform the work properly, is sufficient to show that such servant was incompetent for the work, the evidence showing that the operation of such lever by an incompetent person was dangerous to those operating the crane.

3. To show that the machinery was dangerous when handled in the way it was handled when plaintiff was injured, evidence that at another time, when the machinery was handled

in such manner, another person was injured in a way similar to that in which plaintiff was injured, is admissible.

Appeal from appellate court, First district.

Action by F. Schroeder against Fraser & Chalmers, a corporation. From a judgment of the appellate court (60 Ill. App. 519) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Walker & Eddy, for appellant. McCracken & Cross, for appellee.

WILKIN, J. Appellee recovered a judgment in the circuit court of Cook county against appellant for \$3,500 and costs of suit for a personal injury, which has been affirmed by the appellate court. The count in the declaration upon which the trial was had bases the right of recovery upon the allegation that defendants, being a corporation, owned and operated a certain crane used for moving heavy masses of iron and machinery, describing it; that at the time of the alleged injury plaintiff, with other servants of the defendant, were engaged in lifting a certain piece of machinery, weighing about 6,000 pounds; and that, while so engaged, one of the servants, in obedience to the order of the boss or foreman of the gang to stop the machinery, through incompetency and inexperience, so changed the gear of the windlass as to cause it to revolve backward with great force, striking and injuring the plaintiff, who was at the time working at one of the cranks by which the same was turned; the gravamen of the action being the inexperience and incompetency of the servant so changing the gear. The plea was not guilty. It appears from the record that about September 1, 1890, one Charles Blae, a laborer in defendant's employ, was ordered by its foreman to take men to assist him and remove from a wagon a casting of about the weight stated in the declaration. He took with him Charles Buchin, William Gors, and plaintiff, also laborers working for appellant. The crane used was so constructed that when in operation it could be changed to three different gears,—one called the "fast gear," used in moving light loads; another the "slow gear," used in moving heavier objects; and a third, to stop the windlass. It was changed from one of these to another by means of a lever moved by hand. If changed from the slow to the fast gearing while moving a heavy object, the tendency was to throw the cranks backward against the persons using them. At the time of this accident the slow gear was being used, and the casting had been lifted a few inches from the wagon, its entire weight being suspended from the crane. Plaintiff, Gors, and Buchin, were turning the cranks. Blae was on the wagon, superintending the work. He called out, "Stop the crane!" Plaintiff testified that he ordered Buchin to move the lever. Blae denied that he told any particular one of the three men to stop it, but admitted giving the general order, and all agree that Buchin attempted to obey it, but so

moved the lever as to throw it into the fast gear, instead of the proper one to stop the windlass, the result being that the crank at which plaintiff was working was suddenly thrown back against him, causing the alleged injury. The theory of plaintiff's case is that the defendant, by its vice principal, Charles Blae, ordered an incompetent, inexperienced co-employé (Charles Buchin) to operate the lever upon the crane, who, by reason of such incompetency, caused the accident. The gist of the charge is, not the retaining of a servant once competent, who subsequently became incompetent, but selecting and ordering one to do a certain act who was incompetent to perform that duty. The right of recovery upon this theory is not controverted by counsel for appellant, but they say: "Upon this theory the burden of proof was upon plaintiff in the trial court to establish the following propositions of fact: First, that Buchin, as a matter of fact, was directed by some one in authority, not a fellow servant of appellee, to move the lever; second, that his incompetency and inexperience were either actually known to appellant, or by the exercise of reasonable care could have been known to appellant; third, that appellee did not know, and could not have known by the exercise of ordinary care and observation, of the alleged incompetency of Buchin; fourth, that the accident was the result of Buchin's incompetency." It is admitted that these questions of fact, in so far as their determination depends upon conflicting evidence, must be accepted by us as conclusively settled by the decisions below in favor of the plaintiff. Conceding, therefore, that the burden of proof upon each of the foregoing propositions was upon plaintiff, still, unless we can say the evidence, with all fair and legitimate inferences arising therefrom, does not tend to establish them, this court must treat the case of plaintiff as made out. The first of the propositions involves two questions; that is to say: Was Blae, at the time of the accident, a vice principal of the defendant? And did he order Buchin to move the lever? We said in *Coal Co. v. Holmquist*, 152 Ill. 581, 38 N. E. 948: "Where a master confers authority upon one of his employés to take charge of and control a certain class of workmen in carrying on some particular branch of his business, such employé, in giving and directing the movements of the men under his charge, with respect to that branch of the business, is a direct representative of the master, and not a mere fellow servant. All commands given by him within the scope of his authority are, in law, the commands of the master; and, if he is guilty of a negligent and unskillful exercise of his power and authority over the men under his charge, the master must be held to answer,"—citing *Railroad Co. v. May*, 108 Ill. 288. The evidence at least tends to bring Blae within this rule. The mere fact that he had no power to employ or discharge men does not necessarily render him other than a vice principal. The

question was one of fact for the jury. *Railroad Co. v. Flynn*, 154 Ill. 448, 40 N. E. 332. The testimony of plaintiff was to the effect that Blae ordered Buchin to stop the crane; to "move the lever." While the second proposition, as stated by counsel, assumes Buchin's incompetency, it is insisted in the argument that he was not; and it is contended that, aside from the fact that he failed to so set the lever as to stop the windlass, there was no proof whatever tending to prove he was not perfectly competent to perform that which he was ordered to do. It is said he knew perfectly well where to move the lever, and attempted to do it, but failed. But it was not merely a question of knowledge as to how the lever should be moved, but also of ability to properly perform the act. A mechanical engineer, familiar with the construction of the crane, testified that shifting the gear was dangerous, and should be done by a person who thoroughly understood it. The description of the device by this and other witnesses makes it clear that the lever in the hands of an inexperienced man during the lifting of heavy objects, renders it extremely dangerous to those turning the cranks. It is in proof that Buchin was wholly inexperienced in the performance of that duty, having never attempted it before. If Blae, the representative of the defendant, did not know these facts, he could have readily ascertained them by the use of even slight diligence before engaging in the work, and before ordering him to do that which he knew might endanger plaintiff and others. The evidence showed that plaintiff had no previous knowledge of the competency or incompetency of Buchin, and he certainly had no opportunity to inquire into that fact after the order was given. The rule that when one employé has knowledge of the incompetency of another, but continues in the service until he is injured through such incompetency, he cannot recover, has no application to the facts of this case. Plaintiff had no reason to expect that Buchin would be ordered to perform the duty until the moment he was told to do so, and it was impossible for him then to abandon his post at the crank, even though he had known of his want of skill. Finally, it cannot be seriously contended the evidence wholly fails to prove that the injury resulted from Buchin's incompetency. That it was caused by his failure to place the lever in proper position is not denied. All that is claimed is that such failure was the result of a mistake or accident, and not of incompetency. Enough had been said on this point to show that there was at least evidence to the effect that he did not possess the requisite skill and experience to do the required act. Unquestionably, the machine was capable of being handled with safety by those who understood how to handle it. There being evidence, then, tending to support all the material allegations of the declaration, the trial court properly overruled the motion of defendants to instruct the jury to

return a verdict of not guilty. The only remaining question presented for our consideration is the assignment of error on the improper admission of testimony. A witness called by plaintiff was allowed to testify, over objection, that shortly before this accident he was hurt by the same crane, in a similar manner. We see no valid objection to this testimony. On this point counsel for appellant assume that the only issue before the jury was the competency of the employé who moved the lever. It is true that was the main issue in the case, but, as shown above, the plaintiff's right of recovery depended upon the further fact that the injury was the result of that incompetency. In establishing it he had the right to prove that the crane, when handled in a certain unskillful manner, was dangerous,—liable to cause the accident from which plaintiff received his injury. For that purpose the evidence was competent. *City of Bloomington v. Legg*, 151 Ill. 9, 37 N. E. 696. Even if this testimony had been improperly admitted, we do not think the error would have been of that material and substantial character which should work a reversal of the judgment. The judgment of the appellate court will be affirmed. Affirmed.

(163 Ill. 305)

CHICAGO & E. R. CO. et al. v. MEECH.

(Supreme Court of Illinois. Nov. 9, 1896.)

RAILROAD COMPANIES—LIABILITY OF LESSOR—HARMLESS ERROR—DAMAGES—PLEADING—EVIDENCE—WITNESS—CREDIBILITY—INSTRUCTIONS—TRIAL—MISCONDUCT OF PARTIES.

1. A railroad company which allows other companies to run trains over its track is jointly liable with such other companies for injuries caused by their negligence. 59 Ill. App. 69, affirmed.

2. In an action for personal injuries received in a collision between the trains of defendant railway companies, the admission of evidence which was immediately stricken out is harmless.

3. To enable plaintiff to recover damages for inability to work at his usual employment, it is only necessary to allege such inability caused by the injury, without alleging the nature of such employment.

4. To show how much plaintiff's earning capacity has been decreased by reason of personal injuries, evidence as to the amounts earned by him for the year preceding the injury and for the year after is admissible.

5. It is not error to instruct that the jury "may" consider the interest of a party to the action, as affecting his credibility as a witness, instead of "should" consider.

6. An instruction that, "if the plaintiff was injured by the collision, he was bound by law to use ordinary care to render the injury no greater than necessary. It was therefore his duty to employ such medical assistance as ordinary prudence * * * required,"—is properly refused, as likely to mislead the jury to believe that, in case of such failure to employ medical assistance, plaintiff would be precluded from recovering for the injuries which were caused by defendant's negligence, and which were separable from the result of such failure on plaintiff's part.

7. Where plaintiff, after the accident, by his own negligence increases his injuries, defendant is still liable for such injuries as were caused

by his negligence, and were separable from plaintiff's subsequent negligence. 59 Ill. App. 69, affirmed.

8. Where plaintiff in an action for personal injuries became hysterical and was carried from the court room, his wife at the time exclaiming that her husband was being killed, it is within the discretion of the trial judge to refuse to instruct that such occurrence should not be considered by the jury.

9. Defendant is not entitled to a reversal because plaintiff in an action for personal injuries broke down with hysteria while on the witness stand.

Craig, Phillips, and Wilkin, JJ., dissenting.

Appeal from appellate court, First district.

Action by H. H. Meech against the Chicago & Erie Railroad Company and others. There was a judgment for plaintiff, which was affirmed by the appellate court (59 Ill. App. 69), and defendants appeal. Affirmed.

W. H. Lyford, F. O. Lowden, W. O. Johnson, J. B. Mann, and E. A. Bancroft, for appellants. Edgar Terhune (A. W. Browne, of counsel), for appellee.

BAKER, J. This is an action on the case, for personal injuries, brought by Meech, the appellee, against the Chicago & Erie Railroad Company, the Chicago & Eastern Illinois Railroad Company, and the Chicago & Western Indiana Railroad Company. The result of a jury trial in the superior court of Cook county was a verdict against the three corporations, jointly, for \$15,000. A remittitur of \$7,000 was entered, and final judgment rendered for \$8,000 damages and costs. The judgment was afterwards affirmed in the appellate court, and this further appeal then prosecuted.

There was a joint user, under leases, of the tracks of the Chicago & Western Indiana Railroad Company by the Chicago & Eastern Illinois Railroad Company and the Chicago & Erie Railroad Company. On the evening of January 13, 1893, appellee was a passenger on a suburban passenger train of the Chicago & Eastern Illinois Railroad Company, when a passenger train of the Chicago & Erie Railroad Company ran into and telescoped the rear end of said suburban train, while the latter was standing at, or just leaving, the Fifty-Fifth street station on the line of the Chicago & Western Indiana Railroad tracks in the city of Chicago, and appellee was injured as a result of such collision. It is the settled law of this state that when injury results from the negligent or unlawful operation of a railroad, whether by the corporation to which the franchise is granted, or by another corporation or other corporations which the proprietary company authorizes or permits to use its tracks, the company owning the railway tracks and franchise will also be liable. *Pennsylvania Co. v. Ellett*, 132 Ill. 654, 24 N. E. 559, and authorities there cited.

Appellants claim that the appellate court, in rendering its judgment of affirmance, evaded the duty which rested upon it, of reviewing the evidence and determining whether it jus-

tified the verdict of the jury, and, without examination or consideration, accepted the verdict as final upon all questions of fact. As we said in *Railroad Co. v. Heinrich*, 157 Ill. 388, 41 N. E. 860, it is the duty of the appellate courts, under the law as it exists in this state, to consider the testimony, and if they find that the verdict and judgment are not supported by it, or are clearly against the weight of evidence, to set aside such verdict and reverse such judgment. A performance of this duty is absolutely essential for the preservation of the rights of citizens and property owners in all those classes of cases where the judgments of the appellate courts are final and conclusive upon all questions of fact. But, as we also said in the case last cited, we cannot do otherwise than presume that the appellate court has faithfully performed that duty, and has found that the evidence properly sustains the verdict and judgment. Yet, be this as it may, we are expressly prohibited by the statute from reviewing, in a case such as this, the decisions of the courts below upon controverted questions of fact.

A claim is made that it was reversible error to allow the plaintiff, over the objections of defendants, to ask the witnesses Clarke, Rubridge, and Lyford the questions that were asked them in regard to an arbitration agreement between the defendants, or some of them. In answer to the question "if he knew whether there were any contracts between the roads, or any of them, in regard to the accident," the witness Clarke answered that he was unable to answer the question. In answer to a like question addressed to the witness Rubridge, he answered, "I think there was"; but he was neither asked any question, nor made any answer, in regard to the contents of such agreement. The witness Lyford, in answer to a like and further questions, answered, in substance, that there was an agreement entered into with reference to the accident; that it was between the Chicago & Eastern Illinois Railroad Company and the Chicago & Erie Railroad Company, and made provision for an arbitration in regard to the accident; that "the result of that arbitration was to determine, as between the two above-mentioned companies, the liability for that accident," and that "it further provided that there should be submitted to the arbiters only the written evidence which was taken in shorthand at the investigation held immediately after the accident occurred; that there should be submitted to the board of arbiters a time card which was in force, and the book of rules of the Chicago & Western Indiana Railroad Company which was in force, at the time the accident occurred, also a plat showing the position of the tracks, etc.; that the arbiters might, if they saw fit, visit the scene of the accident." At the close of his testimony, the evidence of this witness concerning the contents of this arbitration agreement was stricken out by the court, except the reference to the rules and regulations. We are

wholly unable to see how the testimony of either Clarke or Rubridge could by any—even remote—possibility have any effect upon the verdict of the jury. Excluding the matter of the reference to the rules of the Western Indiana Company contained in the agreement, the same may be said in respect to the testimony of Lyford in regard to the contents of the agreement. It was wholly immaterial, and it seems impossible that it could in any way influence the verdict of reasonable and sensible jurors. At all events, with the exception of the reference to the rules and regulations of the Western Indiana Company, it was immediately stricken out and excluded from the jury. And said rules and regulations were then already in evidence before the jury, and it is manifest from the other evidence in the record that all of the defendant railroad companies were governed by and operated under these rules and regulations, and no claim to the contrary is or was made. Even Mr. Lyford testifies that he knows of his own knowledge that the Eastern Illinois Company uses the Western Indiana tracks under certain leases, and that while upon the Western Indiana tracks the Eastern Illinois trains are subject to the orders and rules and regulations of the Western Indiana Company, as also are all other trains which use those tracks. Whatever of admission there may be in the arbitration agreement in respect to said rules and regulations is merely cumulative to plenary proof otherwise in the record, and which was not and is not disputed. If any errors were committed in allowing the questions that were asked either Clarke, Rubridge, or Lyford, then such errors worked no injury, and afford no just ground for reviewing the judgment.

The averment of damages in the first and second counts of the declaration is, in part, as follows: "And has been prevented from attending to his usual business and avocation, and earning and receiving large emoluments which he otherwise would have earned and received." In the third count the averment, in part, is: "And, as the immediate result of said injuries, plaintiff has heretofore been hindered and prevented, and will hereafter be hindered and prevented, from attending to and transacting his affairs and business, and plaintiff has heretofore been, and will hereafter be, deprived of large gains and profits which he might otherwise and would have acquired in said business." And in the fourth count the statement is substantially the same. The plaintiff testified at the trial that he was a contracting painter at the time of the accident, and that it was his mode of business to obtain contracts for painting, and employ others to assist in doing the work. He was then permitted to state, over the objections of defendants, that since the accident he had not been able to make a living. The following then occurred: "Q. I will now ask you to state as nearly as you can how much you have earned as a painter, without regard to

any special contracts, since the 13th day of January, 1893,—the total amount. (Same objection by each of the defendants. Objection overruled by the court. Exception by each of said defendants.) A. \$100 would cover it. Q. I will ask you to state how much you made as a painter, without regard to any special contracts, for, say, a year anterior to the 13th day of January, 1893. (Objected to by each of said defendants. Objection overruled by the court, to which ruling of the court each of said defendants excepted.) A. I can approximate the amount. I can't give the exact amount. \$3,000." It is urged the court erred in permitting the plaintiff to testify what his income from his business had been for the year before the collision, and what since. In *City of Chicago v. O'Brennan*, 65 Ill. 160, the trial court permitted appellee to give in evidence the fact of particular engagements to lecture in the state of Virginia, and the probable gains thereof, and that appellee was prevented from fulfilling them by reason of the injury, and his estimates of the special loss thereby sustained. Appellant insisted that this evidence was inadmissible, on the ground that it was special damage which was not alleged in the declaration. This court held that it was necessary that these special damages, and the facts on which they were based, should have been set out in the declaration. In *City of Bloomington v. Chamberlain*, 104 Ill. 268, the averment in the first count of the declaration was that plaintiff was hindered from transacting her business and affairs, and deprived of large gains and profits which she otherwise would have earned, and, in the second count, that the injuries received had a permanent effect upon her personal, bodily strength and ability to make a living, and that she had been rendered unable to earn or make for herself a living, and had been deprived of large gains and profits which she otherwise would have earned. On the trial, against the objection of the defendant, the court permitted the plaintiff to testify that she had taught school at \$50 per month. This court said: "We think it was admissible, under these averments of the declaration, to show what was the business of the plaintiff, and that she had been disabled from pursuing it by reason of her injuries. The testimony objected to tended to no more than this, and to give the jury some idea of the wages of school teaching." And further said: "Had the evidence gone to show the loss of the profits of a particular engagement which had been made for teaching school, another question would have been presented,—the one appearing in *City of Chicago v. O'Brennan*, 65 Ill. 160." Moreover, in *City of Bloomington v. Chamberlain*, special reference is made to *Luck v. City of Ripon*, 52 Wis. 196, 8 N. W. 815, and the doctrine of that case expressly approved, and its authority admittedly recognized and followed. In said case of *Luck v. City of Ripon* the averment was that the plaintiff, Minnie Luck,

"was thenceforth, until the commencement of this action, hindered from attending to her usual and necessary business, and has ever since remained and continued, and now is, sick, sore," etc. It was claimed on the appeal that it was error to permit the plaintiff to give evidence of the fact that she was a midwife, that after the injury she was unable to pursue her business as such, and that she thereby suffered loss. The court said: "When the complainant states facts showing that the injury has been such as to render it impossible for the injured party to pursue his ordinary business, and damages are claimed for the loss of time in such business, the plaintiff should be permitted to show upon the trial what his business is, and what damages he has suffered by reason of inability to pursue the same." In *Railway Co. v. Friedman*, 146 Ill. 583, 30 N. E. 353, and 34 N. E. 1111, the allegation in the declaration was that the plaintiff became sick, lame, etc., "from thence hitherto," suffering great pain, and being prevented from attending to his business, and thereby losing profits, etc. On the trial the plaintiff had been permitted, over the objection of the defendant, to introduce evidence tending to prove that the plaintiff at the time of the injury was receiving a compensation of \$3,000 per annum for his services as a traveling salesman. It was held that the evidence went to the extent of showing the loss of profits of a particular engagement, and its admission was erroneous, under the rule held in *City of Chicago v. O'Brennan*, supra. In the opinion of the court the case of *City of Bloomington v. Chamberlain* is referred to with approval, and in respect thereto it is said: "There the admitted evidence was held not to be erroneous, but the ruling was placed on the express ground that the evidence was not as to the loss of profits of a particular engagement." In *Fisher v. Jansen*, 128 Ill. 549, 21 N. E. 598, it is held that direct proof of any specific pecuniary loss is not indispensable to a recovery of damages for an inability to labor or transact business resulting from personal injuries. As shown in the opinion of Gary, J., filed in this cause in the appellate court, in numerous cases for personal injuries decided in this court during the time it was authorized to review the facts in such cases, the amounts and the sources of the earnings of the several plaintiffs, received by them before their respective injuries, were taken into consideration in passing upon the question of damages; and this, as is apparent, in cases where there were no allegations of special damage other than such as are contained in this declaration. *Railroad Co. v. Welch*, 52 Ill. 183; *Railroad Co. v. Weldon*, Id. 200; *City of Decatur v. Fisher*, 53 Ill. 407; *City of Chicago v. Elzeman*, 71 Ill. 131; *Railroad Co. v. Ebert*, 74 Ill. 399; *City of Aurora v. Hillman*, 90 Ill. 61.

The rule deducible from the cases in this state is that, in order to recover compensa-

tion for inability to work at the plaintiff's ordinary and usual employment or business, all that is necessary in the declaration is the general averment of such inability caused by the injury, and consequent loss and damages, and that proof of his particular employment or business, and of his ordinary wages or earnings therein, is admissible in evidence under such general averment, but that, when it is sought to recover for loss of profits or earnings that depend upon the performance of a special contract or engagement, then these special and particular damages, and the facts on which they are based, must be set out in the declaration. The distinction we have noted may be a relaxation of the common-law rule, but it is founded upon the precedents to be found in our Reports. It may be that the testimony in the case at bar in regard to prior earnings was entitled to little weight, owing to the fact that it was confined to the earnings of but a single year; but that is a question of weight of evidence, and a matter that was open for argument before the jury and the courts below. And if appellants had reason to suppose that the year immediately preceding the accident was, for any cause, an exceptional year, they could have shown that fact on cross-examination, or by the introduction of testimony. It follows from what we have said that the trial court committed no error in admitting the challenged testimony.

Appellants asked the court to instruct the jury that, in passing upon the weight to be given to the testimony of the plaintiff himself while upon the witness stand, they "should" take into consideration his interest in the event of the suit. The court modified the instruction before giving it to the jury by substituting the word "may" for the word "should." This action of the court is assigned as error. The interest of a party or of a witness in the event of the suit is properly to be regarded in estimating the weight of his testimony. In *Padfield v. People*, 146 Ill. 600, 35 N. E. 470, we said that the interest of a party in the event of a suit "may be regarded for the purpose of affecting his credibility." It is possible that a jury might understand the use of the mandatory word "should," in the instruction asked, as meaning that, under the law, interest would necessarily detract from credibility; and, if so understood, the instruction would mislead, and would be an invasion of the province of the jury. An interest in the event of a suit does not necessarily detract from the credibility of a witness. It is simply a circumstance that the jury may take into consideration. *Douglass v. Fullerton*, 7 Ill. App. 102. And the question of credibility is always one for the jury. It would not have been error to have given the instruction, in the form in which it was submitted. *Williams v. Shup*, 12 Ill. App. 454; *State v. Vansant*, 80 Mo. 67. Nor was it error for the court to make the

modification it did. Either form is substantially accurate, and both forms mean substantially the same thing.

It is assigned as error that the court modified the eighth instruction tendered by defendants, and gave the same as modified. Said instruction, as tendered, was as follows: "(8) If the plaintiff was injured by the collision, he was bound by law to use ordinary care to render the injury no greater than necessary. It was therefore his duty to employ such medical assistance as ordinary prudence in his situation required, and to use ordinary judgment and care in so doing." The instruction was likely to mislead the jury. It stated a correct but abstract rule of law, and gave the jury no directions in regard to its proper application to the case in hand. The jury would probably understand therefrom that although there was culpable negligence on the part of the defendants, and consequent injury to the plaintiff, yet, if any aggravation of injurious consequences was caused by subsequent negligence of the plaintiff, then there would be no cause of action, even for such consequences as necessarily resulted from the injury. The doctrine is that where, after the occurrence, the plaintiff, by his own negligence, increases the damage, then the defendant is liable only for the consequences of his own acts, and not for those of the plaintiff, or of a third person, which are separable from the results of his own acts. 1 Harris, Dam. Corp. § 224; *Workman v. Railroad Co.*, 32 Law J. Q. B. 270. There was no error in refusing to give the instruction as asked, and, even as modified and given, it stated the law more broadly and more favorably for defendants than it should; and it was the plaintiff, instead of the defendants, that had a right to complain.

It is claimed that the court erred in refusing to give this instruction: "During the progress of the trial of this case the plaintiff was carried from the court room. Why this was necessary, if it was necessary, the jury do not know, nor can they presume. They must entirely disregard such occurrence, to all intents and purposes, as though it had not taken place." It appears that during the examination of the witness Ella Louise Hoyt, the plaintiff became hysterical, broke out crying, and uttered a cry of distress, and was carried out of the court room; that immediately at the time of the occurrence his wife exclaimed, "You are killing my husband! You will be responsible for the death of my husband"; and that the witness began to cry, and was temporarily excused from the stand. The instruction was not one that was based on the evidence that was submitted to the jury. It had reference only to the occurrence that had, several days before, temporarily suspended the trial of the case. The court had seen and heard what had then transpired, and it was a matter of sound judicial discretion for the court to judge whether the circumstances re-

quired, or properly called for, any instruction on its part. We cannot say there was any abuse of that discretion, or that the failure to give the instruction was either detrimental to the rights of the defendants, or erroneous.

It is finally urged that the superior court erred in not granting a new trial for prejudicial conduct of the plaintiff in the presence of the jury. This contention has reference to the transaction to which allusion has just been made. The fact that a plaintiff or defendant or witness, or any other person, suddenly swoons or faints, or gives vent to hysterical exclamations, or breaks down with hysteria, does not call for the granting of a new trial; and especially so when the party claiming to be prejudiced does not ask for the withdrawal of a juror and continuance of the case, but lies by and speculates upon his chances for a verdict. It is hardly probable that the occurrence in question affected in any way the verdict. If it had any effect, it was as likely to prejudice as to help the case of the plaintiff. Of course, if it appeared that the dramatic occurrence that took place in the midst of the trial was intentional, and for an improper motive, it would afford ground for setting aside the verdict. But here the affidavits submitted at the hearing of the motion indicate quite clearly that the plaintiff's conduct was not feigned, but was owing to the mental strain of several days of trial acting upon a weak and exhausted physical condition and a shattered nervous system. We find in the record no sufficient cause to justify a reversal. The judgment of the appellate court is affirmed. Affirmed.

CRAIG, PHILLIPS, and WILKIN, JJ., dissent.

(163 Ill. 101)

OBEREIN et al. v. WELLS.

(Supreme Court of Illinois. Nov. 9, 1896.)

QUIETING TITLE—EQUITY—BURNT RECORD ACT—PRAYER FOR GENERAL RELIEF—RES JUDICATA—ADVERSE POSSESSION—WRONGFUL POSSESSION.

1. The original grantor in complainant's chain of title obtained a decree, in 1865, directing a conveyance of the land to him from the original owner, and confirming his right of possession as against defendant's ancestor. In 1875 complainant's grantor filed a bill against defendant's ancestor, setting up the original decree, which had been destroyed by fire, and asking for its restoration, and for general relief. Defendant's ancestor was served, but filed no answer, and a decree was rendered, as by confession, confirming the title of complainant's grantor, declaring the possession of defendant's ancestor to be wrongful, and enjoining him from claiming any right in the premises. Held that, the bill on which such decree was rendered being for general relief, the fact that it did not comply strictly with the requirements of the burnt record act did not affect the validity of the decree.

2. As the court had jurisdiction of the parties and the subject-matter, the decree, unreversed and not appealed from, was res judicata as to defendant's ancestor and those claiming under him.

3. The decree rendered against defendant's ancestor in 1875 was an adjudication of the rights of the parties, interrupting the running of the statute of limitations.

4. The possession of defendant's ancestor having been declared wrongful, defendant cannot, on a bill brought for the recovery of the land and the enforcement of the right of entry, plead such possession in bar under the statute of limitations.

5. Upon a decree confirming complainant's title to the land by virtue of the adjudication in 1875, it was proper to award him a writ of possession.

Appeal from circuit court, Cook county; M. F. Tuhy, Judge.

Bill in equity, brought by L. W. Wells against A. Oberlein and others. From a decree for complainant, defendants appeal. Affirmed.

Hollett & Tinsman, for appellants. Henry D. Beam and Edward D. Cooke, for appellee.

PHILLIPS, J. The question presented for the determination of the court is the ownership of certain real estate, in the town of Thornton, in the county of Cook and state of Illinois, described as commencing at the N. E. corner of the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 31, in township 36 N., range 14 E. of the third P. M.; running thence west, along the north line of said quarter section, 20 chains; thence south 57 links; thence east 5 chains; thence southerly, parallel with the west line of said quarter section, 16 chains; thence easterly, parallel with said north line, 15 chains; thence northerly, in a direct line, to the place of beginning,—containing 25 acres of land, more or less; said land being otherwise described as the north 16.57 chains of the east 15 chains of the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 31, and the north 57 links of the west 5 chains of the W. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of said section 31, all in township 36 N., range 14 E. of the third P. M. Appellee claims to be the owner in fee, and files his bill to establish title and regain possession from appellants, who, with their ancestor, John Oberlein, have held it for many years. About 1861 this land was owned by Jane Ross, afterwards Fuller. She contracted in writing to sell it to one William R. Hunt, on certain payments. Before obtaining title Hunt contracted to convey to Joseph B. Hunt, under certain conditions and future payments. All interest in the last-named contract was assigned by Joseph B. Hunt to John Oberlein, who went into possession, but never complied with the conditions of payments, and thus ceased to have any rights under his contract. William R. Hunt did fully comply with his contract with Jane Ross (or Fuller), but found it necessary to file a bill for specific performance in order to obtain deed. Such a bill was filed in Cook county circuit court in 1865, and to it John Oberlein was made a party defendant with the Ross heirs. He was personally served with summons, but filed no answer. On this bill a decree was rendered in 1865, directing a deed to Hunt, and perpetually en-

joining all the defendants from setting up or asserting any right, title, or interest in or to these premises, and directing any of the defendants who might be in possession to surrender it to complainant, Hunt. Under these proceedings a master's deed was executed to Hunt, October 30, 1865, which was recorded November 8, 1865. On January 6, 1874, Otis B. Cowles filed his bill in the circuit court of Cook county against John Oberlein, alleging, among other things, that he was the owner in fee simple of the premises in question, and reciting various deeds of conveyance purporting to show a complete chain of title from William R. Hunt to complainant, Cowles. The bill further recites the proceedings in the case of Hunt v. Fuller, setting out in full the prayer of the bill and the final decree in said cause. The bill further alleged that John Oberlein was in possession of said premises at the time the decree was rendered in the case of Hunt v. Fuller et al., and that he had ever since retained possession, and still claimed the right to possession of said land; that the public records of Cook county were destroyed by fire on or about the 8th and 9th of October, A. D. 1871; that among the records destroyed were certain deeds of conveyance of said premises, together with the records of the judicial proceedings of this court in the suit of William R. Hunt v. Jane Fuller et al.; that said destruction by fire occurred without the fault or neglect of said complainant; and that such loss or destruction of such records, unless supplied, might result in damage to complainant, Cowles. The bill further alleged that, at the time of the destruction of the records as aforesaid, the solicitor for the complainant, Cowles, had the court files of the case of Hunt v. Fuller et al. in his possession; that such files, which at the time of filing said bill were in the possession of this court, contained the bill of complaint and all of the subsequent papers in said cause. The prayer of the bill, omitting the formal part, was as follows: "That an order may be entered of record in this court reciting what was the substance and effect of the said destroyed records of this court in the said suit of Hunt v. Fuller et al.; that such an order and the said files of said cause may be decreed to constitute a complete record of said cause, or that the court will make such an order as will fully restore the record of said cause; that the title of your orator to said land may be established and confirmed; that the said defendant, Oberlein, may be perpetually enjoined from claiming any right, title, or interest in and to said premises; that he, or whoever may be found in possession of said premises, may be required to surrender possession thereof to your orator, and that said defendant, John Oberlein, may account to your orator for the rents and profits of said premises; and that your orator may have such further relief or such other relief as the nature of this case may require, and as shall be agreeable to equity." The bill was sworn to

by the complainant, Cowles. Oberein was served with process. Afterwards, for want of an answer, the bill was taken as confessed by said defendant, John Oberein, and was referred to a master. The master's report, recommending that the prayer of the bill be granted, and that the complainant be allowed \$287.50, the rental value of said premises from October 4, 1869, to the date of said report, was filed and approved, and a decree entered on the 15th day of July, 1875. The decree recites the facts subsequently, as set forth in the bill of complaint in the case of Hunt v. Fuller et al.; the filing of the bill, and the subsequent proceedings in the case of Hunt v. Fuller et al., including the final decree; the conveyance by Hunt to Parsons, and by Parsons to complainant, Cowles; the destruction by fire of the record of said decree; the failure of John Oberein to obey the order of this court in the case of Hunt v. Fuller et al.; and the fact that he still retained possession of said premises. The decree then proceeds in the following words: "On motion of Hiram A. Merrill, counsel for the complainant, the court doth order, adjudge, and decree that the orders and decree of said circuit court, above found, are in substance and effect the same with those destroyed by fire, and that they, together with the files of said cause in this court, constitute a complete record of said cause, and that the said orders and decree do stand fully restored, and that the title of complainant to said premises be, and the same is hereby, established and confirmed; that the said defendant, John Oberein, deliver immediate possession of said premises to complainant, and, in case of his failure to do so, that a writ of assistance, in the name of the people of the state of Illinois, issue out of and under the seal of the court, directed to the sheriff of said Cook county, to put the complainant in possession of said premises, and him in such possession thereof from time to time maintain and defend, commanding him, immediately after receiving the same, to go to and enter upon the said premises, and eject and remove therefrom the said defendant, and all and every person or persons holding or detaining the same, or any part thereof, against the said complainant, and that he put and place the complainant, or his assigns, in full, peaceable, and quiet possession of the said premises without delay, and him, the said complainant, in such possession thereof, from time to time, maintain, keep, and defend, or cause to be kept, maintained, and defended, according to the tenor and true intent of this decree and order; that the said John Oberein do stand perpetually enjoined from setting up or asserting any right, title, or interest in and to said premises."

The master to whom the case at bar was referred found the facts to be substantially as stated in appellee's bill, and also found that appellants' ancestor, John Oberein, had been in possession of the land in question from the year 1865 until September 16, 1881, the

day of his death, and that Sophia Oberein, widow, and August Oberein, son of said John Oberein, deceased, have resided upon said premises since the death of said John Oberein; that the taxes on said premises have been paid by Oberein and his heirs, or by some one in their behalf, for the years from 1862 to 1892, both inclusive. The master's report was confirmed by the court, over the exceptions of appellants, and a decree entered pursuant to the prayer of the bill. In this condition matters remained until 1892. Oberein was still in possession of the land, no steps apparently having been taken to enforce the provisions of the last-mentioned decree. At the September term of that year the bill in question was filed by appellee, setting forth, in substance, the foregoing facts. The prayer of the bill was that a decree be rendered to carry out and enforce, against the widow and heirs of John Oberein, deceased, the decree of 1875; that they be required to surrender up possession of the land, and account for the rents and profits,—together with prayer for injunction. The answer sets up and relies upon the statute of limitations of 20 years. The cause was referred to a master to take proof and report, with his conclusions on law and evidence. The report of the master found that all the material allegations of complainant's bill are true, and that he was entitled to the relief asked for. A number of exceptions were filed by appellants to the master's report, 10 in number, the effect of which was to question the validity of the decree of 1875, and to insist that it was no interruption of the running of the statute of limitations of 20 years. A decree was rendered, overruling all the exceptions to the report of the master, and granting the relief asked for in the bill. The decree finds that the decree of 1875 is still in full force and effect, and unappealed from, and since that date the possession of appellants is in violation of that decree and of the injunction of the court then granted, and decrees that appellants surrender up the possession of said lands.

There are two errors assigned on this record: First, that the circuit court erred in overruling each and every of the exceptions to the master's report; and, second, the court erred in granting the relief prayed in the bill of complaint. The bill in the case of Cowles v. Oberein was general in its nature. The record of its order and decrees had been destroyed by fire, but the original files in the case were accessible, and were produced before the court. It not only sought to restore the record from these files, but asked other and additional relief incident to a bill in equity. The evidence on which the decree was based was sufficient to support it. The appellant, Oberein, was personally served, and given an opportunity to present any defense. This decree, standing, as it does, unreversed and unappealed from, and finding, in substance, that he had no interest in this

land, and directing him to surrender possession, and enjoining him from asserting any claim or title, is *res judicata*, and binding upon him. *Baker v. Palmer*, 83 Ill. 568; *Gould v. Sternberg*, 128 Ill. 510, 21 N. E. 628; *Litch v. Clinch*, 136 Ill. 410, 26 N. E. 579; *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053; *Gage v. Gentzel*, 144 Ill. 450, 33 N. E. 536. From the rendition of that decree his possession was illegal, unlawful, and in direct violation of the terms of the decree by which he was bound. Neither a party nor those claiming under him can be heard to say that a possession of land which is expressly held by a court of competent jurisdiction to be a wrongful possession will afterwards be held by a court of equity to be one recognized as sufficient to create a bar under the statute of limitations. The contention of appellants that the decree of 1875 was no interruption of the statute of limitations is without merit. It was an adjudication of the rights of parties, and decreed that the 10 years' former possession by Oberlein had been an unlawful possession. If he afterwards continued, it must be as a new possession, and dating from the rendition of this decree. When the present bill was filed, then, appellants will not be given a credit of time on the statute of limitations which extends back of that decree, and it was not error in the circuit court to so hold, and to overrule appellants' exceptions to the master's report bearing on that question.

It is contended by appellants that the decree of 1875 was void, and not effective against them, for the reason that the bill was one filed under the burnt record act, and that no such publication was made as required by that act. By the decree of 1875 John Oberlein was found to have no interest in this land. He was enjoined from claiming any title, and ordered to deliver possession. The bill of 1875 only sought the enforcement of that decree so far as he was concerned. It is not now claimed that the conditions had at that time changed, or that he had acquired any other interest. The merits of the cause then demanded the enforcement of the decree. He was made a party in 1875, personally served with process, his appearance entered, and an opportunity given him to show cause, if any, why the decree of 1865 should not be effective. It was found that he still had no rights. The court had jurisdiction over him and the subject-matter, and the decree was binding on him. The bill could have been maintained and a decree rendered irrespective of the burnt record act. "A bill to carry a decree into execution is proper, where, after a decree has been pronounced, it has happened that, owing to some neglect of the parties to proceed upon the decree, their rights have become so embarrassed by subsequent events that no ordinary process of the court upon the first decree will serve, and it is therefore necessary to have another decree of the court to ascertain and enforce them." *Story, Eq.*

Pl. § 429; Daniell, Ch. Prac. p. 1508, § 7; Adams, Eq. p. 415. While it is true that proceedings under the burnt record act, being purely statutory, must be strictly complied with, the objection made by appellants to want of publication is without merit, for the reasons above stated.

Objection is also made, by the ninth exception of appellants, to that part of the master's report, adopted by the decree, which finds that appellee is entitled to a writ of possession under the decree of 1875 granting Cowles the right of possession. The court having found and decreed ownership, possession was an incident thereto, and was properly decreed. It is the duty of a court of equity, having acquired jurisdiction of a cause, to grant complete relief, and do justice between the parties. *Aldrich v. Sharp*, 3 Scam. 261; *City of Peoria v. Johnston*, 56 Ill. 45; *Leach v. Thomas*, 27 Ill. 457; *Freeman v. Freeman*, 66 Ill. 53; *O'Brian v. Fry*, 82 Ill. 274. "The power to effectuate its decree is inherent in the nature of a court of equity. Possession is one of the elements which is necessarily involved in the ownership of real estate. When a court of equity finds the petitioner to be the owner in fee of the premises, it is not obliged to send him to a court of law to get possession which it has decided he is entitled to." *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1055.

The foregoing discussion necessarily leads to the conclusion that there was no error in the decree of the circuit court, and it is accordingly affirmed. Affirmed.

(163 Ill. 445)

FARSON et al. v. HUTCHINS.

(Supreme Court of Illinois. Nov. 9, 1896.)

APPEAL—REVIEW.

Where no propositions of law to be held as law in the decision of the case were submitted to the trial court, as required by *Prac. Act § 42*, relating to trials before the court without a jury, questions as to the form of the action, necessity of a demand before the action was commenced, or as to whether plaintiff was entitled in law or fact to recover, cannot be reviewed.

Appeal from appellate court, First district.

Action by Oscar B. Hutchins against John Farson and others. From a judgment of the appellate court (62 Ill. App. 439) affirming a judgment for plaintiff, defendants appeal. Affirmed.

This is an appeal from a judgment of the appellate court affirming a judgment of the circuit court of Cook county in favor of appellee against appellants. The case is submitted here on the briefs and arguments filed in the appellate court. Counsel for appellants state the case, and the grounds upon which they rely for a reversal of the judgment below, as follows: "This is an assumpsit suit, brought by appellee to recover under the common counts upon a claim

for money had and received. Appellants' firm was the depository of a certain real-estate contract and \$1,000 in earnest money connected with the sale of land. The contract itself provides that the earnest money shall be held by appellants for the mutual benefit of the parties thereto. About a month after the expiration of the time stipulated in the contract for its fulfillment, appellants turned over the contract and earnest money to the vendor, Thomas W. Sprague. Appellee claims that the money should have been returned to him, and brought suit in assumpsit against appellants, together with Sprague, seeking to recover the said earnest money. Upon the trial below, and after hearing of all the evidence, appellee dismissed proceedings against the vendor, Sprague, and prosecuted his suit against appellants. Jury was waived by parties, and a finding and judgment rendered against appellants for the sum of \$1,214.50, being the amount of earnest money and interest. From this finding and judgment, appellants have appealed to this court. The contention of appellants, and reasons for the reversal of said judgments, are: First. The action is improperly brought against them; that appellants are not liable in assumpsit upon the common counts. Second. No demand is shown to have been made by appellee before the commencement of the suit. Third. Appellee is not entitled, in law or fact, to the return of the earnest money. Therefore the finding of the court below was contrary to the law and evidence."

Mann, Hayes & Miller, for appellants. J. S. Huey, for appellee.

WILKIN, J. (after stating the facts). The errors relied upon, it will be seen, raise no questions of law upon the admission or exclusion of evidence. They each proceed upon the theory that upon the facts proved no cause of action is shown. No written propositions to be held as law in the decision of the case were submitted to the trial court, as provided by section 42 of the practice act, relating to the trial of causes before the court without a jury. The record therefore does not contain the questions of law attempted to be raised for our decision here. *Hardy v. Rapp*, 112 Ill. 359; *Merrimac Paper Co. v. Illinois Trust & Sav. Bank*, 129 Ill. 296, 21 N. E. 787; *St. Louis & C. R. Co. v. East St. Louis & C. Ry. Co.*, 139 Ill. 401, 28 N. E. 1088; *Crean v. Hourigan*, 158 Ill. 301, 41 N. E. 880, and cases cited. The judgment of the appellate court will accordingly be affirmed.

(163 Ill. 417)

PRINCE v. DU PUY.

(Supreme Court of Illinois. Nov. 9, 1896.)

QUIETING TITLE—SUFFICIENCY OF EVIDENCE.

1. Where a deed to land is procured from the owner by fraud, and he thereafter conveys

the same land to another grantee, such second grantee can file a bill to set aside the first deed for fraud.

2. An owner of land, residing in a foreign state, intrusted to his agent the duty of investigating the value and the title to such land. The agent concealed information which would have been of value to his principal, and induced his principal to convey the land to him for an inadequate consideration. *Held*, that an action would lie by the principal or his grantee to set aside such deed for fraud.

Appeal from circuit court, Cook county; M. F. Tuley, Judge.

Action by George A. Du Puy against Earl H. Prince to set aside and cancel, as a cloud on plaintiff's title to a certain lot, a deed made by one Luther B. Johnson to defendant. From a judgment in favor of complainant, defendant appeals. Affirmed.

The appellee, Du Puy, filed his bill in equity against appellant, Prince, to set aside and cancel, as a cloud upon his title to a certain lot in Hinckley's subdivision, in Chicago, a certain deed of conveyance made to Prince by Luther B. Johnson. The trial court decreed as prayed in the bill, and Prince appealed. Both parties claim title from Johnson. The lot had been conveyed many years before to Johnson's father, and Johnson derived his title by descent, as the only heir. The property has been sold many times for unpaid taxes and assessments, and was incumbered by four or more tax titles, and for taxes for many years. Johnson had very little, if any, knowledge as to the situation or value of the lot, or as to whether or not he had any valuable interest in it. Johnson lived in the state of Vermont; Prince and Du Puy, in Chicago. In May, 1892, Du Puy wrote to Johnson to the effect that, if he wished to sell his remaining interest in the property, he would buy, for a small sum, and later, early in the month of June, after some correspondence, wrote offering him \$50 for a conveyance, but received no reply. On June 29th Du Puy again wrote to Johnson that he expected to leave Chicago either on July 9th or the 16th, and requested an early reply, and inclosed draft of a deed of the property, requesting that it be executed and returned to him if Johnson decided to accept his proposition, and that he did not care to purchase unless he did so before his departure. In the interval upon receiving Du Puy's proposition to pay \$50 for his interest, on June 8, 1892, Johnson wrote to Prince, who was then engaged in the business of a real-estate agent in Chicago, that he had received an offer of \$50 for his interest in the property; that whatever could be realized from it would go to his father's creditors, but he was anxious to receive as much as possible,—and further wrote: "I should like to find out whether the offer I mentioned is the equivalent of the value of the interest. Would you be willing to look the matter up, with the understanding that, if you are the means of bringing a greater price than \$50, you should be paid, otherwise not? I am

directed to you by Mr. Plumley, the administrator, who says it would not be advisable to incur charges in looking up this matter unless there was a strong probability of increased returns. If you are willing to undertake the matter, I will give you more definite outline of the case." Three days later Prince replied by letter to Johnson that, upon receiving a description of the property, he would look it up and see what there was in it, and let Johnson know, and asked for plat, and particulars of his father's death, his age, etc. Under date of June 17th, Johnson replied to Prince that he had no plat, and could not accurately describe the property, but that it fronted on West Center avenue, near Fifty-First street; that Albert D. Bingham and wife conveyed the lot to his father, James N. Johnson, by warranty deed, recorded in December, 1873 (information that Du Puy had given him),—and further wrote: "If you require the actual location of the lot by data giving range, section, etc., I can probably furnish it, by corresponding with the prospective purchaser. Father died Feb. 1, 1890. I am 22 years old; no brothers or sisters. My opinion is, there is some value to my interest in this property, else the party making me the offer would not do so. Doubtless, he has not appraised its value in my favor, either. Please give the matter early attention, and oblige." Prince testified that he was unable to give the matter special attention until about June 29th, on account of the sickness and death of his partner; but on the last-named date he wrote to Johnson that he was unable to locate the property from the description given, and that, if Johnson could not give him an accurate description, he would better refer him to the party proposing to purchase it, so that he could locate it and look it up, and find out about it. On July 2d Johnson wrote Prince as follows: "Yours received. It is now too late to do anything about looking up the lot's title, location, or value. Inclosed find a quitclaim deed, signed, ready for delivery to the purchaser, G. A. Du Puy, R. 41, City Hall, Chicago. Please collect the \$50.00, hand over the deed, and remit me the proceeds after deducting your charges. As Mr. Du Puy leaves the city in a day or two, I beg you to act upon the matter at once." And on July 11th Prince wrote Johnson, in reply, as follows: "Your letter of July 2d is at hand, and contents noted. It came at a time when I was very busy, as my partner, E. Y. Foote, had just died; so your business has been neglected. I am going to gamble a little. I think, if it is worth \$50 to Mr. Du Puy, it ought to be worth nearly that to me, and I do not care to have you lose anything by my negligence. Therefore I inclose you a draft for \$50. Yourself and wife will please sign the inclosed deed, and have it acknowledged; and please have a certificate of the clerk of the court, of the genuineness of the notary's signature, attached to the deed. As

soon as I get time I will look the matter up, and find out whether there is anything in it for me or not. I think the party having the tax title will certainly be willing to give me \$50 to get a clean title. If you will do as I requested, you will greatly oblige me." Johnson supposed that Du Puy had left the city, and that the trade with him had fallen through, and accepted the \$50 from Prince, and executed, acknowledged, and sent to him a deed, as requested. He afterwards learned that Du Puy had not left the city at that time, but that Prince had withheld from Du Puy the fact that he had Johnson's deed for delivery to him. Johnson thereupon demanded a reconveyance from Prince, and offered to return the \$50, but Prince refused to comply with the demand. The evidence also tended to show that Du Puy would have paid a larger amount for the property, rather than lose it, and that Prince knew that fact, but concealed it from Johnson. Afterwards, in September, 1892, Johnson executed, acknowledged, and delivered to Du Puy a quitclaim deed for the property. Linscott, who at the time of the transaction was a partner of Prince, testified that Prince spoke to him about the Johnson lot; that he went with Prince to the county building in Chicago, and showed him a plat of the subdivision, and looked up with him the names of the parties who held tax deeds; that this occurred the last of May or the first of June; that, before he made the offer to purchase to Johnson, he (Prince) went and examined the property, and said it was nice property, and was worth three or four thousand dollars, and that he should try and get it himself, and that before replying to Mr. Johnson, and making him a proposition, he would ascertain, if he could, how much it would cost to buy the tax certificates. This is, in part, denied by Prince. He states that the conversation he had with Linscott was after he sent the draft for the deed to himself.

Willis & McCoy, for appellant. James L. Clark, for appellee.

CARTER, J. (after stating the facts). The evidence in this case, when fully and fairly considered, shows that while appellant was acting as the agent of Johnson, the owner, charged with the duty which he had undertaken for Johnson, of investigating the location, value, and condition of the title of the lot in question,—matters concerning which Johnson, who lived in a distant state, knew but little,—he (appellant) concealed from Johnson information in the premises which he had obtained in the course of his employment, and which would have been of value to Johnson before he parted with his title, and instead of reporting to Johnson information which he had tending to show that Johnson's interest was of greater value than \$50, the amount which Du Puy had offered, and that Du Puy would increase

the amount of his offer, took advantage of the knowledge he had so obtained, and procured from Johnson a conveyance to himself for the same consideration. In other words, the agent took advantage of the fiduciary relation which he sustained to his principal to procure for himself the subject-matter of the agency. This the law will not tolerate. This principle is too familiar to require elaboration, or citation of authority in its support. After learning the facts, Johnson demanded of Prince a reconveyance, and offered to return the consideration received. Prince refused. Johnson then conveyed the property to Du Puy, the appellee, who filed the bill. It is conceded that the law is that appellee had the same right to maintain suit to set aside the deed to Prince that Johnson had before he conveyed to Du Puy. We have no doubt that Johnson had such right, and that his conveyance of the property to Du Puy operated as a disaffirmance of the sale and conveyance to Prince, and that Du Puy's bill was properly brought. *Norton v. Tuttle*, 60 Ill. 136; *1 Perry, Trusts*, § 169; *Lantry v. Lantry*, 51 Ill. 463-465; *Weaver v. Fisher*, 110 Ill. 154; *Davis v. Hamlin*, 108 Ill. 49; *Whitney v. Roberts*, 22 Ill. 383; *Smith v. Wright*, 49 Ill. 408; *Chit. Cont.* p. 527; *Choteau v. Jones*, 11 Ill. 300. No other point of importance is made in the case. Counsel for appellant endeavor, in elaborate arguments, to make it appear that he violated no duty to his principal in obtaining the conveyance to himself at the same price Du Puy was to pay, after Johnson had concluded to sell to Du Puy, and had executed and sent to him (Prince) the deed, with instructions to deliver to Du Puy and collect the consideration. In this we cannot agree with counsel. Johnson, having received no information from Prince, his agent, and fearing that by delay he would lose the sale to Du Puy, made the deed, and sent it to his agent, with instructions to deliver, but did not notify Du Puy, or otherwise accept his offer. Let it be conceded, as contended by counsel, that this was not a delivery of the deed to Du Puy, or to a third person for his benefit; that, in the hands of Prince, Johnson's agent, it was still in the hands of Johnson. Still, if Prince withheld the deed from Du Puy because of information which he had of the lot and its value, and which he knew Johnson, his principal, did not have, his duty was to make use of it for Johnson's, and not for his own, benefit; to advise Johnson as fully as he knew, and, in the light of such information, enable Johnson to still deal with the property to his own best advantage.

We have not thought it necessary to consider whether, from the evidence, Prince owed any duty to Du Puy in respect to delivering him the deed as instructed by Johnson. The bill is framed on the other theory, —the theory above mentioned,—and is, we think, fully sustained by the evidence. It is conceded that, if the decree is proper on

this branch of the case, it is also proper so far as the tax titles are concerned. We are satisfied that the case was correctly decided by the learned chancellor of the circuit court, and the decree will be affirmed. Decree affirmed.

(163 Ill. 535)

HUGHES et al. v. CITY OF MOMENCE. (No. 87.)

(Supreme Court of Illinois. Nov. 9, 1896.)

ASSESSMENTS FOR LOCAL IMPROVEMENTS—VALIDITY
—LAYING WATER MAINS—ASSESSMENT OF BENEFITS—EVIDENCE—APPEAL—BILL OF EXCEPTIONS.

1. An ordinance authorizing the construction of a system of waterworks by a city provided that so much of the improvement as related to the laying of water mains and the appurtenances thereto, but not including hydrants, reservoir, or pumping station, should be paid for by special assessment. *Held*, that the improvement contemplated was a local improvement, within the statute allowing special assessments for local improvements.

2. An ordinance authorizing the construction of waterworks by a city provided that so much of the improvement as related to the laying and construction of water mains and the appurtenances thereto, but not including hydrants, reservoir, or pumping station, should be paid for by special assessment on the property benefited, the cost of the reservoir, etc., to be defrayed by general taxation. *Held*, that the ordinance cannot be construed as providing for two improvements, but merely for one improvement, the cost of different parts of which should be defrayed in different ways.

3. The ordinance was not objectionable for the reason that it provided for the laying of mains on certain streets on which a private water company had already laid mains.

4. Upon the hearing of objections to a special assessment levied upon lots benefited by a local improvement, the objectors can show, for the purpose of reducing their assessments, that lots not assessed were specially benefited by the improvement.

5. On the hearing of objections to a special assessment on the ground that lots belonging to the objectors were assessed more than they were benefited, after verdict, and the denial of a motion for new trial, the objectors offered to show that other property not assessed was specially benefited. *Held*, that it was not error to refuse leave to introduce such evidence.

6. An objection on appeal that the bill of exceptions was not properly sealed by the judge is made too late if not raised before the case was taken.

Appeal from Kankakee county court; John Small, Judge.

Action by Stephen Hughes and others against the city of Momence to set aside a special assessment. From a judgment for defendant the plaintiffs appeal. Affirmed.

W. R. Hunter and B. F. Gray, for appellants. Paddock & Cooper and E. Eldredge, for appellee.

PHILLIPS, J. The city council of the city of Momence adopted an ordinance, the first and ninth sections of which are as follows:

"Section 1. That a system of waterworks including supply mains, a standing reservoir and a submerged reservoir, distribution mains, fire hydrants and the necessary appurtenances and

appendages thereto be built and constructed in the city of Momence, Kankakee county, Illinois, and vicinity thereof as hereinafter provided."

"Sec. 9. That so much of said improvement as shall relate and refer to the laying and construction of the water mains, and the appurtenances thereto, not including hydrants, reservoir and pumping station, but meaning and intending to include mains and such things as are properly a part of mains and go to constitute mains constructed, shall be made, and the cost thereof paid for by a special assessment to be levied upon the property benefited thereby, to the amount that the same may be legally assessed therefor (and the remainder of such cost shall be paid by general taxation) in accordance with article nine of an act of the general assembly of the state of Illinois, entitled 'An act to provide for the incorporation of cities and villages,' approved 10th day of April, 1872."

The commissioners appointed to make an estimate of cost of the improvement in laying mains and of making the assessment made the estimate at \$24,400, and of this sum the amount assessed against lots and blocks was \$24,255.58, and to be paid by the city, \$144.42. This does not include cost of reservoir and standpipe, etc. A petition was then filed in the county court for the appointment of commissioners to make assessment of the same upon the property benefited, etc., which was done, and upon a return of the assessment roll objections were filed by various owners of lots and blocks. By these objections it is insisted the ordinance is void, and the city council had no authority to make the proposed assessment, as it was not a local improvement; that two assessments are made on the same property; that the proposed improvement is on streets where water mains already exist; that it is a general public improvement, and not a local one; that the assessment is not levied in proportion to benefits; that the assessment is made for a part of the proposed improvement, without any provision being made for the payment of that part not specially assessed; and that objectors' property would not be benefited equal to the assessment made. These objections were overruled, except as to that which was based on the objection that appellants' property would not be benefited by the proposed improvement equal to the assessment made. The overruling of these objections presents the first question raised on the record.

The ordinance in this case fully states the nature of the proposed improvement, its character, locality, and description, and the part to be paid by special assessment and by general taxation. It is urged that this is not a local improvement under this ordinance, for which a special assessment should be made; and counsel rely on *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611, and *Village of Blue Island v. Eames*, 155 Ill. 398, 40 N. E. 615, as establishing that rule. In those

cases it was held the construction of the waterworks such as the wells to furnish a supply of water was not a local improvement. The cost of constructing a reservoir, of sinking a well, the erection of a standpipe and the pumping works and buildings for the same, are not local improvements, but of general utility to the inhabitants, and must be paid for by general taxation. The laying of pipes for the conveyance of water along a particular street or streets is local to that particular street, and of special benefit, and is a local improvement, and may be paid for by special assessment or special taxation. The objection that two improvements were to be made under the ordinance is not well taken. The ordinance provides for one improvement, and the costs of certain parts of that improvement shall be paid for by general taxation and certain other parts by special assessment. That part of the general improvement, such as the reservoirs, etc., could only be paid for by general taxation, and the fact that the ordinance so provided, and at the same time provided that certain other parts should be paid for by special assessment where there were special benefits to property, constitutes no valid objection to the ordinance. *Galesburg v. Searles*, 114 Ill. 217, 29 N. E. 686. That there are certain streets on which water pipes already exist, being those of a private company, cannot constitute an objection fatal to this ordinance. The right to provide for the improvement is in the city council, and its necessity and character is solely for that body, unless manifestly unreasonable. *Chicago, B. & Q. R. Co. v. City of Quincy*, 139 Ill. 355, 28 N. E. 1069; *Pike v. City of Chicago*, 155 Ill. 658, 40 N. E. 567; *Cram v. City of Chicago*, 138 Ill. 506, 28 N. E. 757. A private company may have certain mains laid, and refuse to extend them to other parts of the city. The city might provide for laying mains on the same streets where those were already existing, and it might be necessary to do so to make any available. The fact that the city has not provided means to pay that to be paid other than by special assessment constitutes no defense to the adoption of the ordinance, and the levy and collection of the special assessment. *People v. Green*, 158 Ill. 594, 42 N. E. 163.

There was no error in overruling the objections. The only question for trial before the jury was whether the land of the objectors was assessed more than it was benefited, or more than its proportionate share of the proposed assessment. *Jones v. Town of Lake View*, 151 Ill. 663, 38 N. E. 688. The objectors, for the purpose of lessening and reducing the amount assessed against them, would have a right to show that other property not assessed was specially benefited; but that would be evidence for the jury. In this case, after the verdict and overruling motion for a new trial, the objectors offered evidence of that character for the court. This was not proper at that time, and it was not error to deny the motion for leave to introduce that evidence.

It is objected that the bill of exceptions is not sealed by the judge. It appears to be signed, but no scrawl is attached as a seal. This objection is purely technical, and, if made before the case was taken, it would have been necessary to correct it in that regard. It comes too late to make that objection in the briefs on the case as taken. We find no error in the record, and the judgment is affirmed. Affirmed.

(164 Ill. 16)

HUGHES et al. v. CITY OF MOMENCE.
(No. 88.)

(Supreme Court of Illinois. Nov. 9, 1896.)

PUBLIC IMPROVEMENTS — SPECIAL ASSESSMENTS — WATERWORKS.

A city expressly authorized to levy and collect a general tax for the construction of waterworks cannot make a special assessment to pay for the standpipe, reservoir, and pumping apparatus, since these do not constitute a "local improvement," for which alone a special assessment is proper.

Appeal from Kankakee county court; John Small, Judge.

Petition by the city of Momence for confirmation of a special assessment. Stephen Hughes and others filed objections, which were overruled, and said objectors appeal. Reversed.

W. R. Hunter and B. F. Gray, for appellants. Paddock & Cooper and E. Eldredge, for appellee.

PHILLIPS, J. This is an appeal from an order confirming a special assessment. After the adoption of the ordinance under which a special assessment was made for laying mains, etc., as affirmed in *Hughes v. City of Momence* (not officially reported) 45 N. E. 300, another ordinance was passed by the city council on the same day the former ordinance was adopted, the first and second sections of which are as follows:

"Section 1. Be it ordained by the city council of Momence that so much of the local improvements in a certain ordinance contemplated this day passed, of the following title: 'An ordinance providing for the construction of a system of water works and water mains and hydrants, to be constructed, laid and set in certain streets and parts of streets in the city of Momence, Kankakee county, Illinois, and through other lands in said city, and for the construction of a standing reservoir, and a reservoir excavated beneath the ground, or submerged reservoir, on certain lands in the following ordinance mentioned, said water mains, hydrants, reservoirs and other work to form a connected system of water works for said city, for the use of said city, for the purposes of fire protection, and for the use of the inhabitants of said city, as a means of furnishing to the inhabitants thereof water; the whole to form a complete and connected system of water works.' As relates to the construction

of hydrants and reservoirs, the attachments and appurtenances thereto, which form a part of the said hydrants and reservoirs shall be made and the cost thereof paid for by special assessment to be levied upon the property benefited thereby to the amount that the same may be legally assessed therefor, and the remainder of such cost to be paid by general taxation, in accordance with article 9 of an act of the general assembly of the state of Illinois entitled 'An act to provide for the incorporation of cities and villages,' approved the 10th day of April, 1872, and the acts amendatory thereof.

"Sec. 2. That the total amount of said special assessment shall be divided into seven installments, the first of which shall be one-seventh of the entire cost of said improvement, estimated as herein provided, plus a fractional amount of said remaining six-sevenths of said cost over and above the greatest number of even hundred dollars in said remainder divisible by six, and each of the remaining six installments shall be one-sixth of the residue after deducting the said first installment. The first of the said seven installments shall be due and payable on and after the confirmation of said assessment; the second installment in one year; the third in two years; the fourth in three years; the fifth in four years; the sixth in five years; the seventh in six years," etc.

By the provisions of this second ordinance it was sought to provide by a special assessment for the payment for the construction of standpipe, reservoirs, pumping works, and attachments and appurtenances thereto, which by section 9 of the ordinance, the title of which is embraced in section 1 above, was to be paid for by general taxation on property within the city. We held, in the case above cited, that the laying of mains, etc., was a local improvement, which would be provided by ordinance to be paid for by special assessment, etc. The ordinance in this case having been passed and a petition filed for a confirmation of the assessment, certain lot owners appeared, and filed objections. For the purpose of this case we need refer to but the twelfth and thirteenth, which are: "(12) This proceeding is void, because it is a general public improvement, for the benefit of all the property in said city of Momence, both real and personal; and real property cannot be assessed for an improvement which benefits personal property as well, without assessing the benefits against such personal property, which, under the law, cannot be done. (13) A general public improvement of this character can be made and paid for by general taxation only, and not by special assessment." The objections were overruled, to which exception was taken. The standpipe, reservoir, pumping works, etc., of a system of waterworks are in no sense a local improvement, and there is no authority in law for making a special assessment on the property of appellants to

pay for the same. The city is expressly given power to levy and collect a general tax for the construction of waterworks, and is prohibited from making a special assessment to pay for the same. *Village of Morgan Park v. Wiswall*, 155 Ill. 262, 40 N. E. 611; *Village of Blue Island v. Eames*, 155 Ill. 398, 40 N. E. 615. The objection is made that the bill of exceptions is not sealed by the judge. What is said in *Hughes v. City of Moline*, supra, applies to this case. The judgment of the county court of Kankakee county is reversed.

MEADOWCROFT et al. v. PEOPLE.¹

(Supreme Court of Illinois. March 28, 1896.)

CONSTITUTIONAL LAW—DUE PROCESS OF LAW—BANK DEPOSITORS—TRIAL BY JURY—BANKING—RECEIVING DEPOSITS AFTER INSOLVENCY—INDICTMENT.

1. Act June 4, 1879, making it criminal for any person doing a banking business, or officer of any bank, to receive deposits, knowing that the bank is insolvent, whereby the deposit is lost to the depositor, is not unconstitutional, as a deprivation of property without due process of law, in that it curtails an inherent right to contract.

2. Act June 4, 1879, making it criminal for any person doing a banking business, or officer of any bank, to receive a deposit, knowing that the bank is insolvent, and providing that the subsequent failure of the bank within 30 days shall be prima facie evidence of an intent to defraud, does not violate the constitutional provision that the right of trial by jury shall remain inviolate.

3. Nor does it violate the constitutional provision that no person shall be deprived of life, liberty, or property without due process of law.

4. Under Act June 4, 1879, making it criminal for any person doing a banking business to receive deposits, knowing the bank to be insolvent, whereby the deposit is lost to the depositor, and providing that the subsequent failure of the bank shall be prima facie evidence of an intent to defraud, an indictment alleging that accused corruptly, willfully, fraudulently, and feloniously received a deposit, etc., is sufficient, without specifically alleging that the deposit was received with intent to defraud.

5. An indictment under such act alleging that accused, "being persons then and there doing a banking business, * * * did receive" from one D. certain moneys, of the property of said D., the said D. then and there not being indebted to accused, sufficiently alleges that accused was doing a banking business, and that the moneys were received as a general deposit.

6. An indictment under such act alleging that accused were doing a banking business under the name of "Meadowcroft Bros.," and that they were insolvent at the time they received the deposit, is sufficient, without alleging that the partnership of Meadowcroft Bros. was insolvent, as a partnership is not a legal entity, independent of the persons composing it.

7. Under Cr. Code, div. 13, § 18, providing that, if any prisoner shall have been admitted to bail, the court may continue the trial to the third term, a prisoner who has been admitted to bail is not entitled to be discharged after the third term, for want of prosecution, where he in no way appeared, after being admitted to bail, to demand trial.

8. Under Act June 4, 1879, providing that if any banker shall receive any deposit, when insolvent, whereby the deposit so made shall be

"lost" to the depositor, said banker "so receiving said deposit," shall be deemed guilty of embezzlement, and on conviction fined in a sum double the amount so "embezzled and fraudulently taken," the crime is consummated when the banker receives the deposit, and he is unable, by reason of his insolvency, to repay the entire sum deposited.

9. It is not necessary that a demand be made for the return of the deposit, where the day after the deposit a receiver was appointed for the banker, who was hopelessly insolvent.

10. Where an insolvent bank is placed in the hands of a receiver, a deposit received while the bank was insolvent is "lost" (Act June 4, 1879), to the depositor, so as to warrant a conviction of the banker for receiving the same, though pending the prosecution therefor the full amount of the depositor's claim is tendered to him.

11. Under Act June 4, 1879, fixing the punishment of a banker receiving, when insolvent, a deposit which is lost to the depositor, at a fine in double the amount of the deposit, and, in addition thereto, imprisonment,—the imprisonment being optional,—a general verdict fixing the amount of the fine and the term of imprisonment, without finding as to the amount of the deposit, is not invalid. Phillips, J., dissenting.

12. A verdict of guilty against F. and C., co-defendants, and fixing the "punishment of said F. and C. at a fine of twenty-eight dollars, and, in addition thereto, at imprisonment for one year," is not defective, as fixing a joint, instead of several, punishment. Phillips, J., dissenting.

Error to criminal court, Cook county; Theodore Bretano, Judge.

F. R. Meadowcroft and another were convicted of fraudulent banking, and bring error. Affirmed.

Walker & Eddy, Collins, Goodrich, Darrow & Vincent, and George S. House, for plaintiffs in error. Maurice T. Moloney and W. W. Clemens, for the People.

BAKER, J. The indictment upon which Charles J. Meadowcroft and Frank R. Meadowcroft, the plaintiffs in error, were convicted, was based upon the first section of "An act for the protection of bank depositors," approved June 4, 1879. Said section is as follows: "Section 1. Be it enacted by the people of the state of Illinois, represented in the general assembly, that if any banker or broker or person or persons, doing a banking business, or any officer of any banking company, or incorporated bank doing business in this state, shall receive from any person or persons, firm, company or corporation, or from any agent thereof, not indebted to said banker, broker, banking company or incorporated bank, any money, check, draft, bill of exchange, stocks, bonds or other valuable thing which is transferable by delivery, when at the time of receiving such deposit, said banker, broker, banking company or incorporated bank is insolvent, whereby the deposit so made shall be lost to the depositor, said banker, broker, or officer so receiving said deposit, shall be deemed guilty of embezzlement, and upon conviction thereof shall be fined, in a sum double the amount of the sum so embezzled and fraudulently taken,

¹ Rehearing denied October 21, 1896.

and in addition thereto, may be imprisoned in the state penitentiary, not less than one nor more than three years. The failure, suspension or involuntary liquidation of the banker, broker, banking company, or incorporated bank within thirty days from and after the time of receiving such deposit, shall be prima facie evidence of an intent to defraud, on the part of such banker, broker or officer of such banking company or incorporated bank." The validity of this section of the statute is challenged on several grounds. It is urged that it is in derogation of that provision of our constitution which declares that "no person shall be deprived of life, liberty or property without due process of law" (Const. 1870, art. 2, § 2), and that the case is controlled by the decisions of this court in *Millett v. People*, 117 Ill. 294, 7 N. E. 631; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364; and *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62. The contention is that every person living under the protection of our state government has the right to be engaged in the prosecution of any one of the ordinary and common callings or business pursuits that is innocent in itself, and has been followed from time immemorial, on the same terms that govern those engaged in other ordinary and common callings or business pursuits of life, and, as incident thereto, has the right to make the same contracts relative thereto as those engaged in such other ordinary and common callings or business pursuits are allowed to make; that the business of private banking is an ordinary and common industrial pursuit, like merchandising, manufacturing, mining, and very many other occupations of life, and is open to any one who may choose to embark in it; that one of the ordinary incidents and inherent elements of the business of a private banker is the receiving of deposits from his customer, and the relation of the banker to his depositor is the ordinary contract relation of debtor and creditor, the moneys deposited becoming the property of the banker, and not trust funds; that every person in this state, other than a private banker, engaged in the ordinary and common callings of life, is allowed to enter into contracts, the result of which is to establish for himself the relation of debtor to every other person in the community who may deal with him; and that to deny to the private banker the right to prosecute his business, and, as incident thereto, to contract in regard to the same, on the like terms as other ordinary and common callings or business pursuits are transacted, is to deprive him of both liberty and property, to the extent that he is thus denied the right to contract, without due process of law.

The fundamental error in the contention thus formulated is the assumption that the business of banking stands upon exactly the same footing that the ordinary industrial

pursuits of farming, merchandising, manufacturing, and mining, and the many other common occupations of life, stand upon. The business of a banker is not *juris privati* only, but, like that of an innkeeper or common carrier, is affected with a public interest, and therefore subject to public regulation. At common law the business of banking is open to all, and may be followed by the citizen at pleasure, unless forbidden by legislative enactment. The right, however, to engage in banking may be restrained by the sovereign authority, and may be regulated by legislation, and it must be commenced and carried on in strict accordance with such statutes as have been enacted for its regulation. *Nance v. Hemphill*, 1 Ala. 551; *Atty. Gen. v. Insurance Co.*, 2 Johns. Ch. 377; *People v. Bartow*, 6 Cow. 290; *Curtis v. Leavitt*, 15 N. Y. 52. In *Bank v. Earle*, 13 Pet. 519-596, it was said by Chief Justice Taney, in delivering the opinion of the supreme court of the United States: "And it is very clear that at common law the right of banking, in all of its ramifications, belonged to the individual citizens, and might be exercised by them at their pleasure. Undoubtedly, the sovereign authority may regulate and restrain this right, but the constitution of Alabama purports to be nothing more than a restriction upon the power of the legislature in relation to banking corporations, and does not appear to have been intended as a restriction upon the rights of individuals. That part of the subject appears to have been left, as is usually done, for the action of the legislature, to be modified according to circumstances." All persons possess their rights, whether to things tangible or intangible, subject to the general police power of the state. *Northwestern Fertilizing Co. v. Village of Hyde Park*, 70 Ill. 634. The police power is that inherent and plenary power which enables the state to restrain or prohibit all things hurtful to the comfort, safety, and welfare of society. *Town of Lake View v. Rose Hill Cemetery Co.*, 70 Ill. 191; *Cole v. Hall*, 103 Ill. 30; *Harmon v. City of Chicago*, 110 Ill. 400; *Dunne v. People*, 94 Ill. 120. In *Cooley's Constitutional Limitations*, in discussing the police power of the states, it is said: "The police power of a state, in a comprehensive sense, embraces its system of internal regulation, by which it is sought, not only to preserve the public order, and to prevent offenses against the state, but also to establish for the intercourse of citizen with citizen those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." A banker is a dealer in capital,—an intermediate party between the borrower and the lender,—who borrows of one party and lends to another; and the business of banking is, among other things, the estab-

lishing of a common fund for lending money. Newm. Bank Dep. § 21. And as said by the supreme court of Wisconsin in *Baker v. State*, 54 Wis. 368, 12 N. W. 12, a bank implies capital, and capital invites confidence. A man holding himself out as a banker thereby gives public proclamation that he has money, and property readily convertible into money, in his possession and subject to his control, and for that reason he may be safely trusted; and his business not only affects himself as a banker, but every person who deals with him as such. The object of the statute that is here challenged was evidently to protect the public from being induced to deposit money with insolvent bankers, and there is manifest reason and necessity for protecting the community in their dealings with persons engaged in the banking business that do not exist in respect to their transactions with those employed in the ordinary agricultural, manufacturing, merchandising, and mining pursuits.

It is urged that proof that the accused is a banker, or person doing a banking business; that he received a deposit from a person not indebted to him, and at a time when he was insolvent, whereby the deposit is lost to the depositor,—is not, in and of itself, and without evidence from which the jury can infer a criminal intent, sufficient to convict of a crime. And, in that connection, our attention is again called to the same constitutional provision already partially considered,—that no person shall be deprived of life, liberty, or property without due process of law,—and also to the further provision of the constitution that the right of trial by jury, as heretofore enjoyed, shall remain inviolate, and, in connection therewith, to the fact that among the maxims of the common law which these constitutional provisions secure to the citizen are these: That every man is presumed innocent until proven guilty, and that the burden is upon the state to overcome that presumption of innocence by a preponderance of the evidence. And the claim is made that, in that the statute provides that the failure, suspension,* or involuntary liquidation of the banker within 30 days from and after the time of receiving the deposit shall be prima facie evidence of an intent to defraud on the part of the banker, such statute is in derogation of these rights so secured, and therefore unconstitutional and void. The law always presumes an accused party innocent until he is proved to be guilty, and this is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict which either finds the party guilty, or converts the presumption of innocence into an adjudged fact. *Cooley, Const. Lim.* 309. But no one has a vested right in the rules of evidence, and, in legal contemplation, they are not regarded as being of the essence of any right with which a party is invested. They pertain to the remedy, and are subject to modification and control by the

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legislature. *Id.* 367. In *Board v. Merchant*, 103 N. Y. 143, 8 N. E. 484, it is said: "The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party, and thus deny him the opportunity for trial, would substantially deprive him of due process of law. It would not be possible to uphold a law which made an act prima facie evidence of crime which had no relation to a criminal act, and no tendency whatever, by itself, to prove a criminal act. But so long as the legislature, in prescribing rules of evidence in either civil or criminal cases, leaves a party a fair opportunity to make his defense, and to submit all the facts to the jury to be weighed by them, upon evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds." And in the later case of *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, the same court held that the state legislature has power to enact that, even in criminal actions, where certain facts have been proved they shall be prima facie evidence of the main fact in question, but that the fact upon which the presumption is to rest must have some fair relation to, or rational connection with, the main fact, and that the inference of the existence of the main fact, because of the existence of the fact proved, must not be purely arbitrary, unreasonable, unnatural, or extraordinary, and the accused must have a fair chance to make his defense, and to submit the whole case to the jury. In *State v. Buck*, 120 Mo. 479, 25 S. W. 573, it was held, after a full review of the authorities, that a section of the statute of that state which makes it a criminal offense for an officer of a bank to receive a deposit, knowing the bank to be insolvent, and providing that the subsequent failure of the bank shall be prima facie evidence of such knowledge, is not violative of a constitutional provision that "the right of trial by jury, as heretofore enjoyed, shall remain inviolate."

Plaintiffs in error call attention to *State v. Beswick*, 13 R. I. 211, and other cases which apparently announce a rule somewhat in conflict with that held in the authorities we have cited. They seem, however, to be against the weight of authority. At all events, this court is committed to the doctrine, as held in New York, Missouri, and other states, that the legislature may provide that a designated fact or facts shall be prima facie evidence of a certain other fact, but subject to the restrictions stated in the authorities to which reference has been made. In *Railroad Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, we said: "It is argued that the provision of the statute making the schedule of the commissioners prima facie evidence that the rates therein fixed are reasonable maximum rates

of charges is unconstitutional and void, not only as depriving the carriers of their property without due process of law, but as infringing upon the right of trial by jury. We do not think that this objection should be sustained. In the first place, the act does not deprive the railroad corporation of the right to have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of the acts of the commissioners in fixing the rates of charges. In the second place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence. 2 Rice, Ev. pp. 806, 807; Com. v. Williams, 6 Gray, 1; State v. Hurley, 54 Me. 562. Such provisions are not unusual. Cases have arisen in this state under a statute making the fact of injury caused by sparks from a locomotive passing along the road prima facie evidence of negligence, and no question has ever been raised as to the validity of the statute. * * * Acts making tax deeds prima facie evidence of the regularity of proceedings antecedent to the deed have been held to be valid. 2 Rice, Ev. p. 607; Hand v. Ballou, 12 N. Y. 541; Delaplaine v. Cook, 7 Wis. 54; Allen v. Armstrong, 16 Iowa, 508; Wright v. Dunham, 13 Mich. 414; Gage v. Caraher, 125 Ill. 547, 17 N. E. 777." See, also, Chicago, & A. R. Co. v. People, 67 Ill. 11.

If one is a banker, or person doing a banking business, and receives on deposit the money of his customer, it is to be presumed that he knows at the time of receiving such deposit whether or not he is solvent. At all events, as he holds himself out to the public and to his customers as being possessed of money and capital, and therefore to be safely trusted, it is his duty to know, and he is, under all ordinary circumstances, bound to know, that he is solvent; and it is criminal negligence for him not to know of his insolvency. The Criminal Code, par. 280, declares that a criminal offense consists in a violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence. When a banker fails in business within 30 days after he has received a deposit from his customer, it cannot fairly be said that the fact of such failure does not tend to show that he was insolvent when he received the deposit; and since, if he was then insolvent, he is presumed to have known of such insolvency at that time, and it is criminal negligence for him not then to have known of it, the inference that, when he received such deposit, it was with a fraudulent intent on his part, is not so purely arbitrary, unreasonable, unnatural, or extraordinary as would justify the courts in saying that such failure within 30 days had no fair relation to or connection with the existence of a fraudulent intent at the time of the deposit, and that, therefore, the act of

the legislature is unconstitutional, null, and void. It is only in a very clear case that the courts will assume to declare the invalidity of a statute enacted by the legislature, and no clear and palpable case of invalidity here appears.

It is assigned as error that the court denied the motion to quash the indictment. The indictment is substantially as follows: That Charles J. Meadowcroft and Frank R. Meadowcroft on the 3d day of June, 1893, in said county of Cook, in the state of Illinois, then and there being persons then and there doing a banking business under the name of "Meadowcroft Bros.," corruptly, willfully, fraudulently, and feloniously did receive from one John D. Collins 100 current United States of America treasury notes, etc., of the value of, etc., of the personal goods, money, and property of the said John D. Collins, the said John D. Collins then and there not being indebted to the said Charles J. Meadowcroft and Frank R. Meadowcroft, when at the time of receiving the said money and deposit, to wit, on the said 3d day of June, etc., said Charles J. Meadowcroft and said Frank R. Meadowcroft, said persons then and there doing a banking business as aforesaid, were then and there insolvent, whereby and because of which insolvency the said money and deposit so then and there made as aforesaid was then and there lost to him, said John D. Collins, whereby, and by force of the statute in such cases made and provided, etc.

It is urged that the statute is penal, and must therefore be strictly construed. But the rule of strict construction does not prevent our calling in the aid of other rules, and giving to each its appropriate scope; the ascertainment of the legislative will being the primary consideration, after all. Bish. St. Crimes, § 200. A strict construction is not violated by giving the words of a statute a reasonable meaning, according to the sense in which they were intended, and disregarding captious objections, and even the demands of an exact grammatical propriety. Id. § 212. And a statute which is made for the good of the public ought, although it be penal, to receive an equitable construction. 6 Bac. Abr. 391; People v. Bartow, 6 Cow. 290.

It is claimed that the indictment is defective in not containing a specific averment of an intent at the time of receiving the money to defraud John D. Collins. The indictment states the offense in the terms and language of the statute creating the offense, and is therefore to be deemed sufficiently technical and correct. Such is the legislative mandate (Cr. Code, par. 408), and very numerous decisions of this court have given effect to it. And, in addition thereto, it charges that the act was corruptly, willfully, fraudulently, and feloniously done. It is to be noted that the offense is created and defined in the first part of the section, and

that the office of the last sentence of the section, to the effect that the failure, suspension, or involuntary liquidation of the banker within 30 days from and after the time of receiving the deposit shall be prima facie evidence of an intent to defraud on the part of such banker, is merely to establish a rule of evidence that shall be applicable in trials for the offense that had already been created and defined. It may be granted that it is a legislative recognition of the fact that in the commission of the offense created there must be a criminal intent, or that negligence which is its equivalent; but such recognition is nothing more than the recognition of the principle of the common law, which, as we have already seen, is also embodied and declared in the Criminal Code, in the words that in the commission of a criminal offense there must be a union or joint operation of act and intention, or criminal negligence. The act upon which the indictment is based does not require that there should be either an averment or proof of a specific intent to defraud John D. Collins. Under our statutory rule, it is sufficient to charge the offense in the terms and language used in creating and defining it, and it is only when such terms and language mention the intent as one of the constitutional elements of the offense created that it is necessary to allege the criminal intent. *McCutcheon v. People*, 69 Ill. 601. The essential element of a criminal intent or criminal negligence is, however, implied, since it is of the essence of every criminal offense; and it must in some way appear, in order to justify a conviction. A statute makes an act a crime, and either provides that proof of a specific fact or facts shall be prima facie evidence of evil intent, or else the law infers the evil intent from the act itself. But if it appears, upon the whole case, that the thing done is not within the intention of the law, then it is not within the law, though within its letter.

It is claimed that the indictment is defective in not specifically, and in express terms, averring that the defendants received the money of the prosecuting witness as bankers, and as a general bank deposit. The indictment does allege that the defendants, "being persons then and there doing a banking business under the name of 'Meadowcroft Bros.," "did receive from one John D. Collins" certain specified moneys, of certain specified values, "of the personal goods, money, and property of the said John D. Collins, the said John D. Collins then and there not being indebted to" the said defendants. The charge is in the terms and language of the statute, and, tested by the statutory rule, is to be deemed sufficiently technical and correct. If the defendants, while doing a banking business, received a deposit, the reasonable and natural conclusion is that they received the deposit in their capacity of bankers. And the rule is that a deposit is general, unless the depositor

makes it special, or deposits it expressly in some particular capacity. *Ward v. Johnson*, 95 Ill. 215; *Brahm v. Adkins*, 77 Ill. 263.

It is urged that the indictment is defective because it does not charge that the partnership of Meadowcroft Bros., as a partnership, was insolvent on June 3, 1893, or at any other time. The claim, in substance, is that since the indictment simply charges that Charles J. Meadowcroft and Frank R. Meadowcroft, persons doing a banking business under the name of "Meadowcroft Bros.," were then and there insolvent, non constat that the partnership of Meadowcroft Bros. was then and there insolvent, and that, therefore, the facts alleged, if conceded to be true, do not constitute a crime. This claim is based upon the theory that a partnership is a legal entity, distinct from, and independent of, the persons composing it. Whatever may be the law of other states, such is not the law of this state. Most of the cases relied on to establish the proposition seem to have been decided in states that have either adopted a code, or have abolished the distinction between legal and equitable rights and remedies, or have enacted statutes giving to copartnerships a quasi personal existence. In this state the rule which requires the assets of a firm to be first applied to the payment of firm debts, and the individual assets of the several partners to be first applied to the payment of the individual debts of the several partners, is not a rule that is recognized or enforced in a court of law, but a rule of equity, that is enforceable only in courts exercising equitable jurisdiction, and is not founded on the equities of the creditors, but is worked out only through the medium of the equities of the partners. See *Hanford v. Prouty*, 133 Ill. 339, 24 N. E. 565, and numerous other cases. At law the individual debts and the partnership debts are placed upon the same footing, and are to be paid *pari passu* out of the assets. *Ladd v. Griswold*, 4 Gilman, 25, and subsequent cases. The statute under consideration provides "that if any banker or broker, or person or persons, doing a banking business or any officer of any banking company or incorporated bank," shall receive a deposit, etc. It does not mention or say anything about a firm or copartnership. The indictment follows the statute, and alleges "that Charles J. Meadowcroft and Frank R. Meadowcroft, then and there being persons then and there doing a banking business under the name of 'Meadowcroft Bros.," received a deposit. If Charles J. Meadowcroft and Frank R. Meadowcroft were persons doing a banking business, and were insolvent, and received a deposit under the circumstances denounced by the statute, it would seem that they must be guilty of the offense prohibited by that statute. The fact that they did their banking business under the name of "Meadowcroft Bros." did not make that mere name a legal entity, and endow it with a personal existence distinct from, and independent of, themselves. In fact, "Meadowcroft Bros." was simply the

firm name or trade name in which Charles J. Meadowcroft and Frank R. Meadowcroft did the banking business of Charles J. Meadowcroft and Frank R. Meadowcroft; and, if they were solvent, then Meadowcroft Bros. was solvent, and, if they were insolvent, then Meadowcroft Bros. was insolvent, for there was no such a person, either natural or artificial, in existence as Meadowcroft Bros., distinguishable from Charles J. Meadowcroft and Frank R. Meadowcroft. There was therefore no necessity for averring in the indictment the insolvency of Meadowcroft Bros. Our conclusion is that there was no error in overruling the motion to quash the indictment.

It is assigned as error that the court denied the motion of the defendants made at the November term, 1894, to be set at liberty for want of prosecution. It appears that they were indicted at the April term, 1894, of the criminal court of Cook county; that the defendant Frank R. Meadowcroft gave bail on May 5, 1894, it being one of the days of the said April term; and that the defendant Charles J. Meadowcroft gave bail on May 7, 1894, it being the first day of the May term, 1894. It also appears that the June, July, August, September, and October terms, 1894, of said court, were held after the return of the indictment and the giving of bail, and prior to the entry of said motion at said November term to be set at liberty. In *Gallagher v. People*, 88 Ill. 835, the question arose as to the construction to be placed upon the latter part of section 18 of division 12 of the Criminal Code, which reads as follows: "If any such prisoner shall have been admitted to bail for a crime other than a capital offense the court may continue the trial of said cause to a third term, if it shall appear by oath or affirmation that the witnesses for the people of the state are absent, such witnesses being mentioned by name, and the court shown wherein their testimony is material." There defendant had been indicted, and had entered into recognizance at the May term, 1874, of the court; and the claim made was that he was entitled to be discharged at the third term after the bail was given, and was not required to appear at the September term, 1876. It was held that, since he was out on bail, he was not entitled to be discharged at the third term after bail was given, because it was not shown that the various continuances were had on the application of the people, or that the accused was present, ready for or demanding a trial. And it was there said that the statute "only authorized the accused who is under bail to demand a trial, and, if not granted at the third term, to be discharged from bail and prosecution under the indictment then pending." In the case at bar it appears from the affidavit of the defendant Frank R. Meadowcroft, submitted on the motion to be set at liberty, that he appeared and gave bail on the 5th day

of May, 1894, and, further, "that neither he nor his counsel, nor any one in his behalf, has appeared in court, for any purpose whatsoever, since the said 5th day of May, A. D. 1894." And it appears from the affidavit of the defendant Charles J. Meadowcroft, presented at the hearing of said motion, that he appeared and gave bail on the 7th day of May, 1894, and "that neither he nor his counsel, nor any one in his behalf, has appeared in court, for any purpose whatsoever, since the said 7th day of May, A. D. 1894." If the defendants were out on bail, and never appeared in court until the November term, then, as matter of course, they were not put upon trial until that term. Even if we should assume that it was legally possible for the prosecution to try the case in their absence from court, yet it is very clear that the prosecution was not bound so to do. The defendants were fortunate in that judgments of forfeiture were not taken upon their bail bonds, if so be it that they were not declared forfeited. There was no error in denying the motions for discharges.

A multitude of questions are raised in this case by the 54 elaborate assignments of error upon the record, and in the almost 300 printed pages of brief and argument filed by the plaintiff in error, and an analysis of the statute upon which the indictment is based will facilitate the consideration of these questions. The substance of the section, expurgating all words that are not essential to the present inquiry, is this: If any banker or person or persons doing a banking business shall receive from any person or persons not indebted to said banker any money, when at the time of receiving such deposit said banker is insolvent, whereby the deposit so made shall be lost to the depositor, said banker so receiving said deposit shall be deemed guilty of embezzlement, and, upon conviction thereof, shall be fined in a sum double the amount of the sum so embezzled and fraudulently taken, and in addition thereto, etc. Waiving the question of evil intent, what elements enter into the commission of the crime created by this section of the statute? Plainly, these: The defendants must be bankers, or persons doing a banking business; they must receive money on deposit; they must be insolvent at the time of receiving such money on deposit; and the money so received on deposit must be lost by reason of such insolvency. The nature of the first three of these elements is easy enough of comprehension. In respect to the last there is more difficulty. The words of the statute are, "whereby the deposit so made shall be lost to the depositor." When lost? At the time that the deposit is received by the insolvent bankers? Or is it when, upon final settlement of the insolvent estate, the exact amount that will not be repaid by the dividends declared is definitely ascertained? Or is it after the death of the bankers, and the final settlement of the testate or intestate estates left by them, and when for the first time

it can be known just how much, if any, of the deposit is so absolutely lost to the depositor as that it will never be returned to him? And then, again, the language is, "whereby the deposit so made shall be lost." That language seems to imply the whole amount of the deposit. If less than the whole was in legislative contemplation, then it is reasonably to be presumed that the statute would have said, "the deposit or any part of it." Let us look at the context. The section provides that if any banker shall receive any money, when at the time of receiving such deposit said banker is insolvent, "whereby the deposit so made shall be lost to the depositor," said banker "so receiving said deposit" shall be deemed guilty of embezzlement, and upon conviction thereof shall be fined "in a sum double the amount of the sum so embezzled and fraudulently taken." When is the sum "fraudulently taken"? Manifestly, at the time that the banker, being insolvent, fraudulently receives the money of the depositor. And what is "fraudulently taken" by the banker? Plainly, the money received on deposit is "the sum fraudulently taken." A specified sum is "taken" by the banker, and under circumstances that make such taking fraudulent, and the fine imposed as a part of the penalty is to be in a sum double the amount of the sum "taken." The statute evidently has reference to the total amount of the deposit, and not merely to a part of the sum deposited. When a deposit of money is made, the banker, in contemplation of law, has money on hand, to the full amount of the sum deposited, ready to deliver when called for, and his contract with the depositor is to refund that same amount on demand. When it is not paid back on demand, as contemplated by the agreement between the banker and the depositor, and this because of the insolvency of the banker and his consequent inability to refund the amount of the sum deposited, then, within the true intent and meaning of this statute, which is entitled "An act for the protection of bank depositors," "the deposit so made," or, in other words of the statute, "the sum fraudulently taken," is "lost to the depositor."

The crime created by the statute is consummated when the insolvent banker fraudulently receives the deposit, for the statute declares that such banker so receiving such deposit shall be deemed guilty of the embezzlement of the sum so fraudulently taken. This view carries into effect the legislative intention, and gives force and vitality to a wholesome and remedial statute. And this construction does not, as is suggested, leave the clause, "whereby the deposit so made shall be lost to the depositor," without any meaning or import whatever. The statute, without that clause, would be open to the construction that a banker who has never suspended business, and has continuously paid all authorized checks drawn upon him, and has even promptly paid out upon checks the full amount

of the deposit made by the prosecuting witness, was within the penalties of the statute. If only it were made to appear that, at the particular time the deposit of such prosecuting witness was made, he (the banker) was insolvent, and the insertion of said clause affirmatively excludes him from the purview of the statute. Nor is the meaning we have placed upon the word "lost" unauthorized, for the rule is that in construing a statute the court is not restricted to the primary meaning of a word used, where, from a consideration of the whole and every part of the statute, it is plain that the word is used in a different sense. *City of Springfield v. Green*, 120 Ill. 269, 11 N. E. 261. The failure, suspension, or involuntary liquidation of the banker, by reason of insolvency, shortly after the receipt of the deposit, relates back to the fraudulent taking, and shows that the deposit was at that time "lost to the depositor." On the other hand, to construe the statute as meaning that there can be no conviction until it can be clearly and definitely ascertained what the exact amount is that can never be recovered, and is permanently and absolutely lost, would utterly defeat the object of the statute. It would seem that such amount can never be so ascertained until after the death of the banker, and the final settlement of his estate by his administrator. And, even if it should be held that what the statute contemplates is the ascertainment of the amount of the deficit after the distribution of the proceeds of the property that the banker owned at the time of his suspension of business, yet it can readily be seen that usually—in fact, almost always—many years would pass before final settlement of that estate would be made, and in the meantime the statute of limitations would frequently bar any prosecution for the offense committed. And it is to be borne in mind that it is important the exact amount of the deposit lost to the depositor shall be definitely ascertained, for the statute expressly provides that the fine imposed in case of conviction shall be a sum double the amount of the sum so embezzled and fraudulently taken.

There is authority as well as reason to sustain the conclusions we have reached in regard to the meaning of this statute. In *Queenan v. Palmer*, 117 Ill. 619, 7 N. E. 470, 617, the words of the statute were, "make good all losses to depositors or others." This court there said: "What is meant by the term 'losses,' as used in the statute? It would seem from the argument that defendants would restrict the meaning of the term 'losses' to signify only the difference between the depositor's claim and what he might have realized by an action or bill against the insolvent bank. * * * It cannot be that the term 'losses' was used in this connection in that restricted sense, as to mean that which can never be recovered. Otherwise there might be no such thing as any 'losses' to the depositors in this case, for there might exist a remedy against the bank for

one portion, and against the stockholders for the residue, and what would there be left for the term to attach? Obviously, the term 'losses' was used in a more general sense, and one usually attached to it by common understanding. In its most general sense, the word 'loss' means any deprivation. In some instances it may mean that which can never be recovered, and in others that which is simply withheld, or that of which a party is dispossessed. Often the context assists to a clearer understanding of the words employed in a statute or written agreement. By another section this corporation was authorized to receive deposits from laborers and servants, and was obligated to repay such deposits when required. The suspension of the bank by reason of insolvency was an absolute refusal to repay the deposits to the owners, and operated as a deprivation,—a withholding of the same from the depositors,—and that is a 'loss,' in the ordinary acceptance of that word. A portion of the value of such deposits, or all, might ultimately be recovered from either the banker or the stockholder, but the deposits are lost to the owner. After the suspension of the bank, nothing remained of his deposits but the obligation of the bank or the stockholders to pay the value. That obligation might or might not be of value to him, depending on the fact of the solvency or insolvency of both the corporation and the stockholders. At all events, the funds have been wasted by the corporation becoming partially or totally insolvent, and that is a loss to the depositor, in the sense that term is used in the statute, and his right to proceed against the stockholder arises at once. Any other definition of this word 'losses' would be inconsistent with the context, and would afford no adequate security to the depositors or others dealing with the bank." The whole of this language just quoted seems peculiarly applicable to the case now at bar.

It is claimed that the state failed to make out a case at the trial, because it did not show that the deposit made on June 3, 1893, by Collins was a general deposit, as distinguished from a special or specific deposit. That fact is amply shown by the testimony of Collins and his bank book, which was introduced in evidence. Besides this, a deposit of money with bankers at their banking house is regarded as general, unless it appears that the banker makes it special, or deposits it expressly in some particular capacity. *Brahm v. Adkins*, 77 Ill. 263. A like failure to make out a case is claimed because it is not shown that Collins ever made a demand for the return of his deposit, and that defendants refused to comply with such demand. It appears from the evidence that Collins deposited the \$200 on Saturday, June 3, 1893, and that when he returned to the bank on Monday, June 5th, he found the door closed, and a card of the receiver of the Meadowcroft Bros. tacked thereon, and the

bank not open or doing business, and also that the defendants were insolvent, and have never resumed business. When a bank or banker suspends payment, and closes doors against depositors and creditors, and discontinues banking operations, it or he waives the necessity for a demand on the part of its or his depositors. *Watson v. Bank*, 8 Metc. (Mass.) 217; *Planters' Bank v. Farmers' & Mechanics' Bank*, 8 Gill & J. 449. The case of *Wright v. People*, 61 Ill. 382, is not here in point; for there the failure to deliver on the demand of the consignor was, by the express terms of the statute there involved, made a constituent element in the offense that was created.

At the conclusion of the evidence for the state the defendants called Collins to the stand, and after he had testified that he had never made any demand upon the defendants, or either of them, for the return of the deposit, counsel for the defendants then and there, on behalf of the defendants, tendered to Collins the full amount of the deposit, with interest thereon. Collins declined the tender, whereupon the money was deposited with the clerk of the court, subject to his order. It is claimed by counsel that if it appears, even after indictment, and at any stage of the proceedings thereon, that the depositor has recovered, or will recover, his deposit in full, and will sustain no absolute and ultimate loss, then the prosecution must fail, even though the banker, on the day of receiving the deposit, was hopelessly insolvent. This claim is based on the clause of the statute which says, "whereby the deposit so made shall be lost to the depositor." We have already placed a construction upon that clause, and it will readily be conceded that, if we are right in the construction we have given it, then the contention now under consideration cannot be sustained. It needs no citation of authorities to show that, as a matter of law, the restitution of money that has been either stolen or embezzled, or a tender or offer to return the same or its equivalent to the party from whom it was stolen or embezzled, does not bar a prosecution by indictment and conviction for such larceny or embezzlement. The effect of the tender and payment in court may be a discharge from the indebtedness for the deposit fraudulently received, so far as the depositor and his civil remedies are concerned; but, the crime having been fully consummated before indictment found, it is not within the power of the banker and the depositor, or either of them, to compromise or take away the right of the state to insist upon a conviction for the crime committed. It is not to be presumed that in making the offense, and providing for its punishment, it was the intention of the legislature to make the criminal courts of the state collecting agencies for collecting the debts due to depositors from insolvent banks and bankers.

The view we have taken of the statute

eliminates from consideration most, if not all, of the objections that are urged by plaintiffs in error to the rulings of the trial court on questions relating to the admissibility of testimony, and upon the instructions. It is manifest that in these rulings the trial court held the law more strongly in favor of the plaintiffs in error, and against the prosecution, than was warranted by the statute. The state assumed at the trial a much greater burden of proof than the law imposed upon it. The result was that the rulings upon matters of evidence and upon instructions were more favorable to plaintiffs in error than they were entitled to, and they have no just ground for complaint in that regard. Even if it be conceded that some technical errors were committed pending the struggles of the state under the unwarranted burdens that at the trial were imposed upon it, yet they were immaterial, so far as the real merits of the case were concerned, and plaintiffs in error were not damaged by them. The evidence abundantly sustains the verdict of the jury. The testimony is exceedingly voluminous, owing to the matters already suggested. We refrain from any discussion of the facts of the case, as no useful purpose would be accomplished thereby.

It is urged that there are two obvious objections to the verdict that was returned by the jury that tried the case, either of which, under the law, is fatal to the validity of the verdict and of the judgment of the court. The verdict was as follows: "We, the jury, find the defendants, Frank R. Meadowcroft and Charles J. Meadowcroft, guilty of embezzlement, in manner and form as charged in the indictment; and we fix the punishment of the said Frank R. Meadowcroft and Charles J. Meadowcroft at a fine in the sum of twenty-eight dollars (\$28), and, in addition thereto, at imprisonment in the penitentiary for the term of one year."

The first of the objections made is that the jury did not find, in their verdict, the sum of money or value of the deposit embezzled, that the punishment that by the mandate of the statute must be imposed is the fine, the imprisonment being optional with the jury, and that this fine must be fixed by the jury at a sum that is double the amount that is embezzled. The claim is that it is clearly settled in this state that, whenever the punishment depends upon the value of the article stolen or embezzled, the jury must affirmatively and expressly find that value, and a general verdict is bad, and will not support a conviction. The cases of *Highland v. People*, 1 Scam. 392; *Sawyer v. People*, 3 Gilman, 53; *Hildreth v. People*, 32 Ill. 36; *Collins v. People*, 39 Ill. 233; *Williams v. People*, 44 Ill. 478; *Tobin v. People*, 104 Ill. 565; and *Thompson v. People*, 125 Ill. 256, 17 N. E. 749,—are relied on as sustaining their doctrine. The claim, as urged, is too broad. The rules of the common law do not require that the jury should, in terms, find

the value of the property charged to have been stolen or embezzled. It is only by force of our statutes, and in cases where the character of the offense and the mode of punishment depend upon the value of property, that the value of such property is required to be found in the verdict. In *Sawyer v. People*, supra, it is said that where the value of the property determines the character of the offense, and regulates the mode of punishment, it is necessary for the jury to ascertain the value, and state it in their verdict, that the court may know with certainty whether the accused should be subjected to punishment by confinement in the penitentiary, or by the payment of a fine, and imprisonment in the county jail. Like language was used in *Highland v. People*, supra. And the other cases relied on are expressly decided upon the authority of the *Highland Case* and the *Sawyer Case*. Here neither the character of the offense, nor the mode of the punishment, is contingent upon the value of the deposit embezzled by the banker. Upon conviction the fine is to be imposed at all events, and whether the value of the property embezzled is \$1 or \$400; and the optional punishment of imprisonment in the penitentiary may lawfully be inflicted when the value of the property is a single dollar, and omitted when its value is hundreds, or even thousands, of dollars. The most that can be said is that the amount of the fine depends upon the value, but that goes only to the measure or quantity of punishment, and not to the character of the offense or mode of punishment. We are not inclined to extend the doctrine relied on beyond the requirement of the rule, and apply it to cases not within the reason of the rule. Here the fine fixed by the jury was only \$28, and, as we have already seen, it should, under the evidence and the law, have been \$400. Plaintiffs in error are not injured, and cannot be heard to complain.

The other objection to the verdict is that it fixed a joint, instead of a several, punishment for the two defendants. In *Moody v. People*, 20 Ill. 315, this court said that, where several persons are jointly indicted and convicted, they should be sentenced severally, and the imposition of a joint fine is erroneous. "If each defendant was guilty of the crime charged, then each incurred the penalty or penalties provided by the statute, and the jury should have fixed the punishment of each. The verdict in this case is very informal, but is it to be regarded as invalid? It is to be kept in mind that juries are usually composed of men who are not learned in the forms of the law, or exact in their use of language, and therefore all reasonable intendment should be made, in order to sustain their verdicts, when the validity of such verdicts is challenged on merely technical grounds. If the verdict was simply, "We fix the punishment of the said Frank R. Meadowcroft and Charles J. Meadowcroft at im-

prisonment in the penitentiary for the term of one year," then, growing out of the nature of the punishment, the verdict, though informal, would without doubt be regarded as a sufficiently distinct fixing of punishment at imprisonment for one year, as against each defendant. It would not in such case reasonably, or without leading to absurdities, be regarded as the fixing of a single term of one year for the two defendants jointly, the further punishment of each to be discharged upon his suffering imprisonment for six months of the term. This being so, and the "imprisonment in the penitentiary for the term of one year" being fixed as a part of the punishment of the said Frank R. Meadowcroft and Charles J. Meadowcroft, and in immediate conjunction therewith, and connected with it by the clause "and in addition thereto," the jury fixing the other part of the punishment "at a fine in the sum of \$28," we think there can be no reasonable doubt but that it was the intention of the jury to fix the punishment of each defendant at the fine of \$28, as well as at imprisonment in the penitentiary for the term of one year. It is evident that the criminal court so regarded and understood and acted upon the verdict; for it sentenced the defendant Frank R. Meadowcroft to imprisonment in the penitentiary for a term of one year, and rendered a several judgment against him for a fine of \$28, and awarded execution therefor, and also sentenced the defendant Charles J. Meadowcroft to imprisonment in the penitentiary for a term of one year, and rendered a several judgment against him for a fine of \$28, and awarded execution therefor. We find no error in the record for which the judgment should be reversed, and it is therefore affirmed. Affirmed.

PHILLIPS, J. I do not concur in the opinion of the majority. There are two objections to the verdict that was returned by the jury that tried the case, either of which, under the law, is fatal to the validity of the verdict and of the judgment of the court. The verdict was as follows: "We, the jury, find the defendants, Frank R. Meadowcroft and Charles J. Meadowcroft, guilty of embezzlement, in manner and form as charged in the indictment; and we fix the punishment of said Frank R. Meadowcroft and Charles J. Meadowcroft at a fine in the sum of twenty-eight dollars (\$28), and, in addition thereto, at imprisonment in the penitentiary for the term of one year."

The first of the objections made is that the jury did not find in their verdict the sum of money or value of the deposit embezzled. The statute provides, in express terms, that upon conviction the defendant or defendants "shall be fined in a sum double the amount of the sum so embezzled and fraudulently taken, and in addition thereto, may be imprisoned in the state penitentiary not less than one nor more than three years." The

punishment that by the mandate of the statute must be imposed is the fine. The imprisonment is optional with the jury. This fine must be fixed by the jury at a sum that is double the amount of the sum that is embezzled. In this respect the statute is like the provision of the Criminal Code in regard to larceny, wherein the punishment depends upon the value of the property stolen, and like the provision in regard to receiving stolen goods, wherein, also, the punishment depends upon the value of the stolen goods received. It is clearly settled in this state, by repeated and uniform decisions of this court, extending from the year 1837 down to this time, that whenever the measure or kind of punishment depends upon the value of the property stolen, embezzled, or received, the jury must find that value as a part of their verdict, and that without such finding their verdict is bad, and will not support a conviction. *Highland v. People*, 1 Scam. 393; *Sawyer v. People*, 3 Gillman, 53; *Hildreth v. People*, 32 Ill. 36; *Collins v. People*, 39 Ill. 233; *Williams v. People*, 44 Ill. 478; *Tobin v. People*, 104 Ill. 565; *Thompson v. People*, 135 Ill. 256, 17 N. E. 749. The reasons for the rule are given in the cases cited, and need not be repeated. We cannot do otherwise than hold the law of the land to be as it has continuously been held to be by the court of last resort for a period of 60 years. And in accord with the rule that obtains in this state are the decisions in other states. *Ray v. State*, 1 Greene (Iowa) 316; *State v. Redman*, 17 Iowa, 329; *Miles v. State*, 3 Tex. App. 58; *State v. Heath*, 41 Tex. 426; *State v. Ladd*, 32 N. H. 111.

Another objection to the verdict is that it fixed a joint, instead of several, punishment for the two defendants. That this cannot be done is fully shown by the authorities. *Miller v. People*, 47 Ill. App. 472; 1 Bish. New Cr. Law, §§ 954, 955; 1 Bish. Cr. Proc. (3d Ed.) § 1036; *Allen v. State*, 34 Tex. 230; *Hampton v. State*, 45 Tex. 154; *Flynn v. State*, 8 Tex. App. 398; *State v. Gay*, 10 Mo. 440; *Streughan v. State*, 16 Ark. 37; *Cunningham v. State*, 26 Tex. App. 83, 9 S. W. 62; *Medis v. State*, 27 Tex. App. 194, 11 S. W. 112; *Hays v. State*, 30 Tex. App. 472, 17 S. W. 1063; *Com. v. Harris*, 7 Grat. 600; *Caldwell v. Com.*, 7 Dana, 229; *Curd v. Com.*, 14 B. Mon. 386; *Reg. v. Littlechild*, L. R. 6 Q. B. 293; *Godfrey's Case*, 11 Coke, 43; *Rex v. Sterling*, 1 Lev. 125; *Jones v. Com.*, 1 Call, 555; *State v. Hunter*, 33 Iowa, 361; *McLeod v. State*, 35 Ala. 395; *Waltzer v. State*, 3 Wis 785; *Com. v. Ray*, 1 Va. Cas. 262. And in *Moody v. People*, 20 Ill. 315, this court said, "Where several persons are jointly indicted and convicted, they should be sentenced severally, and the imposition of a joint fine is erroneous." If each defendant was guilty of the crime charged, then each incurred the penalty or penalties provided by the statute, and the jury should have fixed the punishment of each. If the verdict was simply, "We fix the punishment of the said Frank R. Meadowcroft and Charles J. Meadowcroft at imprisonment in

the penitentiary for the term of one year," then, growing out of the nature of the punishment, the verdict, though informal, might be regarded as a sufficiently distinct fixing of punishment as against each defendant. And see *Fife v. Com.*, 29 Pa. St. 429. But when the verdict says, "We fix the punishment of the said Frank R. Meadowcroft and Charles J. Meadowcroft at a fine in the sum of \$28," it is manifestly the awarding of a fine of \$28 against them jointly, and cannot be regarded otherwise without doing violence to the language used by the jury in their verdict. The language used by them plainly indicates their intention to impose a single fine on the two defendants jointly. And when the criminal court afterwards rendered a several judgment against Frank R. Meadowcroft for a fine of \$28, and awarded execution therefor, and also rendered a several judgment against Charles J. Meadowcroft for a fine of \$28, and awarded execution therefor, it rendered a judgment that was not based upon, or authorized by, the verdict. This identical question was before the supreme court of Texas in *Allen v. State*, 34 Tex. 230, and that court held that the judgment was not warranted or supported by the verdict, the judgment being several while the verdict was joint, and reversed the judgment. In the case at bar the verdict was insufficient to support a valid judgment, and the trial court erred in presuming the intent of the jury to be otherwise than was expressed in the verdict they returned into court, and in entering a several judgment upon a joint verdict.

(55 Ohio St. 423)

PALMER et al. v. TINGLE.

YOUNG v. LION HARDWARE CO.

(Supreme Court of Ohio. Dec. 8, 1896.)

MECHANIC'S LIEN—RIGHTS OF PROPERTY—LIEN OF SUBCONTRACTORS—CONSTITUTIONAL LAW.

1. The inalienable right of enjoying liberty and acquiring property, guaranteed by the first section of the bill of rights of the constitution, embraces the right to be free in the enjoyment of our faculties, subject only to such restraints as are necessary for the common welfare.

2. Liberty to acquire property by contract can be restrained by the general assembly only so far as such restraint is for the common welfare and equal protection and benefit of the people, and such restraining statute must be of such a character that a court may see that it is for such general welfare, protection, and benefit. The judgment of the general assembly in such cases is not conclusive.

3. While a valid statute regulating contracts is, by its own force, read into, and made a part of, such contracts, it is otherwise as to invalid statutes.

4. The act of April 13, 1894 (91 Ohio Laws, 135), in so far as it gives a lien on the property of the owner to subcontractors, laborers, and those who furnish machinery, material, or tile to the contractor, is unconstitutional and void. All to whom the contractor becomes indebted in the performance of his contract are bound by the terms of the contract between him and the owner.

Minshall, J., dissenting.
(Syllabus by the Court.)

Error to circuit court, Putnam county.

Error to circuit court, Clark county.

Separate actions in the common pleas by Palmer & Crawford against William C. Tingle, and by the Lion Hardware Company against L. F. Young, to foreclose mechanics' liens. In the former case there was a judgment for defendant on appeal to the circuit court, and plaintiffs bring error; and in the latter there was a judgment for plaintiff on appeal to the circuit court, and defendant brings error. Affirmed in the former case, and reversed in the latter.

These two cases were heard and determined together. Both cases involve the constitutionality of the mechanic's lien statute, as amended April 13, 1894. In the Putnam county case the contract was made on the 23d day of April, 1894, and was for the repair of Mr. Tingle's house, at the agreed price of \$500, which was to be paid by the owner of the house to the contractor, a Mr. McComb, by indorsing and delivering to him two notes held by Mr. Tingle against a man by the name of Vale; and Mr. Tingle did indorse and deliver the two notes, each for the sum of \$250, to Mr. McComb, and he received the notes in full payment and satisfaction of the agreed repairs. Mr. McComb purchased materials from Palmer & Crawford, a co-partnership, for the purpose of making the repairs, and the materials were in fact used in the making of said repairs. Mr. McComb fully performed his contract, but failed to pay for the materials, in the sum of \$214.87; and thereupon the partnership, within four months, filed an affidavit, in all respects as required by statute, in the office of the recorder of the county, seeking to perfect a lien upon Mr. Tingle's house, and the land upon which it stands. The circuit court, upon appeal, held the statute unconstitutional, and rendered judgment in favor of Mr. Tingle. The partnership filed its petition in error in this court seeking to reverse the judgment of the circuit court. In the Clark county case, Mr. Young made a contract with a Mr. Hollenback on the 29th day of June, 1894, by the terms of which Mr. Hollenback was to furnish the materials and labor, and erect for Mr. Young, upon premises owned by him, a dwelling house, on or before the 1st day of October, 1894, except the foundation, painting, and chimneys, for the sum of \$1,925. The payments were to be \$300 upon completion of the roof, \$300 when ready for plastering, \$400 when the plastering should be completed, and the remainder, \$925, within 30 days after the completion and acceptance of the house. Mr. Hollenback performed his part of the contract, and Mr. Young accepted the house and paid therefor according to the contract. Mr. Hollenback purchased from the hardware company materials for the completion of the house to the amount of \$215.97, which materials were of that value, and were used in the completion of the house. After payment had been made in full for the com-

pletion of the house, and within four months after the materials were furnished, the hardware company filed its affidavit, in due form, in the office of the recorder of the county, to perfect a lien upon the house of Mr. Young for the materials so furnished to Mr. Hollenback for the completion of said house. Mr. Young had no notice of the claim for said materials until after the house was completed, accepted, and paid for in full. Upon appeal to the circuit court, it made a finding of facts and rendered a decree in favor of the hardware company. Thereupon Mr. Young filed his petition in error in this court, seeking to reverse the judgment of the circuit court, and asking that judgment be rendered in his favor upon the findings of fact.

Leasure & Powell, for plaintiffs in error Palmer & Crawford. Mowen & Mowen, for plaintiff in error L. F. Young. W. H. Griffith, Hagan & Hagan, Outhwaite & Linn, and Henry Gumble, for defendant in error Lion Hardware Company. Watts & Moore, for defendant in error William C. Tingle.

BURKET, J. (after stating the facts). The constitutionality of the amendment of the mechanic's lien law, as passed April 13, 1894 (91 Ohio Laws, 135), is challenged in each of the cases. In the first case, payment was made under the contract in full before the work was done. In the second case, payment was made under the contract as the work progressed, and a final payment in full upon the completion and acceptance of the building, and before any mechanic's lien was filed, or notice given the owner. The section of the statute under which a right to a lien in these cases is claimed is as follows: "Sec. 3184. A person who performs labor, or furnishes machinery or material for constructing, altering or repairing a boat, vessel or other water-craft, or for erecting, altering, repairing or removing a house, mill, manufactory, or any furnace or furnace material therein, or other building, appurtenance, fixture, bridge or other structure, or for the digging, drilling, plumbing, boring, operating, completing or repairing of any gas-well, oil-well, or any other well, or performs labor of any kind whatsoever, in altering, repairing or constructing any oil-derrick, oil-tank, oil or gas pipe-line, or furnishes tile for the drainage of any lot or land by virtue of a contract with, or at the instance of the owner therefor or his agent, trustee, contractor or sub-contractor, shall have a lien to secure the payment of the same upon such boat, vessel, or other water-craft, or upon such house, mill, manufactory or other building or appurtenance, fixture, bridge or other structure, or upon such gas-well, oil-well, or any other well, or upon such oil-derrick, oil-tank, oil or gas pipe-line, and upon the material and machinery so furnished, and upon the interest, leasehold or otherwise, of the owner in the lot for and on which the same may stand, or to which it may be removed." The former statute on

this subject provided that a lien might be taken by a person who should perform labor, or furnish machinery or material, by virtue of a contract with the owner or his authorized agent, while the statute here in question provides that such lien may be taken by any person who performs labor, or furnishes machinery or material, or tile for drainage, by virtue of a contract with, or at the instance of, the owner, or his agent, trustee, contractor, or subcontractor. It is claimed by those opposing the statute that in so far as it undertakes to give a lien on the owner's property for labor, machinery, materials, or tile not supplied under any contract with him or with his agent, and not at the instance of either, it is unconstitutional. On part of those who are upholding the statute, it is claimed that the statute is constitutional, and that, by operation of law, its terms become woven into the contract between the owner and the contractor, and that the owner, having thereby agreed to pay the debts made by the contractor in completing the building, has no cause for complaint. As to which claim is right must be determined by the constitution, aided by general rules of law.

The preamble to the constitution is as follows: "We, the people of the state of Ohio, grateful to Almighty God for our freedom, to secure its blessings and promote our common welfare do establish this constitution." It is worthy of notice that the constitution is established to secure the blessings of freedom, and to promote the common welfare. As the constitution must be regarded as consistent with itself throughout, it must be presumed that the laws to be passed by the general assembly under the powers conferred by that instrument are to be such as shall secure the blessings of freedom, and promote our common welfare. To make this more emphatic, the first section of the bill of rights provides that, "All men are, by nature, free and independent, and have certain inalienable rights, among which are those of enjoying and defending life and liberty, acquiring, possessing and protecting property, and seeking and obtaining happiness and safety." And by the second section it is provided that: "All political power is inherent in the people. Government is instituted for their equal protection and benefit." The usual and most frequent means of acquiring property is by contract, and one of the most valuable and sacred rights is the right to make and enforce contracts. The obligation of a contract, when made and entered into, cannot be impaired by act of the general assembly. Const. art. 2, § 28. The word "liberty," as used in the first section of the bill of rights, does not mean a mere freedom from physical restraint or state of slavery, but is deemed to embrace the right of man to be free in the enjoyment of the faculties with which he has been endowed by his Creator, subject only to such restraints as are necessary for the common welfare. *People v. Marx*, 99 N. Y. 377, 2 N. E. 29; *Bertholf v.*

O'Reilly, 74 N. Y. 509; In re Jacobs, 98 N. Y. 98. Contracts and compacts have been entered into between men, tribes, and nations during all time from the earliest dawn of history; and the right and liberty of contract is one of the inalienable rights of man, fully secured and protected by our constitution, and it may be restrained only in so far as it is necessary for the common welfare and the equal protection and benefit of the people. That such restraint of the right and liberty of contract is for the common, public welfare, and equal protection and benefit of the people, must appear, not only to the general assembly, in the face of popular clamor, or the pressure of the lobby, but also to the courts; and it must be so clear that a court of justice, in the calm deliberation of its judgment, may be able to see that such restraint is for the common welfare and equal protection and benefit of the people. *People v. Gillson*, 109 N. Y. 389, 17 N. E. 343. The statute in restraint of the liberty to contract as to interest on money is valid for the reason that all can see that it is for the common welfare. Many other like cases of restraint as to contracts are to be found in our statutes, but all of them, in so far as they are valid, depend for their validity upon the same principle. It was the infringement of the liberty of contract that induced this court, in *State v. Iron Co.*, unreported,¹ to hold the statute unconstitutional which required corporations to pay their employees at least twice in each month. Our exemption laws can be sustained only on the ground that while they, in a slight degree, limit the liberty of contract, such limitation is for the general welfare of the whole people, and does not interfere with their equal protection and benefit. In such cases courts can see that the slight restraint of the liberty of contract is for the common welfare of the people, but no court can see that it is for the common, public welfare that the liberty of contract should be taken away from the owner of a building, to enable the seller of materials to collect their value from a man who never purchased them, and has already fully paid the one with whom he contracted for all that he has received. There can be no public necessity for making the contractor the agent of the owner, to enable the seller of materials to collect his pay from one who does not owe him, and with whom he has no contract. An agent can have no interest adverse to his master, but this statute attempts to create an agent for the owner out of the contractor, who is opposed to him in every interest. It is an attempt to make the contractor serve two masters,—himself and the owner. This cannot be done. For this we have the highest authority. The owner has the right to acquire his building upon the best terms possible, and if he can, by making a contract to pay, in advance, or by exchange of securities or other property, acquire his building cheaper than by contracting to pay after four months from its completion, he has the inalienable right to so acquire it, and to be

protected in its enjoyment; and it is not within the power of the general assembly to compel him to pay a higher price for his building, for the protection of laborers and furnishers with whom he has no contractual relation. To enable the contractor, by force of this statute, to enlarge the price to be paid, by allowing liens to be taken on the property for labor and materials, would be as unjust as to authorize the owner, by statute, to enlarge the building, without a corresponding increase in payment.

But it is urged that the act is constitutional for the reason that the statute itself must be read into the contract, and that thereby the owner agrees that the contractor may obtain labor and materials for which a lien may be taken against the owners' property. This begs the question, and assumes the constitutionality of the statute. If the statute is valid, it must be read into the contract; but, if invalid, it binds neither party, and does not become a part of the contract.

It is further urged that the owner has the means of protecting himself against loss by taking a bond, or withholding payment for four months, or collecting his loss from the contractor, and that statutes in restraint of the liberty of contract are, in such cases, constitutional. There are cases which so hold, notably, *Mallory v. Abattoir Co.*, 80 Wis. 170, 49 N. W. 1071. But even in that case it was held that the means of protection must be adequate. It cannot be said that the means suggested would be adequate, under the statute in question, to protect the owner against loss, as he would likely have to pay a higher price in case he should delay payment or require a bond, or undertake to pay for the labor and material himself. And, as to collecting from the contractor, there would be no necessity of taking a lien in case of his solvency, and in case of his insolvency the loss would fall on the owner. The suggested means of protecting the owner from loss are therefore not sufficient to compensate him for the loss of his liberty to contract to the best advantage, and, besides, there is no public necessity for singling out owners, and laying such heavy burdens upon them for the benefit of a favored class attempted to be created by this statute; and to do so would not be for the general welfare and equal protection and benefit of the people.

It is also urged by the friends of the statute that it is beneficial in this: that it drives all the small and insolvent contractors out of business, and leaves the contracting business in the hands of those who are rich enough to guaranty their contracts. But it is not for the general welfare that small and financially weak contractors should be driven out of business. As well might poor laborers and small furnishers be driven out of business, and thus leave the whole business of building and furnishing to the rich, and give them a monopoly of the whole trade, and drive the weak and poor into

¹ No opinion filed.

starvation. Liberty and the common welfare demand that all—rich and poor alike—should have an equal chance, and be treated alike, and laws should be enacted for their equal protection and benefit. With liberty and the equal protection of the laws, the weak and poor of to-day become the rich and influential of the future. And it is a narrow, unworthy, and unpatriotic policy to attempt to drive the poor and weak out of business for the benefit of the rich and influential. One of the principal virtues of the statute, claimed by its friends, is that it has driven all the poor and weak contractors out of business. This result, instead of being commended, is to be deplored.

There are some cases in other states in which statutes somewhat similar have been upheld, usually upon the theory that the statute enters into the contract, and is therefore agreed to by the owner; but as an unconstitutional statute cannot enter into a contract without the assent of the parties, those cases are not regarded as sound, and we refuse to follow them. A statute of Michigan similar to the one here in question, was held unconstitutional by the supreme court of that state, for reasons which seem sound. *Spry Lumber Co. v. Sault Sav. Bank, Loan & Trust Co.*, 77 Mich. 199, 43 N. W. 778. See, also, *Taylor v. Murphy*, 148 Pa. St. 337, 23 Atl. 1134.

The conclusion is that the statute in question, in so far as it attempts to give a lien for materials, machinery, tile, or labor obtained by the contractors, is unconstitutional and void. The following cases throw some light upon the question: *Coal Co. v. Rosser*, 53 Ohio St. 12, 41 N. E. 263; *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 579; *Harding v. People*, 160 Ill. 459, 43 N. E. 624; *State v. Goodwill*, 33 W. Va. 179, 10 S. E. 285; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395. It follows that the Putnam county case should be affirmed, and that the Clark county case should be reversed, and judgment entered upon the findings of fact in favor of Mr. Young. Judgment accordingly.

MINSHALL, J., dissents.

(55 Ohio St. 224)

DONEY v. CLARK.

(Supreme Court of Ohio. Dec. 1, 1896.)

INSOLVENT ESTATE—LANDS FRAUDULENTLY CONVEYED—BONA FIDE PURCHASER—RIGHTS OF ADMINISTRATOR.

1. By the provisions of section 6139, Rev. St., the administrator of an insolvent estate is a trustee for the creditors of his decedent with respect to lands conveyed by said decedent in fraud of his creditors, and he may maintain a suit to subject them to the payment of the demands of such creditors, unless the rights of a purchaser in good faith from the fraudulent grantee have intervened.

2. Such administrator may maintain an action against the fraudulent grantee to recover the value of the lands, if the latter has conveyed them to an innocent purchaser.

3. The time within which such action may be brought is not fixed by the general statute for the limitation of actions, but by the special provision of said section, which permits it to be brought within four years from the death of the fraudulent grantor.

4. On the trial of issues of fact joined in an action so brought to recover the value of the lands, either party is entitled to demand a jury.

5. The action to recover the value of the lands so conveyed "involves the validity of a deed," and the grantee is competent to testify generally under the provisions of sections 5240-5242 of the Revised Statutes.

(Syllabus by the Court.)

Error to circuit court, Franklin county.

John F. Clark, as administrator of William H. Dunnick, filed his petition in the court of common pleas to recover from Abram C. Doney the value of real estate described in the petition. He alleged, in substance, that Dunnick died insolvent, August 11, 1890; that prior to the death of Dunnick, while he was so insolvent, Dunnick and Doney, for the purpose of hindering, delaying, and defrauding the creditors of the former, entered into an agreement whereby Doney should, through the forms of legal proceedings, enforce a judgment rendered against Dunnick in foreclosure in favor of one Jaeger; that pursuant to said agreement Doney, with moneys furnished him by Dunnick, procured an assignment of said judgment, caused the lands to be sold, and himself became the purchaser, agreeing to hold the title thereto for the use and benefit of Dunnick, who furnished all the money which Doney paid in the transaction. Prior to the death of Dunnick, in May, 1889, Doney, in violation of said agreement and of the rights of Dunnick's creditors, sold and conveyed said lands to one Lena G. Miles, under circumstances which gave validity to the title acquired by her. A general demurrer to this petition was overruled. In his answer, Doney denied the alleged agreement by which he was to hold the title in trust for Dunnick, and that the latter furnished any portion of the funds used by him in the transactions mentioned in the petition, and alleged that he purchased the premises in good faith, with his own funds, and for his own use. There was a judgment for the plaintiff for \$2,240 and costs. This judgment was affirmed by the circuit court. The record in the court of common pleas shows that the case was set for trial in one of the civil-jury rooms, and that when it was called for trial the defendant moved that it be tried to the court. This motion was allowed, the court holding that neither party was entitled to a jury. On the trial of these issues the defendant, Doney, was called as a witness in his own behalf. He was permitted to testify in contradiction of a witness who had testified to admissions made by him. Questions were then put to him concerning his transactions with Dunnick, and to elicit his denials of the alleged contract, and to show that Dunnick had not furnished any of the moneys used in making the purchase. On

objection by counsel for the administrator, he was not permitted to testify generally, or in answer to such questions. Judgment for plaintiff. Defendant brings error. Reversed.

J. V. Lee and George L. Converse, for plaintiff in error. M. R. Patterson, for defendant in error.

SHAUCK, J. (after stating the facts). It is conceded by counsel for the plaintiff in error that, if the legal title to the lands, which, according to the allegations of the petition, were the subject of the conveyance, had remained in the fraudulent grantee, the administrator of the grantor might have maintained an action to set aside the conveyance, and subject the lands to sale for the payment of the grantor's debts, under the provisions of section 6139 of the Revised Statutes. That section relates to the duties and powers of executors and administrators with respect to the sale of lands of decedents for the payment of their debts, and provides: "The real estate liable to be sold as aforesaid, shall include all that the deceased may have conveyed with intent to defraud his creditors, and all other rights and interests in lands, tenements and hereditaments: provided, that lands so fraudulently conveyed, shall not be taken from any one who purchased them for a valuable consideration, in good faith, and without knowledge of the fraud; and no claim to lands so fraudulently conveyed shall be made unless within four years next after the decease of the grantor." Nor can it be doubted that the powers of executors and administrators are such only as may be conferred upon them by statute. This, however, does not forbid the application to remedial statutes conferring such power of the familiar rule that, to the extent which their language will permit, statutes of that character are to receive such construction as will accomplish the apparent object of the legislature. The course of decisions in this state shows a rigid adherence to the rule that a grantor who creates a trust for his own benefit to hinder or delay his creditors cannot maintain any form of action to enforce the trust. The rule results from the turpitude of the transaction. The same rule logically should, and under our authorities does, apply to the administrator of a solvent decedent who, in his lifetime, executed a deed for such fraudulent purpose. The estate being solvent, such suit would, in its substantial aspect, inure to the benefit of the heirs at law of the fraudulent grantor whose rights are not superior to his. *McCall v. Pixley*, 48 Ohio St. 379, 27 N. E. 887. But no logical or ethical consideration would justify the extension of that rule to the defrauded creditors of the grantor, or to any one standing in their rights. They are in no sense *participes criminis*. Accordingly, we have express provisions of statutes authorizing suits to subject property so conveyed to the payment of the grantor's debts. Such

suit may be brought by the creditor, or by the assignee of the grantor for the benefit of creditors, or by the administrator, under the section quoted. In none of these statutes is there express authority for an action against the fraudulent grantee for the value of the lands when the rights of a bona fide purchaser intervene. But that such action may be maintained by the proper party seems clear on both reason and authority. Although the trust which the parties attempt to establish by their contract is void, the property in the hands of the fraudulent grantee is, by the terms of the statute, impressed with a valid trust in favor of the grantor's creditors. It may be that the fraudulent grantee is required only to surrender the land so held; but when, by his own act, he has made that impossible, there attaches the usual incident of a personal liability for the value of the subject of the trust. *Wait, Fraud. Conv.* § 177; *Solinsky v. Bank*, 85 Tenn. 368, 4 S. W. 836; *Chamberlin v. Jones*, 114 Ind. 458, 16 N. E. 178; *Mason v. Pierron*, 69 Wis. 585, 34 N. W. 921; *Post v. Stiger*, 29 N. J. Eq. 554. It is true that upon the subject of the right of the administrator to maintain an action for the recovery of property fraudulently transferred by his decedent the decisions in other states are not uniform. The decisions have been much influenced by statutory provisions. Where the administrator is regarded as succeeding only to the rights of his decedent, a recovery has, of course, been denied. Where he is regarded as standing in the rights of creditors also, it has been allowed. Here, in view of the insolvency of the estate, and the provisions of the statute, the administrator asserts the rights of creditors. This sufficiently distinguishes the case under consideration from *Benjamin v. Le Baron's Adm'r*, 15 Ohio, 518, which related to personal property, and was not influenced by such statutory provisions.

In answer to the observations of counsel as to the statute of limitations, it is sufficient to say that the special limitation prescribed in the section under consideration is exclusive. It limits the action to four years after the decease of the grantor. The present action was brought within less than two years. The common pleas court did not err in overruling the demurrer to the petition.

This was an action for the recovery of money only. In view of the fact that the fraudulent grantee had conveyed a valid title to the subject of the trust, no decree in equity was needed or sought. Although the principles upon which a recovery was sought may be of equitable cognizance, either party is entitled, in an action for the recovery of money only, to have the issues determined by a jury. The erroneous ruling of the trial court to the contrary is, however, not a ground of reversal, since it was made at the instance of the party who complains of the final judgment there rendered.

The question yet to be considered relates to the ruling of the trial court that the defendant is not, in a case of this character, competent to testify generally. The general rule prescribed by section 5242 of the Revised Statutes would sustain that ruling because the plaintiff is an administrator. But the last paragraph of the section contains the following: "Nothing in this section contained shall apply to * * * actions or proceedings involving the validity of a deed." The foundation of this action is the invalidity of the deed to Doney. If the apparent title had remained in him, the appropriate remedy would have been a decree to subject the lands conveyed. In a suit for that purpose, it is conceded, the grantee would have been competent to testify generally. The difference in the form of the action and the remedy results from the voluntary act of the fraudulent grantee in divesting himself of such title. No reason is suggested why the defendant should be competent in one form of action and not in the other, nor do the terms of the exception restrict it to suits to set aside deeds or to subject lands fraudulently conveyed by the testator. Neither action could be sustained if the deed were valid to convey an absolute title according to its purport. The action, therefore, "involves the validity of a deed," and it is within both the letter and the reason of the exception. It follows that in actions of this character the defendant is within the general rule of competency prescribed by section 5240 of the Revised Statutes. For error in excluding the testimony of the plaintiff in error, the judgments of the circuit court and the court of common pleas are reversed.

(55 Ohio St. 199)

THORNTON et al. v. STANLEY.

(Supreme Court of Ohio. Nov. 17, 1896.)

WILL — BEQUEST OF INCOME — RIGHTS OF CREDITORS.

Where a testator bequeathed all the net income of his estate to a trustee in trust for the education and support of a certain person for life, without other limitation, *held*, that the bequest so made is an absolute one, and is subject to the claim of creditors.

(Syllabus by the Court.)

Error to circuit court, Hamilton county.

Action by A. Stanley against Emma C. Thornton and Charles C. Murdock. Judgment for plaintiff, and defendants bring error. Affirmed.

William L. Avery, for plaintiffs in error.
Scott Bonham, for defendant in error.

MINSHALL, J. The suit below was an action commenced by A. Stanley against Emma C. Thornton and Charles C. Murdock, her trustee, under the will of Stephen Clark, deceased, to subject money in his hands to the payment of a judgment he had recovered against her,

and on which execution had been issued and returned unsatisfied for the want of property whereon to levy. The case was appealed to the circuit court, where judgment was rendered in favor of the plaintiff. The only question in the case is whether the provision made for Emma C. Thornton in the will of Stephen Clark is subject to the claim of creditors; she being the person therein named as "Emma, the natural child of Mary Maiden." The provision of the will is as follows: "I, Stephen Clark, do hereby dispose of all my property, real and personal, by this, my will—to the Hon. C. C. Murdock, in trust, and as executor herein for Emma, the natural child of Mary Maiden or Mary Craid, now residing in Covington, Kentucky. The said trustee and executor to have the rents, issues and interests after deducting his compensation, taxes and charges of every description, to the said Emma, for her education and support during the life of the said Emma only, and if the clear income should not amount to three hundred dollars per year for the said Emma, enough of the principal to be appropriated to make up three hundred dollars for her per year, and if the said Emma should die leaving lineal descendants of her blood, near or remote, natural or legitimate. Then said property to be delivered to said descendants in the order of the statute of descents and in fee." It will be observed that the testator gives all his property to his trustee, upon the express trust, however, that the net income shall go to the child Emma during her life, for her support and education. The purpose named, however, is no limitation upon the gift itself. It only expresses the motive of the gift. No discretion is given the trustee as to the amount he may so apply. It is all the income, after deducting the expenses and a reasonable compensation to himself. While, under the rule that is admitted to prevail in England, such a bequest might be aliened, and would, without doubt, be subject to the claims of creditors, it is claimed that, under the rule that prevails in Massachusetts and many of the other states, such is not the case. This rule permits a testator, through the agency of a trustee, to make a bequest in such wise as to preclude the claims of creditors against the beneficiary, where the purpose is clearly expressed, on the ground that a testator has the right to dispose of his property as he sees fit, and may therefore so limit a bequest as to protect it from the claims of creditors against an improvident beneficiary. Whether this is so in Ohio need not be determined, for, as shown, it is clear that the provision in the will of Stephen Clark in favor of the natural child of Mary Maiden manifests no such intention. It is said by Morton, C. J., in *Sears v. Choate*, 146 Mass. 395, 15 N. E. 786: "This court has held that the founder of a trust may give an equitable life tenant a qualified estate in income which he cannot alienate, and which his creditors cannot reach. *Bank v. Adams*, 133 Mass. 170. But in order to give such a quali-

fied estate, instead of an absolute one, the language of the founder must be clear and unequivocal to that effect." And observing that, in the will then in question, "there is no limitation over of the estate in any contingency to any other person, there is no discretion given to the trustees, and there is no provision that the income of the estate shall not be alienable by the plaintiff or attachable by his creditors," the court said: "It cannot be doubted that under this will plaintiff took an equitable estate, which he might alienate, and which equity would apply to the payment of his debts;" citing *Sparhawk v. Cloon*, 125 Mass. 263.

The claim that the bequest in this case is a limited one is founded solely on the fact that it was given for the education and support of the beneficiary. But in *Slattery v. Wason*, 151 Mass. 268, 23 N. E. 843, it is said by Allen J.: "When the whole income or a definite sum is given to the beneficiary for his support, the whole belongs to him, and is to be applied by him at his discretion, and the expression of the purpose for which it is given is not deemed to be the expression of an intention that the right to secure it shall not be inalienable; but, when the right is for a support out of a fund which is given to another, the right is in its nature inalienable, and the intention of the donor that it shall not be alienated is presumed." Taking this to be a fair expression of the rule and its limitations in Massachusetts, where it has apparently received its widest application, the bequest in question must be regarded as an absolute one. As before observed, the net income is all given to the beneficiary for her education and support, not such sum as may be allowed by the trustee or by him thought necessary; nor is it a support out of a particular fund given to another, for here, to her, is given the whole fund, the net income from the testator's estate. For a statement of the doctrine of the English chancery, and adopted in many states of the Union, see *Perry, Trusts*, § 386, and notes; and, for the qualified doctrine of some of the states, section 386a, and notes, of the same work. We therefore think it is subject to the claim of creditors, and the judgment is affirmed.

(55 Ohio St. 364)

STATE v. EMERY.

(Supreme Court of Ohio. Dec. 1, 1896.)

ADULTERATION OF FOOD AND DRUGS—CONSTRUCTION OF ACT—EVIDENCE.

1. The reference, in section 3 of the pure drug statute (87 Ohio Laws, 248), to the United States Pharmacopœia, is to the edition in general use when the statute was enacted, which was that of 1880.

2. The sale of a drug, which was equal to the standard of strength, quality, and purity laid down in that edition, is not rendered unlawful because it is below a higher standard, laid down in a subsequently revised edition, though that edition was in general use when the sale was made.

3. A copy of the subsequent revised edition

is not competent evidence on the trial of a prosecution under the statute.

(Syllabus by the Court.)

Exceptions from court of common pleas, Lucas county.

Glen A. Emery was convicted of selling adulterated drugs, and appealed to the court of common pleas, where the judgment was reversed, and the state excepts. Exceptions overruled.

The state instituted a prosecution, in a justice's court, against Emery for having sold, on the 15th day of October, 1895, a drug, known as "cochineal," that was below the standard required by section 3 of the act of April 22, 1890 (87 Ohio Laws, 248), which provides that: "An article shall be deemed to be adulterated within the meaning of this act: (a) In the case of drugs: (1) If, when sold under or by a name recognized in the United States Pharmacopœia, it differs from the standard of strength, quality or purity laid down therein; (2) if, when sold under or by a name not recognized in the United States Pharmacopœia but which is found in some other pharmacopœia, or other standard work on materia medica, it differs materially from the standard of strength, quality, or purity laid down in such work; (3) if its strength, quality or purity falls below the professed standard under which it is sold." The United States Pharmacopœia is a book generally in use by pharmacists and druggists in the United States, and recognized as a standard authority. The edition of the book in use when the act above referred to was passed, and when it took effect, was the edition of 1880. The drug sold by the accused was equal to the standard of strength, quality, and purity laid down in that edition. In 1890, the book was revised by an association or congress of pharmacists of the United States and Canada. A new and revised edition, known as the "Edition of 1890," was published in 1893, which purports to be official from January 1, 1894. This edition made numerous changes in that of 1880, among others, raising the standard of cochineal, so that the article sold by the accused was inferior to that standard; and, being so, the state claimed the sale was in violation of the statute. On the trial the state was permitted, over the objection of the accused, to give in evidence a copy of the edition of the Pharmacopœia published in 1893; and for the admission of that evidence, the court of common pleas reversed the sentence passed on the accused, he having been convicted before the justice. To this action of the court the prosecuting attorney took the bill of exceptions which is now submitted to the court, according to the provisions of sections 7305 and 7306 of the Revised Statutes.

F. S. Monnett and James M. & Walter F. Brown, for the State. King & Tracy, for respondent.

PER CURIAM. The reference in the statute to the United States Pharmacopœia could

be to no other than the edition of the book in use and recognized when the statute was enacted and went into effect, which was the edition known as that of 1880. It is not to be supposed that the legislature intended to adopt, by reference, as part of the penal laws of the state, an edition of the book not then in existence, and of which the legislature could then have no knowledge. The drug, with the sale of which the accused was charged, was recognized, in the edition of 1880, by the name under which it was sold, and a standard of strength, quality, and purity therein laid down. It is not claimed the drug sold was below that standard; and the sale could not be rendered unlawful because it is below a higher standard, laid down in a subsequently revised edition of the book, though that edition was in use at the time of the sale. To hold that the sale could thus be made unlawful would be equivalent to holding that the revisers of the book could create and define the offense,—a power which belongs to the legislative body, and cannot be delegated. Exceptions overruled.

(55 Ohio St. 332)

STANDARD OIL CO. v. SOWDEN et al.

(Supreme Court of Ohio. Dec. 1, 1896.)

MECHANIC'S LIEN — NOTES FOR BALANCE DUE — ASSIGNMENT.

Upon completion of a structure, three notes were taken by the contractors from the owner for the balance due, which notes were indorsed and sold to a bank; and within four months after the completion of the structure, and while the bank was the owner and holder of the notes, the contractors made and filed with the county recorder an affidavit in due form for perfecting a mechanic's lien to secure the indebtedness for erecting the structure. *Held*, that such lien is valid.

(Syllabus by the Court.)

Error to circuit court, Cuyahoga county.

Action between the Standard Oil Company and George E. Sowden, assignee of the Merchants' Oil Company, and others. From a judgment, the Standard Oil Company brings error. Affirmed.

The Merchants' Oil Company, a corporation, in the year 1891, employed Kennedy, De Forrest, Parsons & Co., a co-partnership, to construct certain tanks in the refinery of the oil company, and upon completion of the tanks, not having ready cash to make payment, gave its three promissory notes for the amount due, at 60, 75, and 90 days, which notes were accepted by the partnership, not as payment of the debt, but to give further time to the oil company, and to enable the partnership to raise money by discounting the notes. The notes were at once indorsed by the partnership, and sold to a bank; and while the bank was the owner and holder of the notes, and within four months after the completion of the tanks, the partnership filed with the recorder of the county an affidavit containing an itemized statement of the amount and value of erecting the tanks,

with a description of the promissory notes, in all respects as required by section 3185, Rev. St. When the notes became due, the oil company failed to pay them; and the partnership took them up, and thereafter continued to be the owner and holder thereof, but no affidavit for the purpose of perfecting a mechanic's lien was filed after it took up the notes, nor before it discounted them to the bank. In the month of January, 1892, after said tanks had been completed, and before said notes had been made, and before any attempt had been made to perfect a mechanic's lien, the oil company executed and delivered a real-estate mortgage to the Standard Oil Company upon the premises upon which the tanks had been erected; and the Merchants' Oil Company having made an assignment to Mr. Sowden, defendant in error, who sold the premises under orders from the probate court, a contest arose as to the distribution of the proceeds of sale. The probate court held the mechanic's lien taken by the partnership valid, and superior to the lien of the mortgage of the plaintiff in error; and the partnership having produced the notes in the probate court, and offered to surrender them, that court ordered its lien to be first paid out of the proceeds of the sale. Upon appeal to the court of common pleas, the case was submitted upon an agreed statement of facts, and the court held the mechanic's lien invalid, and awarded the money to the Standard Oil Company, upon its mortgage. The circuit court, on error, held the mechanic's lien valid, and awarded the money to the partnership. Thereupon the Standard Oil Company filed its petition in error in this court, seeking to have the judgment of the circuit court reversed, and that of the common pleas affirmed.

Henderson, Kline & Tolles, for plaintiff in error. Burke & Ingersoll, for defendants in error.

BURKET, J. (after stating the facts). It is urged by plaintiff in error that the mechanic's lien is void, for the reason that the affidavit upon which it is based was filed while the bank was the owner and holder of the notes, and while the partnership was not the creditor of the owner of the premises, and while the owner owed the money to the bank, and not to the partnership. It was strongly urged in oral argument that the partnership could not truthfully say under oath, while the notes were outstanding, that any amount was due or payable to it for building the tanks. In *Crooks v. Finney*, 39 Ohio St. 57, where promissory notes had been taken in payment of the amount due, it was held that no mechanic's lien could thereafter be taken for such amount. Shortly thereafter the general assembly amended section 3185 so as to authorize the taking of such liens in cases where promissory notes had been given for the amount due.

The general assembly has shown a purpose to go as far as it can, within the limits of the constitution, to protect mechanics, laborers, and furnishers of materials in the collection of the amounts due them, and the statutes are so worded as to sweep away all technicalities in the remedy. Section 3185 provides that the mechanic, laborer, or furnisher shall file "an affidavit containing an itemized statement of the amount and value of such labor, machinery, or material, * * * with all credits and offsets thereon, a copy of the contract, if it is in writing, a statement of the amount and times of payment to be made thereunder, and a description of the premises," etc. Having made and filed such affidavit with the county recorder, and caused it to be recorded, the same shall "operate as a lien from the date of the first item," etc. It will be noticed that this statute requires no statement of the amount due or owing to the mechanic, laborer, or furnisher, nor does it require a statement as to who owns the promissory notes. The lien is taken to secure the indebtedness, and the indebtedness, whether in the form of account or note, will remain secured by the lien until payment; and, when payment shall be made, the lien must be released, and, upon refusal, the same may be compelled by action. In the taking of the lien, it makes no difference who holds or owns the notes. When the owner of the property comes to make payment, he may be put to some little inconvenience in ascertaining the parties entitled to receive the same; and, in obtaining a valid release of the lien, such inconvenience is only an incident of the transaction, like garnishee process, and does not affect the property rights of the owner of the structure, and only diverts the money owing by him from one person to another. A like inconvenience arises when a note secured by mortgage is transferred without assigning the mortgage. In such case payment of the note must be made to the holder, while the release of the mortgage must be obtained from the mortgagee. The mechanic's lien law has been amended from time to time, and each amendment evinces a purpose on the part of the general assembly to more effectually secure the mechanics, laborers, and furnishers of materials in the collection of the moneys earned by them. The object of the statute is to tie up the money owed by the owner of the structure, and make it a security for the indebtedness to the mechanics, laborers, and furnishers, and those holding under them, their rights to the fund to be determined by the ordinary rules of law and equity; but the owner of the structure, and other lienholders, cannot take advantage of the manner in which the indebtedness is held by others, to defeat the lien. If notes are accepted as payment, such payment as effectively discharges the indebtedness as a payment in cash; but, as long as the indebtedness for erecting the

structure exists unpaid, it may be secured by the taking out of a mechanic's lien. As the notes in question were not accepted as payment, it follows that the partnership had the right to perfect its mechanic's lien for the security of the indebtedness, while the notes were owned and held by the bank; and the lien having been taken in time, and being in due form, should be upheld.

It follows that the circuit court did not err in awarding the money to the partnership. This conclusion is reached by a construction of our statute, but the following cases from other states also throw some light upon the subject: *Palmer v. Mining Co.*, 70 Cal. 614, 11 Pac. 666; *Bank v. Schloth*, 59 Iowa, 316, 13 N. W. 314; *Graham v. Holt*, 4 B. Mon. 61; *Edwards v. Derrickson*, 23 N. J. Law, 39; *Sweet v. James*, 2 R. I. 270; *The Charlotte v. Hammond*, 9 Mo. 59; *Scott v. Ward*, 4 G. Greene, 112; *Hawley v. Warde*, Id. 36; and *Phil. Mech. Liens*, § 278. To the same effect is *Association v. Kelsey*, 11 Wkly. Law Bull. 33. Judgment affirmed.

(55 Ohio St. 323)

VILLAGE OF BELLEFONTAINE v. VASSAUX.

(Supreme Court of Ohio. Dec. 1, 1896.)

MAYOR'S COURT—REVIEW OF JUDGMENT—SALE—DELIVERY.

1. A judgment of conviction by a mayor, of an offense made punishable by a village ordinance, is reviewable upon questions of law, but not upon the weight of the evidence.

2. The general rule is that title to goods intended to be transported passes from the vendor to the purchaser upon delivery by the former to a common carrier consigned to the purchaser, whether paid for or not. But if the vendor consigns the goods nominally to the purchaser, but actually in care of his own storekeeper, who is to retain them in control, and give possession to the purchaser only on payment of the purchase price, then the delivery to the common carrier is not, in law, delivery to the purchaser.

3. Under such circumstances, the shipment being, in effect, to the vendor himself, the delivery, when it occurs, would be at the storehouse of the vendor; and the transaction would not be a completed sale at the point of shipment.

4. As a general rule, a sale of personal property is not completed when anything remains to be done to identify the thing sold, or discriminate it from other like things.

(Syllabus by the Court.)

Error to circuit court, Logan county.

Upon a complaint before the mayor of Bellefontaine, Louis Vassaux was convicted of keeping a room at that place where intoxicating liquors were sold in violation of an ordinance of the village, and sentenced to fine and costs. Error was prosecuted to the common pleas, where the judgment of the mayor was affirmed. On error, the circuit court reversed both judgments. The village brings the case here to obtain a reversal of the latter judgment. Reversed.

S. H. West and West & West, for plaintiff in error. James Kernan and John R. Casiday, for defendant in error.

SPEAR, J. The ground of reversal by the circuit court, as stated in the record, is that "the complaint in the proceedings before the mayor is not supported by evidence." It appears to be conceded in argument that this finding means only that, in the opinion of the circuit court, there was no evidence to sustain the judgment, and that, therefore, it was not supported by evidence. It is proper to give this construction to the holding, for we are required to assume that the court did not intend to exceed its power. There has not been, so far as we are aware, any change in the statute in this particular since the decision in *Williams v. State*, 25 Ohio St. 628, where it is held that "proceedings in error to reverse the sentence of a police court are regulated by the Municipal Code, and there is no authority for reversing such sentence on the ground that the conviction was against the weight of evidence"; and hence that case is in point. The practice as to error was intended to be regulated by sections 125, 179, 180, and 181 of the Municipal Code, now codified as section 1752, Rev. St.; and inasmuch as the manner and extent of review is by that section required to be the same as formally permitted on writs of error or certiorari, and as, under those writs, no review upon the weight of the evidence could be had, so now the review is confined to questions of law. The policy of the legislature seems to be, as to minor complaints,—those requiring summary treatment,—to give the accused a right of review upon legal questions, but to leave final determination respecting the weight of the evidence to the trial court.

We therefore look to the record to see if there is any evidence tending to support each material element of the complaint. Those are that the defendant, between July 20, 1894, and August 23, 1894, at the village of Bellefontaine, kept a place where intoxicating liquors were sold at retail, other than at the manufactory, and otherwise than on prescription, or for exclusively known mechanical, pharmaceutical, or sacramental purposes. The evidence shows that a refrigerating beerhouse owned by John Wagner's Sons, of Sidney, Ohio, and of which defendant had charge, was maintained within the village at the time stated, in which a large number of kegs of beer, each containing four gallons, was kept. Two witnesses were called to testify to alleged sales. One (Harry Roof) testified, among other things, that he had not ordered any beer of Vassaux; that it was a question with him whether he purchased from the defendant or from Wagner Bros.; but that, between the dates named, he received of defendant, at the beerhouse, 10 kegs of beer known as "pony kegs," one at a time, and paid defendant for each keg as received at the beerhouse; that he paid 10 times, one dollar each time; that this was in the village of Bellefontaine; that he bought the beer to drink;

that he did not hold any prescription from any physician for beer; that each keg was marked with the letter "R"; and that the beer was an intoxicating liquor. The beer was hauled either by defendant or by Henry Vassaux or one Hitchins, wherever witness directed. From orders he had received, witness would judge that Ed. Wagner ran the beerhouse; that he had seen him there, although he was not always there when witness got beer, nor did he pay Wagner for any of the beer. He ordered beer from Mr. Wagner, i. e., he would write to Mr. Wagner at Sidney, and then "I would receive an order from him for five kegs, and showed it to Louis Vassaux at the beerhouse, and, when I wished my beer, would say to him I had received an order from Wagner Bros. Then, after that, I could order beer to the amount of five kegs. I would tell Mr. Vassaux, 'I want a keg of beer on my order.'" Another testified that he had not purchased any beer of Vassaux; that, during the time named, he received three four gallon or pony kegs of beer of Vassaux, which were delivered at his house, one keg at a time, for which he paid the driver (Hitchins), on delivery, one dollar each. Witness testified otherwise generally as the former witness, except that two kegs ordered by him had not been paid for or delivered to him. "They will be paid for," said the witness, "when I receive them." The orders described by Roof were addressed to John Wagner's Sons, Sidney, Ohio, and requested them to sell the writer five kegs beer, at usual wholesale prices, and "ship same to me, care of your storekeeper, to be stored by you in your warehouse here, subject to my order." The response would be, in substance, a bill for the beer, and the advice underneath: "We have shipped the above beer at Sidney to you at Bellefontaine, marked 'R,' care of our storekeeper, to be stored by us for you in our storehouse in Bellefontaine, subject to your order. [Signed] John Wagner's Sons." The order from the other witness, and response, were of similar form and substance. All beer so ordered was shipped on a waybill giving the names of those who had ordered, the number of packages requested, the initial mark on each keg, with "entire lot care of Louis Vassaux." The witness Hitchins testified that he was in the employ of the Wagners to drive the wagon and deliver the beer at Bellefontaine. They paid him by the month. Vassaux was in charge of the beerhouse; was the storekeeper. Witness and Vassaux unloaded the beer at the depot, and stored it at the beerhouse. The kegs were stored in racks, and over each an initial, being a rack for each letter of the alphabet. So that when Roof called, and showed his order, and asked for a keg of beer, it would be taken from the rack which had the initial of his surname over it, "R." Each keg had the initial of the consumer on it, but there would be no means of distin-

guishing Roof's keg from any other that had "R" on it. Witness did not collect any money for any beer delivered; but the consumers sometimes deposited with him, and he "put it up for Mr. Wagner." He did not give the money to Vassaux, but put it in his trunk until Wagner came, and then gave it to him; and Vassaux put what he received "in the same box." In the opinion of witness, he "simply received that money on deposit for the customers to pay it for them to Wagners." But, should such money be lost, he would be responsible to Wagner. He could not hold the man from whom he got it. Vassaux had no authority over the beer other than to store and deliver it on the order of the purchaser; but if Mr. Roof or other customer had appeared at the storehouse having an order, and demanded that beer in his name should be delivered without pay, it would not have been done. If, under like circumstances, the customer had presented the price, the beer would have been delivered at the place designated. Just so much would have been delivered as was paid for. Edward Wagner, among other things, testified that the business of John Wagner's Sons was brewing beer, ale, and malt, and selling the same; that the place of business was at Sidney, but they owned the storehouse in Bellefontaine which had been described by other witnesses, of which Louis Vassaux was the keeper. Witness had the exclusive control of it. John Wagner's Sons had a government license to sell beer at retail in Bellefontaine. The method of making the sales and shipments was described, and he added: "We retained no control as vendors over the beer thus sold and shipped after delivery to the railway station, only to secure the money from Mr. Roof, and to store it for him according to contract. When I delivered it, it was his beer; and I stored it in Bellefontaine for him as his property, according to contract." As to the authority of Vassaux to collect, he testified: "Well, we told the customers they could deposit the money with Mr. Vassaux and he could keep the money for me till I came up here. Some of the collecting I did myself."

The foregoing embraces the salient points made by the testimony. What does it tend to prove? It is contended in support of the judgment of reversal that the evidence conclusively establishes that the propositions to buy were made at Sidney, accepted at Sidney, credit given at Sidney, beer delivered to the carrier, at request of purchaser, at Sidney; the beer having been previously set apart and designated by the initial letter of each purchaser's name. Thus the possession, right of possession, control, and title passed to the purchasers at Sidney, and hence conclusively, and as matter of law, the sales were made at Sidney, and so could not be held to have been made at Bellefontaine; the relation of Wagner's Sons to the property when at Bellefontaine being only that of

bailees storing it for the purchasers. The ordinary rule is that title passes where the specific goods are, at the request of the purchaser, delivered to the common carrier, consigned to the purchaser, whether the price has been paid or not. So that the mere fact that the goods were to be subsequently paid for would not of itself prevent the transaction being a completed sale. But it is also true that if the vendor ships the goods to the keeper of his own storehouse, and retains, whether as owner of a storehouse or otherwise, control of the goods at the terminus, for the purpose of exacting pay before actual possession by the purchaser is permitted, then the fact of delivery to the carrier is not of itself delivery to the purchaser. And, under such circumstances, the delivery, when it occurred, would be at the terminus, and not at the point of shipment. It is observed by Mr. Benjamin, in his work on Sales (section 399): "The fact of making the bill of lading deliverable to the order of the vendor is, when not rebutted by evidence to the contrary, almost decisive to show his intention to reserve the *jus disponendi*, and to prevent the property from passing to the vendee. The *prima facie* conclusion that the vendor reserves the *jus disponendi*, when the bill of lading is to his order, may be rebutted by proof that, in so doing, he acted as agent for the vendee, and did not intend to retain control of the property; and it is for the jury to determine as a question of fact what the real intention was." So, if the trial court believed the witnesses who testified as to the method of shipment, the form of the waybill, and the method of storing, and conditions of delivery of the beer, and the collection of the purchase price, there was evidence of circumstances, however contradictory, tending to show that the vendors did not intend to part with possession and control of the beer absolutely, but intended to retain control through their agent, Vassaux, until the price should be paid. Again, the general rule is that, in order to pass title, the particular property must be designated. As expressed in *Woods v. McGee*, 7 Ohio, 127: "Where a part of an undivided lot of property is sold, and an order given for its delivery, there must be some act of selection under the order before the right of property is changed." This case was distinguished in *Newhall v. Langdon*, 39 Ohio St. 87; but the facts of that case are peculiar, and the decision does not bear upon the case at bar. It is held in *McClung v. Kelley*, 21 Iowa, 508: "A sale is not completed so long as anything remains to be done to the thing sold to put it in condition for sale, or to identify it, or discriminate it from other things, or to determine its quantity if the price depends on this, unless this is to be done by the purchaser." So, also, if the trial court believed the testimony of the witness Hitchins with respect to the way the beer was kept in the storehouse (and on this he was uncontradict-

ed), there was evidence tending to show that there had been no special designation of Roof's beer; for, while the letter "R" was on each keg delivered to him, that letter was equally on all kegs intended for other purchasers whose names began with "R," and, as stated by the witness, they could not distinguish Roof's beer from any other that might be on the "R" rack.

The evidence was confusing and more or less conflicting. We think, however, there was evidence tending to prove each element of the accusation, and upon the trial court devolved the duty of getting at the real transaction, the real intent of the parties, for it was this intent which should govern. Whether that was that the owners should part with their property, and the purchaser became the immediate owner on delivery at the railroad station at Sidney, or, on the other hand, that control was to remain in the vendors, and title pass to the purchaser only after performance of certain conditions at Bellefontaine,—which was the controlling question in the case,—was to be determined by weighing the evidence. This duty was within the province of the mayor. In performing it, he was required to consider, not the orders, responses, and bills, and the declarations of the vendors alone, but all the evidence, and weigh it all in the light of surrounding circumstances. If, upon the whole case, he was of opinion that the sales were in fact completed at Sidney acquittal would of necessity have followed; but if, on the other hand, he was of opinion that, under the evidence, the sales were proven to have been made at the beerhouse in Bellefontaine, it was within his province and jurisdiction to so find and declare. If he so found, the fact that Vassaux was an agent would not shield him. Our criminal law does not recognize agencies. The sales, if made at Bellefontaine, were made by the four-gallon keg, and were at retail, as held in *Kaufmann v. Village of Hillsboro*, 45 Ohio St. 700, 17 N. E. 557. They were not made at the manufactory, nor upon any prescription, nor for mechanical or pharmaceutical purposes, but for personal consumption.

With the correctness of the mayor's finding on the preponderance of the evidence we are not concerned. It is enough that there was evidence tending to sustain each element of the complaint, and that the mayor had jurisdiction to weigh the evidence, and find as his judgment should dictate. Judgment of the circuit court reversed, and that of the common pleas and mayor affirmed.

(146 Ind. 239)

TERRE HAUTE & L. R. CO. v. CITY OF SOUTH BEND.

(Supreme Court of Indiana. Nov. 24, 1896.)

CITY ORDINANCES—IMPLIED REPEAL.

An ordinance requiring railroads to keep a 2,000 candle power electric light burning all

night at every street crossing, under penalty of a fine, was impliedly repealed by an ordinance requiring railroad companies to establish lights at certain specified street crossings, to be kept burning during certain hours, under penalty of a fine.

Appeal from circuit court, St. Joseph county; Daniel Noyes, Judge.

Prosecution by the city of South Bend against the Terre Haute & Logansport Railroad Company for violation of a city ordinance. From a conviction, defendant appeals. Reversed.

Miller, Winter & Elam and S. D. Miller, for appellant. Wilbert Ward, for appellee.

JORDAN, C. J. The appellant was convicted for failing to obey the provisions of a penal ordinance adopted by appellee's common council, requiring the former to place, keep, and maintain an electric light at a point where its railroad crosses a certain street in said city. The errors assigned are: (1) That the complaint does not state facts sufficient to constitute a cause of action; (2) that the court erred in overruling the motion for a new trial. It is charged in the complaint that "the defendant, on the 13th day of February, 1894, at the city and county aforesaid, violated section one of Ordinance No. 936, passed by the common council on the 28th day of November, 1893, by then and there failing to place, keep, and maintain, at the point where the track of said railroad company crossed Sample street, an electric light of two thousand nominal candle power." The ordinance alleged to have been violated by the appellant is based upon an act of the legislature approved March 4, 1893 (Acts 1893, p. 302), being an act authorizing common councils of cities to require railroad companies to keep and maintain lights where streets and railroads cross. The appellant challenges the validity of the ordinance upon several grounds, but its principal insistence is that the ordinance had been repealed prior to the trial and conviction of appellant thereunder. The trial in the circuit court, on appeal from a judgment rendered in the mayor's court, occurred on June 8, 1894, and a fine of \$20 was assessed against the appellant for the alleged offense.

The record discloses the following facts: The ordinance (No. 936) under which appellant was tried and convicted was passed by the common council of appellee city on November 28, 1893. On April 23, 1894, Ordinance No. 943, relating to the same subject-matter, was adopted by the common council, and was in force at and prior to the date of the appellant's conviction in the lower court. Section 1 of Ordinance 936 provides that "all railroad companies whose tracks cross or intersect any public street of the city, shall place, keep, and maintain at all points where such railroad crosses any public street, an electric light of 2,000 nominal candle power, which shall be kept burning every night from twilight until dawn." Section 2 fixes the penalty for a failure to comply with the ordinance at a fine not

exceeding \$50. The ordinance last adopted contains seven sections. The first section declares "that it shall be the duty of all railroad companies running and operating a railroad through the city of South Bend, to provide for the security and safety of the citizens and other persons, from the running of trains through the city, by keeping and maintaining electric lights at such points and for such times as are hereinafter specified." By subsequent sections the railway companies, and the points at which the same are to maintain lights, and the time of night during which they are to be kept lighted, are specially mentioned. It was therein provided that appellant was to keep an electric light all night at the crossing of Tutt and Sample streets, and a midnight light at the crossing of Grant and State streets. A penalty of not less than \$25, nor over \$100, was fixed to be assessed upon conviction against any company for every train run by it over any crossing where such light was not kept and maintained. There was no saving clause expressed in this ordinance applying to prosecutions under the former ordinance. Both ordinances, upon the trial, were introduced in evidence, but the court finally, over the objections and exceptions of appellant, struck out and refused to consider the one passed April 23, 1894. This ruling of the court was assigned by the appellant as one of its reasons for a new trial. Counsel contend that this ordinance was material and legitimate evidence, for the reason, insisted upon by them, that it covers the entire subject-matter of the ordinance under which appellant was convicted, and operated as a repeal of it by implication. It is claimed, therefore, that, had Ordinance 943 been in evidence, it would have established that 936 had been repealed without any reservation; consequently, this prosecution could not have been maintained, and therefore the trial court erred in excluding the ordinance. Upon an examination of these respective ordinances it is evident, we think, that the last adopted covers the whole subject-matter of the one for the violation of which the appellant was convicted. The first ordinance, as it appears, required an "electric light of 2,000 nominal candle power," while the second did not provide for a light of any specified power. The penalty fixed by the first for a violation of its provisions might be in any sum not exceeding \$50; by the second, it could not be less than \$25 nor over \$100. The last is more specific and certain in its provisions, and it prescribes a higher or different penalty for the offense. These two ordinances seem to be so materially inconsistent with each other that they cannot stand together, and we are of the opinion that the council clearly intended, in adopting the new ordinance, that it should supersede and take the place of the older, which embraced the same subject-matter; consequently, this would result in a repeal by implication. The general rule applicable to statutes is that where a new statute covers the whole subject-matter of an older one, adds new provisions, prescribes

different penalties, and is evidently intended to supersede and take the place of the prior act, the latter is repealed by implication. *Wagoner v. State*, 90 Ind. 504, and cases there cited; *Thomas v. Town of Butler*, 139 Ind. 245, 38 N. E. 808, and cases cited. The rules which control the repeal of statutes by implication are equally applicable to questions arising relative to municipal ordinances. *Horr & B. Mun. Ord. § 63*. In section 197, Id., it is said: "If, during the progress of a prosecution, the ordinance on which it is based is repealed, the prosecution must fail, unless the repealing ordinance contains some express provisions whereby all pending prosecutions are saved from its operation." We think that if the ordinance had remained in evidence, and been considered by the court, it would have established that the one upon which the prosecution of appellant was founded had been repealed during the progress of the prosecution, without any reservation as to pending actions thereunder, and this would have resulted in a failure of the action. It follows that the court erred in striking out the ordinance in question, for which error the judgment is reversed, and the cause remanded, with instructions to the lower court to grant appellant a new trial.

HOWARD, J., was absent.

(147 Ind. 250)

CLEVELAND, C., C. & ST. L. RY. CO. v. WARD.¹

(Supreme Court of Indiana. Nov. 24, 1896.)

APPEAL—ASSIGNMENT OF ERROR—INSTRUCTIONS—MASTER AND SERVANT—RAILROADS—DEFECTIVE ENGINE—EVIDENCE OF NEGLIGENCE.

1. An assignment of error for a refusal to give an instruction will not be considered, where it does not appear when the instruction was asked, nor that the record contains all the instructions given, nor that the instruction was filed as required by statute (Rev. St. 1894, § 542; Rev. St. 1881, § 533).

2. While evidence that inspectors of engines employed by a railroad company were competent, and that an engine which collapsed, resulting in the death of an employe, was inspected and found in good condition three days before the accident, tends to show due care on the part of the company, evidence of the condition of the engine after the accident is admissible; and a jury may be warranted in finding therefrom that the report of the inspector as to its condition was incorrect, and that the inspection was not carefully made.

Appeal from circuit court, Randolph county; L. J. Monks, Judge.

Action by George H. Ward, administrator, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Elliott & Elliott, for appellant. J. W. Newton and Engle & Parry, for appellee.

HOWARD, J. On January 14, 1894, at the town of Winchester, the appellee's decedent, a fireman on appellant's engine No. 383, was killed by the explosion or collapse of said engine. In this action appellee sought to recover

¹Rehearing denied, 46 N. E. 462.

damages for the death of his decedent, alleging that the same was caused by the negligence of the appellant. The jury returned a general verdict for the appellee, answering, also, certain interrogatories propounded to them. On this appeal it is contended by the appellant that the court erred in overruling the motion for a new trial.

One cause assigned in favor of the motion for a new trial is that the court erred in refusing to give instruction No. 14, as requested by the appellant. There are several reasons why the question so raised cannot be considered. In the first place, as said in *Puett v. Beard*, 86 Ind. 104, "it does not appear that the instruction was asked at a proper time." It should be shown affirmatively that the request was made in due season; that is, at or immediately after the close of the evidence. Section 542, Rev. St. 1894 (section 533, Rev. St. 1881); *Railroad Co. v. Crist*, 116 Ind. 446, 458, 19 N. E. 310. Neither does it appear that all the instructions are in the record, and it must be presumed that the instruction refused, if a correct one, was embodied in some other instruction given. *Puett v. Beard*, supra. Finally, it is not disclosed by the record whether the instructions were ever filed, as required by the statute above cited. Except when instructions are brought into the record by bill of exceptions, it should affirmatively appear that they have been filed. *Blount v. Rick*, 107 Ind. 238, 5 N. E. 898, 8 N. E. 108; *Railway Co. v. Beyerle*, 110 Ind. 100, 11 N. E. 6; *Railway Co. v. Dunn*, 138 Ind. 18, 36 N. E. 702, 37 N. E. 546.

The main contention of appellant is that the verdict is not supported by the evidence. Engine No. 383, whose collapse caused the death of appellee's decedent, was purchased by appellant from reputable builders in 1887, and was repaired in appellant's shops in 1891, the fire box being in part renewed, and new stay bolts being put in, in place of those found broken. In April, 1893, nine months before the accident, the engine was subjected to an hydraulic test. After the collapse of the engine, it was found that 47 of the 600 or over stay bolts used to hold together the outer and inner sheets of the fire box were broken. The broken bolts were clustered together, in a square, or nearly so, close to the center, and on the right side of the fire box, and the sheet on this side was forced inward. It would appear to have been the rule of the company to have the stay bolts inspected as often as once a week, to discover whether any were burnt out or broken by the contraction and expansion of the inner and outer sheets of the fire box. The test used by appellants to learn the condition of the stay bolts is called the "hammer test." The heads, only, of the bolts can be seen from the fire box, and it is agreed that the hammer test is the best and only practicable means, and the one in general use on all railroads, to learn the condition of the part of the stay bolts concealed between the two sheets of the fire box. To make the hammer test, the inspector, after

the engine has cooled, enters the fire box, carrying a torch and hammer, and taps the head of each stay bolt, and is thus enabled, by the sound,—or, as it is also claimed, by feeling the vibrations of the sheet with one hand,—to tell whether the bolt is whole or broken. If, however, the bolt is freshly broken between the sheets, and the broken ends still fit close to each other, it is admitted that it may be more difficult to tell by the hammer whether the bolt is yet whole or not. No better test, though, is known, save taking the fire box apart, which is agreed to be impracticable for ordinary and usual testing. The last hammer test of the stay bolts in this case was made January 11, 1894, three days before the disaster; and the dispute between counsel is whether the test then made was a reasonably careful one, or, rather, whether there was competent and sufficient evidence from which the jury might, as they did, infer that the test made was not a reasonably careful one. An examination was also made on the morning of the day of the accident, by merely looking into the fire box; but it is evident that but little reliance could be placed on this examination as to the condition of the stay bolts, only the heads of which could be seen by looking into the fire box.

Counsel for appellant admit that it is the employer's duty to make reasonably careful inspection; but they contend that, if reasonable care is used in selecting inspectors, and if the inspection is made in the usual manner, there is no breach of duty, and therefore no liability, even though it is discovered, after the accident, that defects existed. They say, further, that the burden is on the plaintiff to establish negligence, and that he cannot establish negligence except by showing the inspector's incompetence, or by showing that there was not, in fact, a reasonably careful inspection made. There can be no doubt that the last propositions are correct statements of the law. The jury find that the inspector was incompetent; but, without considering whether that finding is supported by the evidence, it may be said that the important question here is whether there was competent and sufficient evidence to prove, or from which the jury might infer, that on January 11, 1894, the inspection made was not a reasonably careful inspection, and such as the appellant was in duty bound to make; for, even if the inspector were competent, yet if the inspection made by him were not a reasonably careful one, or one such as is usually made by reasonably careful and competent inspectors, the appellant would still be liable. The inspection of the stay bolts of engine No. 383, made on the night of January 11, 1894, was by Ezra L. Lepper, a boiler maker long in the service of appellant. Taking appellant's evidence alone, and it appears quite satisfactorily that the inspector was competent. Nor is this evidence directly controverted, and, if controverted at all, it is only by inference from his own and other testimony. Mr. Lepper had no personal recollection of having made the

inspection, and depended for his knowledge wholly upon the report made by him. This report, signed by him, showed that on January 11, 1894, all the stay bolts had been examined, and none found broken. After the accident the condition of the fire box and stay bolts was examined by several skilled persons, machinists, engine and boiler makers, firemen, engineers, and others; and from the evidence of these men we are of opinion that the jury might conclude that the report made by the inspector was incorrect,—that many of the stay bolts must have been broken at the time they were reported sound by him.

John Fitzmorris, a machinist of 15 years' experience in repairing and working on boilers, took a light, and examined the fire box immediately after the collapse. He found the right side outer sheet of the fire box torn off, and thrown over towards the left, with 47 of the stay bolts broken in two; some of the broken parts clinging to the outer sheet, and some to the inner. The space covered by the broken bolts "formed a square," some running up from the square "into a kind of neck." They were all "near the center of the fire sheet." This witness further testified that, of the 47 broken bolts, there were 7 or 8, along the bottom, "that looked like they had been broken off for some time; that is, the ends of them were smooth, like they had come together." The ends of the more recently broken bolts were not smooth, but of a "ragged appearance." The bolts that had been broken off for some time "were in a bunch," or "were all in one square." He also testified that the breaking of one stay bolt would weaken the others around it,—put more strain on the stay bolts next to it,—and that, after the 7 or 8 worn stay bolts were broken, the engine would not be safe. William Fitzmorris, a machinist and engine builder of many years' experience, a very intelligent witness, gave much evidence of a similar character. He discovered some stay bolts that "appeared to have been broken for some time,—could not say how long,—and then all around them were considerable more." The bolts that appeared to have been broken for some time were "slack where the two ends work together. The end of it was worn smooth. The fiber was all worn off of it, where, on the others, that had recently broke off, the fiber was still on the stay bolt; that is, the ragged and sharp edges to them. They were broken for some time. It was worn smooth. There were none of those ragged edges." He also testified that, if one stay bolt was broken, it would throw greater pressure upon the adjacent bolts; that, if five or six stay bolts were broken, the fire sheet "would be in bad shape"; and that, if seven or eight bolts were broken, near together, the engine "would not be safe,"—that "it would make it in a very bad condition." This witness also noticed that it did not seem that the stay bolts broke that way at once,—some wear more

than others." The ends might wear smooth by the vibration of the side sheets in two or three days, and it might take a month. James M. Richert, a locomotive fireman, looked into the fire box on the day after the accident. He testified that the bottom row of stay bolts on the right side, also the top row, and part of the one next to it, seemed to have been recently broken. The other rows showed "appearance as though they had been broken off some time." The "appearance was corroded with scales,"—"scales and mud." The bottom and upper rows, where broken, "showed bright." The others, in his opinion, "had been broken and separated some time before the explosion." As to whether an engine with stay bolts so broken off and corroded for such length of time would be safe, he replied, "She was not, according to my judgment." William Garsteln, superintendent of motive power for the appellant railroad system, said that, if one stay bolt was broken, it would increase the pressure on each of the surrounding bolts, and, as more bolts were broken, the pressure on the remaining bolts would continue to increase. Thomas A. Laws, mechanical engineer of the appellant company, in answer to the question as to whether an engine is safe to run with broken stay bolts, said, "They are safe to run, if not too many of them are broken." He also said that, if one stay bolt were broken, the added pressure on the others would render them more liable to be broken, and, the more that were broken, the more likely the remainder were to be broken.

We think this evidence must have caused the jury to question very seriously whether a careful examination had been made by the inspector, Lepper, on the night of January 11, 1894, three days before the collapse of the engine. It was the province of the jury to weigh the conflicting evidence, and if they were of opinion, after considering all the evidence, that Lepper had not, in fact, made such careful examination, but that seven or eight of the stay bolts had been broken for some time, when his report showed them to be sound, we cannot disturb their finding. Lepper himself does not remember making this inspection, but goes by his report. If he actually sounded each bolt in the inspection made that night, it would seem that he must have discovered at least some of the broken bolts; but his report shows them all unbroken. About a month after the disaster the company had Lepper examined as to his ability to detect broken stay bolts by the hammer test, and he found them all. He could, consequently, hardly have missed all had he made a careful inspection just a month previous. The jury not only found a general verdict for appellee, but they found specially that, at the inspection made on January 11, 1894, the fire box and the stay bolts were not found to be sound or in good condition. We think the record shows competent and sufficient evidence to support the

finding so made. In a late Michigan case (*Woods v. Railway Co.*, 66 N. W. 328) there was, as in this case, evidence that a number of broken stay bolts were worn smooth, that the process of wearing smooth requires some time, that by the hammer test 90 per cent. of all broken bolts could be discovered, and that the bolts break gradually. The court held that, from this evidence, the jury might find that, in an inspection made by the hammer test 14 days before the accident, the company was negligent. The court also held that a person who had been a locomotive engineer for 14 years, who had known stay bolts to break, and seen them taken off, and who had been in machine shops a good deal, might testify as to whether broken stay bolts which he had examined were recently broken or not. As to the conflict of evidence in that case, which is similar to the conflict in the case at bar, the court there said: "We think, in view of this testimony, and the testimony which tended to show that a large number of the stay bolts were broken a sufficient length of time before the injury so that their ends had become worn smooth, and that the process of wearing them smooth must have been very slow, according to any theory, and in view of the fact that the testimony shows that these bolts break gradually, it became a question for the jury whether the witnesses Hunter and Kelly made a proper hammer test at the time stated. If their testimony could not be disputed in the manner adopted in this case, it follows that, however incredible the surroundings may make their testimony that they performed their full duty, their testimony must be accepted as true." See, also, *Fuller v. Jewett*, 80 N. Y. 46; *Railway Co. v. Snyder*, 140 Ind. 647, 39 N. E. 912.

At the test made of appellant's inspectors, in February after the accident, Mr. Lepper, the night inspector, was found to have made a perfect inspection, having then, by the hammer test, discovered all the broken bolts in the engine examined. At the same February inspection, the day inspector discovered all but one of the broken bolts in an engine then examined by him; and he was therefore said to have proved himself a fairly good inspector. In the Michigan case cited, it was shown that, in a reasonably careful inspection, "90 per cent., at least, of the broken stay bolts would be discovered by the hammer inspection." There was, in the case at bar, competent evidence given from which it might be concluded that, at the time when the inspection was made of engine 383, seven or eight stay bolts were actually broken. The evidence also authorized the conclusion that, had a reasonably careful test been then made, almost all of the broken bolts—according to the Michigan case, 90 per cent. of them—would then have been discovered. The inspector, however, reported none then broken. The jury were, therefore, justified in finding that a reasonably careful inspection had not

been made on the night of January 11, 1894. If the evidence given by the report alone should control, then it would follow that, no matter how inefficient an examination had been made, yet this report could not be contradicted, but it must be taken for granted that, an inspection by the hammer having been shown, the inference would follow that a reasonably careful inspection had been made. This cannot be the law. The jury, therefore, having weighed the evidence, and there being competent and sufficient evidence to sustain their verdict, we cannot disturb it. Judgment affirmed.

MONKS, J., took no part in the decision of this case.

(146 Ind. 285)

HARRIS et al. v. UNITED STATES SAV. FUND & INV. CO.

(Supreme Court of Indiana. Nov. 24, 1896.)

APPOINTMENT OF SPECIAL JUDGE—AUXILIARY PROCEEDINGS—RECEIVER—SUFFICIENCY OF PETITION—RIGHT OF DEBTOR TO EXEMPTION.

1. In a suit by a corporation to foreclose a mortgage, the judge, being interested, appointed the judge of another circuit as special judge. After decree, the plaintiff filed a petition for the appointment of a receiver to take charge of the property included in such decree. *Held*, that such petition was, in effect, a new suit for the trial of which the judge was authorized to appoint a new special judge, though the first appointment had not been revoked.

2. After a decree of foreclosure, the plaintiff filed a petition, alleging that the property was insufficient to pay the debt; that the defendant was insolvent, and did not occupy the premises; that the insurance would soon expire; and that taxes would become due; and asked the appointment of a receiver to take charge of the property, collect the rents, etc., and pay the necessary expenses. *Held*, that the petition was sufficient as a petition for a receiver.

3. There was no error in the refusal of the court to determine the defendant's right to exemption in the property on the hearing of the petition for a receiver.

Appeal from circuit court, Hendricks county; Thad. S. Adams, Special Judge.

Petition by the United States Savings Fund & Investment Company for the appointment of a receiver of the rents, etc., of lands of John W. Harris and others, supplementary to proceedings for the foreclosure of a mortgage. From an order appointing a receiver, defendants appeal. Affirmed.

Chas. Foley, for appellants. Hogate & Clark and Cofer & Hadley, for appellee.

HACKNEY, J. The appellee, the United States Savings Fund & Investment Company, obtained a personal judgment against the appellant John W. Harris, and the foreclosure of a real-estate mortgage against him and his wife, Lottie B. Harris, who is also an appellant herein. Because the regular judge of the lower court was interested in the appellee company, he appointed the judge of another circuit to preside in said cause

as special judge. After the judgment and decree above mentioned were duly entered and signed by said special judge, but during the same term of court, the appellee filed a petition against the appellants for the appointment of a receiver to take charge of the property included in said decree. Upon the return day of the summons issued upon said petition, to wit, 17 days after the entry of said judgment and decree, the regular judge of said court, by reason of his interest aforesaid, appointed a member of the bar of said court to hear the proceedings upon said petition. The petition set up the judgment and decree above mentioned, and alleged that the property was not of sufficient value by the sum of \$500 to discharge said decree; that John W. Harris was insolvent; that appellants owned the property as tenants by entirety, but did not occupy the same; that insurance on the building would soon expire; that appellee had been and would be required to pay the taxes upon said property; and that its rental value was from eight to twelve dollars per month. The prayer asked that a receiver "apply the income, rents, and profits from said real estate as the court shall direct, and as equity demands." By way of answer in abatement, the appellants pleaded the said first appointment of a special judge in the original suit; that he had presided as above stated; and that his appointment had never been revoked or set aside, and that he had not declined to act further, but that no effort had been made to procure his further attendance; that they had objected to the appointment of said second special judge, and that, by reason of said facts, he was not authorized to preside in the hearing of said petition. To this answer the court sustained the appellee's demurrer, and thereupon the appellants offered to consent to the appointment of a receiver, upon the condition that the net proceeds of the rentals, after paying costs of receivership, taxes, insurance, and maintenance of property, be paid to them. This offer was declined by the appellee, and the appellant John W. Harris answered, further admitting the allegations of the petition, alleging facts disclosing that he was a resident householder of the state, and entitled to exempt property from execution; that he had only his interest in the real estate in question, and the rentals thereof; and he claimed said rentals as exempt from execution, and denied the right to a receiver therefor. To this answer the court sustained the appellee's demurrer. The appellant John W. Harris declined to plead further. Lottie B. Harris answered, further, in general denial, and, upon a hearing by the court, a receiver was appointed. At this point in the proceedings, the appellants moved the court to order said receiver to distribute the net proceeds, after paying costs, etc., to them, which motion was overruled, and the court thereupon ordered the receiver to preserve the property, pay

taxes, and insurance, and to abide the further order of the court. The sufficiency of the petition, the jurisdiction of said second special judge, and the right of John W. Harris to an exemption of said rentals, are the questions argued in this court.

The court, through its regular judge, notwithstanding the change of venue or change from such regular judge, possessed jurisdiction to name the special judge who should hear and determine the cause, or any part thereof undisposed of. *Stinson v. State*, 32 Ind. 124; *Glenn v. State*, 46 Ind. 368; *Hutts v. Hutts*, 51 Ind. 581. The proceeding for the appointment of a receiver was auxiliary to the original case, and properly followed the final judgment and decree. *Railway Co. v. St. Clair (Ind. Sup.)* 42 N. E. 225. The first special judge, during his sitting, was not required by any issue then formed to pass upon the question of appointing a receiver. The petition for such receiver, although in aid of the decree originally rendered, was a new invocation of the equity powers of the court, and was an appeal to the court, rather than to its judge, or to the special judge who presided in the original suit. The right to put that jurisdiction into exercise did not depend upon the will or pleasure of the special judge, but rested with the court whose regular judge was disqualified from acting, all but to appoint a special judge. The first special judge reached a definite conclusion, and exercised the jurisdiction he was called upon to entertain. The application for a receiver was as distinct from the original proceeding, in calling for the action of the regular judge in selecting a judge to hear it, as if the original proceeding had been purely legal, instead of equitable, and the new proceeding had required the exercise of another jurisdiction. We have no doubt that the special judge so appointed to hear the application for a receiver had jurisdiction, and that the demurrer to the plea in abatement was properly sustained.

We think there can be no question of the sufficiency of the petition to support the appointment of a receiver. From its allegations it appeared that the property was inadequate to secure the debt; that the debtor was insolvent; that the mortgagors did not occupy the property; that the security was in peril from the lapse of insurance and the maturity of taxes. This is sufficient. *Rev. St. 1894, § 1236 (Rev. St. 1881, § 1222)*; *Favorite v. Deardorff*, 84 Ind. 555; *Connelly v. Dickson*, 76 Ind. 440; *Storm v. Ermantrout*, 89 Ind. 214; *Main v. Ginthert*, 82 Ind. 180; *Hursh v. Hursh*, 99 Ind. 500; *Merritt v. Gibson*, 129 Ind. 155, 27 N. E. 136.

That the appellants, or either of them, may have been entitled to an exemption, cannot be considered with reference to the sufficiency of the petition, as no facts appear therein from which the privilege will be deemed to have been claimed by them. The answer setting up the claim of the appel-

lant John W. Harris to an exemption, and his duty to interpose the claim in the proceeding for the appointment of a receiver, are sought to be maintained upon the authority of *Storm v. Ermantrout*, supra. There the petition raised affirmatively the issue, and upon it the court adjudged that the rentals were subject to the payment of the mortgage debt. It was held that the debtor could not, in the face of that adjudication, obtain another hearing as to the liability of the rentals to so pay the debt. The inference from the language of the learned judge who wrote that opinion is that, if the question had not been put at rest by the adjudication, the right to an exemption, if such right existed, might thereafter be asserted. Here the petition sought no such decision, and the order, as we have shown, included only the direction to apply rentals to insurance and taxes, and to retain the balance subject to the future order of the court. That this was a proper order is conceded, upon the theory of the offer of the appellants to permit a receiver to be appointed, and upon the discussion of their counsel in this court with reference to that offer. At any rate, the order did not preclude the appellants upon the question of an exemption, but left that question open for disposition upon the distribution of the fund, if any shall remain. As to whether the right of exemption exists in favor of John W. Harris we offer no opinion. We find no error in the judgment of the circuit court, and the same is affirmed.

(151 Ind. 108)

STARNES et al. v. ALLEN.¹

(Supreme Court of Indiana. Nov. 24, 1896.)

QUIETING TITLE — SUFFICIENCY OF EVIDENCE — PRACTICE — INTRODUCTION OF EVIDENCE — ADMISSIBILITY OF EVIDENCE — UNACKNOWLEDGED MORTGAGE — ADVERSE POSSESSION — APPEAL — SUFFICIENCY OF RECORD.

1. In an action to quiet title, it appeared that plaintiff's father had negotiated for the land, and had received a deed, which, by reason of defects, was not recorded, and was afterwards lost; that he had entered upon and improved the land, occupying it for six years, up to the time of his death. The plaintiff claimed that the deed named him as grantee, and some of the grantors testified that such was the case. Others of the grantors testified that the father and stepmother of the plaintiff were named as the grantees. It appeared that plaintiff had tried to negotiate a purchase of the land, but his father had taken up the negotiations, with the idea of turning in certain labor and property as part of the purchase price. Held that, as the evidence was conflicting, a finding that plaintiff was the grantee in the first deed will not be disturbed.

2. The evidence tending to show that plaintiff was the grantee in the first deed cannot be disregarded on the ground that it was admitted out of the regular order, in the absence of any objections made at the time.

3. In view of the fact that there was evidence that the plaintiff was named as grantee in the lost deed, a subsequent deed made by the grantors to the plaintiff could not be excluded

from evidence on the ground that it was void, as a deed of land in the adverse possession of another.

4. Under Rev. St. 1894, § 3372 (Rev. St. 1881, § 2952), providing that, unless a certificate of acknowledgment to a conveyance of land is recorded with the conveyance, neither the record of the conveyance, nor any transcript thereof, can be received in evidence, a certified copy of the record of an unacknowledged mortgage is not admissible in evidence.

5. In an action to quiet title to lands formerly in the possession of plaintiff's father, which the plaintiff claimed under a lost and unrecorded deed, it was error to permit plaintiff to show that, on the night of the death of plaintiff's father, defendant had been seen taking certain papers, which looked like deeds and mortgages, out of a drawer in the table in the room occupied by plaintiff's father, in the absence of anything tending to show that the deed under which plaintiff claimed was among such papers.

6. The record on appeal showed that the transcript of the evidence had been filed in the clerk's office January 25th; that on the same day the bill of exceptions had been filed, containing what purported to be a transcript of the evidence. The clerk's certificate of the record stated that it was a full, true, and correct copy of the records and judgment in the cause, as the same appeared of record in his office. Held that, as the record was sufficient to bring the evidence before the court, it was immaterial whether the transcript was filed in the clerk's office before being incorporated in the bill of exceptions or not.

Appeal from circuit court, Morgan county; George W. Grubbs, Judge.

Action to quiet title, brought by Elisha M. Allen against Mary M. Starnes and another. There was judgment for plaintiff, and defendants appeal. Reversed.

John R. East, Robert G. Miller, and Oscar Matthews, for appellants. Willis Hickam and Duncan & Batman, for appellee.

McCABE, J. The appellee, Elisha M. Allen, sued the appellants, Mary M. Starnes and Zibeon Starnes, in the Monroe circuit court, to recover possession of 130 acres of land situate in Monroe county; and, in another paragraph, he sought to quiet his alleged title therein against the defendants. In each paragraph he alleged that he was the owner in fee simple. The issues formed by an answer of general denial were tried in the Monroe circuit court, resulting in a verdict and judgment for the defendants (the appellants). The plaintiff was awarded a new trial as of right, under the statute, and the venue of the cause was changed to Owen county, and afterwards from Owen to Morgan county, where another trial of the issues resulted in a verdict in favor of the plaintiff, who had judgment on the verdict, over defendants' motion for a new trial for cause alleged. The insufficiency of each paragraph of the complaint, and the action of the court in overruling appellants' motion for a new trial, are assigned for error. The error assigned on the insufficiency of the complaint is expressly waived by the appellants' counsel in one of their briefs. Therefore the only error to be considered on this appeal is that assigned on the ruling denying a new trial.

The first ground urged in support of the

¹Rehearing denied, 51 N. E. 72.

motion for a new trial is that the evidence is not sufficient to support the verdict. And specially it is urged that the complaint declared upon a legal title, and, at best, plaintiff only proved an equitable title. It appears from the undisputed evidence that on March 26, 1888, there lived in Monroe county one David Allen and Mary M. Allen (now Mary M. Starnes), who were husband and wife. At that time, David owned a farm of 600 acres, upon which they were then living, called the "Home Farm," and a farm of 296 acres, known as the "Pitts Farm," and another of 86 acres, known as the "Coffee Farm." His wife owned a farm of 112 acres, known as the "James Place," and another of 80 acres, known as the "Copenhaver Land." Mary was a subsequent wife. David was then 66 years old, and hopelessly in debt, there being mortgages on his real estate amounting to \$13,000. His personal property had been sold on execution, and there were still hanging over him unpaid judgments to the amount of several thousand dollars. On that day he purchased of the heirs of George B. Moore the 130 acres of land now in controversy, known as the "Moore Farm," for \$15,000. Five hundred dollars were paid down, and notes were executed for the balance of the purchase money to the different ones of the Moore heirs, according to the respective interests of the different heirs, and such notes were signed by David Allen and Mary M. Allen. The oral evidence tends to show that at the time of the purchase said David and Mary M. executed to the Moore heirs a mortgage on said farm to secure the payment of said notes. The mortgage seems to have been lost. The deed conveying the farm by the Moore heirs seems to have been taken to the recorder's office at Bloomington for record, but by whom it was taken the evidence is not agreed. The deed was found to be defective in its description of a part of the land, and, on the advice of the recorder, it was not recorded; but he wrote out another deed to be executed in its stead by the Moore heirs. David and Mary went into possession of the farm at once, but failed to have the new deed executed, or the old one corrected and recorded. They made lasting and valuable improvements on the farm,—to the house at a cost of \$400, a new barn at a cost of \$800, and crib and granary worth \$250,—a part of the material coming from Mary's other lands. They builded fences, grubbed the brush, and filled washed places on the land, and paid off the notes when they fell due. These notes were partially paid with money derived from proceeds from Mary's other lands. They moved into the house on the Moore farm after it was improved. They cultivated the land, and took all the crops, and appropriated the same to their use and benefit, from the time of the purchase until David's death, which occurred June 5, 1894. And his widow, Mary M., married her co-defendant, Zibeon Starnes, a hired man living in the family, in

December following. The plaintiff, Elisha M. Allen, is a son of said David by a former marriage, and was married and living apart from his father at the time of the purchase of the Moore farm, and all the time it was occupied by David and Mary. Said plaintiff claims that in the original deed containing the defective description he was named as the sole grantee, though he admits he never saw it, and that it was never delivered to him. The defendants claimed that the original deed named David and Mary M. Allen, his wife, as joint grantees, and the evidence on behalf of the defendants strongly tends to prove that to be the fact, but that evidence was contradicted by evidence on behalf of the plaintiff. The person who negotiated the sale of the land for the Moore heirs (one McHenry, husband of one of the heirs) was dead. And the living Moore heirs, who had signed the deed and testified in the case as witnesses, differed in their recollection as to whether David and Mary M. Allen were named in the deed as grantees, or Elisha M. Allen was named therein as such grantee. Some had it one way, and some the other. The turning point in the case must be, who was the grantee named in that deed? Plaintiff claims that he had been on a trade for the land before his father was, and that his father requested him to allow the father to trade for the farm, as he could put in a lot of sawing and hay on the purchase price, and thus save some money, and they could settle the matter between themselves. The evidence tends to show the presence of Elisha M. on one of the settlements of purchase money, and that he paid some money on the purchase-money notes at that time; his father, David Allen, also being present. The purchase-money notes were all surrendered to David, when paid off, and they were produced on the trial. David paid all the taxes during the six years he occupied the land, and the receipts were put in evidence. During the six years that David and Mary occupied the land, up to just a short time before David's death, Elisha M. made no claim to the ownership of the land. When David was in his last sickness, in the month of March, 1894, Elisha M. Allen procured a new deed to be drawn up, which was duly signed and acknowledged by the Moore heirs, purporting to convey said farm to said Elisha M. Allen. This deed, it was claimed, was made as a mere correction of the original or first deed, wherein there was a defective description. This deed was introduced in evidence.

The plaintiff's evidence in chief is wholly silent as to who the grantee named in the first deed was, and hence it is contended by the appellants that the evidence is not sufficient to support the verdict. This contention is predicated on the idea that if the Moore heirs had already conveyed their title in the first deed, even though there was some defect in the description, it was incumbent on the plaintiff to show who the grantee in the first

deed was, because, if it were a different person than the one named in the amendatory deed, then the latter conveyed no title; and the further idea that the second deed while David and Mary were in adverse possession, claiming to be the owners, would be void as to them. But as to the latter contention it is sufficient to say that while the evidence strongly tends to show that David and Mary were named in the first deed as the joint grantees, and were claiming to own under such deed adversely to all the world, yet there is evidence sufficient, if uncontradicted and standing alone, to prove that David had purchased the land for his son, Elisha M., and was occupying it subject to him. And if the evidence tending to prove that the first deed named Elisha M. as grantee is believed, as the jury had a right to believe it, then the last deed could not be void for being made by one out of possession to another, while the land was in the adverse possession of a third party. Under such circumstances, the possession of David and Mary M. would not be adverse.

As to the other contention, the plaintiff's evidence in rebuttal was amply sufficient, standing alone and uncontradicted, to establish that the plaintiff was named in the first deed as the sole grantee. And that is the way we must consider the evidence, as we cannot weigh it. We must determine whether the evidence in support of a proposition or fact, standing alone and uncontradicted, is legally sufficient to establish that fact. We do not mean to intimate that the evidence tending to prove that the plaintiff was named in the first deed as grantee was not evidence in chief, and was rebutting evidence. It seems to have been admitted without any question as to the order of its introduction, and hence we are bound to consider it. If the first deed named the plaintiff as grantee, then that established title in fee simple in him, especially if the second deed corrected the defect in the description in the first. The evidence fails to show what the defect in the description in the first deed was, further than that it failed to include about 10 acres of the land.

The next reason urged for a new trial is the refusal of the trial court to admit in evidence a certified transcript from the mortgage record by the recorder of Monroe county. This mortgage had not been acknowledged, though it had been recorded. It had no right to be recorded, and the statute expressly forbids the record, without an acknowledgment or a certified transcript thereof, to be admitted in evidence. Rev. St. 1894, § 3372 (Rev. St. 1881, § 2952); *Westerman v. Foster*, 57 Ind. 408. Counsel seem to suppose that because the mortgage debt had been paid off, and the object of the proposed evidence was not to establish or rely on the continued legal force of the mortgage, but to give it in evidence as a circumstance tending to show that the first deed must have named the mortgagors, David and Mary M. Allen, as grantees, made it im-

material whether the mortgage was acknowledged or not. That is true. It was immaterial, had the original mortgage been offered in evidence. But the question here was, not the effect of the mortgage without acknowledgment, but the question was, how can the existence and contents of the mortgage be proven? The attempt here was made to prove it by a certified transcript from an unauthorized record. The statute simply authorizes a duly-recorded instrument, or certified copy thereof, to be used in evidence, and forbids the use of such record or copy in evidence when recorded without acknowledgment. Rev. St. 1894, § 3372 (Rev. St. 1881, § 2952). If the original mortgage was lost, as it seems to have been, secondary evidence of its contents might have been introduced. There was no offer of such secondary evidence of its contents. Besides, there was oral evidence introduced generally by the defendants to the effect that such a mortgage had been executed by David and Mary M. Allen to the Moore heirs to secure the payment of the purchase-money notes. There was no error in excluding the certified copy of the record of the mortgage. It is true, a duly-proven copy would have been more effective under the circumstances than mere oral evidence of its contents.

The next ground of the motion for a new trial urged is the act of the court in overruling the defendants' objection to certain testimony of the witness S. J. Johnson on behalf of the plaintiff. The only answer to appellants' argument in support of this objection which appellee's counsel make is that the evidence is not in the record, and hence this objection cannot be considered. The ground for this contention is, as appellee claims, that there is no showing in the transcript that the longhand manuscript of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions. But the fact is, the clerk certifies in the transcript that such longhand manuscript was filed in his office by the defendants on the 25th day of January, 1896. And in another place in the transcript the clerk certifies that on the 25th day of January, 1896, the defendants filed in his office their bill of exceptions, containing what purports to be the longhand manuscript of the evidence. But the clerk's final certificate to the transcript states that: "I * * * do hereby certify that the above and foregoing is a full, true, and correct copy of the records and judgment of the court in the above-entitled cause, as the same appears of record in my office." This statement is binding on us until the contrary appears, and the contrary does not appear. And according to that statement the longhand manuscript has been copied into the bill and the transcript, in which case it is wholly unimportant whether the longhand manuscript of the evidence was filed in the clerk's office before its incorporation in the bill of exceptions. We hold that the evidence is properly in the record.

After the loss of the first deed had been es-

tablished, and the plaintiff was engaged in introducing evidence tending to prove that he was named in it as grantee, it had been proven that the witness S. J. Johnson was at the house of David Allen, engaged in painting his house, and boarding with him, and that the defendant Zibeon Starnes was also there as a hired man, boarding in the family, and that said David was then on his deathbed, and that he died at about 11:20 o'clock in the night. It had also been shown that said witness, Johnson, had been called up from his bed just as the old man died, and that he came into the room where he had died, and that among others present was the defendant Zibeon Starnes. The court having sustained an objection to a certain question to said witness Johnson as to search for papers immediately after the death of said David, thereupon counsel for plaintiff stated to the court, in the hearing of the jury: "We propose to show a search of drawers, and a search for and gathering up of papers, and to show what they did there. The very deed they have said and proved in this case was lost was in the very table drawer where this search was made for papers, and carried off by one of these defendants. We propose to show that this drawer was taken out, and the papers searched, and that papers the size and form of deeds was taken out and put in their pockets." Thereupon the court overruled the objection, and the defendants excepted. The objection was that the proposed testimony was not material to any issue, unless the plaintiff proposed to show that the lost deed was among the papers about which they proposed to inquire. The witness Johnson then answered the question as follows: "I was sitting within three or four feet of the stand drawer. He [Zibeon Starnes] came to the stand drawers, and took out some several papers,—seemed to be soiled papers,—and put some in his pockets, and a little valise there was in the wardrobe. What they were, I do not know. * * * Q. What time was that? A. About 12 o'clock,—within an hour after he died. * * * Q. What form were the papers in? A. They were sorted out. Different forms. Some were folded and some were long. They seemed to be in different shapes. Q. How were the papers as to this (indicating)? A. They seemed to be about that length. Q. That is, the length of a folded deed or mortgage? A. About that length. Q. How many papers did he take out and put in his pockets? A. 5, 6, or 8. He seemed to be in a hurry, sorting them out. Q. Was he in a hurry about it? A. Yes; a little bit of a hurry. Q. Did he look through the papers, or did he stop to read any of them? A. He would look over them. Some he put in his inside pocket, and others he put in the valise. Q. What, if anything, did he put back in the drawer when he was done? A. I think he took about all there was in the drawer,—is my

recollection. There was quite a number in the drawer. Q. Was there any other stand in the room? A. That was all I saw. Q. In what room was this? A. In the room in which Mr. Allen died,—not more than 5 or 6 feet from where he died." There was no attempt to show that the deed in question was among these papers. There was no evidence to prove that the lost deed was ever in the drawer. The whole of this evidence was therefore wholly immaterial, and irrelevant to any issue in the case. The loss of the deed had already been established so as to admit secondary evidence of its contents. The only possible relevancy the testimony could have had, if the missing deed had been shown to have been among the abstracted papers, would have been the inference that it contained the name of the plaintiff as grantee, instead of that of David Allen and Mary Allen, as the defendants claimed it did. This inference may arise against a party who destroys or suppresses evidence, namely, that such evidence, if produced, would be against him. *Thompson v. Thompson*, 9 Ind. 323; *Doty v. State*, 7 Blackf. 427; *Doan v. State*, 28 Ind. 495. But, without any evidence whatever that the lost deed was in the place from whence the abstracted papers were taken, it was wholly irrelevant. The admission of the evidence was a judicial declaration to the jury that they were expected to consider that irrelevant evidence, and roam at large in their imagination in giving whatever force to that evidence that they might imagine proper. And, before they could use the testimony for any purpose whatever, they must first infer or presume the very fact in dispute, namely, that the missing deed was among the abstracted papers, and then upon that they must base the inference or presumption that the deed must have been against Zibeon's wife, or he would not have suppressed it. Without drawing this inference upon an inference, the jury could not use or consider the evidence at all. And yet its admission was a warrant to them to consider it in that way. In view of the strong countervailing evidence as to who was named in the first deed as grantee, this evidence may have had a very damaging effect on the defendants' cause before the jury. Though it proved nothing at all against the defendants legally, and was therefore irrelevant and immaterial, yet such evidence has been held sufficient to reverse, because it may have had a potent influence in producing the verdict, especially where, as here, there is nothing to show that it proved harmless. *Hessin v. Heck*, 88 Ind. 449. Besides, the evidence objected to had a tendency to mislead the jury, and for that reason ought to have been rejected. *Orr v. Miller*, 98 Ind. 436. The circuit court erred in overruling the motion for a new trial. The judgment is reversed, with instructions to grant the defendants a new trial.

(146 Ind. 270)

STALCUP v. STATE.

(Supreme Court of Indiana. Nov. 24, 1896.)

HOMICIDE—EVIDENCE—HARMFUL ERROR.

1. Where it does not appear clearly from the evidence that the appellant in a criminal case was guilty as charged, the court must scrutinize carefully the errors of which appellant complains, to determine whether they are of such a character that appellant may have suffered from them.

2. To discredit his testimony, defendant in a murder case, who testifies in his own behalf, may be asked on cross-examination if a certain occurrence not connected with the killing had not taken place; but the state is bound by his answer, and cannot impeach him as to this collateral matter.

3. On a trial for murder, defendant's reputation for peace and quiet can be shown only by proof of his general reputation.

4. On a trial for murder, where defendant himself is the only witness to the actual encounter, and there is but one other witness to the circumstances leading up to and immediately following it, and the state has erroneously been permitted to impeach defendant as to a collateral matter while on the stand in his own behalf, it was prejudicial error, since the jury might have inferred that, if his testimony was false as to an immaterial matter, it would be so as touching his connection with the offense.

5. It was prejudicial error to permit the state to introduce evidence as to certain praiseworthy actions of the deceased, whose reputation for peace and quiet could be shown by general reputation only, since, if the jury were thus impressed with the belief that the deceased was of a gentle disposition, they might look upon the act of defendant in taking his life as the more inexcusable.

Appeal from criminal court, Marion county; Frank McCray, Judge.

David Stalcup was convicted of murder in the second degree, and appeals. Reversed.

Willard Robertson, for appellant. Wm. A. Ketcham, Atty. Gen., and C. E. Matson, for the State.

HOWARD, J. The appellant was convicted of murder in the second degree, and sentenced to imprisonment in the state's prison during life, for the killing of George Owens. It is assigned as error on this appeal that the court overruled appellant's motion for a new trial. The quarrel which resulted in the death of George Owens occurred on May 13, 1895, in a drinking place known as "Power's Barrel House," on East Washington street, in the city of Indianapolis. Both parties were colored persons. Excepting appellant himself, the only witness who testified to the circumstances leading up to and immediately following the fatal blow was the barkeeper, John R. Merl. His testimony shows that, at a little before 11 o'clock in the evening, Owens came into the place with a white man. It could be seen that both had been drinking. Owens stood with his back to the bar, not far from the screen, his left elbow resting on the bar. The appellant was then standing near the stove, about nine feet from Owens. Owens did not say anything at first, but in a short time raised his head, and looked over at the appellant,

asking, in very gross language, why appellant was always bothering him. Appellant replied that he was not bothering him. With that both men seemed to move towards one another, Owens afterwards falling back to the bar, but a little further down towards appellant. Appellant then also stopped, standing about two or three feet from Owens. Owens was at this time, as the witness says, standing "away from the bar, and using the bar as a brace, leaning back." The witness continues: "While leaning back in that shape,—he came in once before with a knife in his hand,—I could see the blade of the knife in the palm of his hand, about that position (indicating), like that, and standing about like that (indicating). * * * Dave [appellant] had stopped walking, I think." At this time the deceased said: "Oh, damn you and your family and your sisters!" Appellant replied: "Don't you damn me and my sisters; don't you damn me and my family and sisters,"—calling him also a vile name. The barkeeper then saw that there was to be trouble, and started around the screen to part them. The evidence continues: "When I got around there, they had parted,—just as I got around there. It looked like Mr. Owens braced himself that way, and struck Dave that way, and, in striking out, fell over towards the barrels." "Did he miss Dave, or hit him?" "Missed him." "This is the only strike you saw him make at Dave?" "I think it was, unless he struck the same time Dave did." The barkeeper then parted them, Dave, the appellant, going out on the street; and Owens also started out, when, apparently realizing that he had been hurt, he said, "I am cut." As appellant was going out, the barkeeper had said to him, "Did you cut him, Dave?" but appellant made no answer. Appellant's own evidence as to the quarrel is that he was near the stove, when Owens came in, and stood leaning at the bar, and then continues: "He began to monkey with me, picking at me. I asked him to go away. I told him that he was full, and I did not care about fooling with him. He was drunk. After he found I would not fool with him, he got mad and cursed me, and he said: 'Damn you, you little black son of a b—h, I will cut your damned head off,'—spoke that way. I did not know whether he meant it or not. I said to him: 'Maybe you will. You are big enough to do it,'—just that way. He said: 'Yes, damn you, I will do it.' I said: 'Well, I do not know.' So he gets back against the bar, and says to me: 'Damn you and your mother and sisters, and the whole family of you.' I stepped out. I said: 'George, don't damn me and my family, my mother and sisters. They are not bothering you,'—just that way. He said: 'I will cut your damned head off.' He said that. When he said that, I stepped back towards him from the stove, and said: 'Don't curse me and my

mother and sisters.' They were not bothering him. He said: 'I will cut your damned head off.' He was leaning on the bar on his elbow. He had a knife in his hand. I saw the knife. I stepped back after he straightened up from the bar. I stepped back, and he made two or three steps towards me with the knife in his hand. I saw he had the knife, and I ran my hand in my pocket, and pulled my knife out, and opened it. He kept cursing me, and coming towards me with the knife. He came three or four steps towards me. I saw he was going to cut me. He raised the knife, and stepped back, and I got my knife open, and he rushed on, and I stuck my knife at him that way (indicating). He kept coming towards me. After I stuck my knife at him, I did not know I had cut him until he rushed up by the door, and stopped very sudden, and fell down. When he got up, his knife fell. He said: 'I am cut.' He gets back against the bar with the knife in his hand. By that time Johnny Merl [the bartender] came around from behind the screen." Certain statements made by appellant to the officers at and after his arrest were also given as evidence. The two men were acquainted, but do not seem to have had any relations, either friendly or unfriendly, with each other, except that they had, during that day, a little scuffle. Appellant was a laborer, and his reputation previous to this is not called in question. The deceased was much larger and stronger than appellant. He was abusive and quarrelsome when in drink, but otherwise apparently good-natured. He had been sentenced to the workhouse for assault and battery. He had been in the Barrel House twice before during the evening of the fatal accident,—once about half past 6, and once about 9 o'clock. He was under the influence of liquor each time, and acted in an abusive manner. Fred Baum testified that he saw Owens in the barroom about half past 6. "He came in there," says this witness, "and commenced to raise a disturbance right away. * * * He stepped up to the bar, and asked for a drink, and the barkeeper refused him,—would not give it to him; and the bartender told him to get out, and he did not do it right away, and the bartender called to Mr. Davis, and Mr. Davis came down the back way, and he turned around and dropped his knife. * * * I saw it. He picked it up, and went out, and he was about half way in the barroom, and turned around his head, and said, 'I will go and kill that Dutch son of a b—h,' " referring to the bartender. Appellant testified that he witnessed the quarrel with the bartender, and saw Owens drop his knife as he went out, and pick it up again. The bartender, Merl, also testified that, on the second occasion when Owens came in, appellant was shaking dice at the bar, when he (Merl) said: "That fellow [meaning Owens] acts as though he was looking for trouble."

Appellant testified further that he had heard that Owens was a dangerous man when drinking, and had also heard that Owens had been in the workhouse for assault and battery.

The testimony in the record discloses a case that makes it necessary to scrutinize carefully the errors of which appellant complains, to determine whether they are of such a character that appellant may have suffered from them. In cases where it is manifest that a fair and impartial trial has been had, and that the judgment is just on the merits, the court, as required also by the statute, will disregard errors which have not prejudiced the substantial rights of the defendant, and will suffer the judgment to stand. Rev. St. 1894, § 1904 (Rev. St. 1881, § 1891). This, however, is not such a case. See *Hutchins v. State*, 140 Ind. 78, 39 N. E. 243.

Spencer Brown, a witness called by the state in rebuttal, was asked whether, "on a certain evening in the spring of the year, while David Stalcup was behind the soup counter in Power's Barrel House of this city, if some one did not call David Stalcup a son of a b—h, and he tried to get over or around the counter at him, and you and others interfered." The appellant, on his cross-examination, had been asked the same question by the state, and had denied that any such occurrence had taken place. It was, perhaps, proper to have asked the question of appellant on his cross-examination. He had presented himself as a witness in his own behalf, and, subject to the discretion of the court, might undoubtedly be subjected to the same tests applied to the testimony of other witnesses. *Parker v. State*, 136 Ind. 284, 35 N. E. 1105. This, however, was the limit to which such collateral inquiry could go. The state was bound by the negative answer of the appellant, and could not seek to impeach him in a matter not relating to the charges made against him in the trial, and against which he was then defending himself. Neither was the question put to the witness Brown proper as tending to show the reputation of appellant for peace and quiet. This could be shown only by proof of appellant's general reputation, not by proof of particular acts. *Drew v. State*, 124 Ind. 9, 23 N. E. 1098; *Griffith v. State*, 140 Ind. 163, 39 N. E. 440. Counsel for the state practically admit that this was error, but endeavor to show that the error was harmless. We are of opinion that, considering the state of the evidence before the jury, we cannot say that the error was harmless. There were but two witnesses to the fatal quarrel. Indeed, there was but one witness to the actual encounter,—appellant himself. The error complained of allowed the jury to conclude that in an immaterial matter, one not directly concerning the charge against him, the appellant had testified falsely; and they might well,

therefore, form the opinion that in an account given by him of the encounter with Owens, in which his liberty, if not his life, was involved, he would be still less likely to speak the truth. And, if the jury put no credence in the story told on the trial by appellant, it may well be that they gave little heed to his plea of self-defense, or might find malice where none existed, and so find him guilty of murder in the second degree instead of manslaughter.

A like error was committed in permitting the state to ask one of its witnesses, Aaron King, as to a certain praiseworthy action of the deceased. The general reputation of the deceased for peace and quiet could not thus be shown by testimony as to a particular instance of good conduct. This, too, under the circumstances, we are not able to say was harmless error; for, if the jury were thus impressed with the belief that the deceased was of a gentle disposition, they might look upon the act of appellant in taking his life as the more inexcusable.

Complaint is also made of the giving of, and also of the refusal to give, certain instructions. It would seem that this was a case in which the court should perhaps have more carefully charged the jury as to the element of malice and the distinction between murder and manslaughter. No good purpose, however, would be served by further considering alleged errors which may not be repeated on the next trial, even if they occurred on this, as claimed by counsel. The judgment is reversed, with instructions to grant a new trial.

(146 Ind. 243)

MAKEPEACE v. BRONNENBERG et al.

(Supreme Court of Indiana. Nov. 24, 1896.)

LIMITATION OF ACTION — DISABILITY — HABITUAL DRUNKARDS — JUDGMENTS — APPEAL — BILL OF EXCEPTIONS.

1. An habitual drunkard for whom a guardian has been appointed is not under legal disabilities as a person of "unsound mind" (Rev. St. 1894, § 1309; Rev. St. 1881, § 1285), so as to be within section 279, Rev. St. 1894 (section 278, Rev. St. 1881), authorizing persons under legal disabilities when their action accrued to sue within two years after the disability is removed.

2. The discharge of a guardian appointed for an habitual drunkard will be presumed to have been the result of a finding in accordance with Rev. St. 1894, § 5745 (Rev. St. 1881, § 4320), that the ward had reformed, and that, therefore, his legal disabilities then ceased.

3. Rev. St. 1894, § 5743 (Rev. St. 1881, § 4318), invests guardians appointed for habitual drunkards with all the powers and duties as is a guardian of a minor. Section 2685, cl. 5, Rev. St. 1894 (section 2521, cl. 5, Rev. St. 1881), makes it the duty of a guardian of a minor to defend all suits against his ward, and provides that, if he does so, it is not necessary to appoint a guardian ad litem. *Held*, in ejectment by the guardian of a drunkard, that it was not necessary to appoint a guardian ad litem to defend against a cross complaint seeking to quiet cross complainant's title.

4. A bill of exceptions filed before it was signed by the judge, and not again refiled, cannot be considered.

Appeal from circuit court, Henry county; Edgar A. Bundy, Judge.

Action by Allen Q. Makepeace against Henry Bronnenberg and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Chipman & Walker and James Brown, for appellant. H. C. Ryan, Edgar E. Hendee, M. E. Forkner, J. W. Sayre, and H. D. Thompson, for appellees.

JORDAN, C. J. This action was commenced by appellant in the Madison circuit court, and on motion the cause was venued to the Henry circuit court. By the first paragraph of the complaint, appellant sought to quiet his title to the real estate therein described. The second alleged a cause of action in ejectment, and demanded possession of the land in controversy, and damages for its detention. The fourth paragraph is quite lengthy, and is replete with numerous charges of fraud, etc. It alleges, among other things, that Allen Q. Makepeace, the appellant, from 1870 to 1889, was an habitual drunkard, incapable of transacting any business; that in the year 1874, the court, upon the finding of such facts, appointed a guardian for him; that he continued under such guardianship until 1889, in which year the guardian was discharged. After averring that in 1871 appellant became the owner of a large amount of property, both real and personal, by descent from his deceased father, which property, it is alleged, was of the probable value of \$200,000, this paragraph then proceeds to assail several judgments and decrees of the circuit court of Madison county, Ind., under and through which the appellees, it is alleged, claim title to the real estate mentioned in the complaint. This paragraph in question seeks to attack the proceedings of the court, and the title of appellant to the real estate, upon the ground of fraud on the part of one Edgar Henderson, through whom appellees claim to be the owners of the land in dispute. It also charges that, through the fraudulent designs and acts of said Henderson, the guardian of appellant was procured to commence an action for his said ward in the Madison circuit court against said Henderson and his wife, Eliza C. Henderson, to recover the land now in controversy, and that such fraud was perpetrated upon the court in said action that said defendants, upon a cross complaint filed by them making the appellant and his guardian adverse parties thereto, secured a judgment quieting their title to the real estate in question. Knowledge of the alleged fraud is by the averments of the pleading imputed to the appellee Bronnenberg at the time Eliza Henderson sold the land to him. The paragraph closes with a prayer that the conveyances set forth, together with all judgments and decrees of the court upon which the same rest, be set aside and adjudged null and void, and the plaintiff's title be quieted, and a commissioner be appointed by the court to convey the land to plaintiff. Appellees Henry

Bronnenberg and Eliza C. Henderson each separately answered the complaint by a general denial, and by other paragraphs setting up affirmative matter. These answers substantially aver the same facts, and a determination of the questions raised as to one will be decisive of those relating to the other. The fourth paragraph of appellee Bronnenberg's answer was addressed to the first and fourth paragraphs of the complaint, and it was therein alleged that the cause of action set out and stated in each of said paragraphs did not accrue within 15 years before the commencement of the action. A demurrer was overruled to this paragraph, and counsel for appellant insist that in this the court erred. They say especially that this was error, so far as the answer was intended as a defense to the fourth paragraph of the complaint, for the reason urged that the facts in the latter disclose that appellant, at the time the cause of action arose, was under a legal disability, a guardian having been by the court appointed for him by reason of the fact that he was an habitual drunkard. Section 297, Rev. St. 1894 (section 278, Rev. St. 1881), provides that "any person being under legal disabilities when the action accrues may bring his action within two years after the disability is removed." By section 1309, Rev. St. 1894 (section 1285, Rev. St. 1881), the legislature defined the phrase "under legal disabilities" as including infants, persons of unsound mind, or those imprisoned in the state prison or out of the United States. Habitual drunkards are not embraced or included within this provision of the statute. Again, it appears that this action was not commenced until 1893, and it is shown by the fourth paragraph of the complaint that the court discharged appellant's guardian in 1899. The discharge of the guardian, we must presume, was the result of the court's finding, under and in accordance with section 5745, Rev. St. 1894 (section 4320, Rev. St. 1881) relating to habitual drunkards, that the ward had reformed by abstaining from the use of intoxicating liquors. It appears that over three years had elapsed after the removal of the alleged disability upon which counsel base their contention before this action was instituted; hence, if we were to concede counsel's insistence to be correct, it would follow that appellant has not brought himself within the two-year limit provided by section 297 (section 278), supra.

Appellant also insists that the sixth paragraph of appellees' answer is insufficient. The facts therein averred, in substance, appear to be as follows: That on January 5, 1878, one Edgar Henderson became the owner of the real estate in controversy by virtue of a sheriff's sale had upon certain judgments rendered in the Madison circuit court on November 1, 1873, against the appellant, and in favor of the First National Bank of Anderson, Ind.; that on October 16, 1882, appellant, by Solomon Myers, his guardian, commenced an action in ejectment for the recovery of the real estate in question in the Madison circuit court against

Edgar Henderson and Eliza C., his wife, who were then the owners and in possession of said real estate; that said defendants filed a general denial in said action as their answer, and said Eliza C. Henderson, who had become the owner of the lands by a conveyance from her said husband, filed on January 5, 1883, her cross complaint therein against appellant, wherein she alleged that she was the owner of the land, and asked to have her title quieted; that appellant, by his said guardian, filed a general denial to said cross complaint, and on the 15th day of January, 1883, proceedings were had thereon in said action which upon a trial resulted in the court's adjudging that appellant had no title to the land now in question, and in decreeing that Mrs. Henderson's title to the same be quieted; that all questions relating to the title of said real estate were in said action fully and finally adjudicated between appellant and said Henderson, and appellant has acquired no other title since the rendition of said judgment. It is further averred that appellee Bronnenberg, relying upon said decree, and upon the faith thereof, purchased the land in dispute from said Eliza C. Henderson, and paid her for the same a full and valuable consideration; that, after all disabilities under which appellant labored had been removed, he executed to Bronnenberg a deed of conveyance for said land. The objections urged to this paragraph are that the guardian of appellant was not, under the law, authorized to commence an action for the recovery of his ward's lands. It is not necessary for us to consider this question, as it is shown from the alleged facts that the decree quieting the title of Mrs. Henderson, through whom appellee claims to have become the owner of the land, was rendered upon her cross complaint, which made the appellant a party defendant thereto. To this cross action his guardian seems to have appeared and filed an answer in behalf of his ward. By section 1 of the statute providing for the appointment of a guardian for an habitual drunkard (section 5743, Rev. St. 1894; section 4313, Rev. St. 1881), such guardian is invested with all the powers and duties as is a guardian of a minor. Clause 5 of section 2635, Rev. St. 1894 (clause 5, § 2521, Rev. St. 1881), makes it the duty of such latter guardian to appear and defend all suits against his ward; and, in the event he does, it is not necessary for the court to appoint a guardian ad litem for the ward. *Hughes v. Sellers*, 34 Ind. 337; *Garrigus v. Ellis*, 95 Ind. 598. See *Jones v. Crowell*, 143 Ind. 218, 42 N. E. 612. Appellant's guardian being empowered by the statute to appear and defend all suits brought against his ward, and having appeared in behalf of the latter, and defended the suit to quiet title, instituted by the cross complaint of Mrs. Henderson, the appellant is bound by the decree rendered, and is thereby precluded, under the circumstances, from asserting any adverse interest or title to the land against the appellee. Consequently, the facts alleged in the paragraph in question

disclose a complete defense to the cause of action as alleged in the complaint, and the court did not err in overruling the demurrer to this paragraph of the answer.

At the close of the evidence the court instructed the jury to return a verdict for the defendants. Questions relating to this latter ruling, and also others depending upon the evidence, are discussed and urged for our determination by the learned counsel for appellant. These questions, however, we cannot consider, for the reason that the evidence is not in the record. Time was granted by the court for the filing of bills of exceptions. The transcript shows that what purported to be a bill of exceptions, embracing the evidence, and the instructions given and refused by the court, was filed on May 22, 1894. This bill, it appears, did not receive the signature of the trial judge until June 20, 1894, and there is nothing to show that it was ever filed on or after this latter date. It is therefore manifest, so far as the record discloses, that the only filing of the bill in question occurred May 22, 1894, nearly a month before it was signed by the judge. The settling and signing of a bill of exceptions is a judicial act, and, in the absence of the judge's signature, it can have no existence or validity. After it has received his signature it must be filed, in order to become a part of the record. It follows, therefore, that the bill, for the reasons stated, is not in the record, and serves no purpose in this appeal. There being no available error, the judgment is affirmed.

(147 Ind. 437)

FIDELITY LODGE, NO. 59, I. O. O. F.,
NEW CASTLE, v. BOND.¹

(Supreme Court of Indiana. Nov. 24, 1896.)

PARTY WALLS—RIGHTS OF PARTIES—VENDOR AND PURCHASER.

A party wall, built by one of two adjoining owners, and resting partly on the ground of each, must be one that both parties can use, and have the right to use; and the owner of a lot who sells part of it, restricting, by condition in the deed, the height of the building to be erected thereon, cannot extend a party wall built between the two parts above such height for his own exclusive use, but, if extended, it must be built without openings, and the owner of the other part will have the right to use it, on proper payment, by adding to the height of his building.

Appeal from circuit court, Henry county; E. H. Bundy, Judge.

Action by Mary Bond against Fidelity Lodge, No. 59, I. O. O. F., New Castle. Judgment for plaintiff, and defendant appeals. Affirmed.

Brown & Brown, for appellant. M. E. Forkner, for appellee.

HOWARD, J. On the 1st day of April, 1875, the appellant lodge was the owner of the north half of lot 5 in the town of New Castle. On the north side of this half lot

a two-story brick building had been erected by the lodge. The remainder of the lot was vacant. On that day the appellant conveyed to Barton and Evan Fairfield 19½ feet off of the south side of said half lot, leaving about 20 feet between the lodge building and the ground so conveyed. The deed made to the Fairfields for said 19½ feet contained the following provision: "And the said purchasers agree, and do hereby bind themselves and their heirs and successors, that they will not erect upon said premises a house higher than two stories of fourteen feet each in the clear." Afterwards, on December 11, 1876, the appellant entered into a written agreement with the Fairfields, according to which the latter were given the privilege of building a 13-inch party wall on the north boundary line of their purchase, 6½ inches to be on appellant's land, and 6½ inches on the Fairfields'. A provision in this agreement was to the effect that whoever should join or build to such party wall should pay one-half the value of the same at the time of joining, "from foundation to top of wall, and from front * * * back to end of wall." On May 29, 1878, the appellant conveyed to one Cornelius M. Moore all the land between its lodge building on the north and the Fairfield property on the south, granting to him also the "privilege to join and build to the south wall of its said [lodge] building." On August 22, 1878, the Fairfields made a deed to Moore, conveying to him all their interest in the 6½ inches off the south side of the land bought by him from appellant, and by the same instrument also sold and conveyed to him "the north half of the brick wall now situated on said strip of land, and the right to adjoin to said wall, and maintain a building adjoined thereto perpetually." On April 20, 1886, Moore deeded his land to one Simon T. Powell, embracing also in his deed all privileges held by him as to adjoining walls, "including one-half in thickness of the north wall of the Fairfield business house." On February 7, 1895, appellee purchased the Fairfield land, and on June 8, 1895, appellant repurchased the Moore, or Powell, land. Soon after making this repurchase, appellant began preparations to construct upon the land a three-story brick building, using as the south wall thereof, for the first two stories, the Fairfield party wall, now owned in equal parts by appellant and appellee. Thereupon appellee instituted this action, alleging in her complaint that the defendant (appellant here) is unlawfully and without right, and over her repeated requests not to do so, "proceeding to build, and will build and construct, unless enjoined by this court, a thirteen-inch wall upon the top of said partition wall, twenty feet high, extending six and one-half inches upon the lands of the plaintiff, claiming unlawfully the right to do so, and denying the plaintiff's right to use said wall when so built, or to join to the

¹Rehearing denied, 46 N. E. 825.

same, or build her building now situated upon her said land any higher in any manner whatever; that, if permitted to do so, said wall will constitute a permanent and lasting easement upon her said property, and if prevented from joining to the same, or building her building any higher, it will materially and irreparably injure and damage her said property." The prayer was for a temporary restraining order pending the hearing of the cause, and that upon the final hearing the appellant "be perpetually enjoined and restrained from building upon said wall, or trespassing upon that part thereof owned by the plaintiff. * * * And if adjudged that it has the right to construct the same, she prays that her right to join said wall and use the same be adjudged and quieted in her." The appellant answered in two paragraphs: (1) Denying that appellee has any title to the property or property rights set forth in her complaint, and averring that appellant has a perfect right to build said wall without let or hindrance from her; (2) averring that appellant is seised in fee simple of one-half of the ground upon which the wall rests, and is the owner of, and in possession and enjoyment of, an easement in the other one-half, and, by reason of such seizure and ownership, has the right to carry said wall up, as set forth in the complaint. To this answer appellee replied by setting out all the facts in detail, as we have already stated them, and alleging, in conclusion—First, that said stipulation in said original deed from appellant to the Fairfields, providing that the purchasers would not erect upon said premises a house higher than two stories of 14 feet each, is void as against public policy; second, that no right of easement of any kind was reserved to the appellant in said deed; third, that whatever easement of light and air might be implied as a reservation in said deed was abandoned and forfeited by the conveyance of the intervening property and more than 20 years of nonuser, and did not revive by the reconveyance of said property to appellant; fourth, that there was no right reserved to build an individual wall, and rest the same, or any part thereof, upon appellee's land. There was a finding by the court in favor of appellee, and a decree perpetually enjoining appellant "from constructing and maintaining said wall, or any wall resting to any extent upon that part of said partition wall south of the middle line thereof."

Appellant's answer, as also the brief of counsel, proceeds upon two theories: First, denying to appellee any right to the property in question,—that is, any right to so much of her 19½ feet as extends above the second story of her building; and, second, justifying appellant's action in the premises as founded upon its right in and to the party wall, and its consequent right to extend the same above the second story.

The first theory is based upon the provision in the deed from appellant to the Fairfields, by which the latter agreed not to erect upon the premises purchased a house higher than two stories of 14 feet each. This agreement, it will be observed, while detracting, to the extent stated, from the right of the Fairfields and their successors to use their property as they should think fit, did not give to appellant any right to any part of the property conveyed,—that is, to any part of appellee's 19½ feet,—unless it be an implied right to an easement of light and air. Consequently, upon this theory, appellant could have no right to extend the wall of its third story over 6½ inches of appellee's ground. The most that could be contended for, according to this theory, would be the right to erect such wall upon appellant's own ground along the boundary line of appellee.

Upon the other theory, namely, that, by reason of its equal interest in the two-story party wall, it had an exclusive right to run up and use said wall for its third story, appellant must also fail. Unless by agreement, either express or by necessary implication, there can be no such thing as a party wall for the use of one of the parties to the exclusion of the other. A party wall has been defined to be a structure for the common benefit and convenience of both the tenements which it separates, and either party may use it. Such a wall is a substitute for a separate wall to each adjoining owner, and neither may impair its value as to the other. The ownership has sometimes, though perhaps incorrectly, been said to be that of tenants in common. There can, however, be no partition, and the ownership is rather joint or by entireties, each owner having the full right to the use of the whole wall, so far, at least, as his own side is concerned, and provided only such use does not conflict with the equal right of the other party. A better holding, as we think, and that which seems to obtain in this jurisdiction, is that each adjoining proprietor is the owner in severalty of his part, both of the wall and of the land on which it stands, subject to a cross easement of support and for other common needs in favor of the other proprietor. *Bloch v. Isham*, 28 Ind. 37, 92 Am. Dec. 287, and note; 2 Washb. Real Prop. (5th Ed.) 386; *Tied. Real Prop.* § 620; *Graves v. Smith* (Ala.) 6 South. 308. The wall is therefore to be used equally by both parties for all the purposes of an exterior wall. *Fettretch v. Leamy*, 9 Bosw. 510; *Washb. Easem.* (4th Ed.) 608. It follows that, in the absence of a special agreement to the contrary, such a wall must be solid throughout. It may contain flues or pipes for the use of the parties; but there can be neither doors or windows nor other openings impairing its use as an exterior wall, or by which the privacy of either party may be invaded. *Harber v. Evans* (Mo. Sup.) 10 Lawy. Rep. Ann. 41 (14 S. W. 750), and authorities there cited, also

in note and briefs. The agreement as to the party wall in the case at bar, both in the contract of appellant with the Fairfields, under which the latter built the wall, and also in the deed from the Fairfields to Moore, appellant's grantee and remote grantor, by which deed a half interest in the wall was conveyed to Moore, and under which appellant now claims, shows the structure to be a party wall, simply, along the whole line between the properties, and without restriction or limitation as to height or otherwise. Both parties are treated as having each an equal interest in the wall. While either party, therefore, so far as this contract is concerned, might continue the wall upward, provided no injury were thereby done to the safety of the wall or to the reciprocal rights of the other party, yet the wall so carried up could be nothing but a party wall,—a solid wall,—and the other party could not, on payment of his share of the cost, be deprived of the right to joint thereto whenever he wished to continue his building. In *Everett v. Edwards*, 149 Mass. 588, 22 N. E. 52, the court said: "It is presumed to be a detriment to the owner of a building to deprive him of the power to make additions to it, and grants and contracts will be construed on that presumption unless it is controlled by their terms. Not only would a provision implied in a grant of a party wall, that it should not be carried higher than as originally constructed, be contrary to the interests and apparent intention of the parties, but it would not be in accordance with public policy. The public interest is not promoted by putting impediments in the way of erecting buildings, and the law will not be swift to construe the acts of parties so as to produce that effect. * * * The limitation upon the right of each owner to use the wall as the lateral wall of such house as he may desire to erect is that he shall not impair the value of the wall to the other owner. If one owner carries up the wall, the addition becomes part of the party wall, and the owners have equal rights in it, and the value of the wall to either owner cannot be thereby impaired." The trial court seems to have granted the injunction for the reason that appellant was preparing to erect or continue, not the party wall, but a wall with openings for windows, and for its own individual and exclusive use. This it was rightly held appellant could not do. There is nothing in the decree, however, to prevent appellant from erecting a wall of its own, upon its own ground, to any height it may deem best, and for its own exclusive use. Neither is there anything in the decree to prevent appellant from changing its plan, and continuing the present party wall up a solid wall, without windows or other openings, and to which appellee shall have a right to join whenever she may wish to add to the height of her present building. The decree is not, perhaps, so favorable to appellee as she was

entitled to ask, but she makes no complaint of this, and asks only for an affirmance of the judgment. Judgment affirmed.

(146 Ind. 501)

STULTS et al. v. GIBLER et al.¹

(Supreme Court of Indiana. Dec. 1, 1896.)

MORTGAGES—FORECLOSURE—ADMINISTRATOR—DEB-
TENDANT—APPEAL—JURISDICTION.

1. In an action to foreclose a mortgage, where all the defendants except the administrator and another are heirs at law of the intestate, the sole maker of the notes secured by said mortgage, which was executed by the intestate and her husband upon her separate real estate, an appeal by defendants is governed by the provisions of the Civil Code, and not by the provisions of the act concerning the settlement of decedents' estates.

2. Under Rev. St. 1894, § 657 (Rev. St. 1881, § 644; 1 Horner's St. 1896, § 644), which provides that an administrator may have an appeal and stay proceedings in the court below without giving an appeal bond, unless the appeal is prayed and a stay of proceedings is obtained in the court below in term time, by the administrator, the appeal is governed by the law governing vacation appeals, and all co-parties interested in the judgment must be made co-appellants, or the appeal will be dismissed for want of jurisdiction.

Appeal from circuit court, Huntington county; O. W. Whitelock, Special Judge.

Action by John Gibler and others against Harmon W. Stults, administrator, and others, to foreclose a mortgage. From a judgment in favor of plaintiffs, part of defendants appeal. Dismissed.

James M. Hatfield, for appellants. B. M. Cobb, for appellees.

MONKS, J. John Gibler brought this action against William H. Baker and appellants to foreclose a mortgage and recover judgment for the indebtedness secured thereby. All the appellants except Stults, administrator, were heirs at law of Martha Slusser, the sole maker of the notes secured by said mortgage, which was executed by her and husband upon her separate real estate. This appeal is governed by the provisions of the Civil Code, and not by the provisions of the act concerning the settlement of decedents' estates, being sections 2609-2612, Rev. St. 1894 (sections 2454-2457, Rev. St. 1881; sections 2454-2457, 1 Horner's Rev. St. 1896). As the record does not show that any appeal was prayed or appeal bond filed as required by section 650, Rev. St. 1894 (section 638, Rev. St. 1881; sections 638, Horner's Rev. St. 1896), this appeal, so far as appellants other than Stults, administrator, are concerned, is not a term-time appeal. It is provided, however, by section 657, Rev. St. 1894 (section 645, Rev. St. 1881; section 645, 1 Horner's Rev. St. 1896), that "executors, administrators, and guardians may have an appeal and stay proceedings in the court below, without giving an appeal bond." This section does not provide, however, that an

¹ Rehearing denied.

executor, administrator, or guardian can take a term-time appeal, under the provisions of section 650 (638), *supra*, without filing an appeal bond and complying with the other provisions of said section. But conceding, without deciding, that an executor, administrator, or guardian is entitled to take a term-time appeal under said section 650 (638), *supra*, without filing an appeal bond, it is clear that unless the appeal is prayed, and a stay of proceedings is obtained in the court below, as provided in section 657 (645), *supra*, the appeal would be a vacation, and not a term-time, appeal. The record does not show that Stults, administrator, prayed an appeal or procured an order in the court below for a stay of proceedings, it follows, therefore, that the appeal is governed by the law regulating vacation appeals, and not by the law regulating term-time appeals. It is settled law in this state that all parties affected by the judgment must, in all appeals governed by the Civil Code, except those taken during term time under the provisions of section 638, Rev. St. 1881 (section 650, Rev. St. 1894), be made co-appellants in this court, or the appeal will be dismissed for want of jurisdiction. *Roach v. Baker* (Ind. Sup.) 43 N. E. 932, and cases cited; *Lee v. Mozingo*, 143 Ind. 667, and cases cited page 671, 41 N. E. 454, 455; *Denke-Walter v. Loeper*, 142 Ind. 637, 42 N. E. 358, and cases cited; *Shuman v. Collis*, 144 Ind. 333, 43 N. E. 257. William H. Baker was a co-party with appellants in the court below, and was affected by the judgment, and should, therefore, have been made a co-appellant, to place the case within the jurisdiction of this court. *Lee v. Mozingo*, *supra*. This has not been done. The appeal is therefore dismissed.

(146 Ind. 287)

MOORE v. HORNER.

(Supreme Court of Indiana. Nov. 24, 1896.)

JUDGMENT—PROCEEDING TO VACATE—NEGLECT OF ATTORNEY—RES JUDICATA.

1. The negligence of an attorney is attributable to his client, and when, through such negligence, a judgment is rendered against the client by default, he is not entitled to be relieved from it, under Rev. St. 1881, § 396 (Rev. St. 1894, § 399), authorizing the vacation of a judgment when taken through the party's "mistake, inadvertence, surprise or excusable neglect."

2. The denial of a motion made in an action to set aside a judgment rendered on a default is an adjudication which will bar a subsequent proceeding under the statute for the same purpose.

Appeal from circuit court, Boone county; B. S. Higgins, Special Judge.

Action by Truman E. Horner against Willis E. Moore to set aside a former judgment between the parties. Judgment for plaintiff, and defendant appeals. Reversed.

Ira M. Sharp, for appellant. Terhune & New, for appellee.

MONKS, J. This action was brought by appellee in the court below, under section 396, Rev. St. 1881 (section 399, Rev. St. 1894), to set aside a default and judgment of said court quieting appellant's title to certain real estate. That part of the complaint which it is claimed sets out "the facts which show that the judgment was taken against appellee through his mistake, inadvertence, surprise, or excusable neglect," is substantially as follows: "The original action to quiet title was commenced by appellant in the Boone circuit court on December 30, 1892, against appellee and others, including one Richard M. Crouch. That summons was served on appellee ten days before the return day thereof, by copy; that said Richard M. Crouch, as the agent of appellee, employed the firm of Wesner & Wesner, practicing attorneys, to appear for appellee and make his defense to said action; that said attorneys accepted said employment, and agreed to look after appellee's interest in said action, and notify him when he should be needed; that said Wesner & Wesner entered their appearance generally for the defendants; that afterwards one Patrick H. Dutch, a practicing attorney of said court, announced in open court that he appeared for Matilda Horner, one of the defendants in said cause; that C. S. Wesner, a member of said firm of Wesner & Wesner, was present in court, and heard said announcement, and understood and believed that said appearance was for appellee, and, by reason of said misunderstanding, he did not thereafter appear for appellee, but appeared for O. D. Wesner and Crouch and wife, who were also defendants in said cause; that afterwards a rule of court was taken against the defendants to answer, but, because of said misunderstanding, no one appeared for appellee, and no answer was filed for him, and on the 22d day of January, 1893, a default was taken against appellee, without his knowledge or consent, and without his knowing that Wesner & Wesner were not appearing for him, and without Wesner & Wesner knowing that Dutch was not appearing for appellee, and afterwards, on February 4, 1893, appellant recovered judgment on said default, quieting his title to said lands."

It is earnestly insisted by appellant "that the facts stated in the complaint do not show that judgment was taken against appellee through his mistake, inadvertence, surprise, or excusable neglect, but that the facts alleged show that the same was taken on account of the negligence of his attorneys, and that their negligence is attributable to him." It is clear that the facts alleged show that the default was taken and judgment rendered against appellee on account of the negligence of his attorneys. When C. S. Wesner, his attorney, understood from the announcement made by Mr. Dutch that he appeared for appellee, proper diligence required that he make some inquiry of Dutch in regard to the same, and that he examine the files in the case. This he never did. He knew that Matilda Horner

was a co-defendant in said cause with the appellee, Truman Horner. An examination of the issue docket, order book, entry, or the answers filed, would have disclosed his mistake. His failure to make such inquiry and examination was gross negligence. It is a general rule that no mistake, inadvertence, or neglect attributable to an attorney can be successfully used as a ground of relief, unless it would have been excusable if attributable to the client. The acts and omissions of the attorney in such case are those of the client. *Railway Co. v. Hood*, 130 Ind. 594, 596, 30 N. E. 705, 706; *Sharp v. Moffitt*, 94 Ind. 240; *Kreite v. Kreite*, 93 Ind. 584, 586; *Brumbaugh v. Stockman*, 83 Ind. 583; *Cox v. Harvey*, 53 Ind. 174; *Phelps v. Osgood*, 34 Ind. 150; *Frazier v. Williams*, 18 Ind. 416; *Spaulding v. Thompson*, 12 Ind. 477; *Heaton v. Peterson*, 6 Ind. App. 1, 31 N. E. 1133; 2 Elliott, Gen. Prac. § 1032, and cases cited in note 2. It follows, therefore, that the facts stated in the complaint did not entitle appellee to any relief under the provisions of section 396, Rev. St. 1881 (section 399, Rev. St. 1894), supra.

It appears from the evidence given in this case that at the January term, 1893, of said court (the same term at which said judgment was rendered), appellee filed his written motion to set aside the default and judgment in said cause; that he afterwards filed an amended motion to set aside said default and judgment, which motion was supported by the affidavits of himself, Wesner, and Crouch, the affidavit of Wesner in support of said motion being the same as the one given in evidence by appellee in this proceeding, to which motion, as amended, appellant filed a counter affidavit as to the excuse or mistake averred in said motion for allowing said default to be taken; that afterwards, at the March term of said court, said motion was overruled, to which appellee excepted. When the court overruled said motion, that was a final judgment in said proceeding; and the presumption is that the same was determined upon its merits, unless the contrary is shown. 1 *Van Fleet, Former Adj.* §§ 15-21, and cases cited. The grounds for setting aside said default and judgment alleged in said motion filed by appellee in 1893 were the same as those contained in the complaint in this proceeding, except that appellee's defense to the original action is more specifically stated in the complaint in this case than in said motion. It is not essential, under our practice, that a motion to set aside a default under section 396, Rev. St. 1881 (section 399, Rev. St. 1894), supra, be verified. It is settled law that, whenever a matter is adjudicated and finally determined by a competent tribunal, it is considered forever at rest. This principle not only embraces what was actually determined, but extends to every other matter which the parties might have litigated in the case. *Parker v. Obenchain*, 140 Ind. 211, 39 N. E. 869; *Wilson v. Buell*, 117 Ind. 315, 20 N. E. 231, and authorities cited. We think the action of the

court in overruling said motion made in 1893 to set aside the default and judgment in the original cause was an absolute bar to another proceeding for the same purpose. *White v. Watts*, 18 Iowa, 74, 78; *Kabe v. The Eagle*, 25 Wis. 108; *Mabry v. Henry*, 83 N. C. 298, 300; *Himes v. Kiehl*, 154 Pa. St. 190, 25 Atl. 632; *Zadek v. Dixon* (Tex. Sup.) 3 S. W. 247; *Walker v. Heller*, 104 Ind. 327, 331, 3 N. E. 114; *Stults v. Forst*, 135 Ind. 297, 34 N. E. 1125; *Parker v. Obenchain*, supra; *Davis v. Bass*, 4 Ind. 313; *Hawk v. Evans*, 76 Iowa, 598, 41 N. W. 368; *Wilson v. Craige*, 113 N. C. 463, 18 S. E. 715; *State v. Evans*, 74 N. C. 324; *Moore v. Garner*, 109 N. C. 157, 13 S. E. 768; *Sanderson v. Dally*, 83 N. C. 67; *Phillips v. Queen* (Ky.) 3 S. W. 146; *Bank v. Hansee*, 15 Abb. N. C. 488, 492; *Johnson v. Latta*, 84 Mo. 139; *Armstrong Co. v. Plumcreek Tp. Overseers*, 158 Pa. St. 92, 27 Atl. 842; *Gallaher v. City of Moundsville*, 34 W. Va. 730, 12 S. E. 859; *New York & New Jersey Telephone Co. v. Metropolitan Tel. & Tel. Co.*, 81 Hun, 453, 31 N. Y. Supp. 213; *Rogers v. Hoenig*, 46 Wis. 361, 1 N. W. 17; *Pignolet v. Geer*, 19 Abb. Prac. 264; *Kaufman v. Keenan* (City Ct. N. Y.) 2 N. Y. Supp. 395; *Hill v. Hoover*, 9 Wis. 15; *Pierce v. Kneeland*, Id. 23; *Austin v. Walker*, 61 Iowa, 158, 16 N. W. 65; *Mayer v. Wick*, 15 Ohio St. 548; *Spitley v. Frost*, 15 Fed. 299, 305; *Van Fleet, Former Adj.* §§ 15-21, and cases cited. In 1 *Van Fleet, Former Adj.*, at section 19, it is said: "An order denying a motion to set aside a judgment bars a new motion for the same purpose. So the denial of a motion to set aside a judgment because obtained by irregular practice is a bar to a new one to set it aside for a fraudulent advantage taken in entering it up, because the law does not tolerate successive proceedings to accomplish the same result upon newly-assigned reasons. * * * An order overruling a motion to set aside a default precludes a suit for the same purpose." Besides, the default and judgment which it is sought by this proceeding to set aside were taken at the January term, 1893, of the Boone circuit court; the first motion to set aside said default was overruled April 29, 1893; and this proceeding for the same purpose was not commenced until July 19, 1894, more than 17 months after the judgment was rendered in the original action. No excuse is shown for this delay. The record shows that appellee made his affidavit in the first proceeding to set aside said default on February 10, 1893, and knew then, if not before, that said default had been taken. This court said in *Birch v. Frantz*, 77 Ind. 199, on page 203: "While it is true that the period of two years is allowed a party who seeks to set aside a judgment, in which to file his application, yet he is not excused from showing that he has acted promptly and diligently. After discovery of the default and judgment, a party who seeks relief must act with reasonable diligence. If he is unreasonably negligent in applying for relief, he will obtain none." This case is cited, and the same doc-

trine declared, in *Ammerman v. State*, 98 Ind. 165, where there was a delay of 17 months in making the application to set aside the default. For the reasons given the judgment is reversed.

(16 Ind. App. 380)

BRYANT et al. v. STOUT.

(Appellate Court of Indiana. Dec. 1, 1896.)

On motion for rehearing. Denied.

For former report, see 44 N. E. 68.

DAVIS, J. On petition for rehearing, counsel for appellants insist that the first paragraph of the answer of Bryant and Hughes was sufficient, and that the court erred in sustaining the demurrer thereto. The substance of this paragraph of the answer is "that the plaintiff never at any time, prior to the commencement of this suit, notified them that he had given employment to said Ed. C. Scott as such traveling salesman." The contention of counsel for appellants is that notice to appellants that the bond had been accepted was necessary in order to make it obligatory on them. On careful examination and consideration of the question on the former hearing, we were of the opinion that "no notice of acceptance was necessary." Although counsel for appellants has reargued the question with great skill and ability, we are of the opinion that our conclusion on the original hearing is correct. Therefore no reason exists for granting a rehearing. Petition overruled.

(17 Ind. App. 545)

RIGNEY v. JACOBS et al.¹

(Appellate Court of Indiana. Nov. 24, 1896.)

GARNISHMENT—PRACTICE—MOTION TO DISCHARGE—ASSIGNMENT FOR COLLECTION—EFFEOT.

1. On motion by garnishee to be discharged, facts alleged in the motion, or in the statement in support thereof, cannot be considered, unless set up in the pleadings filed before the motion was presented, such a motion being equivalent at most to a motion for judgment on the pleadings.

2. An assignment of a policy, after loss, for collection merely, does not exempt insurer from garnishment at the instance of a creditor of insured, the assignee being made a party to the proceedings.

3. The fact that the assignee, after the service of garnishment on him, assigned the policy to a nonresident, and that the policy was taken out of the state by such nonresident, does not entitle insurer to be discharged.

Appeal from circuit court, Elkhart county; Lew Wanner, Judge.

Action by the La Porte Carriage Company against James H. Jacobs, in which Henry M. Hixon and others were summoned as garnishees. From a judgment discharging the garnishees, John E. Rigney, who filed under the case, appeals. Reversed.

Baker & Miller and Osborne & Zook, for appellant. Vall & Salisbury, for appellees.

¹ Rehearing denied.

REINHARD, J. The La Porte Carriage Company sued the appellee James H. Jacobs in the court below on three bills of exchange and in attachment, and the other appellees, Henry W. Hixon, the Phoenix Insurance Company of Brooklyn, and the Pennsylvania Insurance Company of Philadelphia, Pa., were brought in as garnishee defendants. The appellant properly filed under the case of the carriage company. Jacobs was defaulted, and judgment was rendered against him in favor of the appellant for the amount of his debt. The carriage company dismissed its garnishment proceedings, leaving the appellant as the only plaintiff. The insurance companies separately filed answers in six paragraphs, the answers of each company being identical with those of the other. The first paragraph of each of these answers is the general denial; the second and third aver that Jacobs did not comply with the conditions of the policies in making proofs of loss and submitting to an examination under oath; the fourth and fifth paragraphs charge that Jacobs set fire to the insured property, and burned it; and in the sixth paragraph it is alleged that after the fire, and before the garnishment process was served on the companies, Jacobs had sold his claims against the companies for a valuable consideration. To the affirmative answers of the companies the appellant replied in one paragraph, setting up affirmative matter. The companies demurred to this reply, and the demurrer was overruled. The reply avers, among other things, that the transfer from Jacobs to Hixon, mentioned in the sixth paragraph of the answer, was made to Hixon in trust, for the purpose of collecting the money for Jacobs, and paying it over to him. After the case had stood thus for some months, each company filed a separate motion to be dismissed as garnishee defendant. This motion was sustained as to each of the companies, and an exception saved, and the ruling is assigned as error. Pending the motions of the insurance companies to be discharged, the appellant offered to file additional replies, which motion was overruled, and the appellant excepted. The ruling upon this motion constitutes the second specification of error. After the discharge of the insurance companies as garnishees, the court rendered judgment for costs in favor of said companies, and this action of the court is the third assignment of error.

Did the court commit reversible error in discharging the insurance companies without affording the appellant an opportunity to make proof of their indebtedness to Jacobs? The practice in filing and sustaining such a motion is an unusual one, but we think it amounts to a motion for judgment on the pleadings, and if upon these the companies were entitled to be discharged, we think the action of the court was proper. If not, it is equally clear, we think, that the court committed an error for which the

judgment must be reversed. The court, in passing upon the motion to dismiss, could properly look to all the pleadings filed, and different steps taken in the cause. The motion was in the nature of a demurrer to the evidence. It admitted all the facts pleaded, and every legitimate inference to be drawn therefrom. We do not think the court could consider as true or admitted any facts alleged in the motion to be discharged, or in the statement in support of the motion, unless such facts had also been set up in the pleadings filed before that motion was presented. The motion was not verified, and, as already intimated, would at best be equivalent only to a motion for judgment on the pleadings. In itself it furnishes no proof of the truthfulness of its averments. It appears from the answers of the insurance companies that on the 12th day of October, 1893, Jacobs, "for a valuable consideration," assigned and transferred all his interest in the policies to Hixon, and that Jacobs and Hixon notified the companies of such assignment. It also appears from these answers that the only supposable evidence of the indebtedness of the insurance companies to Jacobs was by reason of certain fire insurance policies, and that on these they owed Jacobs nothing, because he had not complied with the terms and conditions of the policies in certain particulars, and because he had willfully and purposely burned the property, with intent to defraud the companies. The general denial was not pleaded in reply to the answers. In the affirmative reply the appellant alleged an adjustment of the loss by the insurance companies, and an agreement by them to pay Jacobs a certain amount. The motion to be discharged admitted an adjustment and agreement to pay. The companies were, therefore, estopped to deny these facts, and were not entitled to be discharged by reason of their averment that Jacobs had violated his part of the contract, etc. In his affirmative reply the appellant further alleges, as we have seen, that, although Hixon received the policies by way of assignment, yet that such an assignment was not an absolute one, but was made only in trust and for the purpose of the collection of the debt by Hixon, and the payment of the proceeds to Jacobs. This was a complete traverse of such portion of the affirmative answers as relied upon the transfer of the policy or policies. Nor was it the averment of a mere conclusion. The allegation that the transfer was merely in trust, and for the purpose of collection, was the averment of a fact which was admitted by the motion to dismiss. If it was true that Jacobs transferred to Hixon only for the purpose of having Hixon collect the debt, and to pay it over to Jacobs, and if the companies had not yet paid Jacobs or Hixon, the latter being before the court also, then the appellant was entitled to an order directing the money to be paid to the appellant. Hixon had acquired no right in

the property represented by the policies, except, perhaps, a special property right in the nature of a lien for his commissions. All the parties being in court, the latter could make an order which would protect each of them. The mere fact that the legal title in the policies had been transferred to Hixon did not necessarily discharge the companies as garnishees. It is true, if they had paid Hixon before process was had upon them, such payment would have been a protection to them. But they make no claim of that sort. They say, in effect, "We originally owed Jacobs some insurance, but, as he turned the policy over to Hixon for collection, we will settle with Hixon hereafter." This they are not in a position to assert. Hixon and all parties interested were before the court, and, if the facts pleaded in the reply are true, the appellant is entitled to an order for the money to the extent of Jacobs' interest therein, not exceeding the amount of appellant's claim.

Appellees' counsel lay great stress upon an averment in the reply that, "after the service of garnishment on him [Hixon] he [Hixon] had sold said claims and demands against the appellee insurance companies to one F. G. Cowie, a nonresident of the state, and that no property of the said defendant [Jacobs] had been attached, and the only fund to pay said creditors is said claims and demands against said insurance companies, so sold and assigned by said garnishee Hixon to said Cowie." We do not perceive how this averment will exonerate the companies from the payment of the insurance money into court. If Hixon sold and delivered the policies to Cowie after service of the process on him (Hixon), such sale and delivery would constitute no defense on his part. Indeed, it does not appear that he had any power to sell the policies at all, and how he could transfer the title without authority is difficult to understand. But, if he had such authority from Jacobs, it ceased after the service of the process upon him. The fact that Cowie has taken the policies out of the state cannot be material. The companies can be fully protected by the order of the court. It does not appear that the companies ever paid this debt to Hixon, or to any one else. An order upon them to pay it into court for the appellant's benefit could be no injury to them if they justly owe the debt. If they do not justly owe it, of course they cannot be required to pay it.

Nor do we think the appellant was concluded by the oral examination of Hixon and of one of the agents of the companies. The appellant had a right to introduce evidence in contradiction of the sworn statements of these persons. We think the appellant should have been permitted to prove the averments of his complaint, and, if then the companies succeeded in establishing the facts alleged in their answers, he should have been given an opportunity to show the truth of his reply. This is true, we think,

without reference to the merits of his motion to be permitted to file additional replies.

It is quite true, as contended by the learned counsel for the insurance companies, that the attachment creditors stand in the shoes of Jacobs, and can acquire no greater right than he had at the time the proceedings in garnishment were commenced. But, if the averments of the reply are true, Jacobs still has an interest in the property. He had, at least, an equitable title to the policies, which formed the proper subject for garnishment, if, indeed, Hixon was anything more than a collection agent.

Judgment reversed, with instructions to overrule the motion of the appellees the Phoenix Insurance Company of Brooklyn and the Pennsylvania Fire Insurance Company of Philadelphia, Pa., to be discharged as garnishee defendants, and for further proceedings not inconsistent with this opinion.

(16 Ind. App. 350)

STATE v. CONE.

(Appellate Court of Indiana. Nov. 24, 1896.)

OBSCENITY—SUFFICIENCY OF INDICTMENT.

Under Rev. St. 1894, § 2081 (Rev. St. 1881, § 1995), declaring guilty of public indecency any one over 14 years of age who uses obscene or licentious language in the presence or hearing of a female, etc., if the words charged are not obscene or licentious per se, the indictment must show by extrinsic averments that they were used in that sense, and were so understood by the female.

Appeal from circuit court, Elkhart county; H. D. Wilson, Judge.

Bert Cone was prosecuted for public indecency, and from a judgment quashing the affidavit and discharging defendant from custody the state appeals. Affirmed.

Miles R. McClaskey, J. W. Van Fleet, and W. A. Ketcham, for the State. Dodge & Hubbell, for appellee.

DAVIS, J. This is a prosecution under section 2081, Rev. St. 1894 (section 1995, Rev. St. 1881), for public indecency. The court below sustained the appellee's motion to quash the affidavit in the cause, and discharge the defendant from custody, and the state then excepted. The state of Indiana brings this appeal to reverse said ruling. The part of section 2081, Rev. St. 1894 (section 1995, Rev. St. 1881), under which this prosecution was brought, reads as follows: "Whoever, being over fourteen years of age, * * * uses or utters any obscene or licentious language or words in the presence or hearing of any female * * * is guilty of public indecency," etc. The affidavit charges that "in the county of Elkhart, and state of Indiana, on the 7th day of October, 1895, Bert Cone was then and there a male person of over fourteen years of age, and that said Cone did then and there, in the presence of a female, Katie Marker, use and utter obscene and licentious language and words, such words being as follows: 'After

my balls are over,'—meaning by the word 'balls' his testicles; and further crying out, 'Is there anything in it?' meaning thereby to inquire if said Katie Marker was not a woman of bad character for chastity." The language charged as having been used by appellee is not such as to convey a meaning in its nature obscene or licentious, unless aided by extrinsic averments. It is charged by way of inducement or colloquium that the words were uttered by him in an obscene or licentious sense, but it is not charged that any one in his presence or hearing so understood the words. The crime consists in uttering obscene or licentious language in the presence or hearing of a female. Where language that is obscene or licentious per se is uttered in the presence or hearing of a female, the crime is complete; but where the language is not obscene or licentious per se, the use of it is not a crime, unless it is shown by extrinsic averments that it was used in the presence or hearing of a female in an obscene or licentious sense, and that she so understood the words. The words charged in the affidavit might be used in such connection with other words or with acts to which an obscene or licentious meaning might attach, but nothing is averred showing how, or in what connection, the words were uttered, or that they had any local or provincial meaning. Assuming, therefore, that the words set out in the affidavit can be made actionable by the use of extrinsic language, the extrinsic language used in this instance is not, in our opinion, sufficient to charge the crime. *State v. Coffing*, 3 Ind. App. 304, 29 N. E. 615. The appeal is not sustained. Judgment affirmed.

(16 Ind. App. 357)

STATE v. HARDMAN.

(Appellate Court of Indiana. Nov. 24, 1896.)

STATUTES—EFFECT OF AMENDMENT—REPEAL OF CRIMINAL STATUTE—EFFECT ON PRIOR VIOLATIONS.

1. An amendatory statute which merely defines the same offense in substantially the same language as that used in the statute amended does not take away the right of prosecution for violations of the amended act occurring before the passage of the amendment.

2. Rev. St. 1894, § 248 (Horner's Rev. St. § 248), providing that the repeal of any statute shall not release any "penalty, forfeiture or liability" incurred thereunder, unless the repealing act shall so expressly provide, includes fines and imprisonment for violation of penal statutes; and hence the repeal of Rev. St. 1894, § 1998, relating to criminal libel, by Act July 1, 1895, p. 91 (Horner's Rev. St. § 1925), which contained no saving clause, did not take away the right to prosecute for violations of the former act occurring prior to its repeal.

Appeal from circuit court, Grant county; J. L. Custer, Judge.

John A. Hardman was prosecuted for criminal libel, and from the judgment the state appeals. Reversed.

W. A. Ketcham, Atty. Gen., and Elias Bundy, for the State. Elliott & Elliott and Strange & Huffman, for appellee.

GAVIN, J. On June 16, 1895, the following statute was in force in this state: "Whoever, makes, composes, dictates, prints or writes a libel to be published, and whoever publishes or knowingly aids in publishing or communicating a libel, is guilty of libel and shall, upon conviction thereof, be fined not more than one thousand dollars nor less than five dollars to which may be added imprisonment in the county jail for not more than one year nor less than ten days." Rev. St. 1894, § 1908 (Rev. St. 1881, § 1925). On July 1, 1895, the act of 1895 concerning libel went into force. Acts 1895, p. 91 (Horner's Rev. St. § 1925). Section 3 of this act contains all that is comprised in the first-quoted section, save that the imprisonment is limited to six months. In addition thereto, it contains some additional specifications as to who may be punished for libel, and also prescribes certain rules of evidence to govern upon the trial. In the following section is a clause repealing all laws in conflict therewith, without any saving clause. It has been decided that an amendatory statute which simply defines the same offense in substantially the same language as that used in the statute amended does not take away the right of prosecution under the amended statute, but the new statute is simply to be regarded as a continuation of the old. *Sage v. State*, 127 Ind. 15, 26 N. E. 667. It is claimed, however, by appellee that the latter act, without being amendatory of the former, or a re-enactment of it, covers the same subject-matter, and also creates new and distinct offenses, prescribing different penalties therefor, and thereby repeals the said section 1908. *Wright v. Board*, 98 Ind. 88; *State v. Mason*, 108 Ind. 48, 8 N. E. 716; *State v. Wells*, 112 Ind. 237, 13 N. E. 722. Assuming this to be the case, the question presented for our determination is, does the repeal of the first-named act carry down with it the right to prosecute for violations of its provisions occurring before the repeal? It has been adjudged by our supreme court that no one can, after its repeal, be convicted for the violation of a repealed statute, unless the repealing act made provision therefor by a saving clause. *Taylor v. State*, 7 Blackf. 93; *State v. Loyd*, 2 Ind. 659; *Whitehurst v. State*, 43 Ind. 473; *State v. Mason*, supra. In 1877 a law was passed providing that "the repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability incurred under such statute, unless the repealing act shall so expressly provide: and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability." Rev. St. 1894, § 248 (Horner's Rev. St. § 248). Both the supreme and this court have already held that this statute preserves liabilities which would otherwise fall by reason of the repeal of the statute upon which they are founded. *Daggy v. Ball*, 7 Ind. App. 64, 34 N. E. 246; *Crawford v. Hedrick*, 9 Ind. App. 356, 36 N. E. 771; *Bruce v. Cook*, 136 Ind. 214, 35 N. E. 992. The language of section 248 is broad enough to apply to criminal liabilities,

and the penalties incurred by reason of a disregard of the penal statutes of our state. It is true that the word "penalty" is frequently used to designate a pecuniary punishment or liability, and has sometimes even been declared to be limited to that class alone, and not to include imprisonment. *Village of Lancaster v. Richardson*, 4 Lans. 136. We are satisfied, however, that the word is susceptible of, and is frequently used in, a broader sense than this, and as a generic term including both pecuniary and personal punishment, and that this is the meaning which should be ascribed to it as used in this statute. Penal laws are defined to be "those laws which prohibit an act, and impose a penalty for the commission of it. They are of three kinds,—*poena pecuniaria*, *poena corporalis*, and *poena exitii*." *Rap. & L. Law Dict.* p. 945. Thus, if we may translate freely, three kinds of penalties are recognized, which affect the pocketbook, the person, or the political status of the individual. The *Imperial Dictionary* defines "penalty" as "the suffering in person or property which is annexed by law to the commission of crime, offense, or trespass, as a punishment." To the same effect are the *Encyclopedic Dictionary* and the *Century*. *Bouvier* says it is "the punishment inflicted by a law for its violation. The term is mostly applied to a pecuniary punishment." *Black* says it is "a punishment; a punishment imposed by statute, as a consequence of the commission of a specified offense." Counsel for appellee, in their brief filed in this cause, themselves use the word in this more general sense. The supreme court so use it in the case cited by them (*State v. Wells*, supra), saying: "The general rule is that where a new statute covers the whole subject-matter of an old one, adds new offenses, and prescribes different penalties for those enumerated in the old law, then the former statute is repealed by implication." General saving statutes, such as this, are by law imported into the subsequent repealing acts, and obviate the necessity for individual saving clauses. *Com. v. Sherman*, 85 Ky. 686, 4 S. W. 790; *State v. Kansas City, Ft. S. & G. R. Co.*, 32 Fed. 722. All the cases cited by appellee holding that the right of prosecution is lost by the repeal without a saving clause arose prior to the enactment of the law of 1877, save *State v. Mason* alone, which was decided afterwards. In that case, however, the effect of this statute was not considered, nor is any reference to it made therein. It cannot, therefore, be regarded as determinative of such effect. That this decision was inadvertently rendered is recognized by the same court in the later case of *State v. Wells*, supra, where its authority upon the point now before us was expressly disclaimed, and where the applicability of said section 248 to prosecutions such as this is conceded. Our conclusion, therefore, is that the right of prosecution was not lost by the repeal of the law under which the offense was committed, but the same was continued by said section 248.

Appellee urges the insufficiency of the information, upon the ground that it only charges

the offense in the language of the statute, which did not define the offense. It is sufficient to reply to this that counsel are evidently mistaken as to the fact. The information, as set out in the record, avers the facts constituting the libel fully and in detail, setting out the libelous matter with great particularity. That the malicious publication of the matters therein averred, if false, as declared, was libelous per se, is not, in our opinion, open to question. No specific averments were necessary to make it appear that it was published of and concerning William L. Paulus, and that the publication tended to degrade him, expose him to public hatred and ridicule, or deprive him of the benefits of public confidence, etc. The article spoke for itself, and made the charges directly against William L. Paulus by name; and they were of such a character as necessarily tended to disgrace him, and expose him to public hatred, ridicule, and distrust. Judgment reversed.

(16 Ind. App. 698)

STATE v. HOUCK et al.

(Appellate Court of Indiana. Nov. 24, 1896.)

REPEAL OF CRIMINAL STATUTE—EFFECT ON PRIOR VIOLATION.

Under Rev. St. 1894, § 248 (Rev. St. 1881, § 248), providing that the repeal of a statute shall not release any "penalty, forfeiture or liability" incurred thereunder, unless the repealing act so expressly provides, the repeal of a criminal statute without such saving clause does not relieve an offender from prosecution for a violation thereof occurring prior to its repeal. *State v. Hardman* (Ind. App.) 45 N. E. 345, followed.

Appeal from circuit court, Grant county; J. L. Custer, Judge.

William J. Houck and others were prosecuted for violation of a criminal statute, and from the judgment the state appeals. Reversed.

Wm. A. Ketcham, Atty. Gen., and Elias Bundy, for the State. Elliott & Elliott and Strange & Huffman, for appellees.

GAVIN, J. By section 248, Rev. St. 1894 (section 248, Rev. St. 1881), the repeal of a criminal statute does not relieve an offender from prosecution for violations of the statute prior to its repeal, unless the repealing act shall so expressly provide. *State v. Hardman* (decided at this term) 45 N. E. 345. Judgment reversed.

(16 Ind. App. 337)

MULLEN v. PUGH.

(Appellate Court of Indiana. Nov. 24, 1896.)

LANDLORD AND TENANT—LEASE—CONSTRUCTION—EJECTMENT.

1. A lease for one year provided for a renewal if the tenant should be satisfactory as a tenant, and should do what was right. *Held* that, where the landlord refused to rent the farm to the tenant for another year, the latter was not entitled to retain possession whether he had proved satisfactory as a tenant or not.

2. A lease for one year provided for a renewal if the tenant should be satisfactory as a ten-

ant, and that the tenant "might go at once upon said premises, and that he might build a house thereon, and that, whenever his tenancy should cease," the landlord would pay him for said house. *Held*, that where the tenant built a house on the premises, and the landlord refused a renewal, the tenant was entitled to retain possession until the landlord paid for the house.

Appeal from circuit court, Fountain county.

Action by Nora Pugh against Elmer Mullen to recover possession of real estate. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Edwin F. McCabe, for appellant. J. Frank Hanley, for appellee.

DAVIS, J. This was an action to recover possession of real estate. Appellant, who was defendant in the court below, appeals from the judgment rendered against him in said cause. The error relied on for reversal is the act of the court in rendering judgment in favor of appellee on the special verdict. The special verdict shows that appellant, Mullen, rented of appellee, in 1892, a farm for one year,—from March 1, 1893, to March 1, 1894,—with the agreement that, if appellant "should be satisfactory to the said agent as a tenant, and should do what was right, the plaintiff would again rent and lease said premises to him for another year." The special verdict also shows that it was agreed in said contract that said appellant "might go at once upon said premises, and that he might build a house thereon, and that, whenever his tenancy should cease, the plaintiff would pay him, the said defendant, for said house." It is also found that appellant entered upon said premises pursuant to said contract, and built a house worth \$90, and built a barn worth \$25, and that appellee refused to lease said premises to him for another year. There is no finding that appellant did not farm the land properly, nor is there any finding that he was not in fact satisfactory as a tenant. The appellee has not paid or offered to pay appellant for said house. Counsel for appellant insists: (1) That appellant was entitled to hold the premises as tenant, under the terms of his contract, for another year from March 1, 1894; (2) that appellee could not maintain a suit for possession until she paid or tendered appellant payment for his house.

In support of the first proposition the argument of counsel is that appellant was entitled to the benefit of his contract, and that under the terms of his contract he was entitled to hold possession until March 1, 1895. Whether he was satisfactory as a tenant, and did what was right, does not appear. It is clear, however, that the appellee refused to "again rent and lease said premises to him for another year." Therefore the contract, in the light of the facts found, cannot be construed as a leasing of the premises to appellant for another year. Whether he could maintain an action for damages for breach of contract, or what his rights would have been if it appeared that he was satisfactory as a tenant, and had done what was right, we need not determine.

In support of the second proposition counsel

for appellant contends: (1) That the agreement to pay for the house was a concurrent condition of the contract, which she was bound to perform before she could recover possession; (2) that the agreement to pay for the house was a covenant that ran with the land, and gave appellant an equitable lien thereon, and the right to retain possession until that lien was satisfied. Whether this contract to pay for the house was a covenant which runs with the land we need not determine. This is an action between the original parties to the contract, and, in our opinion, under the peculiar circumstances of this particular case, the appellant has an equitable lien upon the real estate for the value of the house built by him thereon as a permanent improvement under the terms of his lease, and that a court of equity will protect him in the possession of the real estate, on the terms provided in the lease, until he is paid for the value of the improvement. *Ecke v. Fetzer*, 65 Wis. 55, 26 N. W. 266. In this case appellant built the house under the assurance that, if he was satisfactory as a tenant, and did what was right, the appellee would lease said premises to him for another year; and that, when his tenancy should expire, the appellee would pay him for the house. For aught that appears, he was satisfactory as a tenant, and did what was right; and, under the circumstances, on her failure to rent the premises to him for another year, he should be treated as having an equitable lien upon the premises for his improvement, and the right to retain possession in order to enforce such lien. In this action the court can give no relief on account of the barn. There was no agreement in the lease that he should be paid for the barn at the expiration of his tenancy. Judgment reversed, at appellee's costs, with instructions to modify judgment in such manner as to authorize appellant to retain possession in accordance with terms of his contract until appellee pays him the value of the house.

(16 Ind. App. 362)

RIDGLEY v. MOONEY et al.

(Appellate Court of Indiana. Nov. 24, 1896.)

SALE—BREACH OF CONTRACT—MEASURE OF DAMAGES.

1. In an action to recover for the breach of a contract for the purchase of bark, where it appeared that the title to the property had never passed to the purchaser, the measure of plaintiff's damages is the difference between the contract price and the market price at the time and place of delivery.

2. In such case it is essential to plaintiff's right to recover that he should allege in his complaint the market price at the time and place of delivery.

3. In an action to recover for a breach of a contract for the purchase of goods, where it appears that the title has passed to the purchaser, though the goods are still in possession of the seller, the latter has his choice of two remedies, viz.: (a) He may retain the property for the benefit of the purchaser, and subject to his orders, and recover from him the entire purchase price. (b) He may resell the goods, and recover from the purchaser the difference between the contract price and the sum realized at the resale. But, if the latter course be pursued,

the seller, as a general rule, must manifest his election to do so by a preliminary notice to the purchaser that he intends to resell and hold him for any loss that may arise, although notice of the time and place of such resale is not necessary.

Appeal from circuit court, Bartholomew county; F. T. Hord, Judge.

Action by John F. Ridgley against William W. Mooney and others. From a judgment for defendants, plaintiff appeals. Affirmed.

E. S. Doolittle and Hacker & Remy, for appellant. Stansifer & Baker, for appellees.

REINHARD, J. The only error complained of in this case is the alleged error of sustaining the demurrer to the appellant's amended complaint. The complaint alleges, in substance, that on the 26th day of October, 1892, the plaintiff and defendants entered into a written agreement, a copy of which is filed with the complaint, by the terms of which the plaintiff was to furnish the defendants with 500 cords, of 128 cubic feet, or 2,400 pounds, each, of prime chestnut oak bark, to be peeled during the spring of 1893, and straightly and solidly loaded in cars, and consigned and delivered to defendants, at Columbus, Ind., on or before November 1, 1893. In consideration thereof, the defendants were to pay the same price as the ruling price in Cincinnati in the spring months of 1893, together with such additional sum as it would require to deliver the same in Columbus, Ind., over and above what it would require to deliver it in the city of Cincinnati, Ohio; that, confiding in the undertakings of the defendants as set forth in said agreement, the plaintiff, in the spring of 1893, in the state of West Virginia, did peel and prepare for market 500 cords of chestnut oak bark, of the quality, weight, and measurement called for in said agreement; that in preparing said bark for market, as aforesaid, he expended a large sum of money, to wit \$1,000; that in the city of Cincinnati, in the state of Ohio, in the springtime of 1893, the ruling price of prime chestnut oak bark, of the quality, weight, and measurement called for in said agreement, and of the kind and quality that had been peeled and prepared for market by the plaintiff, as aforesaid, was \$13 a cord; that thereafter, and long before the 1st day of November, 1893, the plaintiff had the 500 cords of bark ready for shipment to the defendants, and was ready and willing and offered to ship and deliver the said bark to the defendants, in accordance with the terms of said agreement; and the defendants having full knowledge of all the facts, and of the plaintiff's offer and readiness to deliver said bark to the defendants, the latter notified plaintiff, in writing, that they had no contract with plaintiff for any bark, and would not receive any bark that plaintiff would ship or deliver to them, and that defendants did not then and there, nor at any time, accept and receive said bark in accordance with the terms of the said contract; that, owing to the said absolute refusal to accept said bark, the

plaintiff was obliged to resell the same, and thereafter, on the 1st day of August, 1893, did resell said 500 cords of bark so remaining in his possession, unaccepted and unpaid for. as aforesaid, at and for certain sums of money, amounting in the whole to a much less sum of money, to wit, the sum of \$2,500 less, than the amount of said sum of money so offered and agreed upon by the defendants for the same, and there was thereby a deficiency upon such resale of \$2,500, over and besides the charges attending such resale, amounting to a certain other sum of money, to wit \$500, making in all \$3,000; that, in reselling said bark, the plaintiff sold to realize as far as possible the unpaid purchase money due him for such bark from the defendants; and that he sold the same within a reasonable time, and exercised due diligence, and by good faith tried to realize the best price he could for said bark, and did realize the best attainable price therefor at said time. Wherefore, etc. The contract, a copy of which is filed with the complaint, is as follows (Exhibit A): "Bark Contract. Agreement, made this 26th day of October, 1892, between J. F. Ridgley, of Milton, West Virginia, and W. W. Mooney & Sons, of Columbus, Ind., witnesseth: That said J. F. Ridgley agrees to furnish said W. W. Mooney and Sons with 500 cords, of 128 cubic feet, or 2,400 pounds, each, of prime chestnut oak bark, peeled during the spring of 1893, and to be delivered on or before the first day of November, 1893, at Columbus, Indiana. Said bark to be straightly and solidly loaded in cars, and consigned direct to W. W. Mooney & Sons, Columbus, Indiana. In consideration whereof, said W. W. Mooney & Sons agree to pay said J. F. Ridgley the same price as ruling in Cincinnati in the spring month of 1893, and the additional sum that it would require to deliver said bark in Columbus, Indiana, over and above what it would require to deliver same in Cincinnati, Ohio. It is further agreed that Mr. Ridgley can increase this contract to one thousand cords, instead of five hundred, by giving the said W. W. Mooney & Sons due notice of this, in writing, prior to February 1st, 1893. Signed in duplicate, day and year above mentioned. J. F. Ridgley. W. W. Mooney & Sons."

It is the evident theory of the complaint that, for the alleged breach of the contract on the part of the appellees, the measure of damages is the difference between the contract price and the price for which the bark was actually sold by the appellant. In *Dwiggins v. Clark*, 94 Ind. 40, 52, the law governing such cases was declared as follows: "In actions by the vendor, based upon such contracts as this, the measure of damages arising out of the state of the facts shown, and therefore the nature of the cause of action, is controlled by the question whether, upon the facts, the title to the property is regarded as having passed to the buyer, or as still remaining in the seller. In the former case, the seller is entitled to recover the contract price,

while in the latter case he may recover damages measured by the difference between the contract price and the market price at the time and place of delivery." The rule as above stated was applied by this court in *Neal v. Shewalter*, 5 Ind. App. 147, 31 N. E. 848, and *Shipp v. Atkinson*, 8 Ind. App. 505, 36 N. E. 375. It is undoubtedly true that in many cases the vendor may, upon breach by the buyer, sell the property, and recover the difference between the contract price and the selling price. This principle, we think, is also contingent upon the question whether the title of the property has passed to the purchaser, or still remains in the seller. The contract declared upon was an executory one. By its terms, the appellant agreed to prepare for the market, for appellees, 500 cords of bark of a certain quality, and deliver the same on or before a certain date, at Columbus, Ind. The complaint alleges that the plaintiff duly prepared the bark, and notified the defendants that he was ready to ship the same, but that the defendants refused to accept or receive it, stating that they had no such contract with him as he claimed to have. But, although the contract was executory, it may have become so far executed as that the title to the property had passed to the purchaser, though possession was still retained by the seller. In every case, whether the title to the property has passed to the purchaser or still remains in the vendor, if there had been a breach by the buyer by refusing to accept the property and pay for it, the vendor has his remedy in an action for damages. Where the title has not passed, of course the seller still has the goods, and hence he is not damaged to the full value of the same. He can only recover in such a case whatever may be the loss sustained by him on account of the purchaser's default. This loss, as the cases cited above declare, is the difference between the price fixed by the contract and the market value of the goods at the time and place of delivery, as provided in the contract. For additional authorities on this point, see *McComas v. Haas*, 107 Ind. 512, 8 N. E. 570; *Railroad Co. v. Heck*, 50 Ind. 303; *Beard v. Sloan*, 38 Ind. 128.

Where, as in the present case, the seller is, by the terms of the contract, required to ship to a certain place, and to receive, in addition to the contract price, the expense of shipment, doubtless the expense of getting the goods to the market, and reselling the same, should be added to the damages; for the object of the remedy given is to make the seller whole on account of the loss suffered by the default of the buyer. In the case at bar, as we have seen, the contract price was the market value of the bark at Cincinnati in the spring of 1893, "and the additional sum that it would require to deliver said bark in Columbus, Ind., over and above what it would require to deliver same at Cincinnati, Ohio." It is alleged in the complaint that the market value of such bark in Cincinnati, during the spring months of

1893, was \$13 per ton. This amount, then, \$13 per ton, was the contract price. If we add to this the additional expense required to take the bark to market, and sell it, and deduct from it its market price at Columbus, Indiana, at the time it should have been delivered there, which was not later than November 1, 1893, we obtain the measure of the damages to which the appellant is entitled for the alleged breach of contract, provided the title of the bark did not pass to the appellees. As the appellant had the option of delivering the bark at any time after it was ready for shipment, and not later than November 1, 1893, it follows, we think, that he was entitled to fix the market price at the time he was ready and offered to ship to Columbus. If we assume (what is not alleged) that this was at or about the time he alleges he sold the bark, viz. August 1, 1893, the value of the bark in Columbus, Ind., at or about that time, would be the proper criterion for the establishment of the market value of the property. There is no averment in the complaint as to the place where the appellant sold the bark, and we are unable to see, therefore, how the price for which he sold could in any way establish the market value of the bark in Columbus, even if we assume that he sold it for its full value in the market to which he took it. For anything that is averred, he may have sold it in Europe, or in West Virginia, where it was prepared; and we cannot assume that bark of the quality for which the contract calls was of the same value in every market of the world. The value must be the market value at the time and place of delivery, as we learn from the decisions of our own courts heretofore cited in this opinion, and as is held in the courts of other states. The market price of another place and at another time would not be material, unless it tended to prove the value at that time and place. "A reasonable range of time is sometimes allowed in which to average the price, so that sudden, unnatural, and spasmodic values, not indicating the real state of the market, may not prevail." 21 Am. & Eng. Enc. Law, 579. We do not wish to be understood as holding that appellant was bound to take the bark to Columbus if he could have found a better market elsewhere, either at home or abroad. But in the latter event he should have averred this fact in direct terms, and shown by the facts set out that he obtained for it the best market price.

From what we have said follows the inevitable conclusion, we think, that, if the facts alleged make a case in which the title to the property had not passed to the purchaser at the time of the breach, the complaint is fatally defective, in failing to show the market value of the property when the default was made, and the expense of shipment and sale, as elements essential to the measurement of the damages to which the

appellant would be entitled. Appellant's counsel concede that the title to the bark never passed to the purchaser. This concession was possibly necessitated by the fact that, under the averments, the appellant must be held to have treated the property as his own when he sold it, not as the agent of the vendee and for his account, but in the exercise of such acts of ownership over it as would conclusively indicate that he regarded himself still as the owner. The concession, whatever may have prompted or induced it, is fatal to the appellant's right of recovery, for, as we have shown, the appellant has wholly failed to aver such facts as would enable the court or jury to determine what damages he has sustained. If, however, we should disregard the concession of the appellant that the title to the bark had not passed to the appellees when they made default, and if it could be said from the averments of the complaint that the appellant treated the property as belonging to the appellees, and that he sold it as their agent and for their account, it would still remain to be determined whether the appellant has pursued a course that will entitle him to recover in the present action. In such a case he would have the choice of one of two remedies: He could retain the property for the benefit of the appellees, and subject to their orders, and sue them for the entire purchase price; or he could sell the goods, as he did, and recover from the appellees the difference between the contract price and the price of the sale. *Railroad Co. v. Heck*, 50 Ind. 303, 308; *Benj. Sales* (Corbin's Am. Ed. 1889) § 1165, and authorities cited in note 3. If, however, he chooses to pursue the latter course, he must manifest his election to do so by a preliminary notice that he intends to sell, and hold the purchaser for the loss. The case of *Redmond v. Smock*, 28 Ind. 365, is decisive of the point in our own state. There the plaintiff had sold to the defendants a stock of goods, together with an unexpired lease on a storeroom in which they were situated, for which payment was to be made in the future. The breach assigned was that the defendants refused to make the payments, and that they had abandoned the lease, storeroom, and goods, and repudiated the contract. The action was for damages for the loss of the profit of the sale of the lease, the decline in the value of the goods, and expenses incurred in making a resale, etc. The supreme court held that the taking possession of the goods by the plaintiffs, and treating them as their own, and selling them in their own names, amounted to a rescission of the contract, and then said: "If the plaintiffs had, upon the refusal of the defendants to receive and pay for the goods, given them notice that they (the plaintiffs) should sell the goods for the defendants' account, and hold them responsible for any deficiency on the resale, and for the expenses

of keeping and reselling the articles, the plaintiffs would, perhaps, have been authorized to sell the goods in the usual way of disposing of such property; but, in the absence of any notice whatever of any such intention, the subsequent sale by the plaintiffs was a rescission of the contract." In this class of cases the seller has a lien on the goods for the purchase money, which he may enforce by a resale. The object of the notice of the intention to sell seems to be to hold the purchaser for the deficiency. The notice must be a reasonable one, and what is a reasonable notice depends upon the circumstances of each particular case. See 21 Am. & Eng. Enc. Law, 597, note 1. In *Holland v. Rea*, 48 Mich. 218, 224, 12 N. W. 169, it is said that "It is now generally assumed that where the agreement is silent in regard to it, and no special incidents appear to contend for it, and where the extent of the vendee's liability is not to be materially decided by the price obtained, no notice of the resale itself is necessary. On the other hand, it is held by high authority that, to entitle the vendor to proceed by resale instead of rescission, or by action for the whole price, he must manifest his election by preliminary notice that he intends to sell and hold the vendee for the loss, or notice to that effect." Whatever relaxation of the rule may have been made by the decisions of the courts, we feel bound by the holding in our own state that in such a case a preliminary notice is required. Mr. Sutherland, in his valuable work on the Law of Damages, states the rule to be that the vendor in such a case as this may resell the property within a reasonable time after notice to the vendee of his intention to resell, the resale being made on the theory that the property is that of the vendee retained by the vendor as a means of realizing the contract price, the seller acting as the agent of the vendee, and that, after the giving of the notice of the vendor's intention to sell, no notice of the time and place of the resale is necessary to be given, but that it must be made according to the usage of trade. *Suth. Dam.* (2 Rev. Ed. 1893) § 647. He cites a large number of cases in support of the rule requiring notice, although he says in the same connection that there are some authorities to the effect that if the buyer has notice of the facts which give the vendor the right to resell and the former absolutely refuses to comply with his contract, no notice of an intention to resell is necessary. The only authorities he cites in favor of this view are *Waples v. Overaker*, 77 Tex. 7, 13 S. W. 527; *Ullmann v. Kent*, 60 Ill. 273. There are, doubtless, other cases which he might have cited in support of it; but we think the weight of authority is on the side of the doctrine that, except under peculiar circumstances,—for example, as where the goods are of a perishable nature,—the seller is required to give a preliminary notice of his

intention to resell. In *Kerr's Benjamin on Sales* the law is thus stated: "It is the duty of the seller to give notice to the buyer of his intention to make the resale; but it is not essential that he notify the buyer of the time and place of sale." 2 *Benj. Sales* (1888) p. 780, note to section 1077. *Tiffany on Sales* (1895, § 122) says: "Notice of intention to exercise the right to resell should be given, though cases may arise when, owing to the perishable nature of the goods, or other circumstances, notice might be dispensed with. Notice of the time and place, however, is not essential,"—citing, among other cases, *Redmond v. Smock*, supra. *Chalmers on Sales* (section 50) states the law as follows: "Where the goods are of a perishable nature, or where the unpaid seller gives notice of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may resell the goods, and recover from the original buyer damages for any loss he occasioned by his breach of contract."

Whatever may be the true theory of the complaint, therefore, in the present case, as to whether the title to the bark had passed to the appellees, or was still in the appellant when the alleged breach occurred, the facts alleged do not state a valid cause of action. If the title remained in the appellant, he could have sued for and recovered the difference between the contract price and the market value of the bark at the time and place of the sale. If he elected to treat the property as that of the appellees, he could have retained it for their use, and sued for the entire purchase price, or he could have resold the property as the agent of the appellees, having first given them notice of his intention to do so. As the appellant has failed to bring himself within the lines of either of these remedies, the complaint does not state a good cause of action, and the court below did not err in sustaining the demurrer. Judgment affirmed.

(167 Mass. 205)

EDWARDS v. BARNES.

(Supreme Judicial Court of Massachusetts.
Worcester. Dec. 8, 1896.)

EXECUTORS AND ADMINISTRATORS—SALE OF LAND FOR DECEDENT'S DEBTS—WHEN AUTHORIZED—EXECUTOR'S ACCOUNT.

1. Though a conveyance of land made in trust to secure an existing debt and future advances is not recorded till after the grantor's death, the title vests in the grantee as against creditors of decedent who did not attach the property during his life; and the executors have no power to sell the same for the payment of decedent's debts, under Pub. St. c. 134, § 2, as land "liable to attachment or execution by a creditor of the deceased in his lifetime."

2. An executor is not chargeable in his accounts with the proceeds of land sold after decedent's death, under a valid trust executed by him in his lifetime.

Report from supreme judicial court, Worcester county; James M. Barker, Judge.

Appeal by William C. Barnes from a decree of the probate court allowing the account of Robert J. Edwards and another, as executors of the estate of William Edwards, deceased. Questions reserved and reported for the determination of the full court. Decree affirmed.

The following are substantially the facts as reported: William Edwards, of Southbridge, died on June 16, 1886, testate, and the accountants are the executors of his will. This account is the only one which they have rendered, and it covers their administration from the testator's death until January, 1895. William Edwards was a business man. He had a brother, Jacob Edwards, who lent William money, and also helped him by his credit; and from the year 1875 until William's death he was largely indebted to Jacob. The amount of this indebtedness at the time of William's death was \$50,000 or more. William had valuable real estate, which became marketable before his death; during the later years of his life, after the year 1877. William himself sold and conveyed a number of parcels of his land. In the year 1877, William executed a trust deed of all his lands to Jacob, and Jacob executed a defeasance of the trust deed. These instruments were one transaction. Both were dated on August 1, 1877, and acknowledged on September 24, 1877, and were delivered in the autumn of 1877. After they were delivered, they were placed by William and Jacob Edwards in the custody of a third person, with instructions to place the deed on record if either William or Jacob Edwards should die. The custodian kept the instruments until he learned of the death of William Edwards, which occurred on June 16, 1886; and on June 17, 1886, he caused the deed from William to Jacob to be recorded. The transaction of which the deed and defeasance was part was not known to any one, except the brothers William and Jacob and their attorneys and servants, until after the death of William. When that transaction was made, and ever afterwards, until his death, William Edwards had many creditors other than his brother Jacob. The appellant, William C. Barnes, is one of the other creditors, to whom William Edwards was so indebted, and the debts owed to Barnes at William's death are yet due from the estate. After the delivery of the deed and defeasance of 1877, and down to the time of William Edwards' death, he continued in the possession and apparent ownership of the lands conveyed to Jacob by the deed, except such portions of them as William from time to time sold and deeded as his own; and William appeared to be the owner of those lands, and obtained credit from the present creditors of his estate on account of his apparent possession and record title to the lands; and in one instance Jacob stated to the appellant that William

was worthy of credit, and was all right, because he had settled up with Jacob, and did not owe him. The transaction of 1877 was in fact kept secret by William and Jacob and their attorneys and servants, and intentionally so; and neither the appellant, the accountants, nor any of the creditors of William Edwards whose debts have been proved before the commissioners of his estate, had any notice or knowledge of that transaction, nor of the deed of August 1, 1877, from William to Jacob, until after the death of William, and after that deed was put on record after his death. The accountants were informed, after the death of William Edwards, of the defeasance of August 1, 1877; and, as executors, they have treated the transaction of August 1, 1877, as a mortgage, the effect of which was to secure whatever debts or liabilities existed on William's part to Jacob at the time of William's death. The accountants have received large sums from the sale, since William's death, of the lands conveyed by William to Jacob by the deed of August 1, 1877, such sums amounting to some \$50,000, and have applied, or suffered to be applied, the same in liquidation, so far as it went, of the debts and liabilities existing on William's part to Jacob at William's death, treating such debts and liabilities as the principal of a mortgage due to Jacob, and evidenced by the deed and defeasance of August 1, 1877; and the accountants have not kept any part of the proceeds of said sales of real estate as assets of the estate of William for the payment of his debts, and have not charged themselves in their probate account as executors with any part of said proceeds. The accountants duly represented the estate of William Edwards to be insolvent, and commissioners were appointed March 1, 1887, to receive and examine all claims of creditors against his estate, and to return to the probate court a list of all claims presented, whether allowed or not, with the sums allowed on each, computing the net amount due June 16, 1886, the time of the death of William Edwards. One of the commissioners having resigned, and another having been appointed in his place, the report of the commissioners was finally returned to the probate court on July 2, 1889, showing claims of eight creditors allowed in the sum of \$25,026.02, and one claim of \$500 not allowed. Of the claims allowed, one in favor of Sullivan Moore, of \$13,431.83, has been appealed from, leaving claims allowed, and now standing as allowed, of \$11,594.19, of which the claim of the present appellant, William C. Barnes, is allowed for the sum of \$700. The claims of Jacob Edwards were not presented to the commissioners. If the proceeds of the real estate which stood in William's name of record at the time of his death are not assets of his estate for the payment of debts, there are no sufficient assets for the payment of the claim of the appellant or of the other cred-

itors whose claims have been allowed by the commissioners.

T. G. Kent, G. T. Dewey, and J. C. F. Wheelock, for appellant. F. P. Goulding and J. M. Cochran, for appellees.

BARKER, J. An examination of the instruments of August 1, 1877, called in the report a trust deed and defeasance, shows that they do not constitute a mere mortgage, but give the title to Jacob Edwards in trust to sell the lands, and reimburse himself out of the proceeds. The sales made since the death of the grantor have been made upon this footing, and the proceeds have been applied to the extinguishment of the debt due to Jacob Edwards. These proceeds were in fact money of the trust, and not of the estate of the grantor; and the appellees are not chargeable with them in their executors' account, if they have the right to regard the trust as valid. See *Keith v. Molineux*, 160 Mass. 499, 36 N. E. 476. As there was an existing debt due from the grantor to Jacob Edwards when the trust deed was made, and as subsequent advances were made as contemplated, the conveyance was for a valuable consideration, and was not void as in fraud of creditors. The appellant's contention is that, because the deed was not recorded until after the death of the grantor, the lands conveyed were lands which were "liable to attachment or execution by a creditor of the deceased in his lifetime"; and that, therefore, by the operation of Pub. St. c. 134, § 2, they could be sold by the accountants for the payment of the debts of their testator, notwithstanding the conveyance.

It is true that, up to the death of the grantor, these lands were liable to attachment or execution by any of his creditors who had no notice of the unrecorded deed. But it seems to be a general principle, founded upon justice, that lands of which the apparent record title stands in a debtor, but which in fact do not belong to him, can be taken in payment of his debts only by individual creditors. See *Smythe v. Sprague*, 149 Mass. 310, 21 N. E. 383, and cases cited. Language substantially similar to that of Pub. St. c. 134, § 2, is used in Pub. St. c. 157, § 46, as to the property of an insolvent, namely: "The assignment shall vest in the assignee all the property of the debtor * * * which might have been taken on execution upon a judgment against him." In *Smythe v. Sprague* it was held that, under this provision, land conveyed by an insolvent for a valuable consideration to a bona fide purchaser, by a deed not recorded until after the assignment in insolvency, was not property of the debtor, and did not pass to the assignee. The decision was upon the ground that a creditor with no notice of the deed has the right to take the land on execution, not because it is the property of the grantor, but because the grantee, in violation of the registry laws, has failed to record

his deed, and thereby has committed a constructive fraud upon the creditor, and is therefore estopped to set up his title against him; that this right is a personal right of the creditor, which inures to his own benefit solely; that the grantee, by recording his deed, may, without any other conveyance, perfect his title; and that, if the statute should be construed to vest such property in the assignee, it would unjustly vest in him, not the property of the insolvent, but that of his grantee. The same considerations apply to an unrecorded conveyance made by a person who dies before his deed is recorded, and compel a similar construction of the statute authorizing sales of lands of a deceased person for the payment of his debts. The title passes in each case, and in each no one but an attaching creditor has the right to estop the grantee from setting up his title; and, in the case of a deceased person, it would not be his lands which would go to pay his debts, but the lands of his grantee. Whatever may be the power of an executor or administrator in a case where a creditor has attached during the life of the grantor, in a case like the present, where there was no such attachment, the executors have no power to sell the lands which their testator had in fact conveyed by the unrecorded deed. Decree of probate court affirmed.

(151 N. Y. 171)

KAPLAN v. NEW YORK BISCUIT CO.

(Court of Appeals of New York. Dec. 8, 1896.)

APPEAL—JURISDICTION—BURDEN OF PROOF.

On a motion to dismiss an appeal on the ground that the court of appeals has no power to review under Code Civ. Proc. § 191, providing that where the judgment of the appellate division of the supreme court is unanimous it shall not be reviewed, the burden is on the party moving to show by the record that the judgment was unanimous.

Appeal from supreme court, appellate division, First department.

Action by Simon Kaplan, an infant, by his guardian, against the New York Biscuit Company. A judgment for plaintiff having been affirmed by the appellate division of the supreme court (38 N. Y. Supp. 1049), the defendant appealed. Plaintiff moved to dismiss the appeal. Denied.

Hamilton Wallis, for appellant. David Lev-entritt, for respondent.

HAIGHT, J. This action was brought to recover damages for a personal injury. The trial resulted in a verdict for the plaintiff, which has been affirmed by the appellate division. This court has no power to review, if the judgment of affirmance was unanimous. Code Civ. Proc. § 191. The judgment entered does not state that the decision was unanimous, and that fact does not appear of record. The respondent's affidavit read upon this motion, as we understand it, is based upon information

derived from the opinion of the court reported in 5 App. Div. 60, 38 N. Y. Supp. 1049, in which it appears that all the judges concurred. It, however, appears from the affidavits presented on the part of the appellant that the respondent moved in the appellate division for an order correcting the judgment entered, so as to state that the decision of that court was unanimous, and that the motion was denied by the court, from which we are asked to infer that the decision was not unanimous. The fact is peculiarly within the knowledge of the judges of the appellate division, and we think that we ought not to be compelled to determine it from conflicting affidavits, inferences, or presumptions, but that it should be disposed of by the judgment or by a certificate of the court appearing in the record. The opinion written in a case may furnish information upon which a party may found a belief as to the fact, but it is not conclusive, and this court will not rely upon it for the purpose of determining facts which do not appear of record. *Rosenstein v. Fox*, 150 N. Y. 354, 44 N. E. 1027. The judgment is reviewable in this court unless the affirmance was by the unanimous decision of the judges composing the appellate division. The burden of showing that it was rests upon the party asserting it. This, like other facts, should appear from the record. The motion should be denied, but, under the circumstances, without costs, and with the privilege to renew in case the record should be changed. All concur. Motion denied.

(151 N. Y. 107)

MITCHELL v. ROCHESTER RY. CO.

(Court of Appeals of New York. Dec. 1, 1896.)
NEGLIGENCE—INJURIES FROM FRIGHT—DAMAGES—
PROXIMATE CAUSE.

1. No recovery can be had for injuries resulting from fright, caused by the negligence of another, where no immediate personal injury is received.

2. Where a miscarriage results from fright caused by the negligence of another, such negligence is not the proximate cause of the miscarriage. 25 N. Y. Supp. 744, reversed.

Appeal from supreme court, general term, Fifth department.

Action by Annie Mitchell against the Rochester Railway Company. From an order (28 N. Y. Supp. 1136) affirming an order (25 N. Y. Supp. 744) setting aside a nonsuit, defendant appeals. Reversed.

Charles J. Blissell, for appellant. Norris Bull, for respondent.

MARTIN, J. The facts in this case are few, and may be briefly stated. On the 1st day of April, 1891, the plaintiff was standing upon a crosswalk on Main street, in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there, and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team at-

tached to the car drew near, it turned to the right, and came close to the plaintiff, so that she stood between the horses' heads when they were stopped. She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious, and also that the result was a miscarriage, and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce that result. Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover for the defendant's negligence which occasioned her fright and alarm, and resulted in the injuries already mentioned. While the authorities are not harmonious upon this question, we think the most reliable and better-considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. *Lehman v. Railroad Co.*, 47 Hun, 355; *Commissioners v. Coultas*, 13 App. Cas. 222; *Ewing v. Railway Co.*, 147 Pa. St. 40, 23 Atl. 340. The learned counsel for the respondent in his brief very properly stated that "the consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities: *Haile v. Railroad Co.*, 60 Fed. 557; *Joch v. Dankwardt*, 85 Ill. 331; *Canning v. Inhabitants of Williamstown*, 1 Cush. 451; *Telegraph Co. v. Wood*, 6 C. C. A. 432, 57 Fed. 471; *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435; *Allsop v. Allsop*, 5 Hurl. & N. 534; *Johnson v. Wells, Fargo & Co.*, 6 Nev. 224; *Wyman v. Leavitt*, 71 Me. 227. If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage, in no way changes the principle. These results merely show the degree of fright, or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it. If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury

complained of may be easily feigned without detection, and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and, if so, whether they were caused by the negligent act of the defendant, would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy. Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged, and those that are usual, and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances, which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action. These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury. The orders of the general and special terms should be reversed, and the order of the trial term granting a nonsuit affirmed, with costs. All concur, except HAIGHT, J., not sitting, and VANN, J., not voting. Ordered accordingly.

(151 N. Y. 1)

HENRY v. ALLEN et al.

(Court of Appeals of New York. Dec. 1, 1896.)

PRINCIPAL AND AGENT—IMPLIED NOTICE OF AGENT'S ACTS.

One M. received from plaintiff, as his agent, money to deposit in defendants' bank, under an agreement that he would send plaintiff, for each deposit, either his individual check, or defendants' check indorsed by him. He deposited the money in his own name, and induced defendants to deliver him checks drawn by them, as bankers, on themselves, payable to his order, by representing that he was plaintiff's partner, that the money was his share of the business, and that he desired the checks only as memoranda to be used in settling with plaintiff, after which he would return them. He indorsed the checks, and sent them by mail to plaintiff, who received them in good faith, supposing that they represented deposits made according to his agreement with M. Afterwards M. drew the money deposited, on his own checks, and appropriated it to his own use. *Held*, that plaintiff was not chargeable with notice of the agreement between M. and defendants that the checks should have no binding force, and plaintiff could recover on them from defendants. 28 N. Y. Supp. 242, 77 Hun, 49, reversed.

Appeal from supreme court, general term, Fifth department.

Action by Hiram F. Henry against Norman M. Allen and Hoyt M. Allen, as co-partners engaged in the banking business under the firm name of Norman M. Allen & Son, on certain

checks issued by defendants to F. Monson, who indorsed them to plaintiff. Pending the action, defendant Hoyt M. Allen died. From a judgment of the general term (28 N. Y. Supp. 242) affirming a judgment dismissing the complaint on the merits, plaintiff appeals. Reversed.

This action was founded on 33 written instruments for the payment of money, which, for convenience, are called "checks," differing in dates and amounts, but in other respects like the following, the first of the series, viz.: "\$1,010.25. Dayton, March 17, 1886. Norman M. Allen & Son, Bankers: Pay to the order of F. Monson one thousand and ten ²⁵/₁₀₀ dollars. N. M. Allen & Son." They were all signed by the defendants, under their firm name of N. M. Allen & Son, and indorsed by the payee to the order of the plaintiff. In the aggregate, they amounted to the sum of \$27,999. Each check is the basis of a separate count in the complaint, and there is a final count for money had and received. The defendants, by their answer, deny that the checks were delivered by them to the payee, or by him to the plaintiff, for a valuable consideration, and they allege that they had no legal inception or consideration, but were made and delivered to the payee, at his request and for his convenience, simply as memoranda "showing the time of the receipt by him of certain items" of money deposited with them, upon his representation "that he would not part with the possession of them, but that he would, in a short time, return the same." They further allege that he obtained them from the defendants, upon such representations, with intent to defraud, and that the plaintiff knew the facts aforesaid when he received the checks.

Upon the trial it appeared that during the period covered by the complaint the plaintiff resided at Gowanda, in this state, and had no acquaintance with the defendants, who resided four miles distant, where they carried on business as private bankers. Norman M. Allen, the senior member of the firm, had been a practicing lawyer since 1864, and a banker for eight or ten years. The plaintiff was the proprietor of a traveling minstrel troupe, and his business called him from home continuously, except during the summer months. Forbes Monson, the payee of said checks, had resided in Gowanda for several years prior to March 17, 1886, the date of the first check, and was regarded by the people in that vicinity "as a man of strict integrity, good financial standing, and extraordinary business experience and ability." The relations between him and the plaintiff were of an "intimate and confidential character,—so much so that the plaintiff sought counsel and advice of said Monson upon substantially all of his business affairs, and particularly upon the subject of saving money and making investments." For some time prior to March, 1886, the plaintiff owned three certificates of deposit, issued to him by the Bank of Gowanda,—one for \$1,163.54, and the other two for \$1,000 each. After many conversa-

tions, and much misrepresentation by Monson as to the financial condition of the Gowanda Bank, they "entered into an agreement by which the plaintiff was to deliver to said Monson said three certificates, and all other moneys which he might be able to save from his said business from time to time, said certificates to be converted into money, and such money, together with such as the plaintiff might thereafter send to said Monson from time to time, should be deposited in the defendants' bank, at Dayton, N. Y., by the said Monson, acting for and on behalf of the plaintiff, and the same should be kept there until such time as the amount so deposited should aggregate \$5,000, when it was to be loaned by said Monson, for the plaintiff, to the defendant Norman M. Allen, on a bond secured by a mortgage upon real estate; and, as a part of said agreement, the said Monson did undertake, promise, and agree with the plaintiff to pay him * * * 6 per cent. interest per annum on all moneys which the plaintiff should send to him for deposit with the defendants, while the same should remain on deposit in said bank, and that such interest should be paid quarterly, at the expiration of each and every three months. It was further agreed between plaintiff and said Monson that for the moneys so deposited the said Monson should either send the plaintiff his individual check, or the check of the defendants, indorsed by himself, for the amount of each deposit that should thereafter be made, * * * and * * * that the money should be drawn from the Bank of Gowanda on one of said certificates at a time, and in such manner as would be likely to create no suspicion of where the same was to be placed, or of the arrangements or agreement between them." The defendants knew nothing of this arrangement, and the plaintiff supposed that Monson was interested in the defendants' banking business.

On the 15th of March, 1886, Monson deposited \$900, being part of the proceeds of one of the certificates of deposit, with the defendants, to his own credit, and thus opened a general account with them, which continued until the month of February, 1891, and aggregated nearly \$60,000, including all of the moneys sent to him by the plaintiff under the agreement between them. He took pains to see that the various sums so deposited were credited to him personally on the defendants' books, and he also received a pass book in the usual form, upon which were entered from time to time all such credits to him, as well as all his checks paid by the bank, and charged to his account. On March 16, 1886, he sent to the plaintiff his personal check for the proceeds of the first certificate of deposit, and the plaintiff retained it until in August following, when it was paid by Monson without presentation at defendants' bank. On March 17, 1886, Monson deposited the proceeds of the second certificate with the defendants, and at the time represented to them that the money belonged to him, that no other person had any interest

therein, that he was in partnership with the plaintiff, that the sum so deposited was his share of the profits of their business, and that he wished to keep special memoranda of the moneys received from that source until he could have a settlement. The defendants offered to give him a duplicate deposit slip, but he said that would not answer his purpose. Thereupon, under the express agreement that it was without consideration or validity as commercial paper, or as an obligation against the defendants, and that it should be returned to them without delivery to any other person, and without being charged to him on the books of the bank or otherwise, the defendants, relying upon said representations and agreement, gave him the paper dated March 17, 1886, signed by their firm name, a copy of which has already been set forth. At the same time they gave him credit for the amount so deposited upon their books, and authorized him to check it out whenever he wished. Monson thus procured said instrument with the fraudulent intent of thereafter transferring the same, and he immediately indorsed it to the order of, and mailed it to, the plaintiff, who received it believing that it had been given by the defendants upon the deposit of the proceeds of one of his certificates.

On the 20th of March, 1886, the said Monson, under the same agreement, and upon substantially the same representations, deposited the proceeds of the third certificate with the defendants, and received therefor both credit in his personal account upon the books of the bank, and a written instrument in the same form as that last described, which he promptly indorsed in the same way, and mailed to the plaintiff, who received it as evidence of the investment that he supposed he had made. Thenceforward, until March 4, 1889, the plaintiff on divers occasions delivered and sent to Monson drafts and currency to the amount of \$25,793.14, under the agreement previously made between them, except that the loan of \$5,000 to Norman M. Allen was abandoned. Monson deposited the various sums, as they were received, with the defendants, to his own credit, under the circumstances and upon the representations and agreement already mentioned. Credit was given to him for each sum upon the books of the bank, and a check for the same amount, and in the form previously adopted, was delivered to him, and by him at once indorsed and mailed to the plaintiff, who received it, believing that the defendants had delivered it to Monson as the property of the plaintiff, and for his exclusive benefit. During all this time the defendants had no knowledge that the plaintiff, or any person other than Monson, had any interest in the deposits thus made. From time to time, Monson also deposited moneys of his own in the same account, and those sums were credited to him in the usual way, but no check was given to him in addition. Before the defendants learned that Monson had transferred said instruments in writing to the plain-

tiff, they had paid out the entire amount of the deposits, including all that came from the plaintiff, upon Monson's checks, given apparently in the ordinary course of his business. None of said written instruments were charged to Monson, and no record was kept of them in the defendants' bank. Pursuant to the agreement between them, and down to January, 1891, Monson paid to the plaintiff interest upon all sums received for deposit with the defendants, and was duly credited therefor upon the books of the plaintiff, which contained an account, in the form of debit and credit, of each remittance by the plaintiff to Monson, and by Monson to him. About the 12th of February, 1891, Monson absconded, and shortly thereafter the plaintiff presented the said checks for payment; but the defendants, who then learned for the first time that the plaintiff had any interest in said deposits, refused to pay the same, or any part thereof. Until then the plaintiff knew nothing about the double dealing of Monson, but supposed that he had acted honestly in all respects, and that each of said written instruments was what it purported to be.

The referee found the foregoing facts, in substance, and he also found that about the month of March, 1886, the plaintiff wrote to the defendants, who received the letter and showed it to Monson, but they did not produce it on the trial, claiming that it was lost. The referee refused to find that the letter referred to the deposit of plaintiff's moneys in the defendants' bank. He found, as conclusions of law, that the instruments in question had no legal inception or validity, as obligations against the defendants, while they were in the hands of Monson, and that the plaintiff had no better title. He directed that the complaint should be dismissed, and the judgment entered accordingly was affirmed by the general term, one of the justices dissenting. 77 Hun, 49, 28 N. Y. Supp. 242. The plaintiff appeals to this court.

John G. Milburn, for appellant. Wm. H. Henderson, for respondents.

VANN, J. (after stating the facts). The learned general term proceeded to judgment upon the ground that a principal is chargeable with the knowledge acquired by an agent while transacting his business, and that, hence, the plaintiff had constructive notice of the circumstances under which Monson procured the instruments in question from the defendants. The general rule that notice to the agent, while acting within the scope of his authority, and in regard to a matter over which his authority extends, is notice to the principal, rests upon the duty of disclosure by the former to the latter of all the material facts coming to his knowledge with reference to the subject of his agency, and upon the presumption that he has discharged that duty. *Bank v. Clark*, 139 N. Y. 307, 313, 34 N. E. 908; *Hyatt v. Clark*, 118 N. Y. 563, 23 N. E. 891; *Case of Distilled Spirits*, 11 Wall. 356,

367. This presumption, however, does not always arise, for there are several exceptions well recognized by the authorities. Thus, when the agent has no legal right to disclose a fact to his principal, or he is engaged in a scheme to defraud his principal, the presumption does not prevail, because he cannot in reason be presumed to have disclosed that which it was his duty to keep secret, or that which would expose and defeat his fraudulent purpose. *Innerarity v. Bank*, 139 Mass. 332, 1 N. E. 282; *Weisser's Adm'rs v. Denison*, 10 N. Y. 68, 76; *Frenkel v. Hudson*, 82 Ala. 158, 2 South. 758; *Investment Co. v. Ganzer*, 11 C. C. A. 371, 63 Fed. 647; *Hudson v. Randolph*, 13 C. C. A. 402, 66 Fed. 216; *Kettlewell v. Watson*, 21 Ch. Div. 707; *Cave v. Cave*, 15 Ch. Div. 639; *Mechem, Ag. § 721*. As Mr. Pomeroy says in his work on Equity Jurisprudence: "When an agent or attorney has, in the course of his employment, been guilty of an actual fraud, contrived and carried out for his own benefit, by which he intended to defraud, and did defraud, his own principal or client, as well as, perhaps, the other party, and the very perpetration of such fraud involved the necessity of his concealing the facts from his own client, then, under such circumstances, the principal is not charged with constructive notice of facts known by the attorney, and thus fraudulently concealed. In other words, if, in the course of the same transaction in which he is employed, the agent commits an independent fraud for his own benefit, and designedly, against his principal, and it is essential to the very existence or possibility of such fraud that he should conceal the real facts from his principal, then the ordinary presumption of a communication from the agent to his principal fails. On the contrary, a presumption arises that no communication was made, and consequently the principal is not affected with constructive notice." Section 675. Referring to the same subject in *Weisser's Adm'rs v. Denison*, supra, Judge Allen said: "The principle that notice to an agent is notice to the principal is quite familiar, but is only applicable to cases in which the agent is acting within the scope of his employment. Were it otherwise, and did it extend to acts unauthorized, and outside of the employment, whether trespasses or even felonies, the master might be made responsible for all acts, whether tortious or otherwise, done by his servant, while in his employ, or acting professedly in his behalf, if he did not act at once, by disclaiming the authority. The servant would necessarily have knowledge of his own wrongful act, and, within the rule sought to be applied, the knowledge of the servant would be that of his master. * * * He would thus, by a legal fiction, be charged with the tortious, fraudulent, or even felonious, act of his servant. This is not the law." 10 N. Y. 77.

When an agent abandons the object of his agency, and acts for himself, by committing a fraud for his own exclusive benefit, he ceases

to act within the scope of his employment, and, to that extent, ceases to act as agent. *Shipman v. Bank*, 126 N. Y. 318, 331, 27 N. E. 371; *Welsh v. Bank*, 73 N. Y. 424; *Allen v. Railroad*, 150 Mass. 200, 206, 22 N. E. 917. Monson was an agent to deposit moneys for the plaintiff with the defendants, and to procure their checks therefor, which he was to indorse and deliver to the plaintiff. As a collateral arrangement, he also agreed to personally pay interest upon the amount of the deposits, which neither adds to nor takes from his authority as agent. His authorized power over the money ceased when the deposit was made. In agreeing that the checks given should not take effect according to their legal purport, and that they should be returned to the defendants, without delivery thereof to any one, he was not acting as agent, but in his own behalf. Both the adverse and the personal character of that act destroy the presumption, which would otherwise arise, that he disclosed it to the plaintiff. Not only were the relations of the agent to the subject-matter such as to make it certain that he would not tell his principal that the checks were delivered under an agreement which nullified their effect, but the making of that agreement itself was not done by him in his character as agent, but as an individual, engaged in committing a fraud for his own benefit.

Whether this case should be regarded as an exception to the general rule, because the usual presumption as to disclosure does not exist, or simply as not covered by the rule, because the acts in question were not within the scope of the agent's authority, we think that notice of the agreement between Monson and the defendants that the checks should have no binding force should not be imputed to the plaintiff. No question of apparent authority arises, because the defendants did not know Monson as agent, but supposed he was acting for himself alone. When they invoke his agency for their protection, therefore, they are limited to his actual authority. *Bickford v. Menier*, 107 N. Y. 490, 14 N. E. 438. The plaintiff was, perhaps, chargeable with knowledge that the money was deposited in the name of his agent,—not, however, through constructive notice springing from the law of agency, but because he knew from inspection of the checks that they were made payable to the order of Monson. While this may not have been according to the agreement under which the plaintiff intrusted the money to his agent, still, as his object was to secure the liability of the defendants, as guaranteed by Monson, the receipt of the checks, purporting to have that effect, naturally gave him every assurance that a reasonable man could require. Having the precise security that he wanted, and that the agreement called for, it became a matter of no apparent importance whether the deposit was made in the one name or the other. He had what purported to be the

negotiable instruments of the defendants, payable on demand, for the amount of the deposits, and this apparently placed them under obligation to pay, regardless of the name of the depositor. Indeed, it was the most convenient way to have the checks drawn payable to Monson, because the plaintiff required his indorsement, and that form would make him liable as first indorser. At any rate, as the deposit was so made as to accomplish the object that the plaintiff had in view, he had the right to regard and treat it as a substantial performance of his contract with his agent. As knowledge of the secret agreement cannot be imputed to the plaintiff, he must, in view of the findings of the referee, when interpreted in the light of the undisputed evidence, be assumed to have acted in good faith. Upon this assumption, it remains to be seen whether the courts below were correct in holding that the checks had no greater validity in the hands of the plaintiff than they had while in the hands of Monson.

If Monson had simply deposited the money to his own credit, and had checked it out, the plaintiff would have had no claim upon the defendants. The loss would then have fallen on him. But it cannot be supposed that he would have continued to remit to Monson, unless the earlier remittances were satisfactorily accounted for, so that the loss would have been comparatively light. Monson, however, did account promptly for each remittance by sending the written obligations of the defendants, indorsed by himself. Those obligations were in the nature of cashier's checks, being drawn by the defendants, as bankers, upon themselves. As they were an essential part of Monson's scheme to defraud, it is natural that he should have suggested the form, but it is surprising that the defendants should have adopted it. They were not only negotiable upon their face, but their character was such as to make actual negotiation an easy matter, because they were payable on presentation at a bank, by the bank itself. No one who believed in the responsibility of the defendants, and who wanted paper of that kind for any purpose, would hesitate to purchase it in the open market. The defendants, having extreme confidence in Monson, took no precaution to restrict their liability for the double credit that they gave for the same deposit. If they had drawn the checks without words of negotiability, or had written "Not negotiable" across their face, it would have accomplished every purpose that Monson claimed to have in view, and at the same time would have protected third persons from imposition and injury. As memoranda, the checks would have been as useful in either of those forms as in that adopted. By action as imprudent as it was unprecedented, the defendants placed it in Monson's power to defraud. The form of the transaction invited fraud, by making it

so easy, and it is not surprising that they hesitated and remonstrated before they did it. They thus, in effect, paid the deposit back to Monson, and at the same time gave him their negotiable paper for it, trusting only to his word. Armed with this means of defrauding, thus knowingly intrusted to him by the defendants, Monson from time to time delivered the checks to plaintiff, in fulfillment of his contract, under such circumstances as could arouse no suspicion. He delivered every check as negotiable paper, with the character and quality that the defendants, over their own signatures, asserted that it had. The plaintiff received it as such, in the honest belief that it was the product of his money deposited with the defendants according to his contract with Monson, and that no one could draw the money out without presenting the checks. There was no occasion for suspicion, and nothing to put a prudent man on inquiry. It was in the usual course of business, for it cannot be termed unusual for an agent to make a deposit for his principal, and remit to him the evidence of that deposit in the form of negotiable paper, such as a cashier's check, a certificate of deposit, or the check of private bankers upon themselves. He treated the instruments as genuine, and why should he not, since the defendants issued them in such a form as to induce the most careful to believe in their genuineness? They had never been presented or dishonored, and he received them as soon after the dates they respectively bore as the ordinary course of transacting such business by mail would permit. The fact that the plaintiff held them so long without presentation has no bearing, except on the question of good faith, and is fully explained by the agreement made between him and his agent. No check was stale when it reached the plaintiff, and the title that he acquired as each was delivered, if good then, continued to be good. He gave full consideration, dollar for dollar, not by concurrent delivery, hand to hand, but by the nearest approach to it that was practicable under the circumstances. The business was done substantially through the mails. It was initiated by a general agreement that Monson should deposit all moneys intrusted to him by the plaintiff with the defendants, and remit to him their checks therefor, indorsed by himself. Under this agreement the plaintiff, from time to time, mailed checks and drafts to Monson, who deposited the proceeds with the defendants, and received their check therefor, which he indorsed and promptly mailed to the plaintiff. This method of doing business, although perfectly legitimate, did not admit of delivery by the right hand and receipt by the left. In the nature of things, there could not be mutual delivery, precisely identical in point of time, when there were three parties to every transaction, each at a distance from the others. We think that the

plaintiff parted with his money on the strength of the checks, although they were not in existence at the time, as there was an agreement which, in the natural course of events, promptly brought them into existence, and placed them in his hands. If it had not done so, he could have reclaimed his money, to the extent that it had not reached the possession of bona fide holders. *Roca v. Byrne*, 145 N. Y. 182, 39 N. E. 812. The assurance conveyed by the checks naturally prevented any effort at reclamation. Our conclusion is that, according to the record now before us, the plaintiff is a bona fide holder of the checks in question, and entitled to recover the amount thereof on that ground. This makes it unnecessary to apply the principle that, where one of two innocent parties must sustain a loss from the fraud of a third, such loss shall fall upon the one whose act enabled such fraud to be committed. *Moore v. Bank*, 55 N. Y. 41, 47. The judgment should be reversed, and a new trial granted, with costs to abide event. All concur, except HAIGHT, J., not sitting. Judgment reversed.

(151 N. Y. 143)

UPINGTON v. CORRIGAN et al.

(Court of Appeals of New York. Dec. 1, 1896.)

DEVISABLE INTEREST IN LAND — RIGHT OF RE-ENTRY FOR BREACH OF CONDITION SUBSEQUENT — CONDITION IN DEED.

1. The right of a grantor to re-enter for breach of a condition subsequent is not an "estate or interest in real property descendible to heirs," within 2 Rev. St. p. 57, § 2, making such estate devisable, but, on the grantor's death, passes to his heirs, to be exercised by them as decedent's representatives, and not by virtue of the law of descent. 29 N. Y. Supp. 1002, affirmed.

2. In a conveyance of land, "to have and to hold * * * unto the said party of the second part, his heirs and assigns," etc., a condition that the grantee "shall consecrate, or cause to be consecrated," the property, for the purpose of erecting a church, is not personal to said grantee, but binds his heirs and assigns, though they are not mentioned in the condition.

Appeal from supreme court, general term, First department.

Ejectment by Marie T. Upington against Michael A. Corrigan and others. From a judgment of the general term (29 N. Y. Supp. 1002) affirming a judgment for plaintiff, defendant Corrigan appeals. Affirmed.

This was an action of ejectment to recover the possession of certain lands in the Twenty-Third ward of the city of New York. In 1862 they were owned by Mary McDonough Davey, who, on the 19th day of September in that year, conveyed them, for a nominal consideration, to Rev. John Hughes, by deed containing full covenants and warranty, with this habendum clause and condition, viz.: "To have and to hold * * * unto the said party of the second part, his heirs and assigns, * * * upon the following conditions, to wit: That said party of the sec-

ond part shall consecrate, or cause to be consecrated, the said property, for the purpose of erecting a church building, and shall, within a reasonable time, erect, or cause to be erected, such building." Reservation was also made by the party of the first part of the right to appropriate, at her option, a sufficient place of interment for her deceased husband, her family, and herself, in the ground under the church building, or outside thereof. Subsequently Mrs. Davey, the grantor in the said deed, died, leaving a will, made January 6, 1862, wherein she disposed of her estate, real and personal, and gave to the residuary legatee, therein named, all property and estate, real and personal, not effectually and lawfully disposed of therein. The Reverend John Hughes, grantee in Mrs. Davey's deed, died, and the defendant Archbishop Corrigan has succeeded to his interest. The plaintiff and the defendant Pooler are the only heirs at law of Mrs. Davey, and the plaintiff's claim to recover the possession of the premises described in the deed to Hughes is based upon the breach of the express condition set forth in the deed. The trial judge found, as facts, that up to the time of the commencement of this action the property had not been consecrated for the purpose of erecting a church building, that no church building had been erected thereupon, and that, at the date of the deed, a reasonable time for such erection did not exceed 10 years. This action was commenced in 1891, or about 29 years after the execution of the deed. The plaintiff was awarded judgment at the trial term, and, that judgment having been affirmed at the general term, the defendant Corrigan has appealed from its affirmance to this court.

Frederic R. Coudert, for appellant. James M. Hunt, for respondent.

GRAY, J. (after stating the facts). The question which this appeal presents is both interesting and important, and its answer turns upon the construction to be given to the provisions of our statute of wills. I think, too, that there have been certain decisions made by the courts of this state upon the general question, the effect of which it would be very difficult to overlook, however much inclined we might feel to differ in our reasoning. The question is, can the plaintiff, claiming as heir at law of Mrs. Davey, maintain this action to recover the possession of the premises in question for the breach of the express condition in her grant; or has such a right passed, under Mrs. Davey's will, to her residuary legatee? The learned counsel for the appellant has argued, with ability and with force, against the plaintiff's right; and the contention which he makes is that an interest remained in the grantor, which, being descendible to her heirs, was made devisable by the Revised Statutes, and therefore passed under

her will. If it is true that the plaintiff must rest her right to enter for breach of the condition upon the descent of some estate or interest left in the grantor, then, I think, the appellant's contention is right, and this action should fail; but if, on the other hand, and as argued for the respondent, the plaintiff has the right to enter, not through the operation of the law of descent, but merely representatively, as heir at law, and the rule at common law has not been changed by our statutes, then, I think, we will find ourselves obliged to conclude that the devisee of Mrs. Davey was incapable of possessing a right of entry, and that it belonged solely to her privies in blood.

At common law, the benefit of such a condition in a grant of real estate could be reserved only to the grantor and his heirs. It was not considered to be a devisable interest in the grantor, and the right of re-entry for a breach could not be assigned to a stranger. It was a nonassignable right, and no other person than the grantor, or his heir, could take advantage of a condition which required a re-entry in order to re-vest the former estate. See 4 Kent, Comm. pp. 122, 127; Jackson v. Topping, 1 Wend. 388, 395; Goodright v. Forrester, 8 East, at page 566. The reason quaintly given in Lord Coke's Institutes was that, "under color thereof, pretended titles might be granted to great men, whereby right might be trodden down, and the weak oppressed, which the common law forbiddeth, as men to grant before they be in possession." Co. Litt. § 347. In Greenleaf's Cruise on Real Property (volume 1, tit. 13, c. 1, § 15), the reason of the rule is thus given: "That it is a maxim of law that nothing which lies in action, entry, or re-entry can be granted over, in order to discourage maintenance." Whatever criticisms may be made upon the reasons for the rule at common law, it must be recognized as a continuing rule of property, if not changed or done away with by the Revised Statutes. The effect of section 17 of article 1 of the state constitution was to retain so much of the common law of England as formed the law of the colony of New York on the 19th day of April, 1775, where not repugnant to our form of government, or inapplicable to our institutions, and subject to such alterations as the legislature should from time to time make. The appellant, feeling bound to concede that the right of re-entry was not devisable at common law, claim that the Revised Statutes have altered the law by the provision that "every estate and interest in real property descendible to heirs may be devised." 2 Rev. St. p. 57, § 2. Undoubtedly, this language of the statute of wills is as comprehensive as it can be to cover real interests; but we are remitted, nevertheless, to the inquiry whether, here, what the grantor had, with reference to the estate she had granted, amounted in law to an estate or interest in the real property,

and therein lies the difficulty. At common law it was only a possibility of reverter, and not a reversion. 4 Kent, Comm. 370; *Martin v. Strachan*, 5 Term R. 107, note. Until the happening of the breach of the express condition in the deed and a reversion of the estate through re-entry, the whole title was in the grantee. Have the Revised Statutes changed the grantor's status? In volume 4 (8th Ed.), c. 1, pt. 2, of the Revised Statutes, upon the nature, qualities, and alienation of estates in real property, article 1 of title 2 creates various estates in lands, and divides them into those in possession and in expectancy. The latter class is again divided—First, into future estates limited to commence in possession at a future day, either without the intervention of a precedent estate, or on the determination of a precedent estate; and, second, into reversions, which latter are defined to exist where the residue of an estate is left in the grantor, or his heirs, commencing in possession on the termination of a particular estate granted. By section 35 of the same article, it is also provided that "expectant estates are descendible, devisable and alienable in the same manner as estates in possession." If, therefore, there was any estate left in Mrs. Davey, upon her grant to Hughes, it was not one known to our statute on real property; and all expectant estates, within which class it would have to fall, are abolished by the article, except such as are therein defined, and which must be either estates limited to commence in possession at a future day, or reversions. The real interest contended for here would not satisfy the requirement of either class. The mere possibility of reverter, which was all there was in this case, could not be included within the "reversions" spoken of by the statute, within its letter or spirit. The statute of wills, through the use of such precise words as "every estate and interest in real property descendible to heirs," obviously, must have reference to such as are recognized by the Revised Statutes to be estates of inheritance. We would be without warrant in asserting the existence of any estate in Mrs. Davey in the premises granted to Hughes, whether at common law or under the Revised Statutes. She had an election to enter for condition broken, and she could release her right to do so. To those rights her heirs, after her decease, succeeded, by force of representation, and not by descent. There was no estate upon which the statute of descents could operate; but, as heirs, there devolved upon them the bundle or aggregate of the rights which resided in and survived the death of the grantor, their ancestor. Her legal personality was continued in them.

An early and leading case in this state is that of *Nicoll v. Railroad Co.*, 12 N. Y. 121. That was in ejectment, where the plaintiff sought to recover the possession of certain lands for breach of the condition upon which

they had been granted by one Dederer to the railroad company. The plaintiff, through sundry mesne conveyances, claimed to have acquired the rights of Dederer in the premises. I think that the case fairly presented the question which is involved in the present case, for the right of entry, if assignable by a grantor upon condition at all, could as effectually be assigned through deed as through a testamentary devise. It was held that the grantee in the original deed of the lands took a fee upon condition subsequent, and the discussion turned upon whether the grantor in that deed, when he subsequently conveyed to the plaintiff's predecessor in interest, had any assignable interest in the premises. That question was answered in the negative, there having been no forfeiture. It was said that "a mere failure to perform a condition subsequent does not divest the estate. The grantor or his heirs may not choose to take advantage of the breach, and, until they do so, by entry, or by what is now made by statute its equivalent, there is no forfeiture of the estate. This was the common law, and it has not been altered by statute, so as to give a right of entry to an assignee, in any instance, not coupled with a reversionary interest, as in the case of estates for years and for life, except in cases of leases, or rather of grants in fee, reserving rent." After speaking of the change made in England by 32 Hen. VIII. c. 34, and in our Revised Statutes, which permitted the assignment of a right of entry in case of grants, or leases in fee reserving rents, and of leases for lives or for years, the opinion continues: "There was a reason for the statutory change in the particular cases mentioned, for in them the grantor had an interest independent of the possibility of reverter. * * * But where a fee simple, without a reservation of rents, is granted upon a condition subsequent, as in this case, there is no estate remaining in the grantor. There is simply a possibility of reverter, but that is no estate. There is not even a possibility coupled with an interest, but a bare possibility alone." The question is then considered whether the grantor in the deed to the railroad company might have had an expectant estate under the Revised Statutes, and it was held that the statute has furnished a definition of the term "expectant estates," which shows that they are not in the least applicable to such a case. It was observed that, though "they include every present right and interest, either vested or contingent, which may by possibility vest at a future day, yet they do not include the mere possibility of a reverter, which the grantor has after he has conveyed in fee on condition subsequent." *Underhill v. Railroad Co.*, 20 Barb. 453, was in ejectment, to recover land which had been granted to the defendant upon condition subsequent. Subsequently to the conveyance to the railroad company, the gran-

tor therein made a deed to the plaintiff of "the lands, premises, covenants, and conditions, rights of action, interest," etc., growing out of the first deed and its covenants. Allen, J., speaking for the court, followed the authority of the Nicoll Case, and said: "I come to the conclusion that the effect of the omission to perform the condition by the defendant was to give the grantors, or, in case of their death, their heirs, the right of entry, but that no action can be maintained by the assignee to recover the land, whether the breach was before or after the assignment, and that the court was therefore right in so holding at the circuit." In *Fonda v. Sage*, 46 Barb. 109, Johnson, J., said, with respect to a condition subsequent in a deed: "It seems to be well settled, upon abundant authority, that a condition in a conveyance can only be reserved for the benefit of the grantor of the estate and his heirs, and that no stranger can take advantage of the breach of a condition." He cites various authors and the Nicoll Case, and observes that "until re-entry by the grantor, or his heirs, the estate is not forfeited, but remains in the grantee." In *Towle v. Remsen*, 70 N. Y., at page 312, it was held, upon the authority of the Nicoll Case, that the interest of a grantor upon condition subsequent is a mere possibility of reversion, incapable of assignment. "There is no interest to assign before the breach, and after that the right of entry is not capable of being transferred." So lately as in *Vall v. Railroad Co.*, 106 N. Y., at page 287, 12 N. E. 608, it was said by the present chief judge that, "when a conveyance in fee is made upon a condition subsequent, the fee remains in the grantee until breach of condition and a re-entry by the grantor." And, again, "There are no words limiting the estate conveyed, or which rebut the statutory presumption that the grantors intended to convey all their estate in the land. The possibility of reverter, merely, is not an estate in land, and, until the contingency happens, the whole title is in the grantee." The deed in that case was assumed, for the purpose of the expressions, to convey upon a condition subsequent. *Jackson v. Varick*, 7 Cow. 238, to which our attention is called, is not in point, for the question involved was expressly stated to be "whether the owner in fee can devise land which, at the time of the devise, and of his death, is in the adverse possession of another; * * * whether a person having a right of entry in fee simple shall be said to have an estate of inheritance in lands, tenements, or hereditaments, in the language of our statute of wills." The discussion turned upon the question of seisin, and it was held that the ancestor was seised, although there might have been an adverse possession, and that his right of entry was devisable, within the statute of wills. In a case arising in the courts of the state of New Jersey, the com-

mon-law rule in question was considered in language which I shall quote. That was the case of *Southard v. Railroad Co.*, 28 N. J. Law, at page 21, and it was said: "If, however, the evidence had clearly established a breach of the condition, and a consequent forfeiture of the estate, the plaintiff could not have availed himself of the forfeiture. She claims, not as heir, but as devisee of the grantor. She is a privy in estate, and not a privy in blood. It is a rule of the common law that none may take advantage of a condition in deed but parties and privies in right and representation, as the heirs of natural persons and the successors of politic persons, and that neither privies, nor assignees in law (as lords by escheat), nor in deeds (as grantees of reversions), nor privies in estate (as he to whom the remainder is limited), shall take benefit of entry or re-entry by force of a condition. *Shep. Touch. 149; Co. Litt. 214, a; Litt. § 347; Doct. & Stud. 161, c. 20; Perk. § 830; 4 Kent, Comm. 127; 2 Cruise, Dig. c. 2, § 49.*" See, also, upon this subject, *Schulenberg v. Harriman*, 21 Wall. 44, and *Ruch v. Rock Island*, 97 U. S. 693.

In this case, as it is in every case of a deed of the fee upon condition subsequent, the grantor parted with every interest and estate in the real property conveyed. That was her intention, within the legal presumption from the terms of the deed, and it was also the legal presumption that the condition would be performed by the grantee. That which the grantor retained was never regarded as an interest in real property, or as an assignable chose in action, and cannot be deemed such through any construction of our statute. Until the law is changed by some legislation, it must be regarded as still the settled rule that no one can take advantage of the breach of a condition subsequent, annexed to the grant of a fee, but the grantor or his heirs, or, in the case of an artificial person, its successors. Every estate and interest formerly enjoyed by the grantor were vested by the deed in the grantee. He undertook and agreed to perform the condition which is annexed to the grant, and the presumption was that he would perform. If he, or those who succeeded in interest, failed to do so, within a reasonable time, then it became optional with the grantor to enter for a breach of the condition, and to have a forfeiture of the estate declared. The grantor having died, the right to insist upon a forfeiture for breach of the condition remained in the heir, as the person who occupies the place of the deceased.

The further point is made by the appellant that, if the clause in the deed to Hughes created a condition subsequent, it could not be broken after his death, as there was no mention therein of his heirs, executors, or assigns. I do not think, upon reading the whole of the habendum clause in the deed, that we can say that the condi-

tion amounted only to a personal covenant with the grantor. The language is, "To have and to hold the * * * premises * * * unto the said party of the second part, his heirs and assigns, to his and their own proper use, etc., forever, upon the condition following, to wit: That said party of the second part shall consecrate, or cause to be consecrated, the said property, for the purpose of erecting a church building," etc. The intention seems plain that the conveyance of the estate was upon condition, and I do not think that the construction is permitted that it was a mere covenant on the part of the grantee, personal to him. The condition was one which, in its nature, was so annexed to the conveyance by the deed as to qualify it. 2 Washb. Real Prop. p. 455. The language does not provide that the party of the second part alone shall consecrate, but that he shall cause to be consecrated, the property; and therefore it was within his power, if he did not do so himself, to provide, in any disposition which he made of it, that his successors in interest should do so. They took the estate with knowledge of the condition affecting its title, and cannot complain if bound by it. It seems to me that the natural and ordinary interpretation of the habendum clause is to create a condition subsequent, as the effect of which, in case of a failure to perform it, within a reasonable time, on the part of Hughes, or his heirs or assigns, the estate granted might be defeated, at the option of Mrs. Davey or her heirs. The language of the clause is not merely descriptive of the consideration upon which the deed was given, but qualified the conveyance to the extent or in the manner named. Considering the purpose of the grant by Mrs. Davey, we could not, with reasonableness of construction, say that the condition she imposed was merely personal to Archbishop Hughes.

A careful consideration of these questions, and no others require discussion here, must lead us to the conclusion that the appeal cannot be sustained. The judgment should be affirmed, with costs. All concur. Judgment affirmed.

(151 N. Y. 70)

WHALEN v. CITIZENS' GASLIGHT CO.

(Court of Appeals of New York. Dec. 1, 1896.)

CONTRIBUTORY NEGLIGENCE—BURDEN OF PROOF—EVIDENCE.

1. In an action to recover for personal injuries, the absence of contributory negligence on plaintiff's part must be affirmatively shown by him.

2. Evidence that plaintiff, a woman, 70 years old, with good eyesight, and with nothing to obstruct her view, was injured on a clear day by stumbling over a flagstone four feet long by three feet wide, which a gas company had taken up and placed on an adjoining part of the walk for the purpose of laying a pipe, is insufficient to show want of contributory negligence. 30 N. Y. S. 1077, reversed.

3. Where a gas company, for the purpose of laying a pipe, has made two excavations in a sidewalk, placing a large flagstone taken from one of them on an adjoining portion of the walk, and leaving an unobstructed space of five feet for the passage of pedestrians, a person who, seeing such stone, voluntarily attempts to pass over it, instead of going through the clear space, assumes the risk of injury. 30 N. Y. S. 1077, reversed.

Appeal from city court of Brooklyn, general term.

Action by Ann Whalen against the Citizens' Gaslight Company. From a judgment of the general term (30 N. Y. Supp. 1077) affirming a judgment for plaintiff, defendant appeals. Reversed.

Frank Sullivan Smith, for appellant. Isaac M. Kapper, for respondent.

HAIGHT, J. This action was brought to recover damages for a personal injury. On the 12th day of September, 1893, the defendant was engaged in laying a gas pipe across the sidewalk in Court street in the city of Brooklyn, connecting its gas main in that street with the premises on the northeast corner of Court and Sackett streets. For this purpose it had obtained the consent of the city authorities for the removal of the flagstones of the sidewalk in order to dig a trench in which to lay the pipe. At the time of the accident complained of it had caused a flagstone next to the building to be removed, and another flagstone, four feet two inches in length by three feet four inches in breadth, and between three and four inches in thickness, in the center of the walk, to be taken up and placed upon an adjoining flagstone upon the walk, and its employes were engaged in digging a pit next to the house, intending to tunnel through the intervening space, so as not to necessitate the removal of any more of the sidewalk. The space between the two openings undisturbed was about five feet. While the walk was in this condition the plaintiff approached, tripped her foot upon the flagstone that had been removed, fell upon it, and sustained the injury for which this action was brought. It was about a quarter before 11 o'clock in the forenoon, and was a nice day. She was about 70 years of age, and had been engaged in doing general housework and sewing, and used to go out to wash, iron, and clean house. She testified that her eyesight was very good, and that she did not notice the flagstone, or the excavation beside it, as she came near the place where she fell; that she was looking along the street as she walked.

It is the well-settled law of this state that, in actions of this character, the absence of negligence on the part of the plaintiff contributing to the injury must be affirmatively shown by the plaintiff, and that no presumption of freedom from such negligence arises from the mere happening of an injury. Reynolds v. Railroad Co., 58 N. Y. 248; Weston v. City of Troy, 139 N. Y. 281, 34 N. E.

780. If this law is to be recognized and followed, we are unable to see how this judgment can be sustained, for to hold otherwise would practically overrule and annul the rule of contributory negligence. As we have seen, it was a bright day, and about 11 o'clock in the forenoon. The obstacle over which the plaintiff fell was a large flagstone over four feet in length and three in breadth. There was nothing to obscure her vision; her eyesight was good, and she could see as she was walking along the walk. It is not pretended that anything occurred that momentarily obstructed her vision, and it is difficult to conceive how she could have avoided seeing the obstacle unless she was heedlessly proceeding in utter disregard of the precautions usually taken by careful and prudent people. To our minds the negligence here is greater than that of the plaintiff in the *Weston Case*, supra. In that case the plaintiff stepped upon a ridge of ice which was partially covered with snow. *Andrews, C. J.*, in delivering the opinion, says: "Whether the plaintiff saw the ridge before stepping upon it does not appear. Nor was it shown whether she was walking fast or slow, or what attention she was paying, if any, to the condition of the sidewalk. If she discovered the ridge, she was not required to leave the sidewalk, but she might, without being subject to the charge of negligence, using due care and prudence, have kept on her way. But she could not heedlessly disregard the precautions which the obvious situation suggests, and proceed as if the sidewalk was free and unobstructed. The presumption which a wayfarer may indulge, that the streets of a city are safe, and which excuses him from maintaining a vigilant outlook for dangers and defects, has no application where the danger is known and obvious." See, also, *Beltz v. City of Yonkers*, 148 N. Y. 67, 42 N. E. 401, and cases there cited.

At the conclusion of the case the court was asked to charge that if the plaintiff saw the obstruction, and voluntarily and unnecessarily attempted to pass on the outside by stepping over the stone instead of inside, where a safe passage was left, she cannot be regarded as having exercised ordinary prudence, and she did so at her own risk. The sidewalk at this place was upward of 18 feet wide. The unobstructed space between the two openings in the walk was at least 5 feet. There was no difficulty in the plaintiff's passing through this unobstructed space without injury. If she saw the obstruction, and voluntarily stepped upon it or attempted to pass over it, and, in doing so, fell, we fail to see why she did not assume the risk. It is perfectly evident that the passing over the stone was unnecessary, and that it required but a step or two to one side in order to have the walk entirely unobstructed. The judgment should be reversed, and a new trial granted, with costs to abide the event. All concur. Judgment reversed.

(151 N. Y. 117)

TALBOT v. CRUGER et al.

(Court of Appeals of New York. Dec. 1, 1896.)

FIXTURES—RIGHT OF REMOVAL BY TENANT—RESERVATION OF OWNERSHIP.

1. A tenant of lands purchased at execution sale certain buildings erected on the lands by a former tenant. The tenant subsequently took a lease of the land, without reserving her rights in the buildings. *Held*, that her ownership in the buildings was thereby terminated, precluding her from maintaining an action against the owner of the land for fraudulently inducing her to surrender possession of the buildings. 30 N. Y. Supp. 1011, affirmed.

2. In such case, evidence as to the arrangement between the former tenant and the owner of the lands as regarded the buildings was properly excluded as immaterial.

Appeal from supreme court, general term, First department.

Action by Mary Talbot against Stephen V. R. Cruger and others. A judgment for defendants having been affirmed by the general term (30 N. Y. Supp. 1011), plaintiff appeals. Affirmed.

For former report, see 25 N. Y. Supp. 285, 30 N. Y. Supp. 1011.

J. Baldwin Hands, for appellant. Henry H. Man and Stephen Philbin, for respondents.

GRAY, J. The plaintiff seeks to recover damages, which she claims to have sustained "through the fraud and deceit of the defendants in procuring from her a surrender of her house by falsely representing to her that the paper they presented to her for execution, and which she signed, was a lease of the land on which the house stood." The defendants are the agents of a former owner of the land and a purchaser of the land at a judicial sale. The plaintiff, in her complaint, alleged that by agreement with Mrs. Field, in August, 1888, she became a tenant from year to year of certain lands in New York City, at a certain yearly rental, and that at the same time she became the owner, by purchase at an execution sale, of certain buildings which had been placed upon the lands by a former tenant. It seems that in May, 1881, and as the result of certain judicial proceedings, the lands were directed to be sold, and were purchased by defendant Coffey. Coffey, finding the plaintiff in occupation, and claiming to own the buildings, complained to the defendants Cruger & Co., who had been the agents of Mrs. Field, and they endeavored at first to get a lease from Coffey to plaintiff, and, not succeeding in that, then obtained the signature of plaintiff to a writing, surrendering her house for the compensation of \$25. She says she was unable to read the paper, and did not have its real purport made known to her, and supposed she was signing a new lease of the property. She elects to affirm the transaction, however; but insists upon her right to maintain her action for damages, upon the ground that by the fraudulent devices of the defendants she was cheated out of that which was her personal property.

This appeal must be determined by the question of whether the plaintiff had any property in the buildings upon the land, and for that we are limited to the case. They consisted in a house, shed, closet, and fence, and under the general rule would partake of the incidents and properties of realty. That is the general maxim of the law, and, if there be an agreement with the owner of the land, by which the tenant's distinct ownership of the buildings is recognized, and his right to remove them conceded, it must, of course, be proved by him. The legal presumption based upon the rule must be disproved by affirmative evidence on the part of the tenant. The right of a tenant to remove fixtures erected for trade is conceded to him for reasons of public policy, and, being in the nature of a privilege, it must be exercised before the expiration of the term, or before he quits possession. If the right to remove other fixtures exists by virtue of some agreement, then it must be exercised in like manner. By entering upon a new lease, in which the tenant's rights are not reserved, the rights which may have existed under the former tenancy are determined; and this is true even where there is a continuous holding of the premises, but not under the same lease. A tenant may remain in possession after the old lease has expired; but, unless he reserves the right under the new lease to remove the fixtures upon the land, the right will be deemed to have been abandoned, and they will become the property of the landlord. *Tayl. Landl. & Ten.* §§ 551, 552; *Loughran v. Ross*, 45 N. Y. 792; *Watris v. Bank*, 124 Mass. 571. In this case the plaintiff claims to have become the owner of the buildings by purchase, and that through an arrangement between Hyland, who had erected them, and Mrs. Field, the then owner of the land, it was agreed that they should be and remain Hyland's personal property, and subject to his right to remove them. Assuming these facts to be true, there is the difficulty that the plaintiff did not prove that she herself made any agreement with the landowner, when she became the tenant of the premises. Hyland or the plaintiff very possibly may have been entitled to exercise the right of removal before the expiration of Hyland's tenancy; but it would not necessarily follow, when the plaintiff went into possession under a lease from the landowner, that that right continued in force. It was incumbent upon her to establish that she had made some arrangement with Mrs. Field, which conceded to her such interests and rights of ownership in the buildings as would authorize her to claim them as her distinct property, and to remove them from the land while her tenancy lasted. There is no evidence as to the terms of the plaintiff's tenancy under Mrs. Field, and, even if *Cruger & Co.*, who acted as Mrs. Field's agents, regarded or treated the plaintiff as the owner of the buildings, that does not prevent them from objecting thereafter that she was not, and that she was bound to prove the fact in such an action as this. The case comes

down to this: that, although the plaintiff at some prior time had become the owner of the buildings, she did not show that by the terms of the lease of the land to her, or by any agreement she made with the lessor, her rights were saved from the operation of the general rule, which vests in the owner of the land the property in fixtures not removed before the expiration of the term, or the surrender of possession; and that, during her own yearly tenancy, she at all times remained the owner of these buildings, and had the right to remove them as her property. In the absence of such proof, the plaintiff was in no position to assert this claim for damages. Unless she owned the buildings, which she says the defendants, by fraudulent devices, induced her to surrender possession of, she could not be damaged by what they did in the matter. In this view of the case, the direction of a verdict for the defendants was correct. There was no foundation for a recovery by the plaintiff.

The principal assignment of error in the rulings of the trial judge was with respect to his exclusion of evidence to show what was the arrangement between Hyland, who, when tenant, put up the buildings in question, and the then agent of Mrs. Field. Assuming that the arrangement comprehended his right to remove the buildings, that fact would not aid the plaintiff. The material fact for her to prove, in order to establish that she had an interest in the buildings, which had not been lost, was that she had made an arrangement with the owner of the land which preserved to her the right of removal. It was immaterial what Hyland had the right to do, as long as he had not exercised it, or if it had not been extended to her. No other question demands further consideration and, for the reasons given, the judgment should be affirmed, with costs. All concur. Judgment affirmed.

(151 N. Y. 120)

VAN TASSEL v. GREENWICH INS. CO. OF
CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 1, 1896.)

INSURANCE—RENEWAL OF POLICY—BINDING SLIP
—CANCELLATION—WAIVER OF RENEWAL
—PLEADING AND PROOF.

1. An insurance company, having issued a "binding slip" continuing a policy in force for another year, subsequently wrote to the assured, informing him that unless he would consent to reduce the amount of the policy it would be considered canceled. *Held*, that the letter did not constitute a cancellation of the policy. 25 N. Y. Supp. 301, affirmed.

2. An insurance company issued a "binding slip" continuing in force for another year a policy for \$10,000. Subsequently, the company wrote to the insured, informing him that unless he would consent to reduce the amount to \$5,000 it would be considered canceled. The insured did not reply to the letter, and, a week later, loss occurred. The insured made proof of loss and claim for only \$5,000, but referred specifically to the "binding slip" as the contract upon which he relied. Payment being refused, the insured brought action to recover \$5,000 under the policy. *Held*, that plaintiff, by limiting his demand to \$5,000, did not waive

his rights under the "binding slip." 25 N. Y. Supp. 301, reversed.

3. The fact that under the policy and binding slip the insurance was for \$10,000, while the demand is for only \$5,000, does not constitute a variance between the pleading and the proof fatal to plaintiff's right of recovery.

4. The acts of the insured in limiting his proof of loss and his claim to \$5,000 cannot be construed as an election to abandon the existing insurance under the "binding slip," and to sue upon the offer of reduced insurance, which he never accepted. 25 N. Y. Supp. 301, reversed.

Appeal from supreme court, general term, First department.

Action by Emory M. Van Tassel against the Greenwich Insurance Company of City of New York. From a judgment of the general term, First department, affirming a judgment dismissing the complaint (31 N. Y. Supp. 1134, mem.), the plaintiff appeals. Reversed.

For former report, see 25 N. Y. Supp. 301, and 31 N. Y. Supp. 1134, mem.

George Richards, for appellant. Henry Galbraith Ward, for respondent.

BARTLETT, J. This is an action to recover \$5,000 on a contract of fire insurance covering the premises of plaintiff in the city of New York. The case has been twice tried. At the first trial a verdict was directed in favor of the plaintiff. The general term reversed the judgment (72 Hun, 141, 25 N. Y. Supp. 301), and on the second trial the complaint was dismissed at the close of plaintiff's case. The general term sustained this ruling. The defendant insured the premises in question for \$10,000 January 1, 1889, for a year. This policy was duly renewed until January 1, 1891, and at the latter date the plaintiff received a further renewal for another year in the form of a binding slip. On the 7th of January, 1891, a week after this renewal took effect, defendant addressed a letter to plaintiff's brokers, as follows, viz.: "Your application for renewal of insurance for E. M. Van Tassel at N. E. cor. 13th Ave. and West 11th street is declined for \$10,000; would renew for \$5,000 if wanted. You will therefore consider that the risk is not held binding by this company for more than \$5,000." No reply was made to this communication, and the premises were destroyed by fire six days later, on the night of January 13, 1891. On the first appeal to the general term it was held that the policy was renewed by the binding slip; that the letter quoted was not effectual as a cancellation, but was a mere proposition for a reduction; that, had the plaintiff stood on the original contract, he could have recovered \$10,000; that the plaintiff elected to consider the original policy at an end; and that the letter did not create a new insurance, as its terms had not been accepted. 72 Hun, 141, 25 N. Y. Supp. 301. Under this decision the judge presiding at the second trial dismissed the complaint.

We agree with the learned general term, and approve its reasoning, to the effect that the letter quoted was not effectual as a cancellation, but was a mere proposition for reduced

insurance. We are unable, however, to concur in the view that the plaintiff elected to terminate the insurance under the binding slip. As the case now stands, it is only necessary to determine whether the plaintiff did elect to consider the insurance under the binding slip at an end, and thus deprive himself of any claim upon defendant, as it is not urged on his behalf that he had accepted the offer of reduced insurance. It may be regarded as a self-evident proposition that the plaintiff's rights are to be determined as of the date of the fire, in the absence of subsequent waiver; he was either insured at that time or he was not. If the policy was renewed by the binding slip, and defendant's letter of January 7, 1891, was not a cancellation, and the plaintiff did not respond to the offer for reduction of insurance, then it follows that the binding slip was in full force and effect at the time of the fire. It is quite unnatural that the plaintiff, after the fire, should have in any way waived his rights as against the defendant, and it ought not to be so held, except on a preponderance of evidence. The general term decided that the intention to treat the binding slip as of no effect was manifested by four distinct acts of plaintiff, all occurring after the fire, viz.: (1) By claiming that the defendant was liable for \$5,000 when he gave notice of the loss; (2) by tendering the premium on an insurance for \$5,000; (3) by filing proofs of loss for \$5,000; (4) by bringing this action for the recovery of \$5,000. In the notice of loss and in the letter tendering the premium the plaintiff made explicit reference to the binding slip through his brokers, as the contract upon which he relied. It is also claimed by plaintiff that the proofs of loss read in evidence referred to the binding slip as in force, although they are not printed in full in the record. Enough appears to show that the plaintiff, at the time of the fire, and shortly thereafter, proceeded upon the theory that he was insured under the binding slip, and no act of his prior to the fire is relied upon to prove that he elected to terminate that insurance. The fact that plaintiff, in his notice of loss, tender of premium, filing proofs, and bringing this action, limited himself to \$5,000, cannot be properly construed as a waiver of the insurance under the binding slip, or an effort to hold the defendant under its unaccepted offer of reduced insurance made in its letter of January 7, 1891. The defendant is not prejudiced if plaintiff sees fit to sue it for one-half of the amount justly due under its binding slip, which was in full force and effect at the time this action was begun; nor can it be successfully urged that there was a fatal variance between the complaint and the proofs, as we are of opinion that the action is based upon the binding slip, and limiting the demand for judgment to \$5,000 is not material. It must be admitted that this case presents a novel situation that is not fully explained by the evidence. The counsel for defendants insists that this action was obviously brought upon

the theory that its offer to carry \$5,000 on the risk had been accepted, thus assuming a new contract of insurance. The plaintiff's counsel argues that the former attorney for plaintiff, during all the steps leading up to the trial of this action in which he limited the demand to \$5,000, acted upon an erroneous assumption that the defendant, under its letter of January 7, 1891, had a legal right, under the terms of the policy, to compel a cancellation of its contract in part without the assent of plaintiff, but that, nevertheless, the complaint was based upon the binding slip. It comes to this, in the opinion of the learned general term: that the mere fact of plaintiff limiting his claim to \$5,000 in the various steps taken by him in this matter since the fire leads to the conclusion that he thereby elected to abandon the existing insurance under the binding slip, and sue upon an offer for reduced insurance made to him by defendant, which he had never accepted, and on which he could not possibly recover. We are of opinion that no such result followed the limitation of the claim to \$5,000, and that the complaint of the plaintiff was improperly dismissed. The judgment and order appealed from should be reversed, and a new trial ordered, with costs to abide the event. All concur, except VANN, J., not voting. Judgment and order reversed.

(151 N. Y. 122)

REICH v. COCHRAN.

(Court of Appeals of New York. Dec. 1, 1896.)

RES JUDICATA—JUDGMENT IN SUMMARY PROCEEDINGS AGAINST TENANT—REVIEW ON APPEAL—OBJECTIONS NOT RAISED BELOW.

1. A judgment by default, in summary proceedings to oust a tenant for nonpayment of rent, is conclusive, as to the existence and validity of the lease, in a subsequent action by the lessee against the lessor to have the lease declared a mortgage, and canceled for usury. 26 N. Y. Supp. 443, affirmed.

2. The validity or regularity of a former judgment pleaded in bar cannot be questioned for the first time on appeal.

Appeal from supreme court, general term, First department.

Action by Lorenz Reich against William F. Cochran to have a lease declared a mortgage, and to cancel the same as usurious. From a judgment of the general term (26 N. Y. Supp. 443) affirming a judgment dismissing the complaint, plaintiff appeals. Affirmed.

Delos McCurdy, for appellant. Treadwell Cleveland, for respondent.

MARTIN, J. On the 24th day of February, 1886, the trustees under the will of William B. Astor leased to the plaintiff premises in the city of New York known as the "Cambridge Hotel." Afterwards, and on or about the 1st day of May, 1887, the defendant loaned to the plaintiff several large amounts of money, to secure the payment of which the plaintiff gave him his bonds, and executed to him mortgages upon such lease. On the 1st day of February,

1888, the plaintiff assigned the Astor lease to the defendant, and thereupon the defendant made and executed a sublease of the premises to the plaintiff. The purpose of this action was to procure an adjudication to the effect that the lease from the defendant to the plaintiff was in fact intended as a mortgage, that it was usurious, and that the assignment by the plaintiff to the defendant, and the lease from the defendant to the plaintiff, should be delivered up and canceled, upon the ground of such usury. On August 1, 1893, the sum of \$13,250 rent became due to the defendant, according to the terms of the lease between the parties, which was not paid. The defendant subsequently commenced summary proceedings in the district court of the city of New York in the district in which the premises are situated to dispossess the plaintiff for nonpayment of rent. Upon the return day of the precept the plaintiff herein appeared by attorney. No answer was interposed, and this defendant had judgment, and a warrant issued, but was stayed until the following day, when the plaintiff paid the amount of the judgment. The defendant subsequently served a supplemental answer in this action, setting up the foregoing proceedings and judgment as a defense herein. On the trial a certified copy thereof was introduced in evidence, and a motion was made on the pleadings to dismiss the complaint, when the following stipulation was made in open court: "For the purposes of this motion it is conceded that, in August last, a proceeding was instituted in the Sixth judicial district court in the city of New York, whereby this defendant sought to dispossess the plaintiff, on the ground that there was a certain amount of rent due under the lease that is set up in the complaint, and that such proceedings were had on the 17th of August, 1892, [that] a judgment was entered, in favor of the petitioner, that said petitioner have possession of the premises therein described by reason of the nonpayment of the tenant's rent, and that a warrant issue to remove the said tenant and all persons from the said premises, and to put the petitioner in full possession thereof; that, subsequently, this plaintiff paid the amount stated in the petition as claimed to be due for rent." After the stipulation, the motion to dismiss the complaint was granted, on the ground that the judgment in the summary proceedings was an adjudication that the relation of landlord and tenant existed between the parties, and that there was a valid lease of the premises described in the complaint from the defendant to the plaintiff, and that, therefore, the plaintiff was estopped thereby from questioning the existence of that relation or the existence of a valid lease.

The correctness of that ruling is challenged by the appellant, and presents the only question involving the merits of this controversy. An examination of the allegations of the petition, and the stipulation of the parties made on the trial, renders it obvious that the judgment entered in favor of the defend-

ant in the New York district court for the removal of the plaintiff as tenant involved a direct adjudication between the parties that they occupied the relation of landlord and tenant, and that the lease from the defendant to the plaintiff was valid. A judgment taken by default in summary proceedings by a landlord for nonpayment of rent is conclusive between the parties as to the existence and validity of the lease, the occupation by the tenant, and that rent is due, and also as to any other facts alleged in the petition or affidavit which are required to be alleged as a basis of the proceedings. *Brown v. Mayor*, 66 N. Y. 385; *Jarvis v. Driggs*, 69 N. Y. 143; *Nemetty v. Naylor*, 100 N. Y. 562, 3 N. E. 497. To authorize a judgment to remove a tenant holding over, the conventional relation of landlord and tenant must exist, and, in such a proceeding, the tenant, under a denial of the facts upon which the summons is issued, may prove that the alleged lease was executed in pursuance of a usurious agreement, and is void, so that such relation does not exist. *People v. Howlett*, 76 N. Y. 574. The principle of the authorities cited seems decisive of the question under consideration. To establish the relation of landlord and tenant between the parties, and to entitle the defendant to a judgment in the summary proceedings, the existence of a valid lease, upon which rent was due from the plaintiff to the defendant, was necessary. The existence of such a lease was alleged in the petition, and not denied. No cause was shown before the district court why possession of the property should not be delivered to the petitioner. The plaintiff neither alleged nor attempted to prove that the lease was usurious, or invalid for any other reason. The questions whether the lease was intended as a mortgage, and, if so, whether it was based upon an usurious contract, could have been tried in the proceedings in the district court. The determination in that proceeding comprehended and involved every question relating to the validity of the lease and the relation between the parties, and the estoppel of the judgment extends to them, even though they were not litigated or considered in that proceeding. *Gates v. Preston*, 41 N. Y. 113; *Collins v. Bennett*, 46 N. Y. 490; *Blair v. Bartlett*, 75 N. Y. 150; *Dunham v. Bower*, 77 N. Y. 76; *Jordan v. Van Epps*, 85 N. Y. 427; *Griffin v. Railroad Co.*, 102 N. Y. 449, 7 N. E. 735; *Lorillard v. Clyde*, 122 N. Y. 41, 25 N. E. 292. The rule, as stated by *Andrews, J.*, in *Pray v. Hegeman*, 98 N. Y. 351, must be regarded as the general rule in this state governing the question of estoppel by judgment. In that case it was said: "The general rule is well settled that the estoppel of a former judgment extends to every material matter within the issues which was expressly litigated and determined, and also to those matters which, although not expressly determined, are comprehended and involved in the

thing expressly stated and decided, whether they were or were not actually litigated or considered. It is not necessary to the conclusiveness of a former judgment that issue should have been taken upon the precise point controverted in the second action. Whatever is necessarily implied in the former decision is, for the purpose of the estoppel, deemed to have been actually decided." This rule has been fully indorsed by the subsequent decisions of this court, as will be seen by an examination of the cases of *Griffin v. Railroad Co.*, 102 N. Y. 452, 7 N. E. 735; *Manufacturing Co. v. Walker*, 114 N. Y. 12, 20 N. E. 625; *O'Rourke v. Hadcock*, 114 N. Y. 553, 22 N. E. 33; *Hymes v. Estey*, 116 N. Y. 509, 22 N. E. 1087; and *Thomson v. Sanders*, 118 N. Y. 257, 23 N. E. 374. It is upon the principle that a judgment is a bar to a right of recovery where a party has had his day in court, with full opportunity to be heard, and to assert and protect his rights, although he failed to do so, that it has been held that a former judgment for the services of a physician is a bar to an action against him for malpractice (*Gates v. Preston and Blair v. Bartlett*); that a judgment for the board of a horse is a bar to an action for his conversion (*Collins v. Bennett*); that a judgment by a carrier for freight is *res judicata* in an action for the destruction of the property caused by a failure of the carrier to perform his contract (*Dunham v. Bower*); that a judgment in partition, to which the plaintiff was a party, is a bar to a recovery in an action by her for dower (*Jordan v. Van Epps*); that a judgment in an action by a plaintiff, as receiver, for trespass upon the property of a corporation, is conclusive against the defendant's claim, in a subsequent action, that the plaintiff's appointment was invalid (*Griffin v. Railroad Co.*); and that where, in a former action, there was a judgment to the effect that the plaintiff's cause of action upon contract was divisible, it is *res judicata* in a second action for a subsequent default (*Lorillard v. Clyde*). While the attorney for the appellant has presented an exhaustive brief and argument upon this subject, and has made an extensive review of the authorities, attempting to distinguish the principle established by them from that involved in this case, yet, after carefully examining the cases to which he refers, and duly considering his ingenious argument upon the question, we are still of the opinion that the decisions of this court are adverse to his contention, and that the learned general term properly held that the judgment of the district court was conclusive upon the parties, and a bar to this action.

The appellant, in his brief, has also raised several questions as to the regularity of the proceedings and the validity of the judgment entered in the district court. We do not deem it necessary to examine them separately. The record discloses that the plain-

tiff in this action appeared in the district court and made no objections to the regularity of the proceedings therein. Furthermore, upon the trial of this action, it was stipulated, in open court, that such a proceeding was instituted for the purpose of dispossessing the plaintiff, and that on the 17th of August, 1892, a judgment was entered, in favor of the petitioner, that he have possession of the premises, and that a warrant issue to remove him therefrom. There was then no claim or suggestion that any of the proceedings which resulted in that judgment were irregular, or that the judgment was invalid. We think, when properly construed, this stipulation must be regarded as an admission that a proper and valid judgment was entered in favor of the petitioner. Under the circumstances, we are of the opinion that the plaintiff is not in a position to raise any question as to the regularity or validity of that judgment. Moreover, no such objections were taken to the judgment upon the trial of this action, and it is a well-settled rule in this court that a question which was not raised on the trial will not be considered for the first time on appeal. *Oatman v. Taylor*, 29 N. Y. 649, 662; *Sterrett v. Bank*, 122 N. Y. 659, 25 N. E. 913; *Blair v. Flack*, 141 N. Y. 53, 56, 35 N. E. 941; *Olliphant v. Burns*, 146 N. Y. 218, 236, 40 N. E. 980; *Adams v. Bank*, 116 N. Y. 606, 614, 23 N. E. 7.

We think the judgment of the general term was right, and should be affirmed, with costs. All concur. Judgment affirmed.

(151 N. Y. 163)

**ADAMS v. NEW JERSEY STEAM-
BOAT CO.**

(Court of Appeals of New York. Dec. 8, 1896.)

**CARRIERS OF PASSENGERS—STEAMBOATS—LIABILITY
AS INNKEEPERS.**

Where money for traveling expenses, carried by a passenger on a steamboat, is stolen from his stateroom at night, without negligence on his part, the carrier is liable therefor, without proof of negligence; his liability being analogous to that of an innkeeper. 29 N. Y. Supp. 56, affirmed.

Appeal from common pleas of New York city and county, general term.

Action by Harry C. Adams against the New Jersey Steamboat Company. Judgment for plaintiff at trial term, which was affirmed by the general term (29 N. Y. Supp. 56), and an appeal by defendant allowed. Affirmed.

W. P. Prentice, for appellant. Westmoreland D. Davis, for respondent.

O'BRIEN, J. On the night of the 17th of June, 1889, the plaintiff was a cabin passenger from New York to Albany on the defendant's steamer *Drew*, and for the usual and regular charge was assigned to a stateroom on the boat. The plaintiff's ultimate destination was St. Paul, in the state of Minnesota, and he had upon his person the sum

of \$160 in money for the purpose of defraying his expenses of the journey. The plaintiff, on retiring for the night, left this money in his clothing in the stateroom, having locked the door and fastened the windows. During the night it was stolen by some person, who apparently reached it through the window of the room. The plaintiff's relations to the defendant as a passenger, the loss without negligence on his part, and the other fact that the sum lost was reasonable and proper for him to carry upon his person to defray the expenses of the journey, have all been found by the verdict of the jury in favor of the plaintiff. The appeal presents, therefore, but a single question, and that is whether the defendant is, in law, liable for this loss without any proof of negligence on its part. The learned trial judge instructed the jury that it was, and the jury, after passing upon the other questions of fact in the case, rendered a verdict in favor of the plaintiff for the amount of money so stolen. The judgment entered upon the verdict was affirmed at general term, and that court has allowed an appeal to this court.

The defendant has, therefore, been held liable as an insurer against the loss which one of its passengers sustained under the circumstances stated. The principle upon which innkeepers are charged by the common law as insurers of the money or personal effects of their guests originated in public policy. It was deemed to be a sound and necessary rule that this class of persons should be subjected to a high degree of responsibility in cases where an extraordinary confidence is necessarily reposed in them, and where great temptation to fraud and danger of plunder exists by reason of the peculiar relations of the parties. *Story*, *Bailm.* § 464; 2 *Kent*, *Comm.* 592; *Hulett v. Swift*, 33 N. Y. 571. The relations that exist between a steamboat company and its passengers, who have procured staterooms for their comfort during the journey, differ in no essential respect from those that exist between the innkeeper and his guests. The passenger procures and pays for his room for the same reasons that a guest at an inn does. There are the same opportunities for fraud and plunder on the part of the carrier that was originally supposed to furnish a temptation to the landlord to violate his duty to the guest. A steamer carrying passengers upon the water, and furnishing them with rooms and entertainment, is, for all practical purposes, a floating inn, and hence the duties which the proprietors owe to the passengers in their charge ought to be the same. No good reason is apparent for relaxing the rigid rule of the common law which applies as between innkeeper and guest, since the same considerations of public policy apply to both relations. The defendant, as a common carrier, would have been liable for the personal baggage of the plaintiff, unless the loss was caused by the

act of God or the public enemies; and a reasonable sum of money for the payment of his expenses, if carried by the passenger in his trunk, would be included in the liability for loss of baggage. *Merrill v. Grinnell*, 30 N. Y. 594; *Merritt v. Earle*, 29 N. Y. 115; *Elliott v. Rossell*, 10 Johns. 7; *Brown, Carr.* § 41; *Redf. Carr.* § 24; *Ang. Carr.* § 80. Since all questions of negligence on the part of the plaintiff, as well as those growing out of the claim that some notice was posted in the room regarding the carrier's liability for the money, have been disposed of by the verdict, it is difficult to give any good reason why the measure of liability should be less for the loss of the money, under the circumstances, than for the loss of what might be strictly called baggage. The question involved in this case was very fully and ably discussed in the case of *Crozier v. Steamboat Co.*, 43 How. Prac. 466, and in *Macklin v. Steamboat Co.*, 7 Abb. Prac. (N. S.) 229. The liability of the carrier in such cases as an insurer seems to have been very clearly demonstrated in the opinion of the court in both actions, upon reason, public policy, and judicial authority. It appears from a copy of the remittitur attached to the brief of plaintiff's counsel that the judgment in the latter case was affirmed in this court, though it seems that the case was not reported.

It was held in *Carpenter v. Railroad Co.*, 124 N. Y. 53, 26 N. E. 277, that a railroad running sleeping coaches on its road was not liable for the loss of money taken from a passenger while in his berth, during the night, without some proof of negligence on its part. That case does not, we think, control the question now under consideration. Sleeping-car companies are neither innkeepers nor carriers. A berth in a sleeping car is a convenience of modern origin, and the rules of the common law in regard to carriers or innkeepers have not been extended to this new relation. This class of conveyances are attached to the regular trains upon railroads for the purpose of furnishing extra accommodations, not to the public at large, nor to all the passengers, but to that limited number who wish to pay for them. The contract for transportation, and liability for loss of baggage, is with the railroad, the real carrier. All the relations of passenger and carrier are established by the contract implied in the purchase of the regular railroad ticket, and the sleeping car is but an adjunct to it only for such of the passengers as wish to pay an additional charge for the comfort and luxury of a special apartment in a special car. The relations of the carrier to a passenger occupying one of these berths are quite different, with respect to his personal effects, from those which exist at common law between the innkeeper and his guest, or a steamboat company that has taken entire charge of the traveler by assigning to him a stateroom. While the company running sleeping cars is held to a high degree of care in such cases, it is not

liable for a loss of this character, without some proof of negligence. The liability as insurers which the common law imposed upon carriers and innkeepers has not been extended to these modern appliances for personal comfort, for reasons that are stated quite fully in the adjudged cases, and that do not apply in the case at bar. *Ulrich v. Railroad Co.*, 108 N. Y. 80, 15 N. E. 60; *Car Co. v. Smith*, 73 Ill. 360; *Woodruff Co. v. Diehl*, 84 Ind. 474; *Lewis v. Car Co.*, 143 Mass. 267, 9 N. E. 615.

But, aside from authority, it is quite obvious that the passenger has no right to expect, and in fact does not expect, the same degree of security from thieves while in an open berth in a car on a railroad as in a stateroom of a steamboat, securely locked, and otherwise guarded from intrusion. In the latter case, when he retires for the night he ought to be able to rely upon the company for his protection with the same faith that the guest can rely upon the protection of the innkeeper, since the two relations are quite analogous. In the former the contract and the relations of the parties differ at least to such an extent as to justify some modification of the common-law rule of responsibility. The use of sleeping cars by passengers in modern times created relations between the parties to the contract that were unknown to the common law, and to which the rule of absolute responsibility could not be applied without great injustice in many cases. But in the case at bar no good reason is perceived for relaxing the ancient rule, and none can be deduced from the authorities. The relations that exist between the carrier and the passenger who secures a berth in a sleeping car or in a drawing-room car upon a railroad are exceptional and peculiar. The contract which gives the passenger the right to occupy a berth or a seat does not alone secure to him the right of transportation. It simply gives him the right to enjoy special accommodations at a specified place in the train. The carrier by railroad does not undertake to insure the personal effects of the passenger which are carried upon his person against depredation by thieves. It is bound, no doubt, to use due care to protect the passenger in this respect; and it might well be held to a higher degree of care when it assigns sleeping berths to passengers for an extra compensation than in cases where they remain in the ordinary coaches, in a condition to protect themselves. But it is only upon the ground of negligence that the railroad company can be held liable to the passenger for money stolen from his person during the journey. The ground of the responsibility is the same as to all the passengers, whether they use sleeping berths or not, though the degree of care required may be different. Some proof must be given that the carrier failed to perform the duty of protection to the passenger that is implied in the contract, before the question of responsibility can arise, whether the passenger be in one of the sleep-

ing berths, or in a seat in the ordinary car. The principle upon which the responsibility rests is the same in either case, though the degree of care to which the carrier is held may be different. That must be measured by the danger to which the passenger is exposed from thieves, and with reference to all the circumstances of the case. The carrier of passengers by railroad, whether the passenger be assigned to the ordinary coaches or to a berth in a special car, has never been held to that high degree of responsibility that governs the relations of innkeeper and guest; and it would perhaps be unjust to so extend the liability, when the nature and character of the duties which it assumes are considered. But the traveler who pays for his passage, and engages a room, in one of the modern floating palaces that cross the sea or navigate the interior waters of the country, establishes legal relations with the carrier that cannot well be distinguished from those that exist between the hotel keeper and his guests. The carrier in that case undertakes to provide for all his wants, including a private room for his exclusive use, which is to be as free from all intrusion as that assigned to the guest at an hotel. The two relations, if not identical, bear such close analogy to each other that the same rule of responsibility should govern. We are of the opinion, therefore, that the defendant was properly held liable in this case for the money stolen from the plaintiff, without any proof of negligence. The judgment should be affirmed. All concur. Judgment affirmed.

(151 N. Y. 50)

SCIOLINA v. ERIE PRESERVING CO.
STEVEY v. NEW YORK CENT. & H. R.
R. CO. NIENDORFF v. MANHATTAN
RY. CO.

(Court of Appeals of New York. Dec. 1, 1896.)

APPEAL—ALLOWANCE—COURT OF APPEALS.

Under Code Civ. Proc. § 191, subd. 2 (as amended by Laws 1896, c. 559), prohibiting appeals to the court of appeals from a judgment of affirmance in an action to recover for personal injuries, where the decision of the appellate division is unanimous, unless an appeal is allowed by a judge of the court of appeals, an appeal will not be allowed where the errors to be reviewed affect at most only the parties to the suit, without being of public interest.

Actions by Antonio Sciolina against the Erie Preserving Company, by Jacob E. Stever against the New York Central & Hudson River Railroad Company, and by Otto Niendorff against the Manhattan Railway Company. Certificates in behalf of the respective defendants, certifying that in the opinion of the appellate division a question of law was involved which ought to be reviewed by the court of appeals, were denied, and defendants applied to a justice of the court of appeals for the allowance of an appeal. Denied.

Simon Fleischmann, for appellants. John C. Hubbell, for respondents.

ANDREWS, C. J. The three cases above entitled are actions brought to recover damages for personal injury caused by negligence, in each of which a verdict was recovered, and the several judgments entered thereon have been affirmed on appeal, by unanimous decision of the appellate division of the supreme court in the departments, respectively, in which the cases were pending. 39 N. Y. Supp. 916, 944, and 38 N. Y. Supp. 690. After such affirmance, application was made, in behalf of the respective defendants, to the proper appellate division for a certificate certifying that in its opinion a question of law was involved, which ought to be reviewed by the court of appeals, and in each case the application was denied. The respective defendants have now applied to me, under subdivision 2 of section 191 of the Code of Civil Procedure, as amended by chapter 559 of the Laws of 1896, for leave to appeal to the court of appeals. I am of opinion that these applications should be denied for reasons which I shall briefly state.

The amended section of the Code under which the application is made declares that no appeal shall be taken to the court of appeals in certain specified cases, and, among others, from a judgment of affirmance in an action to recover damages for a personal injury, "when the decision of the appellate division is unanimous, unless such appellate division shall certify that in its opinion a question of law is involved, which ought to be reviewed by the court of appeals, or unless in case of refusal to so certify, an appeal is allowed by a judge of the court of appeals." The public history which preceded the enactment of this amendment of section 191 of the Code reflects light upon its interpretation. The new constitution had recently come into force. One of the serious problems which confronted its framers was how to arrange the judicial establishment of the state so as to secure the greatest efficiency and the highest usefulness of the courts, and at the same time bring the appellate business within the ability of the judiciary to dispose of it with reasonable promptness. The scheme finally adopted was to establish, in each of four departments into which the state was to be divided for judicial purposes, an appellate court consisting of judges selected from the judges of the supreme court for the hearing of appeals in the first instance, and to make the decision of the appellate division final in certain cases. The scheme embodied in the constitution for the organization of the appellate divisions constituted them courts of great dignity and authority, and it was the expectation that their decisions would in many cases be accepted and acquiesced in by litigants, even when further appeal might be taken. Having constituted these courts of appeal, the convention continued the existing court of appeals, but limited its jurisdiction. The judiciary article expressly confines its general jurisdiction to the review of questions of law. It prohibited the court from reviewing a unanimous decision of an appellate division

that there is evidence supporting, or tending to sustain, a finding of fact or a verdict not directed by the court. This provision deprived the court of jurisdiction in a large number of cases theretofore appealable, in which it had been held that a finding of a material fact without evidence presented a question of law reviewable by the court. The article does not affirmatively define the jurisdiction of the court of appeals, beyond confining it to a review of questions of law, except that it prescribes that appeals as of right (save where the judgment is of death, or where the appeal is from an order granting a new trial) can only be taken to the court from judgments or orders entered upon decisions of an appellate division "finally determining actions or special proceedings." Const. art. 6, § 9. It was not the intent of the clause last referred to, to establish a constitutional right of appeal to the court of appeals from every final judgment or order made by an appellate division, and place it beyond the power of the legislature to abridge it or take it away. This is rendered clear by the subsequent clause: "The legislature may further restrict the jurisdiction of the court of appeals, and the right of appeal thereto, but the right to appeal shall not depend upon the amount involved." I am of the opinion that under the general grant of legislative power it is competent for the legislature to deny the right of appeal to the court of appeals in any class or classes of actions in its discretion, the only restriction upon the legislative power being that the right shall not be made to depend upon the amount involved. The amendment to section 191 of the Code, passed in 1896, was therefore, in my judgment, a competent exercise of legislative power. It is plain, I think, that the purpose of the amendment was, in general, to make the appellate division the court of final resort in the classes of cases specified, where its decision affirming a judgment was the unanimous act of the court. The operation of the amendment is to relieve the court of appeals by imposing upon the appellate division the labor and the responsibility of the final decision in many cases. The only question of any difficulty arises upon the construction of the clause authorizing the allowance of an appeal by the appellate division or on its refusal by a judge of this court. Having in view the purpose of the amendment, and the policy which may be presumed to have dictated it, I am of opinion that the right reserved to apply to the court or a judge to allow an appeal was intended primarily to provide for exceptional cases where public interests or the interest of jurisprudence might be endangered by permitting a decision to go unchallenged, and that the questions to be considered by the court or judge to whom the application is made, are—First, whether, in his or its judgment, there is reason to believe that some material error is disclosed by the record; and, second, if so, whether it is of sufficient importance to require the general principle of finality apper-

taining to the decisions of the appellate division to be disregarded in the particular case by the allowance of another appeal. In my judgment the mere existence of errors in rulings on the trial, to the prejudice of the appellant, does not alone warrant the granting of a certificate. Where the questions have a public aspect, then different considerations apply. I can very well understand that where the supposed error relates to a question of constitutional law or the construction of a statute, or where the point is one upon which there is a conflict of decisions between different appellate divisions, or where it relates to a principle of law or a question of evidence which, if permitted to pass uncorrected, will be likely to introduce confusion into the body of the law from the frequent recurrence of occasions where the same questions will come up, that in these, and perhaps similar, cases, the public interests and the interests of jurisprudence would justify, and perhaps require, the granting of a certificate. But without undertaking to anticipate all the cases where this power should be exercised, I deny the present applications, on the ground that, assuming that errors may have been committed in the respects pointed out on the briefs, they are not such as, in my opinion, "ought to be reviewed" by the court of appeals, because they affect at most only the parties to the respective litigations, and do not fall within the general classes above stated; and that the mere fact that the appellate division may have erred (which I do not decide) is not alone a sufficient reason for taking from these courts their general character as final appellate jurisdictions in the cases specified in the amendment in question. I am authorized to say that my associates, on consultation, concur in this opinion. All concur. Motions denied.

(151 N. Y. 16)

POTH v. MAYOR, ETC., OF CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 1, 1896.)
MUNICIPAL CORPORATIONS—ILLEGAL ASSESSMENTS
—REMEDIES.

1. After an illegal contract was made for a local improvement in New York City, the legislature, by special acts (Laws 1880, c. 557; Laws 1881, c. 648), authorized the city to assess the expense on the local property benefited. Before the assessment was imposed, the consolidation act (Laws 1882, c. 410) was passed, providing for all cases of assessment. *Held*, that the defect in a subsequent assessment, arising from the fact that the contract was illegal, was not cured by such special acts.

2. Consolidation Act (Laws 1882, c. 410), § 897, provides that no action shall be commenced to vacate any assessment, or to remove a cloud upon title, but the owners shall be confined to the remedies prescribed by that title. Sections 898–902 specifically provide remedies for vacating, correcting, or reducing assessments. Section 903 provides that no court shall vacate or reduce any assessment for an improvement hereafter completed, otherwise than to reduce it to the extent that the same may be shown to have been in fact increased by fraud or substantial error; and in no event shall the pro-

portion of such assessment which is equivalent to the fair value of any actual local improvement be disturbed for any cause. *Held*, that section 903 and the other provisions of the title of such act relating to assessments do not apply to an action to recover back the amount of an illegal assessment paid by a landowner under coercion of law. *Bartlett and Haight, JJ.*, dissenting. 28 N. Y. Supp. 365, affirmed.

Appeal from supreme court, general term, First department.

Action by John Poth against the mayor, aldermen, and commonalty of the city of New York, to have an assessment declared void, and to recover back the amount paid thereon by plaintiff. From a judgment of the general term (28 N. Y. Supp. 365) denying a motion by defendant for a new trial on exceptions ordered to be heard at general term in the first instance, defendant appeals. *Affirmed*.

Francis M. Scott, for appellant. James A. Deering, for respondent.

O'BRIEN, J. The plaintiff recovered the amount of a local assessment imposed upon his property by the authorities of the city of New York, for regulating First avenue, between 92d and 109th streets. It was confirmed on the 20th of July, 1885. In November, 1890, proceedings were taken by the city to sell the parcels of real estate upon which the assessment was claimed to be a lien. The notice of sale stated that, in case of default in the payment of the assessment, the lands would be sold on the 2d day of March, 1891. On the 5th of January, 1891, the plaintiff paid the assessment, with interest, and expenses of advertising, amounting at that date to the sum of \$3,541.89. It is alleged that the assessment was wholly illegal and void, and that the plaintiff was compelled to pay it by legal coercion. The plaintiff having paid the assessment after active legal proceedings had been instituted for its collection on the part of the city by a sale of his property, the payment is not to be regarded as voluntary, but the result of legal compulsion. *Bruecher v. Village of Port Chester*, 101 N. Y. 240, 4 N. E. 272; *Redmond v. City of New York*, 125 N. Y. 632, 26 N. E. 727; *Tripler v. City of New York*, 125 N. Y. 617, 26 N. E. 721; *Vaughn v. Village of Port Chester*, 135 N. Y. 400, 32 N. E. 137.

The expenditure for this improvement was made under the authority of an ordinance of the common council adopted February 3, 1868; but it seems that the statutory notice which must precede such ordinances was not given or published, and the contract for the work was let without advertisement or competitive bidding, in violation of the provisions of the city charter then in force, and the prices stipulated to be paid to the contractor were greatly in excess of the value of the work. It is conceded, as we understand, that the original contract and expenditure under it were unauthorized by law, and that neither the city nor the property owners on

the line of the work were bound or charged thereby. In other words, the improvement, or the greater part of it, at least, was commenced, and the expense incurred, under an arrangement between the city officers and the contractor that was so far illegal and void that it could not become the basis of any legal assessment on the property sought to be charged. The work was finally completed in the year 1882, under a contract made in April of that year, which was in accordance with law, but only about \$20,000 of the expenditure was made under this contract. We understand it to be admitted that the items included in the assessment for work and material under this contract are legal, and could, if standing alone, have been properly assessed upon the property benefited. Where, however, it appears that the tax or assessment sought to be enforced against the property owner is made up of different items or elements all blended together, some of which are illegal and others legal, he may resist the payment of the whole, in the absence of some statute which modifies the general rule. *People v. Hagadorn*, 104 N. Y. 516, 10 N. E. 891.

But the learned corporation counsel contends that whatever may have been the origin of the expenditure made by the city, and however illegal the contract under which it was made, it was subsequently ratified by the legislature and the assessment was imposed by the same authority. When a public improvement has been made under the authority of the city, but without compliance with the law providing for assessing the expense upon the property benefited, and an assessment made falls by reason of jurisdictional or other defects, it is in the power of the legislature, upon notice to the property owners, to ascertain the amount of the expense, and impose the same in the form of an assessment upon the property benefited. *Spencer v. Merchant*, 100 N. Y. 585, 3 N. E. 682; *Id.*, 125 U. S. 345, 8 Sup. Ct. 921; *Stuart v. Palmer*, 74 N. Y. 183.

It is asserted that in this case, after the contract was made, the legislature, by special acts, authorized the city authorities to assess the same upon the local property benefited (*Laws 1880, c. 557; Laws 1881, c. 648*); and hence the assessment is legal. This theory, upon which it is sought to establish the validity of the assessment, is, we think, successfully met and answered by two objections: (1) Before the assessment was imposed, these special acts were repealed or superseded by the consolidation act which provided for all cases of assessments. *Laws 1882, c. 410*. (2) It has been judicially determined that these special acts did not conclusively bind the property owners as to the validity of the assessment, or the quantity or the value of the work (*In re Cullen*, 53 Hun, 534, 6 N. Y. Supp. 625; *Id.*, affirmed, 119 N. Y. 628, 23 N. E. 1144); and we cannot now depart from the legal results im-

plied in those decisions. The original defect, arising from the fact that the expenditure was made under an illegal contract, has not, therefore, been cured, and this infirmity still inhered in the assessment when paid. In *re New York Inst. for Instruction of Deaf and Dumb*, 121 N. Y. 234, 24 N. E. 378; In *re Livingston*, 121 N. Y. 94, 24 N. E. 290.

The learned corporation counsel finally insists that, in any event, the plaintiff was not entitled to recover anything beyond his just proportion of the excess of the cost of the improvement over its fair value and benefit, or then that the various items entering into the assessment should be separately considered, and the city allowed to retain any which are legal. These two propositions may be treated together. They depend upon the construction which should be given to a system of statute law contained in the consolidation act relating to local assessments of this character. Section 897 provides that no action in equity or otherwise shall be commenced for the vacation of any assessment, or to remove a cloud upon title, but the owners shall be confined to the remedies prescribed by that title. On careful examination of the title in which this section is found, it is apparent that it was a careful attempt to prescribe remedies in equity for vacating, correcting, or reducing assessments. Those remedies are more specifically defined and provided for in the five sections which follow, and then section 903 contains the provision which it is claimed should be applied to this case. It reads as follows: "No court shall vacate or reduce any assessment in fact or apparent, confirmed after June ninth, eighteen hundred and eighty, whether void or voidable, on any property for any local improvement hereafter completed, otherwise than to reduce any such assessment to the extent that the same may be shown by parties complaining thereof to have been in fact increased in dollars and cents by reason of fraud or substantial error; and in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, with interest from the date of confirmation, be disturbed for any cause." This is not an action to vacate or reduce an assessment, but to recover money which the plaintiff paid upon an illegal assessment by coercion of law. Nor can it be said that the result in this case has disturbed any assessment, since none existed after the payment by the plaintiff to the city of the amount assessed and interest. The question is whether this section and the other provisions of the title in which it is placed have any application to a common-law action like this, to recover back the amount of an illegal assessment paid by the landowner under the circumstances stated. This court has held that actions of this character may be maintained by the property owner, notwithstanding the provisions of the title of the consolidation act with respect to assessments. *Jex v. Mayor, etc.*,

103 N. Y. 536, 9 N. E. 39; *Diefenthaler v. Mayor, etc.*, 111 N. Y. 331, 19 N. E. 48; *Trippler v. City of New York*, 125 N. Y. 617, 26 N. E. 721. It has not, however, decided anything with respect to the measure of the recovery. The point decided was that, in such actions, it was no obstacle to the plaintiff's success that he had not resorted to the equitable proceedings prescribed by the title referred to for relief. The right of the property owner to stand upon his legal remedies when it is sought to enforce the assessment against his property still remained. *Chase v. Chase*, 95 N. Y. 373; In *re Smith*, 99 N. Y. 424, 2 N. E. 52; *People v. Myers*, 135 N. Y. 465, 32 N. E. 241; *Scudder v. City of New York*, 146 N. Y. 250, 40 N. E. 734. The construction for which the learned corporation counsel contends would doubtless promote justice. When the owner of property has received benefits from an improvement, and is assessed therefor, but the proceedings are without jurisdiction or otherwise defective, there is great force in the suggestion that he ought not to be allowed to retain the benefits, and recover back the illegal assessment. It would be equitable to hold that in such cases his recovery should be limited to his proportion of the excess of the cost over the fair value of the improvement, or to the illegal items which he was obliged to pay. But we think that such result cannot be obtained by any fair construction of the statute. When all the provisions of the title are read together, it is quite apparent that they were intended to apply to cases where the property owner attacked the assessment by some affirmative proceeding in equity to vacate, reduce, or correct the charge which had been imposed upon his land. The legislature did not intend to deal with a case like this, where the property owner has paid the assessment, and then resorts to his common-law right to recover it back. The remedy of the property owner in such a case has not been changed by the statutory scheme contained in the consolidation act. The right to bring such an action as this was doubtless overlooked, and however just or desirable it may be to limit the right of recovery to the items in the assessment paid that are illegal, or to the proportion of the excess of the cost over the fair value of the improvement, it would involve an extension of the statute beyond its fair scope and purpose. What the statute forbids to the property owner is the right, which formerly existed, to attack the assessment by an action in equity, and in place of that there was substituted the remedies prescribed in the title which deals with assessments. But the right to resist the enforcement of the assessment, or to recover it back when paid, in actions at law, is not touched by the statute. While this court has not before been called upon to determine whether in such actions the plaintiff's damages could be limited by the provisions of section 903, it has held, in many of the cases cited, that

the provisions of the consolidation act presented no obstacle to the property owner to pursue all remedies afforded by the common law. In order to arrive at that conclusion, it had to hold, and did hold, that the title of the consolidation act referred to applied only to such suits or proceedings as are therein specified; that is, actions or proceedings in equity to vacate or reduce the assessment. The contention of the learned corporation counsel cannot be sustained without disregarding this principle. We have reviewed the cases in which this court has passed upon that question, and, when they are read with the various provisions of the statute, we think they cover the case at bar.

If we were at liberty to treat the question as a new one, it is difficult to see how any other conclusion could be reached. In order to apply to such an action as this the provision that in no event shall an assessment be disturbed beyond the fair value of the improvement, the courts would be obliged by strained construction to give to the statute a scope and meaning which we are satisfied was never intended. If it is desirable or just that in such actions the plaintiff's measure of damages should be so limited, the change should be made by the legislature, and not by the courts. When lands are sold under an invalid or void assessment, we think it would be no answer to an action on the part of the owner to recover his property to show that the improvement for which the assessment was made was highly beneficial to the property, or that some items included in it were proper and legally incurred. The same principle must, we think, be applied in a case where the property owner, in order to prevent a sale, pays the assessment, and then calls upon the city for restitution. The statute evidently does not reach such cases.

For these reasons, we think that the judgment must be affirmed.

ANDREWS, C. J., and GRAY and VANN, JJ., concur. BARTLETT and HAIGHT, JJ., dissent. MARTIN, J., not sitting.

Judgment affirmed.

(151 N. Y. 135)

TILLINGHAST, County Treasurer, v. MERRILL, Supervisor, et al.

(Court of Appeals of New York. Dec. 1, 1896.)

OFFICER—LIABILITY—PUBLIC MONIES.

An officer, on the ground of public policy, is liable for public moneys intrusted to him, and lost through the failure of the bank in which they were deposited by him, though he was not negligent. Gray, J., dissenting. 28 N. Y. Supp. 1089, affirmed.

Appeal from supreme court, general term, Fourth department.

Action by George T. Tillinghast, as county treasurer of the county of Madison, against J. Herman Merrill, supervisor of the town of

Stockbridge, and others. From a judgment (23 N. Y. Supp. 1069) affirming a judgment for plaintiff, defendants appeal. Affirmed.

Henry B. Coman, for appellants. John E. Smith, for respondent.

BARTLETT, J. The defendant Merrill, while supervisor of the town of Stockbridge, in the county of Madison, deposited with a firm of private bankers, to his credit as supervisor, certain of the public moneys in his hands. The banking firm afterwards failed and the money was totally lost. This action was brought by the county treasurer to recover the money of Merrill and his bondsmen, upon the theory that Merrill, on receiving the money, became the debtor of the county, and that the deposit of the same was at his own risk. The trial judge found that Merrill acted in good faith and without negligence in all that he did in the premises. Under these circumstances the learned counsel for the defendants has urged, with much earnestness and ability, that a supervisor rests under the common-law liability, whereby he was bound to exercise good faith and reasonable diligence in the discharge of his duties, and is not responsible for any loss of money which came to his official custody, occurring without fault on his part; that proof of the failure of the banking firm, where he had deposited the money in good faith and without negligence, is a complete defense to this action. The trial judge and general term have found against the defendants, and it remains for this court to determine which measure of liability is to be applied to a supervisor under the circumstances stated.

The question is an open one in this state, and, as the case at bar presents a claim against a supervisor who acted in good faith and without negligence, we are permitted to consider and decide this appeal upon general principles, and in the light of public policy. It is rather remarkable that, in a great business state like New York, this question should not have been decided long since by the court of last resort. In 1841 the case of Supervisors v. Dorr, 25 Wend. 440, came before the supreme court, composed of Chief Justice Nelson and Justices Bronson and Cowen. Dorr was county treasurer, and had given a bond to faithfully execute the duties of his office, and pay according to law all moneys. The declaration was on the bond, alleging breaches in not paying over, and in not accounting. Dorr pleaded that the identical money received by him was stolen from his office without negligence on his part. To this plea the plaintiff demurred. Chief Justice Nelson, delivering the opinion of the court, stated that the question was "whether an officer concerned in the receipt and disbursement of the public funds is an insurer of the same, ex virtute officii, while they necessarily remain in his custody." He then stated that "the principle was decided in favor of the defendant in Lane v. Cotton, 1 Ld. Raym. 646,

and subsequently confirmed in *Whitfield v. Le Despencer*, 2 Cowp. 754, and is in conformity with the general rule, of daily application, that, in order to subject the officer, it is necessary to prove misconduct or neglect in the execution of his duties." Justices Bronson and Cowen concurred. An appeal was taken to the court of errors, and that court equally divided upon the question, the effect of which was to affirm the judgment below, and the case stands with no more force as a precedent than a unanimous opinion of the supreme court. Chancellor Walworth, in the court of errors, wrote for affirmance, thus adding his name to those of the distinguished justices of the supreme court who had decided to limit the liability of a public officer by the rule of the common law.

It has been a mooted question whether this case was overruled by *Muzzy v. Shattuck*, 1 Denio, 233, decided in 1845. Mr. Hill, in his note to *Supervisors v. Dorr*, in court of errors (7 Hill, 534), says that in *Muzzy v. Shattuck* the law seems to have been settled, and properly, directly the other way. On the other hand, Judge Earl, in *People v. Faulkner*, 107 N. Y. 486, 14 N. E. 415, 418, in referring to *Supervisors v. Dorr*, says: "The doctrine of that case has been erroneously supposed to have been overruled by the decision in *Muzzy v. Shattuck*. In the latter case the action was upon the official bond of a town collector, and the defense was that the money was stolen from him. It was held that the defense was not good, the supreme court then being composed of Chief Justice Bronson, and Justices Beardsley and Jewett; and Bronson, who concurred in the prior decision, also concurred in this, without any indication that he had changed his views. The prior decision was referred to in the opinion of the court, but not criticised or disapproved. This decision was based, not upon the common law, and not upon the force and effect of the official bond given by the collector, but upon the statutes defining the duties and liabilities of the collector; and the court held that by those statutes he was made an absolute debtor for the money collected by him, and that the fact that the money was stolen, therefore, constituted no defense." The learned judge, after a further elaboration of his views as to *Supervisors v. Dorr*, reaches the conclusion that, in view of the decisions of the federal and state courts, the case should probably not be regarded as binding authority in this state, and that the question therein decided is an open one. He also held that it was not necessary to decide the question in the case in which he was writing, as the money received by the defendant surrogate was not public money, but belonged to a private estate, or to individuals. It, therefore, comes to this, that for 45 years the case of *Supervisors v. Dorr*, 25 Wend. 440, has stood without being directly overruled by any case in this state, and the rule

of the limited liability of the common law approved therein by four of our most distinguished judges. It must be admitted, however, that the weight of authority in the federal and state courts is in favor of holding officials having the custody of public moneys liable for its loss, although accruing without their fault or negligence. In many of these cases the decision turned upon the construction of the local statute or the official bond, but others squarely decide the question on principles of public policy.

In the case at bar, the defendant Merrill is sought to be held liable for school moneys paid to him by the county treasurer, to disburse in payment of the salaries of school teachers upon the orders of the trustees. The statute imposing this duty reads as follows, viz.: "It is the duty of every supervisor (1) to disburse the school moneys in his hands, applicable to the payment of teachers' wages, upon and only upon the written orders of a sole trustee, or a majority of the trustees, in favor of qualified teachers. * * * 2 Rev. St. (8th Ed.) p. 1283, § 6. By paragraph 8 of the same section a supervisor is required to pay to his successor all school moneys remaining in his hands. In this statute it will be observed that there are no explicit declarations of the legislative intent, as in the case of town collectors, to create a supervisor the debtor of the county for public moneys in his hands, and the condition of the bond to safely keep, faithfully disburse, and justly account for the same does not add to the liability created by statute. As before intimated, we must consider and decide this question upon general principles, and in the light of public policy. In the case of an officer disbursing the public moneys, much may be said in favor of limiting his liability, where he acts in good faith and without negligence; and a strong argument can be framed against the great injustice of compelling him to respond for money stolen or lost while he is in the exercise of the highest degree of care, and engaged in the conscientious discharge of duty. When considering this side of the case, it shocks the sense of justice that the public official should be held to any greater liability than the old rule of the common law, which exacted proof of misconduct or neglect. It is at this point, however, that the question of public policy presents itself, and it may well be asked whether it is not wiser to subject the custodian of the public moneys to the strictest liability, rather than open the door for the perpetration of fraud in numberless ways, impossible of detection, thereby placing in jeopardy the enormous amount of the public funds constantly passing through the hands of disbursing agents. Without regard to decisions outside of our own jurisdiction, we think the weight of the argument, treating this as an original question, is in favor of the rule of strict liability, which requires a public offi-

cial to assume all risks of loss, and imposes upon him the duty to account as a debtor for the funds in his custody.

We do not wish to be understood as establishing a rule of absolute liability in any event. The United States supreme court, in *U. S. v. Thomas*, 15 Wall. 337, held the surveyor of customs for the port of Nashville, Tenn., and depository of public money at that place, not liable, when prevented from responding by the act of God or the public enemy. If that state of facts is hereafter presented to this court, it will, doubtless, be carefully considered whether it does not present a proper exception to the general rule. It would not be profitable to refer in detail to the many cases, federal and state, which sustain the strict rule of liability, and we content ourselves with a reference to a number of them involving losses by robbery, burglary, bank failure, and the like. *U. S. v. Prescott*, 3 How. 578; *U. S. v. Morgan*, 11 How. 154; *U. S. v. Dashiell*, 4 Wall. 182; *U. S. v. Keebler*, 9 Wall. 83; *Boyd v. U. S.*, 13 Wall. 17; *Bevans v. U. S.*, Id. 56; *Inhabitants of Hancock v. Hazzard*, 12 Cush. 112; *Com. v. Comly*, 3 Pa. St. 372; *Inhabitants of New Providence v. McEachron*, 33 N. J. Law, 339; *State v. Powell*, 67 Mo. 395; *Lowry v. Polk Co.*, 51 Iowa, 50, 49 N. W. 1049; *Perley v. Muskegon Co.*, 32 Mich. 132; *Nason v. Directors of the Poor*, 126 Pa. St. 445, 17 Atl. 616; *Supervisors v. Kalme*, 39 Wis. 468; *Redwood Co. v. Tower*, 28 Minn. 45, 8 N. W. 907; *State v. Harper*, 6 Ohio St. 607; *Halbert v. State*, 22 Ind. 125; *Ward v. School Dist.*, 10 Neb. 238, 4 N. W. 1001.

The views we have expressed lead to a final judgment against the defendant Merrill as supervisor of the town of Stockbridge, although he is shown by this record to have discharged his official duties in an honorable and faithful manner. The judgment appealed from should be affirmed, with costs. All concur, except GRAY, J., dissenting, and MARTIN, J., not sitting. Judgment affirmed.

(151 N. Y. 94)

MARTIN v. MANUFACTURERS' ACCIDENT INDEMNITY CO.

(Court of Appeals of New York. Dec. 1, 1896.)

ACCIDENT INSURANCE—CAUSE OF DEATH—SURRENDER OF POLICY—FORFEITURE—WAIVER.

1. The holder of an accident policy and the company's agent met to settle a claim for an injury to the assured. The assured agreed to accept \$25, and the agent produced a printed form, which the assured signed. Assessments already paid on the policy kept it in force for two months, and nothing was said during the negotiation about surrendering it. The paper signed recited the receipt of \$25 in full satisfaction and final settlement of any and all claim "I now have or may have against said company for loss resulting from injuries received under my policy, No. 12,157, which is hereby surrendered." The policy was not physically surrendered. Held, that the words, "which is hereby surrendered," referred to the claim described

in the context, and indicated that as to that alone the rights under the policy were surrendered.

2. Where virulent matter, which produces blood poisoning, is communicated to a wound coincident with its infliction, and death is produced thereby, it is a death within a policy which provides that the insurance shall not extend "to any case except where the injury is the proximate and sole cause of the disability or death."

3. Where an accident policy requires immediate notice to be given to the company of an injury, specifying the particulars to be given, and provides that "failure to give such immediate notice, mailed within 10 days from the happening of such accident, shall invalidate all claims," and the company retains a notice of accident received within the proper time, and does not ask for further particulars, it thereby waives a forfeiture because the notice does not contain all the particulars specified in such condition.

Appeal from supreme court, general term, Fourth department.

Action by Eliza A. Martin against the Manufacturers' Accident Indemnity Company on an accident insurance policy issued by defendant to the plaintiff's husband. From a judgment of the general term (24 N. Y. Supp. 1147) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

The action is brought by the widow of William A. Martin to recover a death claim under a policy issued by the defendant November 9, 1888, to the said William. The insured died at Binghamton (his place of residence) May 10, 1890. His death, as the evidence tended to show, and as the jury found, was caused by a slight wound on the second finger of the right hand, made in some way, not clearly explained, on the 27th day of April, 1889, which was immediately followed by blood poisoning, of which he died May 10, 1889,—13 days after the injury. The deceased met with two accidents; one April 8, 1889, and another (above referred to) April 27, 1889. His occupation was book-keeping. The first accident was the crushing of the thumb of his left hand while using a hammer, a severe and painful accident. The insured made a claim under the policy for the injury, which was settled April 13, 1889, as hereinafter stated. The second injury, of April 27th (upon which the death claim is based), occurred, as the evidence tends to show, under the following circumstances: Before breakfast in the morning of that day, Mr. Martin took his umbrella (it being a rainy morning), and went to the grocery, and returned to his home in about 10 minutes. When he came back, he set down his umbrella, and showed his wife where he had punched out a piece of the skin and flesh about the size of a pea from the inside of the second finger of the right hand, and it was then bleeding. He went to the office, and was at work as usual all the forenoon, and again in the afternoon. When he returned home at night his finger pained him, and was swollen and inflamed. After tea, he went to the doctor. The swell-

ing and inflammation continued, extended from the finger to the hand and arm, and later to other parts of his body. Red streaks and spots, as well as pustules, appeared on the injured finger and subsequently on the left leg. It proved to be a violent and unusual case of blood poisoning, of which he died as above stated. The policy in question provided for two claims of indemnity: First, for an accident resulting in bodily injuries which, "independently of all other causes, shall immediately and wholly disable and prevent the insured from the prosecution of any and every kind of business pertaining to his occupation," in which case a weekly payment is to be made to the insured; and, second, by reason of the death of the insured, "effected through external, violent, and accidental means, * * * and such injuries alone shall have occasioned death within ninety days of the happening thereof," in which case the company undertook to pay to the wife of the insured, if surviving, and, if not surviving, to his legal representatives, the sum of five thousand dollars from the benefit fund of the company, subject to certain conditions, not material upon this appeal.

There were several defenses urged on the trial: (1) That the policy sued upon was not in force at the time of the second injury; (2) that virulent matter from the wound on the thumb (which was not healed at the time of the second injury) was dropped upon the wound subsequently inflicted upon the finger of the right hand, and caused the blood poisoning which caused the death, and that the death was not, therefore, the result alone of the injury to the finger, and therefore not a death within the policy; (3) the defendant insisted that conditions as to serving notice had not been complied with.

The question whether the blood poisoning was caused by matter communicated from the wound on the thumb, or was immediately developed from the wound on the finger by inoculation or otherwise at the very time of that injury, was litigated on the trial, and medical experts were called by each side to testify on the subject. The court charged the jury, in substance, that if the blood poisoning was caused by contact of the wound on the finger with matter communicated from the thumb after the injury to the finger, the plaintiff could not recover. The defendant, to sustain the defense that the policy was not in force at the time of the second injury, or at the time of the death of the insured, relied upon a receipt or writing executed by the insured April 13, 1889, given on settlement of the claim for the first injury, in the words and figures following:

"Voucher No. Claim No.
"Assured Certificate No.

"Received from the Manufacturers' Accident Indemnity Co., of Geneva, N. Y., the sum of twenty-five dollars (\$25), being in full satisfaction and final settlement of any

and all claim I now have or may have against said company for loss resulting from injuries received on the 8 day of April, A. D. 1889, under my policy No. 12,157, which is hereby surrendered.

"Dated at Binghamton, in the state of New York, this 13 day of April, A. D. 1889.

"W. A. Martin, Claimant.

"Now 28 Lewis St., Binghamton, N. Y.

"Residence.

"C. L. King, Witness."

A brief reference to the circumstances under which this paper was executed is necessary to its proper interpretation. The injury to the thumb of the insured on the 8th of April, 1889, was followed the next day by a notice by the insured served by mail on the company at Geneva, stating, in substance, the cause and nature of the injury, and that a claim was made on account thereof under the policy. The company instructed Mr. King, their general agent, whose residence was at the same place as that of Mr. Martin, to go to Binghamton, and settle the claim, investing him with full power in the premises. The general agent thereafter, on the 13th of April, in company with the local agent, called at the store where the insured was employed, and found him discharging his ordinary duties. The injury to the thumb, although serious and painful, was to the thumb of the left hand, and did not prevent the insured using his right hand in discharging his duties as bookkeeper. Conversation ensued between the general agent and the insured. The general agent intimated that the insured was not in strictness entitled to anything under the terms of the policy, since he was not wholly disabled, so as to prevent his pursuing his usual occupation. The insured expressed his dissatisfaction that the company should interpose such an objection. The general agent replied, in substance, that it was for the interest of the company to settle such claims, and asked him what he would take, and added, "You are a neighbor of mine, and it is for our interest to settle, and I will give you ten or fifteen dollars." The insured rejected the offer, and the general agent again asked him what he would take to settle the matter, adding, "I am here with authority to settle with you." The insured then said, "I will take one week; that is, twenty-five dollars," and the agent said, "Yes; to end all this discussion, I will pay you." The agent then took from his pocket a printed form, and filled in the sum to be paid, the date of the injury, the number of the policy, and the day and month of the settlement, and handed it to the assured, saying, "Sign that, and I will give you my check." The insured looked at the paper, and said, "What does that mean about surrendering my policy?" The agent replied it was customary to send that to the company with the receipt, but, as "it is not here, I do not consider it important." Thereupon the insured

signed the paper, and gave it back to the agent, who paid the insured the \$25, and subsequently delivered the paper to the defendant. The agent, as he testified, considered the injury a trifling one. In fact the policy was not surrendered. At the time of the transaction it was at the home of the insured, and was found among his valuable papers at his death. The vice president of the defendant testified that when, or soon after, the general agent delivered this paper to the company, a character in pencil was placed on the register opposite the record of the policy, which indicated that it had been surrendered. The words, "Canceled April 15, 1889," were on the register at the time of the trial. But the inference from the testimony is that these words were placed there after the death of the insured.

The facts bearing upon the defense of non-compliance with the conditions of the policy as to service of notices are substantially as follows: The policy provides that: "In the event of any accident or injury for which any claim may be made under the certificate, immediate notice shall be given in writing, signed by the member, or his attending physician, or, in case of death, by the beneficiary, addressed to the secretary of the company at Geneva, N. Y., stating the full particulars as to when, where, and how it occurred, and the occupation of the member at the time and his address; and failure to give such immediate notice, mailed within ten days from the happening of such accident, shall invalidate all claim under this certificate." On May 2, 1889, within 10 days after the second accident, Mr. Martin, being confined to his bed, directed his daughter to write and send a notice of his injury to the defendant. She prepared and mailed a notice to the company on that day, signed in the name of her father, stating: "Please take notice that I sustained quite a serious injury on the 27th ult., while cleaning my thumb, which you are aware was injured some time ago, by communicating the virus to a little cut on my other hand. My doctor hopes I will come out all right ere long,"—and giving the number of his policy. The company received this notice in due course of mail, and filed it with the papers connected with the policy, but did not return it, or communicate in any way with the insured in respect to it. There is evidence to show that the thumb was in a healthy condition when the second injury occurred, and a new nail was forming. It also appears that the thumb was dressed before the insured left his house to go to the grocery on the morning when the second injury occurred. It also appeared that the insured, when he instructed the daughter to prepare the notice of the 2d of May, said he supposed the virus from the thumb had communicated with the wound on the finger. It was claimed on the trial on behalf of the plaintiff that it might have come from some deposit on the um-

brella he was using when the second wound was inflicted.

All assessments had been paid on the policy prior to either injury, so as to keep it in life to June 9, 1889. On the 9th of May, 1889, the company mailed to the insured a notice of assessment, stating: "Your insurance stands on our books as paid to June 9th, 1889. Your next bimonthly premium of \$2.00 is now due. Time of payment expires June 9th, 1889." It was claimed in behalf of the defendant, and there was evidence tending to show, that this notice was sent by one of the clerks by mistake, and in violation of his duty. On the 14th of May, 1889, notice of death of the insured was mailed to the company, signed by the son of the plaintiff in his name, which notice gave the number of the policy, the day of the death, and stated that the death "was the result of an accident a short time ago received," but giving no further particulars, and the notice was retained by the defendant. This notice was followed a few days after by proofs of death served on the company, which proofs the company returned, assigning no reason so far as appears.

The court submitted to the jury three questions, in substance: (1) Whether the blood poisoning which caused the death of Mr. Martin was coincident with the infliction of the wound on the finger, and a part of the accident. (2) Whether the notice of the injury, in case the jury found there was a mistake in the statement as to the cause of the blood poisoning, was given in good faith, and without intent to mislead the company. (3) Whether the failure in the notice of death to comply with the strict requirements of the policy as to particulars, etc., was waived by the company. The defendant asked the court to charge as matter of law that the policy was not in force at the time of the death, and that the effect of the transaction of May 13, 1889, was to surrender and cancel it. This request was refused, and exception was duly taken. Other exceptions appear in the record.

Alex Cumming, for appellant. D. H. Carver, for respondent.

ANDREWS, C. J. (after stating the facts). The most serious question in this case arises on the construction of the writing signed by the assured on the 13th day of April, 1889. If it was merely a receipt, it was open to explanation or contradiction, because a receipt is an admission merely, and not a contract. *Ryan v. Ward*, 48 N. Y. 204. But a receipt may embody a contract also, and when the written instrument has this double character it is, so far as pertains to the contract, subject to the same rules of construction, and can be impeached in the same manner only, as other agreements in writing. Among the principles which apply in such cases is the familiar one that, in the absence of fraud or mistake, or want or failure of consideration, oral evi-

dence is inadmissible to add to, contradict or vary the written terms or the legal import of a written contract. The defendant insists that the writing of April 13, 1889, was both a receipt and a contract; a receipt so far as it acknowledged the payment of \$25 in satisfaction of the claim for the injury sustained by the assured on the 8th day of April, and a contract whereby he surrendered and gave up his insurance, and wholly terminated his relation as a member or policy holder in the company. If this is the necessary construction of the writing, it would be difficult to resist the conclusion that when the second injury, of April 27th, occurred, the policy was not in force. But the rule which forbids the introduction of oral evidence to contradict a written agreement is to be administered in harmony with another rule of no less importance; that where the alleged written agreement is ambiguous, or fairly capable of two constructions, the circumstances which led to and attended its execution, the situation of the parties, and the subject-matter may be shown, and considered in aid of its interpretation. It is the contention of the defendant that the insured surrendered the policy, thereby meaning the entire contract of insurance, on the 13th of April, and that this is conclusively indicated by the words in the receipt, following the number of the policy, namely, "which is hereby surrendered." If this is the necessary construction of the words, they state a fact which undeniably was not true. The policy was not surrendered at that or any subsequent time, but remained in the possession of the assured until his death. The words, "which is hereby surrendered," if given the broad meaning attached to them by the defendant, import a present physical surrender of the policy itself, and this was not done. If that had been intended, the transaction was left incomplete. But, taking those words in connection with the context, we think the fair and reasonable meaning of the writing was that the policy was surrendered as to the claim, which was the subject of the settlement, so that in respect to the injury of April 8th there should be no further claim against the defendant. It protected the company against further liability for that injury, whatever might happen, or however much the then existing symptoms might thereafter be aggravated. This construction, moreover, is the only one consistent with the justice of the transaction. The only thing the parties had in view was the settlement of the claim for the injury of April 8th. The terms of the settlement were agreed upon, and nothing had been said about a surrender of the policy. There was no reason why the assured should be required to give up the contract of insurance. The assessments had been paid, which kept the policy in force until June 9th. If meanwhile another injury should happen, he would be protected. Nor was there any apparent reason why the company should desire to terminate the insurance. The risk, so

far as appears, was a good one. Its only interest was to make a final and complete settlement of the claim for the injury of April 8th. It probably could have successfully resisted the claim as it then stood, under the strict language of the policy, but the agent stated, in substance, that it was for the interest of the company to be liberal in the adjustment of claims, and this was a reasonable motive for its action in conceding its liability. The receipt, as the evidence tends to show, was intended as a mere record of the verbal agreement, and of the payment made by the company. After the oral agreement had been consummated, the agent produced a printed form, filled in the necessary descriptive particulars, and presented it to the assured for signature, and the assured signed it after the agent explained to him that the surrender of the policy was not important. It may be well, in conclusion, upon this point to repeat the language of the receipt: "Received from the Manufacturers' Accident Indemnity Co., of Geneva, N. Y., the sum of twenty-five dollars (\$25), being in full satisfaction and final settlement of any and all claim I now have or may have against said company for loss resulting from injuries received on the 8th day of April, A. D. 1889, under my policy, No. 12,157, which is hereby surrendered." The words, "which is hereby surrendered," we hold may and ought to be construed as referring to the claim described in the context, and to indicate that as to that, and that alone, the rights of the assured under the policy were surrendered. The rule applied to the construction of a release, that general words following words of special release may be restrained to the matter specially recited, confirms the construction we have given to the writing in question.

We think the court did not err to the prejudice of the defendant in charging that, if the jury should find that the virulent matter which produced the blood poisoning was communicated to the wound coincident with its infliction, and the death was produced by the blood poisoning, it was a death within the policy. The policy provides that the insurance shall not extend "to any case except where the injury is the proximate and sole cause of the disability or death." There was evidence upon which the jury could find the facts submitted. There was medical testimony to the effect that the virus was probably on the umbrella, or whatever instrument it was which inflicted the wound; and the condition of the thumb and the bandaging afforded an inference that that was not a source of the virulent infection. All the evidence upon this point was submitted to the jury, including the statement of the assured in the notice of injury; and, the jury having found the fact in favor of the plaintiff, the finding cannot now be disturbed. Upon the fact as found, the inoculation of the wound at the very time of its infliction was a part of the injury, and the immediate cause of the death.

Without the wound, there would have been no inoculation, and so, also, without the inoculation, the wound would not, probably, have been fatal. But it is impossible to separate the two in the practical construction of this condition in question. Both were contributing and co-existing causes of the death, set in motion and operating together from the same moment of time. See *Flitton v. Insurance Co.*, 17 C. B. (N. S.) 122; *Smith v. Insurance Co.*, L. R. 5 Exch. 302.

Nor do we think there was error in the ruling as to the condition requiring immediate notice to be given to the company of an accident or injury. The notice given of the second injury, on the 2d of May, was concededly in time, but it did not contain all the particulars specified in the condition. The company retained the notice, and did not call for further particulars. The policy, after prescribing that immediate notice of an injury should be given, and specifying the particulars to be given, proceeds: "And failure to give such immediate notice, mailed within ten days from the happening of such accident, shall invalidate all claims under the certificate." Where a forfeiture is claimed for a nonobservance of a condition in a policy of insurance, requiring some notice to be given, after a loss or liability has been incurred, a clear case must be made, and in case of doubt the condition is most strongly construed against the insurer. Looking at the clause under which the forfeiture is claimed in this case, it is evident that it was primarily intended to protect the company against delayed claims for indemnity, of which prompt notice had not been given. It is upon a failure to give such "immediate notice, mailed within ten days," that the forfeiture was to accrue. It would be a very harsh and unreasonable construction to apply this clause to every imperfection in a notice, which, although promptly given, omitted to state some particular embraced among those enumerated in the prior clause. We think the forfeiture clause did not apply to a case of such omission. The company could have demanded further particulars, but, having omitted to do so, it waived any objection to the form or contents of the notice. The same view is applicable to the death notice. It was promptly given, and was retained without objection.

We have examined the other questions argued upon the brief of the appellant, but find nothing in them which would justify a reversal of the judgment. The judgment should be affirmed. All concur, except MARTIN, J., not sitting. Judgment affirmed.

(151 N. Y. 83)

MANCHESTER et al. v. GUARDIAN ASSUR. CO.

(Court of Appeals of New York. Dec. 1, 1896.)

INSURANCE—CONDITIONS—WAIVER—AGENTS.

1. An insurance company is estopped to claim a forfeiture of a policy because consent to a

transfer of title to the insured property was not indorsed on the policy, as required by its terms, where its general agent, having authority to make such indorsement, promised to go to a third person, who held the policy as collateral, and make the indorsement. 30 N. Y. Supp. 49, reversed.

2. A general agent, having unrestricted authority to indorse on policies the consent of insurer to a transfer of title to the insured property, may make a preliminary contract for such an indorsement.

3. On breach of a contract by insurer to indorse on a policy its consent to a transfer of title to the insured property, it is liable in case of loss for the amount of the policy.

Appeal from supreme court, general term, Third department.

Action by George N. Manchester and another against the Guardian Assurance Company. From a judgment (30 N. Y. Supp. 49) affirming a judgment dismissing the complaint, plaintiffs appeal. Reversed.

Charles E. Patterson, for appellants. A. H. Sawyer, for respondent.

MARTIN, J. Prior to and upon the 8th day of January, 1889, Ebenezer S. Strait owned certain premises situated in the county of Rensselaer. On that day he procured from the defendant, through its general agents at Troy, a policy of insurance upon the buildings on the premises insuring him against loss or damage by fire to the extent of \$2,000. It was a New York standard fire insurance policy. At that time there were several mortgages upon the property held by the Troy Savings Bank, amounting to \$16,000, and this policy, with others, was held by the bank as collateral, and it was in its possession. On August 1, 1890, Strait conveyed the property insured to Emily J. Manchester, who took immediate possession. The insurance by the defendant was also transferred to her. Shortly after these transfers, Strait, as her agent, notified the general agents of the defendant thereof, and requested them to go to the bank where the policy was, and make the necessary indorsement upon it, which they agreed to do. This agreement, however, they failed to perform. In the following September, a fire occurred, by which the property was destroyed. The plaintiff George N. Manchester subsequently procured assignments of the outstanding mortgages to himself, and thus acquired the same rights as were possessed by the bank. Proofs of loss were duly furnished to the defendant. It is conceded that, if the plaintiffs are entitled to recover, they are entitled to the sum of \$2,115.14. On the trial, the plaintiffs were consulted, presumably upon the grounds that there was a change of title to the property without any written indorsement upon the policy consenting thereto, and that the agents had no power to waive any of its provisions.

The most important and practically the only question in this case is whether, upon those facts, the plaintiffs were entitled to recover. The defendant, through its general agents, had notice of the change of ownership, and

agreed to indorse upon the policy the defendant's consent to the transfer from Strait to Mrs. Manchester. The policy was within the defendant's reach for that purpose. This agreement it failed to perform. The plaintiffs now seek to recover as damages for a breach of that agreement the loss they have sustained. The defendant endeavors to relieve itself from liability because no consent was actually indorsed upon the policy. In other words, it undertakes to defeat the plaintiffs' action upon the ground of the nonperformance of an act which it expressly agreed itself to perform. We think this case falls within the principle of *Ellis v. Insurance Co.*, 50 N. Y. 402; *Angell v. Insurance Co.*, 59 N. Y. 171; *Ruggles v. Insurance Co.*, 114 N. Y. 415, 21 N. E. 1000; and other kindred cases. In those cases this court held that an agent of a fire insurance company, who was authorized to negotiate contracts of insurance, and to fill up and deliver policies executed in blank left with him for that purpose, had authority to make a parol preliminary contract to issue a policy, and that the recovery of the amount agreed to be insured was the proper measure of damages for the breach of such a contract. As the defendant's agents had unrestricted authority to make the indorsement necessary to continue the policy in force, it would seem that they also had authority to make a preliminary contract therefor. Such a contract was made, and was based upon a sufficient consideration. Under the doctrine of the cases cited, it is obvious that the plaintiffs were entitled to recover for a breach of the contract made with the defendant for a continuance of its policy, and to recover as damages the amount of such insurance. Moreover, it is quite probable that the plaintiffs were prevented from procuring other insurance by reason of their reliance upon the agreement of the defendant to make the proper indorsement upon the policy necessary to continue it in force. It would be the natural result of the defendant's act, and, consequently, the case falls within the principle upon which the doctrine of equitable estoppel is founded, and the defendant should be precluded from claiming a forfeiture of the policy on the ground of the absence of such an indorsement, or from insisting that there was a want of consideration. *Pratt v. Insurance Co.*, 55 N. Y. 506; *Whitel v. Insurance Co.*, 76 N. Y. 415; *Buchanan v. Insurance Co.*, 61 N. Y. 26; *Benninghoff v. Insurance Co.*, 93 N. Y. 495.

The learned general term based its decision principally upon the case of *Baumgartel v. Insurance Co.*, 136 N. Y. 547, 552, 32 N. E. 990, 992. We think that case is clearly distinguishable from the case at bar. There the question arose over the provision that, unless otherwise provided by agreement indorsed upon the policy, it should be void in case of other insurance. After the policy was issued, the plaintiff procured other insurance, and afterwards saw the defendant's agent upon the street, talking with another man, when he

walked up to him, and said that he had other insurance for \$1,000, to which the agent replied: "All right; I will attend to it." Upon those facts, it was held that such a notice did not satisfy the requirements of the policy, or estop the defendant from insisting upon its forfeiture. In discussing the question in that case, it was, however, said: "At most, the language of the agent amounted to nothing more than his personal promise to do something in the future, and neither he nor the company could be held to be in default, with respect to such promise, until the plaintiff had presented the policy to him, and requested him to make the indorsement. In case of a refusal then to do what he had promised to do, it may be that the plaintiff's reliance upon the promise, and any changed condition of the parties with respect to the new insurance, in consequence, would be sufficient to induce a court of equity to compel performance." In this case there was an express promise to make the indorsement required, and there was nothing to be done by the plaintiffs before the defendant was to act. The policy was in the hands of a third person, and not under the plaintiffs' control. With a full knowledge of that fact, the defendant promised to go where the policy was kept, and make the required indorsement. Therefore this case is clearly within the exceptions suggested in the opinion in the *Baumgartel* Case. We find nothing in that case which is in conflict with the conclusion we have reached in this. The judgment of the general and trial terms should be reversed, and a new trial granted, with costs to abide the event. All concur. Judgment reversed.

(151 N. Y. 155)

TALBOT v. NEW YORK & H. R. Co. et al.
(Court of Appeals of New York. Dec. 1, 1896.)

INJUNCTION—MAINTAINING STREET BRIDGE—EMINENT DOMAIN—COMPENSATION.

1. An injunction to restrain a defendant railway company from maintaining a street bridge over its tracks, and to compel the removal of the same, will not lie at the instance of a property owner on the street, where the bridge was constructed by defendant as agent of a board of engineers, authorized by Laws 1872, c. 702, to superintend the construction of the same, and the city, after its construction, assumed entire control over it. 29 N. Y. Supp. 187, affirmed.

2. Raising the grade of a street by building approaches for a street bridge to abolish grade railway crossings is not a taking of the property of abutting property owners, so as to entitle them to damages.

Appeal from supreme court general term, First department.

Action by Emily Talbot against the New York & Harlem Railroad Company and another. From a judgment (29 N. Y. Supp. 187) affirming a judgment dismissing the complaint on the merits, plaintiff appeals. Affirmed.

Henry A. Foster and Augustus S. Hutchins, for appellant. Hamilton Harris, for respondents.

BARTLETT, J. This action is brought to enjoin the defendant corporations from maintaining or using the bridge over Fourth avenue on which Forty-Eighth street crosses as a public highway, and a certain protection wall adjacent to plaintiff's house in the same street; also to compel the removal of the bridge and wall. In 1869 the plaintiff purchased a lot 250 feet west from Fourth avenue, on the north side of Forty-Eighth street, and erected thereon a brown stone front house. Shortly after the erection of this house, the New York & Harlem Railroad Company acquired title to all the land on the north side of Forty-Eighth street, lying between plaintiff's premises and Fourth avenue; also a large amount of land on the south side of the street, opposite the lot of plaintiff. On the 1st of April, 1873, the New York & Harlem Railroad Company leased to the New York Central & Hudson River Railroad Company its railroad, extending from Forty-Second street, along Fourth avenue, to the Harlem river. In 1872 the legislature passed an act (chapter 702) entitled "An act to improve and regulate the use of the Fourth avenue in the city of New York," for the purpose, among others, of rendering the same safe and convenient for persons crossing the same. The act provided that the New York & Harlem Railroad Company should construct at Forty-Eighth street a tunnel under the Fourth avenue for sidewalks and carriage ways, or a bridge over the same for a like purpose, and that the tunnel or bridge should be at least 34 feet wide. The act had for its general object the abolition of grade crossings to conserve the public safety, as it was contemplated to run trains from the Grand Central Station, at Forty-Second street, to the Harlem river, at a high rate of speed. It was a work of public necessity, and involved a large expenditure, which was shared equally by the city of New York and the defendants. The act appointed a board of engineers to execute, direct, and superintend the construction of the improvements, to be called "The Board of Engineers of the Fourth Avenue Improvement." This board was made up of five members, one of whom was the chief engineer of the board of public works of the city of New York for the time being, and another was the engineer of the New York & Harlem Railroad Company, and was authorized and directed to take entire charge and control of the work, and to prepare plans and specifications and an estimate of the expense, and file them in the office of the comptroller of the city of New York. They were also required to take an oath of office before a judge of a court of record, and file it with the comptroller. All these provisions were duly observed, and on the 30th of June, 1872, it was resolved by the board to authorize the construction of an iron bridge over the railroad tracks at Forty-Eighth street. On the 25th of July, 1872, the

board awarded a contract for this work to the Watson Manufacturing Company, in accordance with plans, etc., duly filed, and directed the New York & Harlem Railroad Company to execute the contract with that company. This was done. The bridge was constructed, and is the one complained of by the plaintiff. The bridge has approaches on its westerly side commencing opposite to the eastern boundary of plaintiff's premises, and ascending upon the lines prepared by the board of engineers until they meet the iron structure spanning the avenue. The bridge is 34 feet wide, as the act requires, and is placed on the south side of the street, the latter being about 60 feet in width, thus leaving the north sidewalk and a strip of the surface roadway unoccupied by the new structure. In order to close this side of the street, and prevent those traveling upon Forty-Eighth street from injury in attempting to cross the railroad tracks at grade, and as a part of the official plan as filed, a wall of brick was constructed 8 feet 3 inches high and about 31 feet long, beginning at the southeasterly corner of plaintiff's house, and extending over the discontinued portions of the sidewalk and roadway to the corner of the bridge structure. The trial court found that the bridge had been used since its construction as a public highway both for carriages and foot passengers, and that its approaches have been kept paved and in order, and the bridge lighted, ever since, by the corporation of New York. It is further found that the corporation defendants have not had the custody of or maintained the bridge or the wall or used the bridge; that they have in several instances replaced bolts to prevent danger to passing trains, and repainted the iron work, which had been disfigured by the smoke of the engines. It is also found that the board of engineers were able and skillful men, and that the work was examined by them after completion, and accepted as duly performed under the provisions of the act of 1872. It was under this condition of affairs, and nearly 20 years after this work was begun, that the plaintiff instituted this suit, alleging she had suffered great damage by reason of the bridge and wall. The trial court found that the effect of the wall was to prevent, to a certain extent, access of a carriage to the front steps of plaintiff's house, and that in the early morning it cast a slight shadow into the front basement room, but later in the day the reflection from the wall increased the light. It was also found that the bridge itself did not injuriously affect the light, air, or access to plaintiff's house; that the damage caused by the wall was inconsiderable; and that it could not be determined from the evidence given how much in money that damage had been, or how much resulted from the lawful occupation of its own land by the railroad company adjoining and opposite to the plaintiff's premises, and not form-

ing a part of Forty-Eighth street. It is not necessary, however, to determine whether the court below properly disposed of the question of damages upon the evidence, as we are of opinion that the law, as applied to the admitted facts, imposes no liability on the defendants.

We have in this case a change of grade of one of the public streets of the city of New York, the fee of which was in the city, by command of the legislature, under the supervision of a board of engineers of its own creation. The defendant company acted as the agent of the board, and conducted the work according to its plans, and under its supervision and control. On the completion of the work and its acceptance by the board, it has been maintained and used by the city of New York ever since as a part of its highway system. These facts show that, even if the plaintiff has suffered damage, and can compel removal of the wall and bridge, the defendants are not liable in damages; nor would a decree of removal against them be of any force or effect, as they are not in possession of the bridge, or maintaining or using the same. We think, however, that the facts show no liability on the part of any one. While it is a general rule that abutting owners upon city streets, although not vested with the fee, are entitled to the use of the street for access and other purposes, of which they cannot be deprived without compensation, yet this right is subject to important exceptions. In the case of *Reining v. Railroad Co.*, 128 N. Y., at page 165, 28 N. E. 642, Chief Judge Andrews, in a discussion of these exceptions as applied to a very different state of facts, said: "The cases of change of grade furnish apposite illustrations. They proceed on the ground that individual interests in streets are subordinate to public interests, and that a lot owner, although he may have built upon and improved his property with a view to the existing and established grade of the street, and relying upon its continuance, has no legal redress for any injury to his property, however serious, caused by a change of grade, provided only that the change was made under lawful authority. This, it is held, is not a taking of the abutting owners' property, and the injury requires no compensation." In the case at bar there is no closing of the street, nor is the plaintiff excluded therefrom, within the principle of the *Story Case*, 90 N. Y. 122. The abolition of the grade crossing was required for the public safety, and the wall shutting out the traveler from the north sidewalk and strip of roadway leading down to the railroad tracks was a necessary part of the work ordered by the legislature. This wall stands upon the property of the defendants and the city. The proposition that in this case there is no taking of private property for public use under the provisions of the constitution, and that the acts complained of are *damnum absque injuria*, has been frequently sustained by this court. *Radcliffe's Ex'rs v. Mayor*, etc., of Brooklyn, 4 N.

Y. 195; *Bellinger v. Railroad Co.*, 23 N. Y. 42; *Moyor v. Railroad Co.*, 88 N. Y. 351; *Ulline v. Railroad Co.*, 101 N. Y. 98, 4 N. E. 536; *Atwater v. Trustees*, 124 N. Y. 602, 27 N. E. 385. The supreme court of the United States has also approved the rule. *Smith v. Corporation of Washington*, 20 How. 135; *Transportation Co. v. Chicago*, 99 U. S. 635, 641.

The appellant discusses other questions which need not be considered in detail, as they have no direct bearing upon the main and controlling point in this case. The plaintiff's contention that the defendants unlawfully occupy that portion of Forty-Eighth street which is barred off from public use by the bridge and wall is not relevant to this controversy. It is a question between the defendants and the city of New York, if the latter's property rights have been invaded. The bridge approach and wall were located by the state through its agents; and as to the strip of land shut off from public use, it was in no legal sense a closing of the street, but a necessary provision to turn the tide of travel upon the sidewalks and the roadway over the bridge. There is no finding, as contended, that this wall during the last 10 years, or for any other period of time, has been maintained by either of the defendants, but there is an express finding to the contrary.

It is not necessary to examine the question of the statute of limitations. We agree with the learned court below that the plaintiff established no cause of action, and that the complaint was properly dismissed on the merits. The judgment appealed from should be affirmed, with costs. All concur. Judgment affirmed.

(151 N. Y. 75)

PEOPLE ex rel. ECKERSON et al. v.
BOARD OF TRUSTEES OF VIL-
LAGE OF HAVERSTRAW.

(Court of Appeals of New York. Dec. 1, 1896.)

EMINENT DOMAIN—VILLAGES—TAKING LAND FOR STREET—PROCEEDINGS TO ASCERTAIN COMPENSATION—CONSTITUTIONALITY OF STATUTE.

1. Under the constitutional provision requiring the compensation of the owner of property taken for public use, to be "ascertained by a jury, or by not less than three commissioners appointed by a court of record," the jury must be one drawn by the ordinary mode of drawing jurors for service in the courts, and the jurors must have the same qualifications.

2. The provision of the village incorporation act, as amended (Laws 1870, c. 291; Laws 1878, c. 59; and Laws 1896, c. 694), for ascertaining the compensation to be paid the owner of land taken for streets, by a jury of 6, chosen from a list of 12 disinterested "freeholders of the village," to be selected by the trustees of the village, is invalid, neither the method of selection nor the qualifications required being such as to constitute such persons a constitutional jury. 30 N. Y. Supp. 325, reversed.

3. The initial proceeding being void, the fact that the act gives a landowner the right of appeal, in which case his compensation is to be determined anew by three commissioners to be appointed by the county judge, does not render the proceeding a constitutional one, as, in order to avail himself of the right, he is required to

give a bond for the payment of the costs in case the award of the commissioners does not exceed that of the jury by \$20. It is beyond the power of the legislature to compel an owner to pay the costs of a legal condemnation of his property, which in some cases would deprive him of all compensation. 30 N. Y. Supp. 325, reversed.

Appeal from supreme court, general term, Second department.

Certiorari on relation of J. Esler Eckerson and others against the board of trustees of the village of Haverstraw. From a judgment confirming an award made by a jury in proceedings to condemn land for a street (30 N. Y. Supp. 325), the relators appeal. Reversed.

Louis Marshall, for appellants. Wm. McCauley, Jr., and Alonzo Wheeler, for respondent.

VANN, J. In March, 1893, the respondent determined to open a new street in the village of Haverstraw, and for that purpose to acquire the title to certain lands belonging to the appellants. A jury was selected, trial had, and an award made; but as it was not satisfactory to the landowners, they procured a writ of certiorari to review the proceedings, claiming that they were in violation of the constitution of the state. The general term affirmed the award, one of the learned justices dissenting, and the relators bring this appeal.

The proceedings were founded on the act of 1870 for the incorporation of villages, as amended in 1878 and 1893. Laws 1870, c. 291, tit. 7, p. 694; Laws 1878, c. 59, p. 66; Laws 1893, c. 694, p. 1732. That act makes the board of trustees commissioners of highways, and authorizes them to appropriate any land in the village for the purpose of opening streets, but requires that the damages caused thereby, if not agreed upon, shall be determined and awarded by a jury of six freeholders, to be selected as follows: "The said board of trustees shall prepare a list of names of twelve freeholders of the village, in no wise of kin to the applicants, owners or occupants, or any or either of them, and not interested in the lands proposed to be taken; the said board shall cause a copy of such list, with a notice that a meeting will be held at some convenient time and place within the village, for the purpose of selecting the jury from such list, to be served on each of said owners. * * * At the time and place mentioned in said notice, the board of trustees shall meet, and the owners of the land may strike from the said list not more than six names, and of the number which remain the six names standing first upon the list shall be the jury." Laws 1893, c. 694, § 1. Within 20 days after an award by the jury as thus constituted, any person interested may appeal therefrom to the county judge of the county where the village is situated, by a petition "praying for the appointment of three commissioners, residing

in said county, to review said award of said jury." The statute further requires that "the person appealing shall execute a bond to the village in its corporate name in the penal sum of two hundred and fifty dollars, with two sureties who shall justify in twice the amount, conditioned for the payment of the fees of said commissioners and costs of appeal, in case the award of the jury shall not be increased twenty dollars by said commissioners to each party appealing." Provision is made for service of a "copy of the petition with a notice of the time when and the place where it will be presented to the said judge," who "on hearing the parties" may "appoint three disinterested electors to review the award of said jury and determine and award the damages of the person or persons appealing." The commissioners so appointed "have power to compel attendance of witnesses by subpoena," and after examining the premises, and hearing the proofs and allegations of the parties, to award such damages to the appellants as they shall deem just. The award thus made is declared by the statute to be "final and conclusive on all persons interested." Laws 1878, c. 59, § 8. The proceedings in the matter now before us were substantially in accordance with the statute. When the trustees met to choose a jury from the list of twelve names previously selected by them, the relators objected upon the ground "that the proceeding * * * to assess the damages * * * by a jury named or designated in whole or in part by this board is illegal, unconstitutional, and unjust." The trustees declined to make any ruling upon the question thus presented, and thereupon the counsel for the relators struck one name from the list, and declined to strike off any other, although he insisted that two of the persons left were disqualified to act, because they were both over 70 years of age, and he presented the affidavits of those jurors to that effect in aid of the objection. Without any specific ruling, this objection was also disregarded, whereupon the first six persons whose names then appeared on said list, including the two who had been objected to on account of their age, were selected by the trustees to determine and award the damages sustained by the relators. After a long trial the jury awarded the sum of \$1,100, whereas the amount claimed was over \$70,000.

It is provided by our present constitution that, "when private property shall be taken for any public use, the compensation to be made therefor, when such compensation is not made by the state, shall be ascertained by a jury, or by not less than three commissioners appointed by a court of record, as shall be prescribed by law." Const. art. 1, § 7. The constitution of 1846, which was in force when the award in question was made, contained the same provision in the same words. Prior to that the constitution sim-

ply directed that private property should not be taken for public use without just compensation, but said nothing as to the manner in which such compensation should be ascertained, and thereby left the subject, as was held by the court of errors, "to the discretion of the legislature, to be regulated in such manner as might be prescribed by law." *Livingston v. Mayor, etc.*, 8 Wend. 85, 102.

Two questions are presented for discussion by this appeal: (1) Whether a jury thus selected under the statute in question meets the requirements of the constitution; and, if it does not, (2) whether the right of appeal provided by the statute is a constitutional method of assessing the damages.

As to the first question, we agree with the learned general term that the word "jury," as thus used in the constitution, means a body of jurymen drawn in the ordinary mode of drawing jurors for service in the courts. This was so held by the court of appeals in *Cruger v. Railroad Co.*, 12 N. Y. 190, 198, upon the ground that when the constitution of 1846 was adopted there was a known legislative usage upon the subject, which had existed during a period of more than 20 years immediately preceding the sitting of the convention, and that the term "jury" was hence presumed to have the same meaning in the constitution, with reference to the appraisement of damages in condemnation proceedings that it had acquired from long use by the legislature with reference to the same subject. Many statutes were cited by the court in support of its position, and we have examined many passed since that time without finding one, other than that under consideration, which authorized a jury to be drawn to assess such damages, except from the list of jurors, grand or petit, made up for use in the courts. When the legislature has frequently acted with reference to a subject, and always in such a way as to give a certain effect or meaning to a particular word, it has an important bearing upon the meaning of that word in a constitutional provision upon the same subject, adopted at about the same time. Under such circumstances, and in the absence of anything to indicate a different intention, it is a reasonable presumption that the framers of the constitution adopted the word with the meaning that it had acquired from legislative usage. This presumption is strengthened, if, after the adoption of the constitution, the legislature continues to use the word, during session after session; almost without exception, with the same meaning under similar circumstances. No argument is needed to show that the jury in question was not drawn in the ordinary mode of drawing jurors. The jury list, when prepared according to law for use in the courts, comprises a collection of men selected from the body of the people, possessing certain qualifications, and supposed to represent the average intelligence, judgment, and integrity of the best class of citizens. They are required to be male citizens of the United States, residents of the county, not less than

21 nor more than 70 years of age, taxpayers in their own names, or through their wives, in the possession of their natural faculties, neither infirm nor decrepit, free from all legal exceptions, of fair character, approved integrity, sound judgment, and well informed. Code Civ. Proc. §§ 1027, 2991; 2 Rev. St. 411, § 13; Id. 720, § 3; Laws 1890, c. 156. From this list the jurors are drawn publicly by lot, in the most careful manner, and under the supervision of not less than two public officers when they are to serve in courts of record, and by the court itself when they are to serve in the minor courts. Every reasonable precaution is taken to select fair and impartial men, and no party to an action can, directly or indirectly, choose the jurors who are to serve at the session of court when such action is to be tried.

According to the act under consideration, the jurors are simply required to be freeholders of the village, not related "to the applicants, owners or occupants," nor interested in the lands proposed to be taken. No other qualification is required, and no further limitation imposed. As was said by the learned general term, the jurors "may be of any age, or of either sex, and possessed of none of the qualifications named in the Code." They might be ignorant or dissolute, without character or judgment, unable to comprehend evidence or understand law, and in all respects unfit to act as judges in a matter even of small importance. A jury composed of such persons—which though not probable, is possible, under the act in question—would not be such a jury as is meant by the constitution. The objection to the method of selection is equally serious. The respondents were, in a certain sense, parties to the proceeding to condemn this land. They represented the village and its interests. While they could not act except upon the petition of 10 freeholders, when they did act their interests at once became adverse to those of the landowner, for it was their duty to get the land as cheap as they could. The petitioning freeholders, upon presenting their petition, at once dropped out of sight. They had no further power. They are not parties to the proceeding. They do not defend this appeal, nor have they fought the matter for the village and against the relators thus far through the courts. The trustees represent, as they should, the interests of the public. They, and they alone, have the power to discontinue or proceed. They are authorized to agree upon the price of the land. They may purchase it, if they can. If not, they may take it against the will of the owner, through the power of eminent domain. Yet the statute gave them the right to select the men who were to decide the very question which they, as representatives of the village, had been unable to agree upon through negotiation with the owners. It is true that the landowner could strike off 6 from the list of 12, but, if they were all alike, what good would that do? While we have no reason to believe that the trustees in this case abused their power by selecting unworthy men, they

could have done so, and yet have kept within the statute. They could have selected, as they did in part, those disqualified by age. They could have gone further, and have chosen those who were manifestly unfit, through ignorance, prejudice, or want of moral character, to sit in judgment upon the rights of others. That they did not do so is to their credit, and not to the credit of the statute. We think that the constitution means a jury of men with such qualifications as the law in force at the time prescribes for jurors serving in the courts, and selected from one of the lists in use by the courts. The argument that the six persons referred to in the statute are not really a jury, but commissioners, as was held in another state under somewhat similar circumstances (*Soens v. City of Racine*, 10 Wis. 271), does not aid the respondents, because, assuming that those called a "jury" by the statute were in fact commissioners, they were not selected by a court of record, as required by the constitution, but by the respondents themselves. *House v. City of Rochester*, 15 Barb. 517; *Menges v. City of Albany*, 56 N. Y. 374; *Hilton v. Bender*, 69 N. Y. 75, 86.

It is, however, insisted, and so the general term held, without having the advantage of hearing the point discussed, that the appeal to the county judge allowed to the landowner by the statute, and the appointment by that officer of three commissioners to proceed de novo with the appraisal, would be a sufficient compliance with the constitution. The statute requires the county judge of the county to appoint the commissioners, while the constitution commands that they shall be appointed by a court of record. A county judge is not a court of record. A court is a tribunal organized according to law, and sitting at fixed times and places for the administration of justice,—not an individual holding a judicial office. The distinction between a court of record and a judge of a court of record is too well recognized in the law to require discussion. *People v. Donovan*, 135 N. Y. 76, 79, 81 N. E. 1009, 1010; *Helshon v. Insurance Co.*, 77 N. Y. 278; *In re Roberts*, 70 N. Y. 5. The distinction is recognized by the learned counsel for the respondents, who contends that the validity of the statute should be determined by the effect of the action taken under it, and, as the landowner may always make his application at a term of the county court, he is deprived of no constitutional right. There is some force to this position, as well as in another argument used by him; that the statute means the county judge, as the embodiment of the county court. We do not regard the question as free from doubt, because the statute says the appeal may be taken to the county judge of the county where the village is situated, while the only term available to the landowner might be held, as permitted by law, by the county judge of another county. Const. art. 6, § 14. We do not pass upon that question, however, as we think that the right of appeal provided by the stat-

ute fails to comply with the constitution, because it is so hampered by the requirement of a bond as in some cases to prevent the landowner from taking an appeal. It is undoubtedly true, as was held by the general term, that an assessment may be made in the first instance in any manner that the legislature sees fit to direct, provided that an unqualified and unfettered right of appeal is given, whereby the damages may be ascertained in the manner required by the constitution. *Dill. Mun. Corp.* § 618; *Tied. Mun. Corp.* § 245; *Cooley, Const. Lim.* p. 507; *Lewis, Em. Dom.* § 457; 1 *Blish. New Cr. Proc.* §§ 893, 894. If the primary method is constitutional, there is no right to an appeal, except through the grace of the legislature. If it is unconstitutional, but an unhampered right of appeal is given, so that the landowner may have his damages assessed before one of the tribunals named in the constitution, that is sufficient; for he is only entitled to one trial, provided it is before a lawful jury, or before not less than three commissioners appointed by a court of record. If he acquiesces in the first award, his rights are concluded; but, if he takes the appeal, the new trial then had is the only one that the constitution recognizes. It is regarded as a trial had upon his voluntary appearance, and as the sole trial in the proceeding. The appeal, therefore, must not be one granted ex gratia, but as a matter of strict constitutional right, and hence so unshackled as to be freely enjoyed, without regard to ability to give bail or pay costs. When the first trial provided by the statute is valid, the legislature can so restrict the privilege of appealing as it sees fit, or can withhold it altogether. It is only when the appeal affords the only trial which accords with the constitution that it must be given without any condition that the landowner may not be able to comply with. The authorities, therefore, which sustain the right to require bail or award costs on an appeal, after a trial by a constitutional method, do not apply to this case; for, as we have held, the first trial provided by the statute is not in accordance with the constitution. An appeal that can be taken only upon the condition of giving a bond in the penalty of \$250, with two sureties justifying in twice that amount, conditioned for the payment of the fees of the commissioners and the costs of appeal, provided the award of the jury is not "increased twenty dollars" to each party appealing, is not a reasonable regulation of procedure, as it may result in depriving the landowner of the right to appeal, and hence of the right to any trial in accordance with the constitution. In all cases where the fees and costs exceeded the value of the land, it might be a taking of the land without making any compensation whatever. The landowner cannot be compelled to pay any part of the expense of the proceedings to condemn his land. This was so held in *Re New York, W. S. & B. Ry. Co.*, 94 N. Y. 287, 294, where an award made by commissioners appointed in condem-

nation proceedings under the general railroad act had been confirmed by the special term, but, on an appeal brought by the company, set aside by the general term and new commissioners appointed, with costs against the landowners. This court said: "The only point remaining to be considered is the appeal from the judgment for costs rendered by the general term against the landowners, on reversing the order of confirmation and appointing new commissioners, amounting to \$120.70. We are of opinion that the general term had no power to award these costs. If the appeal to the general term had been taken by the landowners, and they had been defeated, it may be that the court could, in its discretion, have compelled them to pay the costs to which they had subjected the company by such an appeal. But the appeal was taken by the company because it was dissatisfied with the amount awarded, and was a continuation of the proceeding instituted by it to ascertain the compensation payable to the landowners, and to acquire their land against their will. In such a case, to compel the landowners to pay any part of the expense incurred by the company for the purpose of ascertaining the compensation, which proceedings were an indispensable condition of its right to take the land, would conflict with the constitutional right of the landowners to just compensation. They are entitled to the full amount of their damages, when finally ascertained; and this amount cannot be diminished by allowing to the company its own expenses incurred in ascertaining it, or in endeavoring to reduce it. In the present case the costs allowed are small, compared with the amount of the award, which was \$35,000, but that can make no difference in the principle. If the company can recover against the landowner the expenses of proceedings carried on by it for its own benefit, where the award is large, it may do the same when the award is small; and a case may be supposed where the costs and expenses of the company would absorb a large part, or even the whole, of the award. There is no warrant in the statute for awarding such costs, and, if there were, it would be a violation of the constitutional right of the landowner." We regard that case as analogous to the one in hand, so far as the point under consideration is concerned. There an award had been made, but set aside; so that, as the matter stood when costs were allowed, the damages had not been ascertained, and yet the landowners were charged with part of the expenses of ascertaining them. Here there was an invalid award, which stands for nothing, and an appeal in continuation of the proceeding to assess the damages is only allowed upon condition that a bond to pay the expenses of the assessment, in a certain contingency, is given by the landowner. He must appeal in order to get pay for his land. He may not be able to comply with the condition upon which an appeal is allowed, but, if he does comply, it may involve the payment by

him of the expenses of the appeal, which must be regarded as a part of the proceedings to acquire his land. We think that an appeal burdened with such a condition is not a constitutional method of ascertaining the damages. The judgment should be reversed, and the proceedings set aside, with costs. All concur, except ANDREWS, C. J., absent, and HAIGHT, J., dissenting. Judgment reversed.

(151 N. Y. 111)

**PORT JERVIS WATERWORKS CO. v.
VILLAGE OF PORT JERVIS.**

(Court of Appeals of New York. Dec. 1, 1896.)

CLAIM AGAINST VILLAGE—ACTION THEREON—IMPLIED CONTRACTS.

1. The decision of the board of village trustees respecting a claim against the village, the village charter requiring all claims against the village to be presented to the trustees for allowance, is not final, unless set aside on review, so as to bar an action on the claim.

2. A village authorized to contract for a water supply for a term of three years, and to insert the annual amount of the bill in the annual tax without submitting the same to a vote of the people, may contract for such water supply without an appropriation of funds therefor, though its charter also prohibits the incurring of any debt or liability beyond the amount of taxes applicable to its payment.

3. A village, having power to contract for a water supply, is liable for the value of water furnished it, though no contract was made therefor. 24 N. Y. Supp. 497, affirmed.

Appeal from supreme court, general term, Second department.

Action by the Port Jervis Waterworks Company against the village of Port Jervis. From a judgment (24 N. Y. Supp. 497) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Lewis E. Carr, for appellant. C. E. Cuddeback, for respondent.

HAIGHT, J. This action was brought to recover compensation for water furnished for a public fountain, watering troughs, sprinkling wagons, the village jail, and hose houses. The plaintiff is a corporation operating a system of waterworks through the village of Port Jervis. The defendant is a municipal corporation. Prior to the 1st day of May, 1886, the plaintiff had furnished water to the defendant for the extinguishment of fires, and for other purposes, under a contract, for \$2,000 per year. A controversy then arose between the company and the village trustees as to the amount that should be paid for water in the future, which controversy continued for the three years following; but, in the meantime, plaintiff continued to furnish, and the defendant to use, the water of the company, as it had theretofore done. The act under which the plaintiff was incorporated required the company to furnish water to the defendant for the purpose of extinguishing fires upon such terms as may be agreed upon with the board of village trustees; and, if they cannot agree, application may be made for

the appointment of commissioners, who shall prescribe the terms upon which the water shall be furnished. Laws 1808, c. 755, § 16. Pursuant to the provisions of this act, commissioners were appointed, who awarded the plaintiff \$2,000 per year for furnishing water for the extinguishment of fires in the village, and this award, amounting to \$6,000 in all for the three years in controversy, was paid. The plaintiff then presented its bill to the board of trustees of the defendant corporation for the water furnished to the village for its fountain, watering troughs, sprinkling wagons, etc., amounting to \$548 per year, or \$1,644 for the three years, which claim the trustees rejected. Thereupon this action was brought.

It is contended that the decision of the village trustees rejecting the plaintiff's claim was an adjudication of a competent tribunal having jurisdiction to act, and that such adjudication is a bar to this action; that the only remedy available to the plaintiff was a review of the determination made by the village trustees. In support of this contention our attention is called to the case of *Brady v. Supervisors*, 2 Sandf. 460, Id., 10 N. Y. 280, and other similar cases; but to our minds these cases are not applicable, and have no bearing upon the questions under consideration. Counties and towns are the civil divisions of the state, and, as such, are not subject to actions, only in so far as the statute has given them corporate capacity, with the right to sue and be sued. With cities and villages it is quite different. They are corporations created by the legislature, and, as such, may be sued in any of the courts of the state having jurisdiction of the subject-matter. It is true that the charter under which the defendant was incorporated provides for the presenting of claims against the municipality to the board of trustees for audit and allowance; but this provision is for the benefit and protection of the municipality, and forms a part in its scheme of government. It enables the trustees to settle and adjust claims without action or expense, and also enables them to estimate and determine the amount of taxes that it will be necessary to levy upon the taxable property in the village. They are not constituted a tribunal for the purpose of final adjudication upon claims which they themselves dispute, for reasons that are obvious. As to such claims, the appropriate remedy is by action. *Reilly v. City of Albany*, 40 Hun, 405; Id., 112 N. Y. 30, 19 N. E. 508; *Nelson v. City of New York*, 131 N. Y. 4, 29 N. E. 814.

It is also contended that this action cannot be maintained for the reason that no funds were ever appropriated therefor under the provisions of the defendant's charter. The provisions alluded to are as follows: "Such village shall have no power to borrow money, nor shall it be liable to pay money borrowed on its account, or advanced in its behalf, by its officers or by any other person, nor shall any of its money or property be applied to any such purpose; nor shall such village

incur any debt or liability beyond the amount of taxes applicable to the payment of such debts or liabilities, which shall have been voted to be raised in such village according to law." "No officer of such village shall have power to assent to incurring any debt or liability on the part of such village, contrary to the provisions of this act; nor shall any such debt or liability be paid from the money or property of such village, but all such officers assenting or assuming to assent to any such debt or liability, contrary to the provisions of this act, shall be jointly and severally liable, in their individual capacities, to pay the same." Laws 1873, c. 370, §§ 100, 101. If these provisions of the charter have reference to, or apply to, the plaintiff's claim, there might be force in the defendant's contention; but, in construing the charter, we must have reference to all of its provisions, and so construe them as to make them harmonious with each other, if possible; and, if we find provisions requiring the trustees to contract for terms of years in advance, thus incurring liabilities which could not have been included in an annual assessment, we must deem such provisions excepted from those above referred to. Upon referring to subdivision 14 of section 51 of the charter, we find that the trustees are required, among other things, to "contract with any water company for a supply of water for extinguishing fires, and for the uses of said village at such times and in such manner as the wants of the village may require, but no contract for water or gas shall be for a longer term than three years; and said board of trustees are hereby authorized to insert the annual amount of said bill for water or gas so contracted for in the annual tax levy without submitting the same to the vote of the people." Here we have an authority on the part of the trustees to contract before the taxes applicable thereto are levied. They may contract for a period of three years, and they may insert the amount of the annual contract in the tax levy for that year, without submitting the same to a vote of the people. This presents an entirely different scheme for the contracting of liabilities from that included in sections 100, 101, and must, therefore, be deemed to be excepted from, and not included in, those provisions. It is true that no express contract was entered into between the parties for the three years in controversy; but the water was furnished by the plaintiff and accepted by the defendant during that time under circumstances in which the law will imply a contract to pay what the water was fairly and reasonably worth for the period.

Some question has been made with reference to the finding that the village was liable for the water used for the sprinkling of the streets. The undisputed evidence shows that the village constructed and maintained the cranes from which the water was taken for sprinkling purposes; that it also paid one man four dollars per month for sprinkling Orange

square. It thus appears that there was some evidence in support of the finding of the trial court, and, inasmuch as that finding has been affirmed in the general term, the question is not open for further consideration in this court. The judgment appealed from should be affirmed, with costs. All concur. Judgment affirmed.

(151 N. Y. 24)

BATH GASLIGHT CO. v. CLAFFY et al.

(Court of Appeals of New York. Dec. 1, 1896.)

CORPORATIONS—ULTRA VIRES LEASE—CONTRACTS—CONSTRUCTION.

1. Where the lessee of the franchises and property of a gaslight company takes possession of and occupies the property, the lessor may recover on the lease for rent accrued, though the lease is ultra vires. 28 N. Y. Supp. 287, affirmed.

2. In an action in New York on a contract made and to be performed in a foreign state, on appeal the cause will be determined according to the law of New York, where the law of such foreign state on the subject does not appear by the record.

Vann, J., dissenting.

Appeal from supreme court, general term, Second department.

Action by the Bath Gaslight Company against John Claffy, impleaded with the United Gas, Fuel & Light Company and John T. Rowland, to recover against defendant Claffy as one of the sureties on the bond given by defendant company to plaintiff to secure the performance of a lease made by plaintiff to defendant company of all its property and franchises for a term of 25 years. From a judgment of the general term (26 N. Y. Supp. 287) affirming a judgment in favor of plaintiff entered on a decision by the court, a jury trial having been waived, defendant Claffy appeals. Affirmed.

Abram J. Rose, for appellant. James McKeen, for respondent.

ANDREWS, C. J. A brief statement of the material facts will present the important question arising upon this appeal. The plaintiff is a Maine corporation, created under a special law of that state passed in 1853, for the purpose of supplying gas for the lighting of the streets and buildings in the city of Bath. The United Gas, Fuel & Light Company is also a Maine corporation, organized in 1888, under a general law, by the execution and filing of a certificate, which, in pursuance of the law of Maine, was first submitted to and approved by the attorney general, who certified that it was conformable to the constitution and laws of that state. The certificate, among other things, specified that the corporation was organized to "manufacture, lease, purchase, and otherwise acquire, deal in, manage, use, and sell any and all machinery, fixtures, appurtenances, appliances, and plants for using and furnishing light, heat, and power, and for any and all purposes for which

gas is now used." The plaintiff, under its charter, established a plant, and at the time of the execution of the lease now to be mentioned was engaged in supplying the streets and buildings in Bath with gas for lighting and other purposes. On the 10th day of November, 1888, it executed to the United Gas, Fuel & Light Company a lease of its property and franchises for the term of 25 years from November 1, 1888, at an annual rent of \$2,500, which the lessee covenanted to pay in semi-annual payments on the 1st day of May and the 1st day of November in each year, and also the taxes assessed during the term. Provision was made for the payment by the lessor to the lessee, at the expiration of the term, of the value of any improvements or extensions made by the lessee; and it was also provided that the lessee should give to the lessor a satisfactory bond for the faithful performance by the lessee of its covenants in the lease. In pursuance of the provision last mentioned, the United Gas, Fuel & Light Company on the same day executed a bond with the defendants John Claffy and John T. Rowland as sureties, conditioned for the faithful performance by the company of the covenants in its behalf contained in the lease, which bond was delivered to and accepted by the plaintiff. The sureties were interested in the United Gas, Fuel & Light Company as stockholders, and Claffy (the appellant) was also a director. The lessee immediately, upon the execution of the lease, entered into possession of the demised property, and paid the rent up to the 1st day of November, 1889, but defaulted in the semiannual payment due May 1, 1890, and on the 2d day of August, 1890 (the rent remaining unpaid), the plaintiff re-entered, and took possession of the demised property under a provision of the lease which authorized the lessor to enter and expel the lessee on failing to pay rent. The entry also was, as may be inferred, with the consent, and, indeed, at the suggestion, of the officers of the lessee. This action was brought on the bond against the lessee and the sureties to recover as damages the rent which fell due May 1, 1890, and the proportionate rent from that date up to August 2, 1890, and taxes which had been assessed against the property during its occupation by the lessee, which it had failed to pay. The defendant Claffy alone appeared, and defended the action. His sole defense to the general claim is that the lease was ultra vires, illegal, and void, because (as is conceded) it was made without legislative sanction. If the court is compelled to accede to this contention by force of controlling authority, or from considerations of public policy which overbear in the particular case the rules of ordinary justice, it will be our duty so to declare, and to say that, although the United Gas, Fuel & Light Company received and enjoyed the undisturbed possession of the demised property under the lease until the re-entry, and accepted and appropriated the benefit of the contract, nevertheless, when called upon to pay

the rent which accrued during its occupation, it may defend itself on the ground that the plaintiff, in making the lease, exceeded its power, and escape the performance of its obligation; and, further, that the defendant Claffy may, for a like reason, avoid his guaranty.

The modern doctrine, as stated by Chancellor Kent, is to consider corporations as having such powers as are specifically granted by the act of incorporation, or as are necessary for the purpose of carrying into effect the powers expressly granted, and as not having any others. 2 Kent, Comm. 299. This doctrine is embodied in the Revised Statutes of New York, and the section relating to the subject is regarded as simply declaratory of the antecedent law. 1 Rev. St. 600, § 3. It has been frequently stated that the validity of contracts of corporations is to be determined by comparing the contract made with the charter, and if, upon such comparison, it appears that the contract was neither expressly authorized nor a necessary or reasonable incident to the exercise of the powers specifically granted, the contract is *ultra vires*. It seems that by the ancient common law a corporation could bind itself by a contract under its corporate seal, although the contract was not within the powers specified in the charter, and even although it contained negative words. This was, in substance, stated by Blackburn, J., in the case of *Riche v. Iron Co.*, L. R. 9 Exch. 262, citing as authority *Sutton's Hospital Case*, 10 Coke, 1. He said: "If there are conditions contained in the charter that the corporation shall not do particular things, and those things are nevertheless done, it gives ground for a proceeding by *sci. fa.* in the name of the crown to repeal the letters patent creating the corporation. But, if the crown take no such steps, it does not, as I conceive, lie in the mouth either of the corporation or of the person who has contracted with it to say that the contract into which they have entered was void as beyond the capacity of the corporation." The case came before the house of lords on appeal from the decision of the exchequer chamber in favor of the plaintiff, and its judgment is reported in L. R. 7 H. L. 653. The action was to enforce a contract entered into by the defendant, a corporation incorporated under the companies act of 1862. The judgment of the exchequer chamber was reversed on the ground that the contract sued upon was expressly prohibited by the act under which the defendant was incorporated, and was, therefore, void. The house of lords applied the general doctrine that an act done in contravention of an express statute is utterly void. The modern and reasonable doctrine that contracts into which corporations may lawfully enter are such only as are expressly or impliedly authorized by their charters, is nevertheless frequently disregarded in practice; and when this is done,

and a corporation enters into a contract beyond its chartered powers, the question arises which has been the subject of debate, and of much contrariety of opinion, how shall such a contract be treated by the courts, and whether the contract can create any rights as between the parties which the courts will enforce. There are some propositions pertaining to the general subject which are beyond dispute. One is that a contract by a corporation to do an immoral thing, or for any immoral purpose, or, to use a convenient expression, a contract *malum in se*, is void, and gives no right of action. The doctrine, however, is not peculiar to contracts of corporations. It has its root in the universal principle that persons shall not stipulate for iniquity. Another principle of general recognition is that a corporation cannot enter into or bind itself by a contract which is expressly prohibited by its charter or by statute; and in the application of this principle it is immaterial that the contract, except for the prohibition, would be lawful. No one is permitted to justify an act which the legislature, within its constitutional power, has declared shall not be performed. The series of cases in this state known as the "Utica Insurance Cases" afford an apt illustration. It was held that the restraining acts which prohibited the exercise of banking powers, including the discount of paper, by other than banking corporations, rendered void securities taken on such discount by corporations not possessing banking powers; and this, although the object of the restraining laws seems to have been the protection of the chartered banks in the monopoly of banking. But in not infrequent instances corporations enter into unauthorized contracts which are neither *mala in se* nor *mala prohibita*, or when the only prohibition or restriction is implied from the grant of specified powers. It is this class of cases which open the field of controversy. Is such a contract performed by one party, but not performed by the other, void as between them to all intents and purposes, so that no recovery can be had under it against the party who has received the consideration for his promise, but neglects or refuses to perform it, or is it so tainted with illegality that the courts must refuse to recognize it under any circumstances or enforce its obligation, whether as to past or future transactions?

There are certain English cases which are relied upon by those who maintain the strict view that contracts of corporations *ultra vires* are under no circumstances enforceable in the courts. The principal of these cases are *East Anglian Rys. Co. v. Eastern Counties Ry. Co.*, 11 C. B. 775, *MacGregor v. Railway Co.*, 18 Q. B. 618, and *Iron Co. v. Riche*, L. R. 7 H. L. 653. The *East Anglian Case* seems to have been the first one in England which sustained a defense of *ultra vires* interposed by a corporation as a defense to an action at law on a contract made

in the name of the corporation. See opinion of Erle, J., Mayor of Norwich v. Norfolk Ry. Co., 4 El. & Bl. 397. The defendant in that case, a railway corporation owning and operating a railway, entered into a contract with another railway company, by which it agreed to pay the parliamentary expenses which might be incurred by the latter company in the effort to obtain authority to extend its lines, whether the grant should be obtained or not, the intention being to turn over the concessions if obtained, together with the original line, to the defendant under a lease, for which a parliamentary sanction was to be applied for. The concessions were only in part obtained, and no authority to make the proposed lease was given, and the project was finally abandoned. The action was brought on the contract to recover the expenses incurred by the plaintiff, amounting to more than £20,000. It was held that the plaintiff was not entitled to recover, on the ground that the statute under which the defendant was incorporated prescribed that the funds of the defendant should be applied to the purposes for which it was incorporated, and that it could not legally enter into a contract involving the application of any portion of its funds to other purposes. The opinion relies upon cases in equity brought by shareholders to restrain the misapplication of corporate funds. The case of MacGregor v. Railway Co., and the Case of Ashbury Railway Carriage & Iron Co., though differing in detail, were decided upon the same principle, but in the latter case there was an express statutory prohibition which was regarded as prohibiting the contract there in question. It is important to observe that in each of these cases the action was brought against the offending corporation, or those in privity with it, to enforce the unauthorized contract while it was still executory on the part of the corporation, and that the effect of a recovery would have been to divert and appropriate the funds of the corporation, by the action of the courts, to unauthorized objects, to the prejudice of the legal rights of stockholders and creditors. Without questioning these cases, it is quite apparent that they stand in justice upon a very different basis from the action in this case, which is brought by the corporation to enforce a contract, the enforcement of which will indemnify the plaintiff and its stockholders for the deprivation of the use of the property of the corporation, during its possession by the defendants, under the unauthorized lease. The supreme court of the United States seems to be committed to a construction of the doctrine of ultra vires which would sustain the defense in the case now before us. Several cases have arisen in that court upon leases of railroads made without legislative sanction, in which it has been held that such leases are void as between the parties, and that no action can be maintained thereon to recover the rent reserved, even during the occupation by the lessee under the lease. In *Thomas v. Railroad Co.*, 101 U. S. 71, the defendant had leased to the plaintiffs a railroad for a term of years, reserving an option to terminate the lease at any time during

the term, and the defendant, in case such option should be exercised, covenanted to submit to arbitration the ascertainment of the loss and damage to the plaintiffs by reason of such termination of the lease, and to abide by the award. The defendant exercised the option, and terminated the lease, and resumed possession of the road, and an action was brought for a breach of the contract in respect to arbitration. The trial court determined the case against the plaintiffs on the ground that the contract sued upon was, in substance, a lease of the property and franchises of the defendant, which, having been executed without legislative authority, was illegal and void; and the supreme court affirmed the judgment. The action, it will be observed, was, in substance, an action to recover the value of the unexpired term of which the plaintiffs had been deprived by the action of the defendant, and the covenant sued upon was wholly executory. But in the subsequent cases of *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094; *Oregon Ry. & Nav. Co. v. Oregonian Ry. Co.*, 130 U. S. 1, 9 Sup. Ct. 409; and *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953,—which were actions by lessors against lessees to recover rent accrued under leases of railroads during the occupation by the lessees, it was broadly held that, as the leases were made without legislative sanction, they were void, and that no action could be maintained thereon to recover the past-due rent, although the lessees were and still remained in undisturbed possession of the demised property. Mr. Justice Miller, in the case in 118 U. S. and 6 Sup. Ct., expressed a doubt whether there could be a recovery on a quantum meruit. We concur with the opinion expressed by two of the learned justices of the court who dissented from the judgment in the case last cited, that the decision carried the doctrine of ultra vires to an unjust extent, and the rank injustice which, as it seems to us, these cases sanction, justifies the observation of Lord St. Leonards in the case of *Eastern Counties Ry. v. Hawkes*, 5 H. L. Cas. 347, 370, that "the safety of men in their daily contracts requires that the doctrine of ultra vires should be confined within narrow limits."

We concede that a railroad or other corporation invested with powers in the exercise of which the public have an interest, and empowered by reason of their quasi public character to do acts and exercise privileges peculiar and exceptional to enable them to discharge their public duties, cannot, as against the public, abdicate their functions, or absolve themselves from the performance of such duties through an unauthorized transfer of their property and franchises to another body or corporation. We have so held in the case of *Abbott v. Railroad Co.*, 80 N. Y. 27, where it was decided that a railroad corporation which, without legal sanction, had leased its road, was not thereby exempted from liability as carrier to a passenger injured by neg-

ligence during the operation of the road under the lease.

There are obvious reasons of propriety and public policy, the prevention of monopolies, among others, aside from the mere question of capacity under their charters, which enforce the now well-settled doctrine that leases by such quasi public corporations, to be valid and effectual, must be authorized by statute. But where, as in the present case, such an unauthorized lease has been made, and the lessee has received and enjoyed the possession of the property under the lease, is there any public policy which requires that the lessee should be permitted to escape the obligation imposed by the contract to pay the rent reserved during the enjoyment of the property? It is doubtless true, as has been suggested, that the corporation in such cases cannot, without the consent of the state, change its obligations to the state or the public, and discharge itself from its public duties. But the law affords ample public remedy for the usurpation by corporations of unauthorized powers, through proceedings by injunction or for the forfeiture of their charters. If a lease by a corporation, made in excess of its powers, and without legislative sanction, is illegal in the ordinary and proper sense of the term, it may be properly conceded that no action could be maintained upon it. The lessee, when sued for the rent, could set up the illegality of the contract, and the defense would prevail, however inequitable the defense might be. But the term "illegal," which is frequently used to describe a contract made by a corporation in excess of its corporate powers, in most cases means simply that the contract is unauthorized, or one which the corporation had no legal capacity to make. Such a contract may be illegal in the true and proper sense, but it may also be one involving no moral turpitude, and offending against no express statute. The inexact and misleading use of the word "illegal," as applied to contracts of corporations ultra vires only, has been frequently alluded to. *Comstock, C. J., Bissell v. Railroad Cos.*, 22 N. Y. 268; *Archibald, J., Riche v. Iron Co.*, L. R. 9 Exch. 293; *Lord Cairns*, same case on appeal, L. R. 7 H. L. 672.

The lease now in question was not in any true sense of the word illegal. It was undoubtedly void as against the state. The parties to the lease assumed it to be valid. It was contemplated, as the provisions of the lease show, that the lessee would continue and extend the business before carried on by the plaintiff, and it is not suggested that it did not, during its occupation, discharge all the obligations to the public which rested upon the plaintiff. The state has not intervened, and the possession of the property has now been restored to its original proprietors. The contract has been terminated as to the future, and all that remains undone is the payment by the lessee of the unpaid rent. We think the demands of public policy are fully satisfied by holding that, as to the public, the

lease was void, but that, as between the parties, so long as the occupation under the lease continued, the lessee was bound to pay the rent, and that its recovery may be enforced by action on the covenant. Public policy is promoted by the discouragement of fraud and the maintenance of the obligation of contracts; and to permit a lessee of a corporation to escape the payment of rent by pleading the incapacity of the corporation to make the lease, although he has had the undisturbed enjoyment of the property, would be, we think, most inequitable and unjust. It has been suggested, to avoid the apparent injustice which would result from holding that there could be no recovery on the contract for past-due rent, that there might be a remedy on an implied contract to pay the value of the use of the property. But, if the express contract was illegal in a proper sense, and the parties to the lease were guilty of a public wrong, so as to preclude a court of equity to entertain jurisdiction on the application of a lessor to be relieved from the lease, and to be restored to the possession of the leased property, as was held in the case of *St. Louis, V. & T. H. R. Co. v. Terre Haute & I. R. Co.*, 145 U. S. 393, 12 Sup. Ct. 953, then surely it would be a mere evasion, and would be inconsistent with legal principles, for the court to imply a contract from the occupation under the illegal lease to relieve the wrongdoer from the dilemma into which he had voluntarily placed himself. We think the rule which should be applied is that the lessee is bound by the contract so long as he remains in possession.

It is unnecessary now to determine whether a lessee under an ultra vires lease may relieve himself from liability in the future by abandoning the possession and restoring, or offering to restore, it to the lessor.

The courts in this state, from an early day, commencing as far back as the *Utica Insurance Cases*, have sought to regulate and restrict the defense of ultra vires so as to make it consistent with the obligations of justice. *Insurance Co. v. Scott*, 19 Johns. 1; *Curtis v. Leavitt*, 15 N. Y. 9; *Bissell v. Railroad Cos.*, 22 N. Y. 260, opinion of *Comstock, C. J.*; *Parish v. Wheeler*, Id. 495; *Arms Co. v. Barlow*, 63 N. Y. 62; *Pratt v. Short*, 79 N. Y. 437; *Woodruff v. Railway Co.*, 93 N. Y. 609; *Starin v. Edson*, 112 N. Y. 206, 19 N. E. 670. The case of *Woodruff v. Railway Co.*, supra, is very much in point in the present controversy. It was there held that the lessee of a railroad could not resist the payment of rent which accrued during its occupation under the lease on the ground that the lessor's title was derived under an ultra vires transaction. Our conclusion, therefore, is that the main question was properly decided against the defendant. It is said, however, that the contract was a Maine contract, and that by the law of that state the lease was illegal and void, and no action could be maintained upon it. It is a sufficient answer to this claim that the law of Maine on the subject does not ap-

pear by the record, and that it is the duty of this court, therefore, to determine the case according to the law of New York as established, or, in the absence of controlling authority, as justice having regard to all interests may seem to the court to require.

The question as to the liability of the defendant for the taxes assessed in 1890 was, we think, correctly adjudged. Finding no error in the record, the judgment should be affirmed.

VANN, J. (dissenting). This action was founded upon a written instrument in the following form, viz.: "Know all men by these presents, that the United Gas, Fuel, and Light Company, a corporation organized under the laws of Maine, and having a place of business in Gardiner, in that state, as principal, and John Claffy, of Brooklyn, Kings county, and state of New York, and John T. Rowland, of Jersey City, Hudson county, and state of New Jersey, as sureties, are holden and stand firmly bound and obliged unto the Bath Gaslight Company, a corporation organized under the laws of Maine, and having a place of business in Bath, in said state, in the sum of fourteen thousand dollars (\$14,000), to be paid to the said Bath Gaslight Company, or its assigns, to the which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators firmly by these presents. Sealed with our seals, dated the tenth day of November, one thousand eight hundred and eighty-eight. The condition of the above obligation is such that on the tenth day of November, A. D. 1888, the Bath Gaslight Company, aforesaid, leased to the United Gas, Fuel, and Light Company, aforesaid, its entire plant and charter rights for manufacturing and disbursing gas, subject to certain conditions, fully set forth in said lease; and if the said United Gas, Fuel, and Light Company shall faithfully and fully execute and perform the conditions of said lease, then this bond shall be void; otherwise remain in full force." By the lease referred to the Bath Gaslight Company demised and let to the United Gas, Fuel & Light Company "the real estate, personal property, trade fixtures, and incorporate rights belonging to and used by the said lessor in carrying on its business of manufacturing and supplying the inhabitants" of the city of Bath, Me., "with gas." The instrument stated that the intention of the lessor was "to transfer and set over to the said lessee during the terms of" said "lease, and subject to the conditions" therein "named, all the rights to manufacture and sell gas under the provisions of the charter granted to the said Bath Gaslight Company on the 22d day of February, 1853, together with any amendments thereto; all the property held by it, the said lessor, in carrying on the said business of manufacturing or selling gas, whether the said property be real, personal, or mixed; * * * to hold for the term of twenty-five years from the 1st day of November, 1888, yielding and paying therefor the rent of \$2,-

800 per annum." There was a covenant on the part of the lessee to pay the rent semiannually on specified days, to surrender at the end of the term, and against waste. There was also a provision that the lessee would "give to the lessor a bond for the faithful performance of the terms of" said "lease in the sum of \$14,000, and the responsibility of said bond" was to be "constantly maintained to the satisfaction of said lessor." "All taxes duly assessed on the premises during the term aforesaid" were to be paid by the lessee, and it was given the right "to alter or change the said gas works so as to manufacture the gas from petroleum or any other product." It was agreed that the lessee might "repair or rebuild any part or all of said works, if necessary, for the proper and safe management of said business; and that upon the reinvestment of said works in the said lessor at the expiration of the term * * * the said lessee" should be "allowed for all improvements," with the right to an arbitration to settle the value thereof, if not agreed upon. The lessor covenanted to "assign and transfer to the said lessee, or its assigns, so much as it may be possible to procure of the capital stock of said Bath Gaslight Company, * * * at any time within five years," at \$80 per share. The lessor promised that it would "endeavor to have its charter extended so as to cover the right of using gas for heating purposes."

The main defense set forth in the answer of Mr. Claffy, who was the only defendant sued, is that the lease was ultra vires and void, because the plaintiff had no power to let for a long term of years all its property and franchises to another corporation engaged in the same business. The trial court held that the lease was void, but that the plaintiff could recover, as upon a quantum meruit, for use and occupation, although no such cause of action was alleged in the complaint, and no proof given as to rental value, aside from the rent reserved in the lease itself. The plaintiff is a corporation organized in 1853 under a special statute of the state of Maine, with authority to make, sell, and distribute, in the usual way, illuminating gas to the city of Bath and its inhabitants for the purpose of lighting buildings, streets, and public places. It was given power by its charter to hold such real and personal property as should be necessary to enable it to carry on the business aforesaid, and also "to lay gas pipes in any of the public streets or highways in said city, upon first obtaining consent" of the proper authorities. It was its duty, as the charter provided, "at all times, and within a reasonable time after request by the city council, * * * to supply with gas to such an extent and in such a manner as" should be "required, any street or public building, at a fair and reasonable rate of payment therefor." There was an express provision that if it should "at any time refuse or unreasonably neglect to comply with this provision, the exclusive privilege" granted by the charter should "be of no

effect." It was further provided that the common council might at any time take and hold capital stock of the company to an amount not exceeding one-half thereof, upon payment of a proportional part of the cost of the investment, with the addition of 10 per cent. thereto. The charter conferred no powers upon the plaintiff, other than those mentioned, and certain incidental authority common to all corporations of a similar nature.

This company laid pipes in the streets of Bath, carried on the business for which it was created, and performed its functions under its charter, from 1853 until the 10th of November, 1888, when another corporation, known as the United Gas, Fuel & Light Company, was organized under the general statutes of the state of Maine, with power to make and furnish gas for lighting purposes, as well as heat and motive power derived from gas, for heating and manufacturing purposes, without restriction as to locality. On the same day that the last-named company was organized, the plaintiff leased to it for the term of 25 years all its property, rights, and franchises, and thereupon the new company took possession of all the property of the plaintiff, including the gas plant, "rights of way through the streets," and four miles of gas mains laid in the public highways. It continued in possession until August 2, 1890, when, owing to the nonpayment of rent and taxes, the plaintiff resumed possession of the property and rights covered by the lease. This action is brought upon the bond given to secure performance of the lease, to recover as damages for the breach of the condition thereof the amount of rent and taxes that became due while the lessee was still in possession. No express authority was conferred upon the plaintiff by its charter to execute a lease so sweeping in character as to part not only with all its property, but also with all its power to carry on business for a quarter of a century. There was certainly no implied power conferred upon the plaintiff to execute such an instrument, for the implied powers of corporations are confined to such as are incidental to those expressly granted and necessary for the convenient and proper enjoyment thereof. *Village of Carthage v. Frederick*, 122 N. Y. 268, 271, 25 N. E. 480; *People v. Chicago Gas Trust Co.*, 130 Ill. 268, 283, 22 N. E. 798, 799; *Beach, Pub. Corp.* § 637. The plaintiff is a public or quasi public corporation, because it was created not merely for the private gain of its stockholders, but for the benefit of the public also. It owed certain express duties to the public, for it was bound to supply with gas any street or public building upon request of the city council. It had a franchise from the city to lay mains in public streets for the purpose of furnishing gas to the inhabitants. It was under obligation, at any time, to transfer one-half of its stock to the city upon payment of a sum to be

agreed upon, or adjusted by arbitration upon a prescribed basis of cost and profit. It was subject to the control of the legislature, could be given the power of eminent domain, and could be compelled by mandamus to discharge its duties to the public. The purpose of its creation was twofold: First, to accommodate the public, both in its organized and unorganized capacity, by furnishing gas to the streets and buildings owned by the city and to the dwellings and business places of the people; and, second, to make it profitable for the stockholders to serve the public in this way. Its powers, therefore, were to be exercised in part for the public good. The due discharge of its duties to the public formed the consideration of the public grant, and an acceptance of the charter was an assumption of the duties imposed thereby. *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co.*, 115 U. S. 650, 6 Sup. Ct. 252. As was said by Chief Justice Fuller in *Gibbs v. Gas Co.*, 130 U. S. 396, 408, 9 Sup. Ct. 553, 557: "The supplying of illuminating gas is a business of a public nature to meet a public necessity. It is not a business like that of an ordinary corporation engaged in the manufacture of articles that may be furnished by individual effort." And in an earlier case in the same court, Mr. Justice Harlan said: "The manufacture of gas, and its distribution for public and private use by means of pipes laid under legislative authority in the streets and ways of a city, is not an ordinary business, in which any one may engage, but it is a franchise belonging to the government, to be granted for the accomplishment of public objects to whomsoever, and upon what terms, it pleases. It is a business of a public nature, and meets a public necessity for which the state may make provision." *New Orleans Gaslight Co. v. Louisiana Light & Heat Producing & Manuf'g Co.*, 115 U. S. 650, 669, 6 Sup. Ct. 252, 262.

The lease under consideration was a contract that wholly disabled the plaintiff from performing those duties to the public that were required by its charter. It was a complete transfer, for the period of 25 years, of all corporate rights, powers, and property except the right to maintain its organization, collect rents, declare dividends, and the like. It could no longer carry on its legitimate business. It could neither make nor sell gas. It could not use the mains that it had laid in the public streets, by permission of the city authorities, for the purpose of distributing gas. It had parted with all control over its own property used to carry on its business. It had transferred to a rival corporation all its "rights to manufacture and sell gas" under the provisions of its charter. It had neither the means nor the right to make or sell that commodity, the making and selling of which was the object of its existence. It could discharge no duty that it owed to the city or to the general public, because it

had, in effect, abdicated every vital function by the transfer of its corporate rights. As was said by Judge Finch in an important case: "Only a shell of the corporation was left standing as a seeming obedience to the law, but with all its internal structure destroyed or removed." *People v. North River Sugar-Refining Co.*, 121 N. Y. 582, 623, 24 N. E. 834, 840. I regard this lease as opposed to public policy, and therefore void. It was beyond the corporate powers of the lessor, and involved an abandonment of its duty to the public. When the charter of a corporation confers upon it a franchise intended in a large measure for the public good, it cannot, without consent of the legislature, by lease or any other instrument, transfer to another company for a long period of time the exclusive right to use that franchise, and to carry on the business for which the charter was granted. It cannot, by contract, render itself powerless to perform the public duties that it assumed in accepting its charter. It cannot sell itself, or its right to be a corporation, or, what is the same in effect, its power to carry on the business for which it was organized. The legislature created the plaintiff, and in the act creating it conferred upon it certain rights which were a part of it, and the most important of those rights was the authority to make, sell, and distribute gas. Without that right, its charter would have been an empty name, and of no value. With that right, it could do business, and, while thus earning money for its stockholders, confer a benefit upon the public. It was a vital right, and when the plaintiff attempted to confer it upon another, either for a long or a short period, it practically suspended its own existence during that period. The legislature, in chartering the plaintiff, not only conferred rights, but also imposed obligations upon it; and it could not, by agreement, disable itself from performing those obligations without the consent of the power that imposed them. It was bound, as by contract, not to abandon those duties. By the express terms of its charter its right to existence depended upon its discharge of the duty to supply gas to the public streets and buildings upon the request of the city council. It could not, by its own act, absolve itself from performing that duty. It could not lease the most essential part of its franchise, which was the right to make and sell gas, without unfitting itself for the performance of its duties to the public. By the lease in question, it parted for a long period of time with its manufacturing plant, all its tangible property, including everything that was essential to its business, as well as the use of its franchise, and its power to serve the public. It stripped itself of substantially everything but a name. All of the authorities, as I read them, hold that such contracts are void, and in support of this position I cite the following: *Central Transp. Co. v.*

Pullman's Palace-Car Co., 139 U. S. 24, 11 Sup. Ct. 478; *Gibbs v. Gas Co.*, 130 U. S. 396, 9 Sup. Ct. 553; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 6 Sup. Ct. 1094; *Thomas v. Railroad Co.*, 101 U. S. 71; *People v. Ballard*, 134 N. Y. 269, 294, 32 N. E. 54, 59; *Id.*, 136 N. Y. 639, 32 N. E. 611; *People v. North River Sugar-Refining Co.*, 121 N. Y. 582, 24 N. E. 834; *Troy & B. R. Co. v. Boston, H. T. & W. Ry. Co.*, 86 N. Y. 107; *Abbott v. Railroad Co.*, 80 N. Y. 27; *Abbot v. Rubber Co.*, 33 Barb. 578; *Taylor v. Earle*, 8 Hun, 1; *Frothingham v. Barney*, 6 Hun, 360.

Although the lease was *ultra vires*, it does not follow, simply on that account, that it cannot be enforced, so far as it has been executed, by compelling the lessee to pay rent for the period that it was in the actual possession and enjoyment of the property leased. While courts of all jurisdictions seek to afford a remedy for the value received by one party from the practical performance of an *ultra vires* contract by the other, they differ as to the ground of recovery. The position of the supreme court of the United States upon the subject is that a contract made by a corporation, which is unlawful and void because beyond the scope of its corporate powers, does not, by being carried into execution, become lawful and valid; and that the proper remedy of the party aggrieved is to disaffirm the contract, and sue to recover, as on a quantum meruit, the value of what the defendant has actually received the benefit of. *Pittsburgh, O. & St. L. R. Co. v. Keokuk & H. Bridge Co.*, 131 U. S. 371, 389, 9 Sup. Ct. 770, 776; *Louisiana v. Wood*, 102 U. S. 294; *Parkersburg v. Brown*, 106 U. S. 487, 508, 1 Sup. Ct. 442, 455; *Chapman v. Douglass Co.*, 107 U. S. 348, 360, 2 Sup. Ct. 62, 72; *Salt Lake City v. Hollister*, 118 U. S. 256, 263, 6 Sup. Ct. 1055, 1059; *Pennsylvania R. Co. v. St. Louis, A. & T. H. R. Co.*, 118 U. S. 290, 317, 6 Sup. Ct. 1094, 1107. In many of the states the same rule prevails where the contract is simply *ultra vires* and not *malum prohibitum*. While the contract is held to be void, the party who has received value under it is compelled to refund, after rescission by the other, either in an action at law for money had and received, or in a suit in equity to compel an accounting and restitution. *White v. Bank*, 22 Pick. 181; *Morville v. Society*, 25 Am. Rep. 40; *Davis v. Railroad Co.*, 41 Am. Rep. 221; *Paul v. Kenosha*, 94 Am. Dec. 598; *Moore v. Tanning Co.*, 60 Vt. 459, 15 Atl. 114; *Anthony v. Sewing-Mach. Co.*, 16 R. I. 571, 18 Atl. 176; *Harriman v. First Bryan Baptist Church*, 63 Ga. 186; *Day v. Buggy Co.*, 57 Mich. 146, 23 N. W. 628. The application of these principles to this case would defeat the plaintiff, for, unless there could be a recovery from the lessee upon the lease, there could be none against its sureties upon the bond, as their sole agreement was that the former should "faithfully and fully execute and perform the conditions of said lease." *Rosa v.*

Butterfield, 33 N. Y. 665; Stewart v. Bramhall, 74 N. Y. 85; Bank v. Wheeler, 60 N. Y. 612; 3 Am. & Eng. Enc. Law, 889. "The obligation of the surety being accessory to the obligation of some person who is the principal debtor, it is of its essence that there should be a valid obligation of a principal debtor. The nullity of the principal obligation necessarily induces the nullity of the accessory." Theo. Prin. & Sur. 2; Chit. Cont. 499. On the other hand, the courts of this state have permitted a recovery upon the contract itself, although *ultra vires*, when wholly or partly performed, for the reason that to hold otherwise would promote injustice. Thus, in *Arms Co. v. Barlow*, 63 N. Y. 62, 69, this court said: "Whether the contract as originally made was *ultra vires* is not a very important inquiry at this time. If it was, the state, under whose sovereignty it dwells, and by whose act and favor it exists, has no interest in arresting its action for the recovery of moneys equitably due upon a contract fully executed, and a work fully accomplished, whatever may be its right to annul its charter. * * * The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong. * * * A purchaser who acquired by contract, and under an agreement to pay for it, the property of a corporation, cannot defeat the claim for the purchase price by impeaching the right of the corporation to become the owner of the property. One who has received from a corporation the full consideration for his engagement to pay money, either in services or property, cannot avail himself of the objection that the contract, thus fully performed by the corporation, was *ultra vires*, or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defense to prevail in an action by the corporation." It was accordingly held that in an action brought under the general manufacturing act of 1848 (Laws 1848, c. 40, § 12, and Laws 1853, c. 333) by one manufacturing corporation against the trustees of another, to recover the contract price for goods sold and delivered to the defendant's corporation, the objection that the plaintiff was not authorized to manufacture and sell the goods, or to enter into the contract, was not available as a defense. The contract in that case, however, was not a violation of any right owing by the corporation to the public. This is true, also, of other cases relied upon by the respondent. *Kent v. Mining Co.*, 78 N. Y. 159; *Bank v. Savery*, 82 N. Y. 291; *Raft Co. v. Roach*, 97 N. Y. 378; *Starin v. Edson*, 112 N. Y. 206, 19 N. E. 670; *Mayor, etc., v. Huntington*, 114 N. Y. 631, 21 N. E. 998; *City of Buffalo v. Balcom*, 134 N. Y. 532, 32 N. E. 7. These cases seem to rest upon the ground of estoppel, which prohibits a corporation from pleading the defense of *ultra vires* so long as it retains the benefits of the transaction; but in *Kent v.*

Mining Co., 78 N. Y. 186, a distinction is suggested when the franchise is of a public nature. In *Woodruff v. Railway Co.*, 93 N. Y. 609, the lessor owed a duty to the public, but certain statutes were relied upon as authorizing the lease, the power to make which was the subject of controversy. Page 616. Thus the court, through its chief judge, after a review of the statutes, said: "It would seem to follow from these statutes that the supreme legislative authority of this state does not regard the transfer of the property and privileges of one railroad corporation to another with a view of their operation by the lessees thereof as either contrary to good morals or public policy." Page 617. The court considered, but did not decide, the question which arose in that case, whether a lease by a railroad corporation of its property and privileges to an individual was *ultra vires* or not, as it held that the grantee in such a conveyance, at least so far as the contract has been executed, is estopped from contesting the title of his lessor, or the validity of the conveyance by which he has acquired, and still holds, possession of the leased property. Where the contract of a corporation is contrary to public policy, solely because made in excess of its rightful powers, but it is free from every other vice, it is not illegal in the sense of the maxim, "*Ex turpi contractu non oritur actio*." Such a contract, when partly performed, may well be proportionately enforced where justice requires it, in order to prevent a defendant from alleging his own wrong for the purpose of avoiding a just responsibility. When, however, the contract of a corporation is contrary to public policy for some cause that would avoid the contract of a natural person, as, for instance, an agreement tending to defeat or impair the interest of the state, a more serious question is presented. The abnegation, by contract, of a public duty, while not *malum prohibitum*, because forbidden by statute, may be so because forbidden by the principles of the common law. The enforcement of such a contract, so far as performed, in order to prevent injustice to individuals, might inflict greater injustice upon the state. Where neither party is misled by the other, but both know that the contract disables a corporation from discharging a duty that it owes to the public, according to the express requirement of its charter, should any part of it be enforced? When the interest of the state is involved, should even a particeps criminis be prevented from asserting that such a contract is void? 5 Thomp. Corp. § 5908. It is not necessary, however, that we should answer these questions in this case by announcing the law of our own state upon the subject, as the rule that prevails in the state of Maine should govern the rights of the parties now before us. The lease was made and was to be performed in the state of Maine. The parties thereto were corporations organized under the laws of that state. They both had offices and were doing business there. The

property covered by the lease was situated there, was used for a purely local purpose, and it could not be used to any extent at any other place. The presumption is, therefore, that the parties intended that the contract should be governed by the law of the place of performance as to its validity, nature, and effect. *Dickinson v. Edwards*, 77 N. Y. 573; *Liverpool & G. W. Steam Co. v. Phenix Ins. Co.*, 129 U. S. 397, 9 Sup. Ct. 469; *Story, Conf. Laws*, § 240.

In order to prove the common law as it exists in the state of Maine, upon the principal question involved, the defendant read in evidence, without objection, the following authorities. *Gould v. Railroad Co.*, 82 Me. 122, 19 Atl. 84; *Edison United Manuf'g Co. v. Farmington Electric Light & Power Co.*, 82 Me. 470, 19 Atl. 859; *Balley v. Trustees*, 71 Me. 472; *Franklin Co. v. Lewiston Inst. for Savings*, 68 Me. 43; *Cummings v. Webster*, 43 Me. 192; *Andrews v. Insurance Co.*, 37 Me. 256, and *Bangor Boom Corp. v. Whiting*, 29 Me. 123. The plaintiff read in evidence *Inhabitants of Bucksport v. Woodman*, 68 Me. 33, which is doubtless a miscitation, as it has no bearing upon the subject. Some of the authorities relied upon by the defendant do not apply to this case, but others hold that there can be no recovery on a contract made by a corporation outside of its corporate powers, even where it has had the benefit thereof, and the agreement has been fully executed. That rule, if applied without qualification, would defeat a recovery by the plaintiff in this action. Since the decision of this case by the trial court, the supreme court of Maine has declared the law of that state in an action founded upon a lease like that now under consideration, which was brought against the same lessee as defendant. *Brunswick Gaslight Co. v. United Gas, Fuel & Light Co.*, 85 Me. 532, 27 Atl. 525. While we may not refer to that case as evidence, because it is not a part of the record, we may refer to it as an authority, most cogent and persuasive, to aid us in interpreting the cases that were read in evidence. In deciding that case the court held that a corporation, which owes duties to the public as well as to its stockholders, cannot sell or lease its corporate powers or privileges, and thereby disable itself from performing its public duties. The lease was also held to be void upon the ground that traffic in corporate franchises, if allowed, would tend to create monopolies. The court declared that there could be no recovery of rent upon the lease, and expressly adopted the rule of the supreme court of the United States upon the subject, that the proper remedy was "to disaffirm the contract, and sue to recover as on a quantum meruit the value of what the defendant has actually received the benefit of." I think that when the cases in evidence are read in the light of that authority, they show that the law of the state of Maine will not permit a recovery upon an ultra vires contract, whether it has been performed or not. The case

cited is simply a logical application of the principle involved in the cases proved. While the reasons are amplified, and the application is extended to a new state of facts, the conclusion is supported and warranted by the previous decisions. For these reasons I am compelled to dissent from the judgment of affirmance pronounced by my associates, and to vote for reversal and a new trial.

All concur with **ANDREWS, C. J.**, for affirmance, except **VANN, J.**, dissenting. Judgment affirmed.

(151 N. Y. 60)

ROWELL et al. v. JANVRIN.

(Court of Appeals of New York. Dec. 1, 1896.)

CORPORATIONS—LIABILITY OF STOCKHOLDERS—ACTION TO ENFORCE—SUFFICIENCY OF COMPLAINT.

1. In an action to enforce the liability of a stockholder of a manufacturing corporation under the act of 1848, providing that the stockholders of such company shall be liable, to an amount equal to the stock held by them, for debts of the company, until the whole capital stock is paid in and a certificate thereof filed for record, the complaint alleged generally that the defendant was a stockholder, and that no certificate had been filed. The defendant demurred on the ground that the complaint did not allege that the stock held by defendant was not issued for property, and therefore exempt from the provisions of the act of 1848, under Laws 1853, c. 333, declaring that the trustees of such company may issue stock for property necessary for the business, and that the holders thereof shall not be liable for further payments under the act of 1848. Held that, as the exception thus provided is a matter of defense, it was not necessary that it should be denied by the complaint.

2. In an action to enforce the liability of a stockholder of a manufacturing corporation under the act of 1848, providing that the stockholders of such company shall be liable, to an amount equal to the stock held by them, for debts of the company, until the whole capital is paid in and a certificate thereof is filed for record, a complaint alleging generally that defendant was a stockholder when the debt was contracted, and had so continued, was sufficient, though indefinite in that it failed to allege the amount of stock defendant held.

Appeal from supreme court, general term, First department.

Action by George P. Rowell and others against Joseph E. Janvrin. A judgment dismissing the complaint having been affirmed by the general term (29 N. Y. Supp. 1149), the plaintiffs appeal. Reversed.

For former reports, see 23 N. Y. Supp. 481; 29 N. Y. Supp. 1149.

Phillip W. Carpenter, for appellants. Dickinson W. Richards, for respondent.

O'BRIEN, J. This was an action against a stockholder of a corporation organized under the manufacturing act of 1848, to enforce a debt of the corporation, upon the ground that no certificate that the capital stock had been paid in was ever made or filed as required by the tenth and eleventh sections of the act. The complaint was dismissed at the trial on the

ground that it did not state facts sufficient to constitute a cause of action, and this ruling, and the exception taken by the plaintiff, raise the only question that need now be considered. The complaint alleges that the certificate required by the sections of the act above referred to was not filed or recorded, but it was held that this allegation was not sufficient to charge the defendant. While the complaint alleges generally that the defendant was a stockholder, there is no statement as to the amount or number of shares that he held, and this was another defect which was stated in the motion to dismiss. No other objection appears to have been made to the sufficiency of the complaint, and no other features of the pleading are attacked, and the discussion is therefore confined to these two points.

The more substantial ground upon which the defendant succeeded in the courts below was that the complaint failed to state whether the stock was issued for cash or for property. It is said that, if the stock was issued for property, there was no duty or obligation to file any certificate whatever, while, if issued for money, then the statute applied, but the plaintiff was bound to state a case in his pleading which brought the defendant within the statute. This contention calls for a construction of the statute upon which the action is based. The tenth section of the act of 1848 provides that the stockholders of such company shall be severally liable to the creditors, to an amount equal to the stock held by them, for all debts and contracts of the company, until the whole amount of capital stock fixed and limited by the company shall have been paid in, and a certificate thereof made and recorded as provided in the following section, and the capital stock shall all be paid in, one-half within one year, and the other half within two years from the incorporation, or the company shall be dissolved. The next section prescribes the form of the certificate, and the officers who are to make and file the same. The fourteenth section declares that nothing but money shall be considered as payment of any part of the capital stock. It will be seen, from these provisions of the statute as originally enacted, that the complaint in this case states sufficient facts to create the liability then imposed upon the stockholders. But by chapter 333 of the Laws of 1853 the act of 1848 was amended generally, without naming any particular section. It is upon this amendment that the learned counsel for the defendant has constructed an argument that has met with signal success in the courts below. That statute reads as follows: "Sec. 2. The trustees of such company may purchase mines, manufactories, and other property necessary for their business, and issue stock to the amount of the value thereof in payment therefor; and the stock so issued shall be declared and taken to be full stock, and not liable to any further calls; neither shall the holders thereof be liable for any further payments under the provisions of the tenth section of the said act; but in all state-

men's and reports of the company, to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact." The nature and ground of the stockholders' liability under this amendment has been much discussed, and on this point, perhaps, the cases are not all in harmony. *Boynton v. Andrews*, 63 N. Y. 93; *Boynton v. Hatch*, 47 N. Y. 225; *Schenck v. Andrews*, 46 N. Y. 589; *Id.*, 57 N. Y. 133; *Griffeth v. Green*, 129 N. Y. 517, 29 N. E. 838; *Veeder v. Mudgett*, 95 N. Y. 296; *Tube-Works Co. v. Gillilan*, 124 N. Y. 302, 26 N. E. 538. It is perhaps true that, in some of the above cases, it was assumed that, in order to protect the stockholder from liability, it was as necessary to file the certificate when the stock was issued for property as when sold for cash. But that precise question was not involved in any of these cases, nor was the question of pleading with which we are now concerned. But, whatever conflict of opinion is to be found in some of the earlier cases with respect to the stockholder's liability from the mere fact of the failure to file the certificate, we think the question is no longer an open one in this court. It was held in *Brown v. Smith*, 13 Hun, 408, that failure to file the certificate where the stock was issued for property was in itself no ground of liability, and that, since the amendment of 1853, the statute did not require a certificate to be filed in such cases. This court affirmed the judgment in that case upon the opinions below. 80 N. Y. 650. The same construction has been given to the statute in a recent case. *Close v. Noye*, 147 N. Y. 597, 41 N. E. 570. The liability still exists, however, in cases where the stock is issued for property at an excessive, fraudulent, or fictitious valuation, to the knowledge of the trustees, and for the purpose of evading the statute. *Douglass v. Ireland*, 73 N. Y. 100; *Iron Co. v. Drexel*, 90 N. Y. 87; *Jessup v. Carnegie*, 80 N. Y. 441; *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544. Whether this rule of liability is confined to the trustees who caused the stock to be issued, and to such stockholders as are chargeable with knowledge of the fraud, or applies even to innocent holders for value, is a question, perhaps, not entirely free from doubt, but not involved here, and need not be decided. 1 Beach, Priv. Corp. § 131c. The liability in such cases, whatever limitations may be attached to it with respect to parties, does not arise and is not founded upon the omission to file the certificate, but rests upon a violation of the statute which prescribes the conditions upon, and the circumstances under which, the capital stock may be issued for property.

But it does not follow that because stock issued by a manufacturing corporation for property is not within the tenth section of the act of 1848, requiring the certificate to be filed, the complaint in this action is defective. The act of 1853 has modified the general provisions of the act of 1848, and has relieved stockholders, under certain circumstances, from personal liability. The

question here is one of pleading, and the complaint is good unless the plaintiff was bound to negative the provisions of the amendment of 1853. In stating a cause of action arising upon a statute, it is an ancient rule that, where an exception is incorporated in the body of the clause of a statute, he who pleads the clause ought to plead the exception. But where there is a clause for the benefit of the pleader, and afterwards follows a proviso which is against him, he may plead the clause, and leave it to his adversary to show the proviso. *Jones v. Axen*, 1 *Ld. Raym.* 120. This rule of pleading has been followed and applied in a great variety of cases arising upon statutes and contracts, to this day. *Harris v. White*, 81 *N. Y.* 532; *U. S. v. Cooke*, 17 *Wall.* 168; *Com. v. Hart*, 11 *Cush.* 130; *Sheldon v. Clark*, 1 *Johns.* 513; *Bennet v. Hurd*, 3 *Johns.* 438; *Teel v. Fonda*, 4 *Johns.* 303; *Hart v. Cleis*, 8 *Johns.* 41; *Fleming v. People*, 27 *N. Y.* 329; *People v. Kibler*, 106 *N. Y.* 321, 12 *N. E.* 795; *People v. Briggs*, 114 *N. Y.* 56, 20 *N. E.* 820. The whole controversy presented by the appeal really turns, therefore, upon the question whether the amendment of 1853 is to be treated as an exception or a proviso. If the latter, the plaintiff was not bound to anticipate it by negative allegations in his complaint, but might leave it to his adversary, as matter of defense. The reason upon which this rule of pleading rests seems to be that when a party counts upon the enacting clause of a statute containing an exception, as the foundation of his action, he cannot logically state his case unless he negative the exception. But if the modifying words are no part of the enacting clause, but are to be found in some other part of the statute, or in some subsequent statute, it is otherwise; and he may then state his case in the words of the enacting clause, and it will be *prima facie* sufficient. When we bear in mind the reason of the rule, and the necessity for pleading the negative, it is not very important to deal with the somewhat vague and shadowy distinctions which are to be found in the books between an exception and a proviso. But the distinction, however difficult to state, has always been recognized. An exception exempts something absolutely from the operation of a statute, by express words in the enacting clause. A proviso defeats its operation conditionally. An exception takes out of the statute something that otherwise would be part of the subject-matter of it. A proviso avoids them by way of defeasance or excuse. *Black, Law Dict.* 960; 2 *Bouv. Law Dict.* 483, "Proviso"; *Minis v. U. S.*, 15 *Pet.* 421. The plaintiff has stated a case under the tenth section of the original act. When that was passed, it contained no exception, and remained in that condition for five years, till the passage of the amendment of 1853. An exception is generally part of the enactment itself, absolutely excluding

from its operation some subject or thing that otherwise would fall within its scope. But when the enactment is modified by ingrafting upon it a new provision, by way of amendment, providing conditionally for a new case, it is in the nature of a proviso. The statute of 1853 has all these characteristics. It was passed five years after the enactment which it modified. It was not an absolute permission to issue the stock for property generally, but only such property as was necessary in the corporate business; and the amount of stock to be thus issued could not lawfully exceed the fair value at which it should, honestly and in good faith, be estimated by the directors. The amendment took out of the original act a special case, and provided specially for such a case. It ingrafted a limitation upon the broad and general language which the legislature had originally employed in constructing the tenth section, and that, as we understand, is the main office of a proviso. In *re Webb*, 24 *How. Prac.* 247; *Potter, Dwar.* 118. It had the same effect as if it was attached to the original section, and was preceded by the usual words, "Provided, however," etc. If this view is correct, it follows that the plaintiff was not bound, by the strict rules of pleading, to negative the proviso. He could state a case within the terms of the original enactment, and leave the defendant to take the case out of it by pleading the facts constituting the special case provided for by the amendment.

We have seen that an exception in a statute is something embodied in, and forming a part of, the enacting clause itself; and nothing of that kind is found in the tenth section, upon which the complaint was framed. If words follow the enacting clause, or are subsequently attached to it or ingrafted upon it by way of amendment, which modify or change its scope and application, or take a particular case out of it, then such new matter or modifying words constitute what is technically known in the construction of statutes as a "proviso," which the plaintiff was not bound to negative by pleading. *Spires v. Parker*, 1 *Term R.* 141; *Rex v. Bryan*, 2 *Strange*, 1101; *Steel v. Smith*, 1 *Barn. & Ald.* 94. And it was therefore for the defendant to aver and prove that the case was one falling within the terms of the amendment of 1853. It appears from the record that this was the view which the defendant's counsel took of the case, since he has pleaded in his answer that the stock was issued for property; thus availing himself of the terms of the amendment or proviso, and in that way avoiding the statutory liability for failing to file the certificate which the original law required, but which the amendment did not, according to the construction which the courts have given to it. But, before the complaint was dismissed, some proof should have been given of the facts so pleaded. When the allegations of the answer were sustained by proof of the fact that the

stock was issued, not for cash, but for property, then the defense would be complete, unless the plaintiff gave proof tending to show either that the property was not such as pertained to the business, or that it was deliberately overvalued for the fraudulent purpose of evading the statute. It would not be enough to show that there was an honest error of judgment on the part of the trustees in fixing the value, but it must be shown that they acted in bad faith. We conclude, therefore, that in this respect the complaint was sufficient.

The other objection is, we think, untenable. The complaint, it is true, does not state the amount of stock that the defendant held in the company, though judgment is demanded for the amount of the debt. The shareholder is liable, under the statute, only to the amount of his stock, and consequently it does not appear from the complaint to what extent the defendant is liable. But it states that he was a stockholder at the time the debt was contracted, and continued to be down to a time within two years prior to the commencement of the action. This is a sufficient allegation that during these times he held at least one share of the stock. The complaint is certainly open to the objection that it is indefinite and uncertain, but this defect can be taken advantage of only by way of motion. It is no ground of demurrer, or for a motion to dismiss, at the trial. A complaint may be indefinite and uncertain, as this is, and at the same time contain facts sufficient to give the plaintiff a standing at the trial, or to defeat a demurrer. It is always in the power of the court, in such cases, to compel the plaintiff to correct his pleading in order to apprise his adversary of the extent of the claim, as well as the grounds thereof; and that, we think, was the remedy which the defendant should have resorted to for the defect in this respect. The facts stated in the complaint are, for all the purposes of this appeal, to be deemed admitted, and we think it cannot be held that they do not, *prima facie*, constitute a cause of action. For these reasons, the judgment dismissing the complaint without requiring the defendant to give any proof should be reversed, and a new trial granted; costs to abide the event. All concur. Judgment reversed.

(151 N. Y. 54)

PEOPLE *ex rel.* COMMISSIONERS OF
PUBLIC CHARITIES AND COR-
RECTION v. CULLEN.

(Court of Appeals of New York. Dec. 1, 1896.)

COURT OF APPEALS—APPEAL IN SPECIAL PRO-
CEEDING.

Special proceedings of a criminal nature, commenced before a police justice or other minor court not of record, are governed, as to appeals, by Code Cr. Proc. pt. 5, tit. 3; and under section 771, limiting the right of appeal to the court of appeals from the judgment of the appellate division of the supreme court to cases "where the original appeal was from a judg-

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ment of commitment of a child," an appeal will not lie from the judgment of the appellate division in a proceeding under Code Cr. Proc. § 899, against a man for failure to support his wife or children.

Appeal from supreme court, appellate division, First department.

Special proceedings of a criminal nature, on relation of the commissioners of public charities and correction, against William Cullen, before a police justice of the city of New York. A judgment of conviction was affirmed by the court of special sessions, but reversed on appeal to the court of general sessions. From a judgment of the appellate division of the supreme court (40 N. Y. Supp. 1) reversing the judgment of the general sessions, defendant appeals. Complainants move to dismiss the appeal. Appeal dismissed.

George W. Lyon, for the motion. H. B. B. Stapler and Payson Merrill, opposed.

VANN, J. This was a special proceeding of a criminal nature commenced before one of the police justices of the city of New York, under that part of section 899 of the Code of Criminal Procedure which provides that "persons who actually abandon their wives or children without adequate support, or leave them in danger of becoming a burden upon the public, or who neglect to provide for them according to their means," are disorderly persons. Code Cr. Proc. pt. 6, tit. 7, § 899. The proceeding was commenced by the board of charities and correction, who, for the sake of clearness and as required by the Code, are called the "complainants," against William Cullen, the husband of Ellen Cullen, as "defendant." *Id.* § 950. The defendant made no defense before the police justice, who adjudged him a disorderly person, and required him to pay the sum of eight dollars per week to the complainants for the support of his family. The defendant appealed to the court of special sessions, where a trial was had, and it appeared that the defendant had no family except his wife, who, on the 15th of October, 1883, had procured a decree of separation from him in the superior court of the city of New York. The judgment, which was read in evidence, made no provision for alimony, but granted leave to any party in interest to apply "for such modification of said judgment touching the support of said plaintiff or any other matter as may be just." It further appeared that in 1887 an application for alimony was made in the same action on behalf of the wife, under the clause in the decree which permitted it, and an order granted directing a reference to ascertain the amount of defendant's property in order that some allowance might be made; but on appeal to the general term the order was reversed, and the motion denied. Although the point was distinctly raised that said decree was conclusive upon the question of the defendant's duty to support his wife, the court of special sessions affirmed the order of the police justice in all respects. Upon appeal, however, by the defendant to the court of

general sessions, the judgments below were reversed, upon the ground that the judgment of separation procured by the wife was a complete defense to this proceeding against the husband for her support. Thereupon the complainants appealed to the appellate division of the supreme court, which reversed the judgment of the court of general sessions, and affirmed the judgment of the special sessions. 7 App. Div. 118, 40 N. Y. Supp. 1. The defendant then appealed to this court, and the complainants now move to dismiss his appeal.

This motion involves our power to review a judgment or order of the appellate division of the supreme court made in a special proceeding of a criminal nature, which originated in a police court or court of special sessions. We have no jurisdiction to hear the appeal unless it is conferred by statute. *People v. Trezza*, 128 N. Y. 529, 28 N. E. 533; *People v. Palmer*, 109 N. Y. 413, 418, 17 N. E. 213, 215; *People v. Dempsey*, 31 Hun, 526, 528. This is the established rule in all actions, both civil and criminal, and we think it is necessarily the same in special proceedings of a criminal nature, which are created by statute, and are partly civil and partly criminal in character. *Szuchy v. Iron Co.*, 150 N. Y. 219, 224, 44 N. E. 974. The practice in criminal actions, criminal proceedings, and special proceedings of a criminal nature is now regulated by the Code of Criminal Procedure, and our attention has been called to no other statute now in force, with reference to the subject of appeals or other method of review in such matters. That Code is divided into six parts, the first three of which relate to courts of original jurisdiction, to the prevention of crime, and to proceedings for the removal of public officers by impeachment or otherwise. Part 4, embracing sections 133 to 698, inclusive, relates to proceedings in criminal actions prosecuted by indictment, and prescribes the procedure from indictment to final judgment in those cases. It includes under title 11 (sections 515 to 549) the subject of appeals, when the prosecution is by indictment, and provides what appeals may be taken by the people, as well as by the defendant. It does not regulate appeals in criminal actions, proceedings, or special proceedings of a criminal nature instituted in courts not of record. That subject is covered by part 5 of the Code of Criminal Procedure (sections 699 to 772), which relates exclusively to proceedings in courts of sessions, police courts, and the like. Title 3 (sections 749 to 772) embraces appeals from those courts, and provides a complete system of reviewing judgments rendered therein. A comparison of parts 4 and 5 shows that criminal and quasi criminal appeals, following the analogy of appeals in civil cases, are classified into two kinds, depending on the jurisdiction of the court in which the prosecution was commenced. When the court of original jurisdiction is a court of record, the procedure is regu-

lated by part 4; but, when the court of origin is not a court of record, part 5 alone applies. Each system is complete and independent of the other, except that certain portions of part 4, not here material, are expressly adopted in part 5. For the rules governing this appeal, therefore, we must look to part 5, which prescribes the only method of reviewing the determination of the inferior criminal courts. In opposition to this view, section 515, which occurs in part 4, is urged upon our attention. That section, as originally enacted, simply abolished writs of error and certiorari in criminal actions, and substituted the remedy of appeal; but in 1884 it was so amended as to apply to criminal proceedings and special proceedings of a criminal nature. Laws 1884, c. 372, § 1. The effect of this was simply to make the method of review uniform in all cases, instead of allowing a review by appeal in criminal actions, and by certiorari in criminal proceedings and special proceedings of a criminal nature, and to remove some confusion that had arisen from conflicting decisions in the supreme court. *People v. Ontario Sessions*, 45 Hun, 54; *People v. Dempsey*, 31 Hun, 526; *Killoran v. Barton*, 26 Hun, 648; *People v. Davis*, 15 Hun, 209; *People v. Trumble*, 1 N. Y. Cr. R. 443; *People v. Carney*, Id. 270. The legislature did not intend by that amendment to make the system of review provided by part 4 applicable to cases covered by part 5, as is evident from the second section of the act of 1884, which so amended section 749 of the Criminal Code as to cover convictions by the minor courts in criminal proceedings and special proceedings of a criminal nature, as well as in criminal actions to which it had previously been confined. Section 515 was thus given a general effect, by abolishing review by writ, and substituting review by appeal in all criminal matters. The new plan was carried into effect by the remainder of part 4 as to appeals where the proceeding originated in a court of record, and by part 5 where the proceeding originated in a court not of record. Part 4, as originally enacted, applied exclusively to criminal actions. It had not then, and it has not now, any reference to special proceedings of a criminal nature. The legislature, by amending section 515, but leaving the other sections of part 4 unchanged, showed that it did not intend to enlarge the grasp of those sections beyond the scope contemplated at the time of their enactment.

Our jurisdiction, therefore, to hear the appeal in question, must be found, if it exists, in part 5 of the Criminal Code. Title 1 refers to proceedings in courts of special sessions generally, and title 2 to the proceedings of those courts in the city and county of New York. Title 3 relates to "appeals from courts of special sessions," without regard to locality; and the first section thereof provides that "a judgment upon conviction, rendered by a court of special sessions, police

court, police magistrate, or justice of the peace, in any criminal action, or proceedings or special proceedings of a criminal nature, * * * may be reviewed by the county court [formerly court of sessions] of the county, upon an appeal as prescribed by this title, and not otherwise." Code Cr. Proc. § 749, as amended by Laws 1895, c. 880. The method of taking the appeal, making the return, arguing the appeal, rendering judgment thereon, and carrying it into effect, is fully prescribed by sections 750 to 769, inclusive. Section 770 then provides that "if the judgment on the appeal be against the defendant he may appeal therefrom to the appellate division of the supreme court in the same manner as from a judgment in an action prosecuted by indictment." The next section directs that the judgment of the supreme court upon the appeal shall be final, "except that where the original appeal was from a judgment of commitment of a child, either party may appeal to the court of appeals in like manner as a defendant under section 519," which refers to appeals in cases originating in a court of record. There is no other provision allowing an appeal to this court in a proceeding commenced in one of the minor courts. Thus, the rule is absolute in all cases, with a single exception, and the proceeding before us is not covered by the exception. The legislature evidently intended to place a limit upon the right of review in the less important class of cases, by allowing only two appeals, one to the county and the other to the supreme court. Our conclusion is that we have no power to hear the appeal in question, which must therefore be dismissed.

Whether the people or the prosecution, under whatever name the proceeding may be instituted, have the right to appeal to the supreme court, after a reversal by the county court or court of sessions, is open to grave doubt. We find no authority for it in any statute. The position of the learned appellate division, that the right exists by implication of law, does not impress us as satisfactory, in view of the complete systems of appeal in all criminal matters that are expressly provided by statute. It is unnecessary, however, to now decide that question. If the judgment of the appellate division is void on its face for the want of jurisdiction to reverse the court of sessions, the defendant may obtain relief when an attempt is made to enforce the judgment against him. The motion to dismiss is granted, but, under the circumstances, without costs. All concur. Appeal dismissed.

(184 Ill. 32)

MAYFIELD et al. v. FORSYTH et ux.
(Supreme Court of Illinois. Nov. 10, 1896.)
RESULTING TRUST—LACHES.

1. Where part of the heirs of a decedent quit-claimed their interest in land of deceased to an-

other heir, on the representation that it was necessary in order to settle the estate without litigation, and relying on his promise to convey it back when the estate was settled, or pay for the same, an express trust, void because not in writing, was created.

2. In an action brought in March, 1895, to establish a trust in land, it appeared that defendant obtained a deed from plaintiffs in 1864, and placed it on record; that he had occupied the land as owner since that time; and that complainants resided in the neighborhood. Held that, even if a resulting trust was created, complainants were barred by their laches.

Appeal from circuit court, Logan county; George W. Herdman, Judge.

Action by Lucy F. Mayfield and others against Robert N. Forsyth and wife for partition, for an accounting, and for general relief. From a judgment in favor of defendants, plaintiffs appeal. Affirmed.

W. D. Wyatt, for appellants. Beach & Hodnett, for appellees.

CRAIG, J. This was a bill in equity, brought by appellants against Robert N. Forsyth and Anna Forsyth, for partition, and for an accounting, and for general relief. It appears from the record that on the 25th day of May, 1864, one Robert N. Forsyth died, intestate, in Logan county, leaving, him surviving, 11 children or descendants of children as his heirs at law. The deceased, at the time of his death, owned the E. $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 24, and the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 24, both in township 20 N., range 3 W., Logan county, containing 100 acres. The complainant Lucy F. Mayfield, as daughter and heir at law of the deceased, claims an undivided one-eleventh of the land; Rebecca T. Beldler, daughter and heir at law, claims an undivided one-eleventh; and the other complainant, Cora Belle Riggs, an heir at law of Emeline Warner, who was a daughter of the deceased, claims an undivided one-eleventh. All the other heirs of the deceased, prior to the filing of the bill, conveyed their respective interests in the land to the defendant Robert N. Forsyth, who was also a son of the deceased. There is therefore no controversy over eight-elevenths of the land, and it will not be necessary to make reference to that interest. The controversy is over the three-elevenths claimed by the complainants. The defendant interposed a demurrer to the bill, which the court sustained. Complainants then amended their bill, and a demurrer was filed to the amended bill, which the court sustained; and, complainants electing to abide by their bill, judgment was entered dismissing the bill.

The bill and amended bill are quite voluminous, but it will not be necessary to set out in detail the various allegations. The question, and the only one which it will be necessary to consider, is whether, under the allegations of the bill and amended bill, the facts therein stated are sufficient to entitle complainants to relief in a court of equity.

And, first, it is claimed that the transaction established a resulting trust, and a court of equity will compel the defendant, as trustee, to convey or account for the land. A resulting trust does not arise by contract, but by implication of law from acts independent of an agreement. *Sheldon v. Harding*, 44 Ill. 68; *Holmes v. Holmes*, Id. 171. Where lands are purchased by one, and paid for by him, but the title is taken in the name of another, the lands will generally be held by the grantee in trust for the person who pays the consideration. *Emmons v. Moore*, 85 Ill. 304. Here it appears from the allegations of the bill that on the 6th day of June, 1864, Lucy F. Mayfield, Rebecca F. Beldler, and Emeline Warner, the mother of Cora Belle Riggs, the parties who then owned the three-elevenths of the land now in controversy, by deed of that date conveyed all their right, title, and interest in and to the land in dispute to the defendant Robert N. Forsyth. The deed was duly acknowledged before a notary public, as required by law, and recorded in the recorder's office of Logan county. It is alleged in the bill that, soon after the death of Forsyth, the defendant Robert N. Forsyth had caused to be prepared a quitclaim deed, and, for the purpose of defrauding them, called on complainant Lucy F. Mayfield, and said "that father's estate was terribly tangled up and involved, and, if it is settled up in the courts, it will be eaten up by the lawyers and costs, and the only way this misfortune and trouble can be averted and prevented is for the heirs to convey and assign to me their respective rights and interests in the estate, so I can settle up the estate without its having to be taken into the courts, and so save the costs and lawyer's fees which would be incurred if it goes into the courts; and so soon as I can do it, or make the money or arrangements to do so after settling up the estate, I will pay you. If you sign this writing, which is merely formal, it will be the best thing for all of us concerned." And, relying upon his acting in good faith and earnestly, she signed said written instrument, without reading it or its being read to her, or knowing what it contained, only as stated by him. It is further alleged that, after Lucy F. Mayfield had signed said instrument in writing, said Robert N. Forsyth took the same to orator Abram Mayfield, presented the same to him for his signature, whereupon orator Abram Mayfield asked of him why he wished such assignment at that time, and to which query he said or replied: "Oh, it is merely formal, and to enable me to settle up the estate without its going through court." "And, after I get the settlement of the estate made, we will all divide it out among ourselves." And so he stated to others who signed said instrument in writing, and in fact such was the understanding with said Robert N. Forsyth with other persons who signed said paper; and said interests were so conveyed or sign-

ed in trust for the use and benefit of all persons who signed the same, and for the purpose of having said estate settled without administration thereof being had in the usual way in court, and to save expenses and paying attorney's fees, and for no other or different reason or purpose whatsoever on the part of oratrix Lucy F. Mayfield, the said Emeline Warner, Matilda Forsyth, and Abram Mayfield, or either or any of them. And oratrix and orators aver that, if any title to the said realty passed to said Robert N. Forsyth by such pretended conveyances, it did so simply in trust for the use and benefit of said oratrices Lucy F. Mayfield, Rebecca Beldler, Matilda Forsyth, and Emeline Warner, her heirs and assigns; and that, moreover, the whole transaction, as an entirety, even without a promise on the part of said Robert N. Forsyth, created a resulting trust.

No argument is required to show that the transaction did not create a resulting trust. What was done by the parties contains no element of a resulting trust. No land was purchased in the name of one person with money belonging to another. The complainants, as appears from the bill, voluntarily conveyed their interest in the land, relying on the verbal promise of defendant to convey back the lands when his father's estate was settled, or pay for the same. If any trust was created by what the parties did, it was an express trust, which would be void unless evidenced by a writing. *Biggins v. Biggins*, 133 Ill. 219, 24 N. E. 516. A similar question arose in *Stevenson v. Crapnell*, 114 Ill. 21, 28 N. E. 380, and it was there said: "Whatever of condition there was to William B. Crapnell holding the deed or land was verbal only, and, so far as there might be supposed to arise therefrom any trust, it was an express trust, which would be invalid, because of not being manifested by some writing signed by the party declaring the trust. Rev. St. 1874, c. 59, § 9. Where there is an express trust, there cannot be a resulting or implied trust. *Kingsbury v. Burnside*, 58 Ill. 310. A voluntary conveyance cannot be held to create a resulting trust for the grantor. *Jackson v. Cleveland*, 15 Mich. 94." So, in the case under consideration, the defendant took the title to the land, agreeing to hold it, settle the estate, and reconvey the land, or pay for it. If any relation of trust was created, it was nothing but an express trust, void under the statute. There is therefore no ground for a recovery on behalf of complainants on the theory that the transaction between them and the defendant was a resulting trust. But, if the transaction was one which might be regarded as sufficient to create a resulting trust, complainants could not recover, because barred by their laches. As has been seen, the defendant obtained a deed from the complainants on the 6th day of June, 1864. After he received the deed, it was placed of record, and the defendant has occupied the land

as owner ever since, the complainants residing in the neighborhood, and yet no bill was filed until March, 1895. Here was a period of almost 31 years in which the complainants, with a full knowledge of all the facts in relation to the manner in which defendant acquired the land, have remained silent, and made no effort whatever to set up any claim, or assert any rights whatever to the land. The delay is inexcusable, and this court has held in numerous cases that a delay for a much shorter period will bar a recovery. *Beach v. Shaw*, 57 Ill. 17; *Owen v. Peacock*, 38 Ill. 33; *McDearmon v. Burnham*, 158 Ill. 55, 41 N. E. 1094; *Brown v. Brown*, 154 Ill. 35, 39 N. E. 983; *Quayle v. Guild*, 91 Ill. 379. The decree of the circuit court will be affirmed. Affirmed.

(164 Ill. 304)

THOMAS et al. v. VAN METER et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

FORECLOSURE OF MORTGAGE—CREDITORS' BILL—RECEIVER'S AFFIDAVIT—EFFECT—ABANDONMENT—BONA FIDE PURCHASER—INADEQUATE CONSIDERATION—LACHES.

1. The assignee of a judgment filed a creditors' bill against the judgment debtor in April, 1874. The debtor filed a bill to foreclose certain mortgages in his own name in May, 1875. A decree was rendered in the creditors' bill in December, 1875, ordering the debtor to pay to complainant about \$30,000, appointing a receiver, enjoining the debtor from transferring his property, and ordering him to assign it to the receiver on demand. March 1, 1876, a decree was entered in the foreclosure suit, finding due \$4,680, decreeing a sale, and finding one S., by reason of advances made to plaintiff in foreclosure, while holding the mortgages as collateral security prior to foreclosure proceedings, entitled to receive from the proceeds \$4,592.82, and plaintiff \$87.72. March 11, 1876, the receiver filed an affidavit in the foreclosure suit, alleging the filing of the creditors' bill, and his appointment thereunder, and the court vacated the foreclosure decree so far as it directed the payment of the proceeds to the parties named, and reserved the question for future order. The receiver did not intervene in the suit, file any petition, bring in any parties, or obtain any further action of the court. The creditors' bill did not describe the mortgages, or seek to reach them, and the affidavit filed by the receiver did not attack the assignments to S. *Held*, that the mere affidavit of the receiver to his appointment did not, without a further order of court, make him a party to the foreclosure suit.

2. The mere order of appointment under the creditors' bill did not confer upon the receiver title to the debtor's property.

3. To entitle the receiver to interfere, it was necessary for him to become a party, and take some affirmative action to set aside the assignments to S., and he could not delay for years, until the creditors' bill was dismissed for want of prosecution, without being held to have abandoned the claim.

4. Where a creditors' bill has been dismissed for want of prosecution, and 10 years later is reinstated, it cannot, by a nunc pro tunc order, be given effect during the period which has elapsed since the dismissal.

5. Unless an execution is issued, the lien of a money decree expires after one year from its date. *Eames v. Germania Turn Verein*, 74 Ill. 54, followed.

6. The records showed a creditors' bill and a decree and appointment of a receiver thereunder December 22, 1875; a foreclosure suit be-

gun by the debtor in his own name in May, 1875, in which a decree was rendered March 1, 1876; a finding therein that S. was entitled to the proceeds as holder of the mortgages as collaterals; a vacation of the finding, and a reservation of the question who should receive the proceeds of the sale, made on the affidavit of the receiver, who took no further steps in the matter, but subsequently resigned, with the statement that he had received no property, and had nothing to do as a receiver; that his successor was appointed; that the creditors' bill was dismissed for want of prosecution in 1882; that the last receiver died in 1884, and that no successor to him was appointed. *Held*, that a bona fide purchaser of the decree of foreclosure in 1888 took it free from any claim or lien under the creditors' bill. 62 Ill. App. 309, reversed.

7. The payment of \$2,500 for an original decree of foreclosure for \$4,680 on property which is incumbered by unpaid taxes and special assessments running back many years, and the title to which can be cleared only by long and expensive litigation, is not so inadequate as to constitute notice of fraud to the purchaser, though the amount of the decree had about doubled by accumulated interest.

8. Where a complainant under a creditors' bill, which has been once dismissed for want of prosecution, and reinstated 10 years afterwards, has lain idly by for 16 years without taking any affirmative action, and till the principal witness to the transactions has died, his alleged rights are barred by his own laches.

Appeal from appellate court, First district.

Bill by Gregory T. Van Meter and another against Horace H. Thomas, W. Beach Taylor, and others to compel a transfer of certain real estate and the assignment of a decree of foreclosure. From the affirmance of a decree in favor of complainants (62 Ill. App. 309), defendants Thomas and Taylor appeal. Reversed.

A. S. Bradley, for appellants. U. P. Smith, for appellees.

CARTWRIGHT, J. Appellees filed their bill of complaint in this case June 1, 1892, against appellants and Emanuel Sandhelmer, George F. Harding, Jr., as administrator of the estate of Eli G. Runals, Alice M. Kirby, John Coyne, Johanna Coyne, and Rodney M. Whipple, praying that the defendants should be decreed to assign, transfer, and convey to the appellee Gregory T. Van Meter, as receiver of Eli G. Runals, deceased, certain real estate sold to the appellant Horace H. Thomas under a decree of foreclosure, and also the said decree, and the notes and mortgages upon which the same was founded; and that an order entered in said foreclosure cause March 24, 1888, providing that the proceeds of sale be paid to the appellant W. Beach Taylor, should be set aside. The material facts alleged in the bill upon which the prayer for relief was founded were as follows: That on September 1, 1864, one Isaac Simmons gave two notes, amounting to \$4,000, to Eli G. Runals, and secured the same by mortgage; that on June 25, 1870, judgment was entered against Runals in favor of the executors of the estate of Alonzo Campbell for \$22,792.28 and costs; that on April 7, 1874, Abner C. Harding, assignee of said judgment, filed his creditors' bill

against Runals in the usual form, and after the death of said Abner C. Harding, about September, 1874, the appellee George F. Harding, as executor, became complainant; that on May 1, 1875, Runals filed a bill to foreclose the mortgages; that on December 22, 1875, a decree was rendered by default on the creditors' bill, ordering Runals to pay to Harding \$30,388.04 and costs, and appointing John H. Roberts receiver, with the usual power of receivers, and enjoining Runals from selling, transferring, or assigning his estate, and ordering him to assign the same to said receiver on demand; that on March 1, 1876, a decree of foreclosure was entered in the suit of Runals against Simmons, finding \$4,680 due, decreeing the sale of the premises, and finding that Emanuel Sandheimer was entitled to receive out of the proceeds of the sale \$4,592.23, and Runals the balance; that on March 11, 1876, the receiver, Roberts, filed his affidavit in the foreclosure case, setting forth the filing of said creditors' bill, and his appointment as receiver; that on March 18, 1876, the court vacated so much of the foreclosure decree as provided for the payment of proceeds to the parties named, and reserved that question for further order, leaving the decree requiring the master to bring the money into court; that the receiver, Roberts, resigned, and the court appointed Sidney P. Walker receiver, November 12, 1877; that on April 7, 1878, Sandheimer, without consideration, assigned to Daniel Head, of Kenosha, all his right, title, and interest in said decree, and Head on the same day assigned the same decree to Runals, and afterwards to appellant W. Beach Taylor, without any consideration, for the purpose of putting the title in said Runals and Taylor secretly; that Receiver Walker died January 1, 1884; that on March 23, 1888, the above-mentioned assignments were filed in the foreclosure suit, together with an assignment dated February 24, 1888, from Runals to Taylor, and another of the same date from Head to Taylor; that on March 24, 1888, an order was fraudulently procured substituting Taylor, as the owner of the decree, and providing for payment of the proceeds to him; that the judgment against Runals was revived by a *scire facias* on May 11, 1889; that on November 5, 1890, said Runals died, and George F. Harding, Jr., was appointed his administrator about July 1, 1891; that in February, 1892, the appellee Van Meter was appointed receiver of Runals, who had died in 1890, to take the place of the former receiver, who died in 1884; and that the assignments were fraudulently made to defeat Harding, and for the benefit of Runals, with full knowledge of the rights of Harding and the receiver. The bill was answered by appellants and other defendants; appellants denying fraud, and setting up their rights, and averring, among other things, that during all the time from March 18, 1876, up to the date of filing the

bill in this case, for more than 16 years, neither the complainants, nor any one for them, on behalf of said pretended claim set up in their bill, ever took any steps or proceeding of any kind to establish said claim, but, on the contrary, that the creditors' bill of Harding was dismissed June 12, 1882, for want of prosecution. The cause was heard, and a decree was entered setting aside the order of March 24, 1888, providing for the payment of the proceeds of the sale to Taylor, and setting aside the assignments of the decree, and the sale certificate and deed of the premises to Thomas, and ordering the premises resold, and the proceeds, less the costs and expenses up to the amount of \$10,014, paid to George F. Harding, as executor, and that any balance of such proceeds should be brought into court for the benefit of Simmons. The appellate court has affirmed the decree.

At the hearing it was proved that the proceedings on the creditors' bill and in the foreclosure suit were substantially as above stated, except that there was no evidence of the alleged assignment from Head to Runals. The affidavit of Roberts, as receiver, which was filed in the foreclosure suit, stated that he had been appointed receiver, and he asked the court to protect his rights and interests as such receiver in the notes and mortgages foreclosed. The order was then made reserving any determination of the proper parties entitled to the money for a further order and decree of the court. The receiver did not intervene in the suit, or file any petition, or obtain any further action by the court; no parties were brought in; no one was ruled to answer anything; and no issue was made upon the subject, but it was apparently dropped or abandoned, so far as any further action was concerned. On November 9, 1877, said Roberts petitioned the court to relieve him from the receivership, and in his petition stated that he had not received, as such receiver, any money, property, or thing, real or personal, whatever, into his possession, and never had occasion to perform any acts whatever as such receiver, and therefore he had no report to make. His resignation was accepted, and he was discharged, and Walker was appointed. Walker did nothing, and on June 12, 1882, the creditors' bill was dismissed for want of prosecution. This did not affect the personal decree which had been entered in that suit against Runals, but it was the end of all proceedings that were or could be taken under that bill by any action of the receiver. Sandheimer had made his claim in the foreclosure suit to the proceeds. His claim was of this nature: Haiman Lowy had, prior to March 1, 1875, loaned to Runals \$1,700 in cash, when, in order to secure payment of the same, Runals placed in his hands the securities for the payment of which the foreclosure suit was brought. After he received the notes from Runals, he

advanced to Runals, on that security, from time to time, money amounting, with interest thereon, to the sum of \$2,892.28, and afterwards sold the claims secured to Sandheimer. There was due Sandheimer from Runals, on the date of the decree of foreclosure, \$4,592.28, for which the notes and mortgages were security; and Sandheimer was entitled to that amount, leaving but \$87.72 of the decree in which Runals had any interest. Roberts, as receiver, could not step into the suit, and, by filing an affidavit, take the proceeds of the sale from Sandheimer. The creditors' bill did not describe this claim or these securities, or seek to reach them. The mere order of appointment set up in that affidavit did not confer title to the property of Runals upon the receiver. *Heffron v. Gage*, 149 Ill. 182, 36 N. E. 569. And as to property previously transferred, the order of his appointment gave him no interest, but merely a right of action to set aside the transfer if it was in fraud of creditors. The only thing he could do, if anything, was to commence some proceeding in that or some other suit to set aside the conveyance to Lowy and Sandheimer. This required affirmative action upon his part. His mere affidavit that he had been appointed receiver, in a creditor's suit against Runals, without any order of the court making him a party of the suit, was not sufficient to make him such a party. *Railroad Co. v. Surwald*, 147 Ill. 194, 35 N. E. 476. His affidavit did not make any charge against the assignments, nor allege any reason for setting them aside. It merely stated that he was receiver for Runals, and, if so, he would only be entitled to receive the \$87.72 due to Runals. The evidence shows that any attempt to set aside the claim of Sandheimer would have been utterly futile. If the receiver designed to attack it, his action was proper enough in order to have the question reserved until he could, as receiver, take action to test the validity of the assignments. But he did nothing of the kind, and simply resigned with the statement that he had never had any property and had nothing to do.

It is said on behalf of Harding that there was nothing for the receiver to do, but that he might lay by for any length of time until the proceeds of the sale should be brought into court, and, when anybody else should undertake to get them, he could make his claim. But we think otherwise. It was necessary for him to set aside the assignments upon some valid ground to entitle him to interfere. He never became a party to the suit, and made no attempt to impeach the assignment. Six years after the affidavit was filed in the foreclosure suit, and when nothing had been done under the creditors' bill, that bill was dismissed for want of prosecution. It was not pending anywhere, or on any docket, until June, 1892, when this bill was filed, and Harding ob-

tained an order of the court purporting to reinstate that suit *nunc pro tunc* as of June 13, 1882; and he then procured the appointment of the appellee Van Meter, a clerk in his office, as receiver of the deceased Runals' estate, and also procured the substitution as defendant of his son, George F. Harding, Jr., who had been appointed administrator of Runals' estate about July 1, 1891. At the time of the assignment to appellant Taylor, the creditors' bill had been dismissed for about six years, and the last receiver appointed had been dead four years. It was four years later that the order of reinstatement was made. It was not within the power of the court to resuscitate the creditors' bill, and give it effect during the period of 10 years while it was dismissed. During all that time there had been no suit pending, and no notice to anybody by that suit that they could not deal with Runals concerning his property. And, while the personal decree against Runals, under the creditors' bill, was unaffected by the subsequent dismissal, that decree was 16 years old when this bill was filed, and had long since ceased to be a lien. *Eames v. Germania Turn Verein*, 74 Ill. 54. At the time of the assignment to Taylor, he was justified by the appearances in the belief that any further proceedings by the receiver and the claim made in the foreclosure suit had been abandoned; and such was the fact, for Harding testified in this case that he did actually abandon the claim. He sought to explain his delay and present attempt to revive the claim first by saying that the matter was pending for some time in this court, and he was waiting to see whether he had a valid decree before going on in the collateral proceedings. So far as this excuse is concerned, it was shown that that case was finally ended by the opinion of this court filed January 31, 1877. *Runals v. Harding*, 83 Ill. 75. That excuse will not cover the period of delay. Next he said he understood that the foreclosure suit was dismissed or defeated in some way, and relied upon this until his attention was called to the matter a year or so before this suit was commenced. The argument based on this testimony is somewhat inconsistent with the remainder of the argument. As against Taylor, it is contended that an affidavit filed in the foreclosure suit was perpetual notice to the whole world of Harding's rights, but that Harding could rely upon reports received from others, and need not take notice of what was being done in the case. It was several years after the assignments to Taylor were filed, and the order substituting him as owner of the decree, that Harding commenced this suit. It appears that after the assignment to Taylor, when there was an attempt to sell the property, Alice M. Kirby, the owner of the fee, obtained an injunction, on May 1, 1888, against the sale, and the matter was litigated by Taylor and

Mrs. Kirby in the circuit court and this court until January 18, 1892, when the decree dismissing her bill was affirmed. Perhaps Harding thought that Mrs. Kirby would be successful in her suit, and was waiting to see the outcome of that litigation. While he was under the impression that Taylor would be defeated, he considered his claim abandoned; but, after Taylor had litigated the matter with Mrs. Kirby to a successful termination, Harding concluded that his claim was not abandoned, and by this suit asked a court of equity to deliver the fruits of the litigation to him. Sandheimer was the owner of the decree, except the small interest of Runals, until April 3, 1878, when he made an assignment of the same to Daniel Head, in consideration of \$1,000 in cash and 100 acres of land in Indiana, conveyed to Head by one Childs. At the same time Runals made an assignment of his share, which was \$87.72 and interest, to Head. There was no evidence of an assignment by Head back to Runals, as averred in the bill. The decree was assigned to Taylor February 24, 1888, by assignments executed by Head and Runals. Taylor gave for the decree a note of Ellisha Gray for \$2,500, secured by telautograph stock, and the note was paid. It is claimed, and the evidence tended to prove, that these transactions were in the interest of Runals, and that the \$1,000 paid to Sandheimer was loaned to Runals by Franklin Head, and was afterwards repaid by Runals. It does not appear that Runals had any interest in the land in Indiana. But, if it be admitted that Runals was the equitable owner of the decree after the assignments were made to Head, there would be nothing to prevent Taylor from purchasing it if the transaction was free from fraud. If Taylor had taken notice of every existing fact, he would have found a judgment at law and a personal decree against Runals, which had ceased to be liens; a reservation in the foreclosure suit of the question who should receive the proceeds of the sale, and this made upon the affidavit of a receiver who took no further steps in the matter, but subsequently resigned his receivership, with the statement that he had done nothing, and had nothing to do, as receiver; the creditors' bill dismissed six years before, and the last receiver dead more than four years.

There is no evidence tending to prove any fraud on the part of Taylor, or that he participated in any manner or to any extent in aiding Runals to conceal property, or defraud creditors. The matter was in litigation, and a long litigation followed the purchase. Under all the circumstances, the consideration was not so inadequate as to affect the right of the purchaser, or give notice to him of any fraud on the part of Runals, if there was any such fraud. There is not a particle of proof that the appellant Thomas ever knew or saw Runals, or ever

heard anything about any fact preceding the assignments to Taylor. The finding that he had full notice that the assignments were without consideration, and fraudulent, to cover up the property of Runals, is without any basis whatever in the evidence. Assertion that a transaction is a sham and fraud, and made for unlawful purposes, to hinder, delay, and wrong others, can be furnished in every case. We are not able to find any evidence upon which the assertion of fraud in this case can rest. But, if Harding ever had any enforceable claim, we think it was lost by unreasonable delay. There is no rule of equity more familiar than that it will lend its aid only to those who seek it in apt time. Here there was not only a delay of 16 years, but the principal witness to the transactions had died in the meantime, after a lapse of 14 years from the entry of the decree which Harding, by the bill in this case, sought to appropriate. And there was no reasonable excuse for such delay. Under such circumstances relief should be denied to the tardy applicant, who slept so long upon his rights, if he ever had any. The judgment of the appellate court and the decree of the circuit court are reversed, and the cause is remanded to the circuit court, with directions to dismiss the bill. Reversed and remanded

(164 Ill. 83)

DREYFUS et al. v. UNION NAT. BANK.

(Supreme Court of Illinois. Nov. 9, 1896.)

ASSIGNMENT FOR CREDITORS—ALLOWANCE OF CLAIMS—OBJECTIONS—WHO MAY FILE—SCOPE OF OBJECTIONS—PARTNERSHIP—WHAT ARE FIRM DEBTS.

1. Objections to the allowance of a claim against an insolvent estate may be filed by the assignee and by creditors who have proved their claims.

2. An objection that a claim against the estate of an insolvent firm is "inequitable, unjust, and improper," is broad enough to include the contention that such claim is not a partnership debt.

3. Evidence that notes, though signed with the individual names of persons composing a firm, instead of the firm name, were given in part payment of land purchased as a partnership venture; that the cash paid for improvements, etc., was from the partnership funds; and that the land and its proceeds were carried on the firm's books as partnership debts,—is prima facie sufficient to charge the firm. 61 Ill. App. 323, affirmed.

Error to appellate court, First district.

Claim by the Union National Bank of Chicago against the estate of Morse, Mitchell & Williams, an insolvent firm. Henry Dreyfus & Co. and others filed objections, which were sustained; but, on appeal to the appellate court (see 61 Ill. App. 323), the judgment was reversed, and the objectors bring error. Affirmed.

The firm of Morse, Mitchell & Williams, composed of Francis E. Morse, George H. Mitchell, and Frederick C. Williams, was engaged in business in Chicago as dealer in

clocks, jewelry, etc. On May 10, 1890, the three persons composing said firm, jointly with two other persons, Mortimer M. Burchard and Edward F. Cragin, purchased from one Anna B. Austin a certain tract of land in Cook county for the consideration of \$120,000. Of this amount \$35,000 was paid in cash, and the balance, \$85,000, by notes, dated June 10, 1890, running over a series of years, and secured by trust deed on the property. For convenience the title was taken in the name of Morse, and he executed the trust deed securing the notes. The purchase-money notes were each signed by all who were interested in the purchase, Morse, Mitchell, and Williams each signing his individual name. The firm name was not signed. Cragin subsequently sold his interest in the land to one Marshall, who in turn sold it to the firm of Morse, Mitchell & Williams. All of said notes were paid, excepting two of them,—one for \$20,000, and the other for \$10,000, payable, respectively, three and four years after date. These had been discounted with the Union National Bank of Chicago. On July 31, 1893, the firm of Morse, Mitchell & Williams made an assignment to Elbert H. Gary for the benefit of their creditors. The Union National Bank filed a claim with the assignee, based on the two notes which it held. To this claim the assignee, and also Henry Dreyfus & Co. and R. A. Kipling, creditors of the insolvent firm, filed objections. Upon a trial of the objections in the county court of Cook county, several propositions of law presenting the claimant's theory of the case were submitted; but the court refused to hold any of them, and refused to allow the claim as against the partnership assets, holding that the notes represented an individual and not a firm indebtedness. From that order the claimant appealed to the appellate court, where the judgment below was reversed, and the cause remanded, with directions to allow the claim against the estate of the insolvent firm. To reverse the judgment of the appellate court the objectors prosecuted this writ of error.

Moses, Pam & Kennedy, for plaintiffs in error. Tenne, McConnell & Coffeen, for defendant in error.

BAKER, J. (after stating the facts). The question in this case is whether or not the notes filed by the defendant in error as a claim against the insolvent estate of the firm of Morse, Mitchell & Williams are a partnership indebtedness. The defendant in error insists that the plaintiffs in error, who are objecting to the allowance of said claim against the partnership assets, are not in a position to object to its allowance. This point is not well made. That they are in a position to make the objection is clear, for one of them is the assignee of Morse, Mitchell & Williams, while the others are creditors who have proved their claims against the

insolvent estate, and their interest therein is such as to entitle them to protect it against improper claims.

The defendant in error insists, also, that the plaintiffs in error cannot here make the objection that its claim is not a partnership debt, for the reason, as is said, that the objection was not made in the county court. A sufficient answer to this is that the eleventh objection filed by plaintiffs in error, viz.: "The claim is inequitable, unjust, and improper," is broad enough to cover that objection.

It is contended in behalf of the plaintiffs in error that the notes on which the defendant in error bases its claim represent the individual indebtedness of the several persons whose names are signed thereto, and are not a proper charge against the partnership assets. Besides the signatures of Burchard and Cragin, the notes bear the individual signatures of Morse, Mitchell, and Williams, but not the firm name. The fact that they are so signed is not, however, necessarily conclusive that the obligation, in so far as Morse, Mitchell, and Williams are concerned, is not a firm obligation. Treating the notes as a firm obligation would not be inconsistent with their face. To determine the fact whether or not they are such, it is necessary to inquire into the nature of the transaction out of which they grew, and how it was intended they should operate. At the hearing, Francis E. Morse, one of the members of the firm, and Carrie A. Howard, the book-keeper, were called as witnesses in behalf of the defendant in error, and they were the only witnesses examined. Morse testified that the purchase of the Austin property was entered into by the firm as a partnership venture, and not on the individual account of the three members of the firm, and that the notes in controversy were given in partial payment of the purchase price; also that, prior to the purchase of said property, the firm of Morse, Mitchell & Williams had speculated several times in real estate. Both witnesses testified, and the firm's books show, that all of the money which was paid for the property, and all that was expended in improvements, was paid by the firm from its partnership funds; Burchard and Cragin refunding their proportions. The land and its proceeds were carried on the firm's books as partnership assets, and the purchase-money notes as partnership debts. This evidence was sufficient to make out a prima facie case for the defendant in error, for it shows that the purchase was made by the firm for partnership profit, and that the notes were given for a partnership indebtedness. And the evidence does not vary or contradict the terms of the notes, for they do not appear on their face not to be an obligation of the firm.

The fact that Mitchell's name did not appear in the preliminary agreement for the purchase of the property is of no importance,

because it does not appear in all the subsequent papers relating thereto. The important fact is, not who first contemplated making the purchase, but whether the firm of Morse, Mitchell & Williams was one of the purchasers. It is also immaterial that the notes were signed with the individual names of the persons composing the firm, instead of being signed with the firm name, since they were given for a partnership indebtedness. *Farwell v. Huston*, 151 Ill. 239, 37 N. E. 864. The notes in question were a proper charge against the assets in the hands of the assignee of Morse, Mitchell & Williams, and its claim should have been allowed. The judgment of the appellate court is accordingly affirmed. Affirmed.

(164 Ill. 149)

ASHLEY WIRE CO. et al. v. ILLINOIS STEEL CO.

(Supreme Court of Illinois. Nov. 9, 1896.)

CORPORATIONS—MORTGAGES—FORECLOSURE—PRIMA FACIE CASE—IRREGULARITIES IN EXECUTION—RATIFICATION—APPARENT POWER OF AGENTS—RIGHTS OF THIRD PERSONS.

1. In foreclosure against a corporation, the mortgagee, by the production of the note and mortgage duly made and executed by the corporation under the hand of its president, and corporate seal attested by the secretary, makes out a prima facie case that they are valid obligations, executed by authority. 60 Ill. App. 179, affirmed.

2. Where the execution of a note and mortgage to secure an existing indebtedness of a corporation is within the general powers of its board of directors, and the proceedings of the meeting are duly recorded, and the mortgage recorded on the day of its execution, and no action is taken by any director or stockholder in disaffirmance of the act of the directors till suit is begun to foreclose the mortgage, the corporation is bound by its acquiescence and ratification. 60 Ill. App. 179, affirmed.

3. A party in good faith dealing with corporation officers on the strength of their apparent power cannot be affected by a failure of the officers to observe the rules and regulations enacted for the internal management of the corporate affairs. 60 Ill. App. 179, affirmed.

4. Where the secretary's signature to a call for a meeting of the directors of a corporation is attached by the president by means of the secretary's rubber stamp, the secretary ratifies the signature by attending the meeting and recording its proceedings. 60 Ill. App. 179, affirmed.

5. Where a meeting of the board of directors of a corporation is adjourned to meet at the call of the president, when a committee appointed about certain business is to report, the call for the special meeting need not specify the business to be transacted. 60 Ill. App. 179, affirmed.

6. To pay or to secure the payment of an account contracted in the ordinary business of a corporation is not an extraordinary proceeding, of which notice must be given in a call, as a condition precedent to action by the directors. 60 Ill. App. 179, affirmed.

7. The presumption that notice of a meeting of a board of corporation directors was duly received by mail, when duly addressed, stamped, and posted, is not overcome by the director's testimony that he has no recollection of receiving the notice. 60 Ill. App. 179, affirmed.

8. Where a by-law requiring written notice of a special meeting of corporation directors is silent as to the manner of its service, the man-

ner employed is of no consequence, where it is proved that the notice was received. 60 Ill. App. 179, affirmed.

9. Where a by-law requires a board of corporation directors to hold regular meetings in a specified place, special meetings are not within the restrictions, and may be held anywhere. 60 Ill. App. 179, affirmed.

10. Where the record of a meeting of a board of corporation directors for the execution of a mortgage shows that the directors had a draft of the mortgage before them, and that the same paper discussed and amended by them was executed on the same day, it cannot be urged against the validity of the mortgage that it contained special provisions not contained in the statutory form of mortgage. 60 Ill. App. 179, affirmed.

11. The rule that strangers to corporations, dealing in good faith with their officers in the exercise of apparent power, may rely on their acts as legally authorized, applies to a mortgagee who accepts the mortgage of the corporation, and grants an extension of time for the payment of an existing debt. 60 Ill. App. 179, affirmed.

Appeal from appellate court, Second district.

Bill by the Illinois Steel Company against the Ashley Wire Company and others to foreclose a mortgage. From an affirmance of a judgment in favor of plaintiff (60 Ill. App. 179), defendants appeal. Affirmed.

This is an appeal from a judgment of the appellate court of the Second district, affirming, on a writ of error, the decree of the Will county circuit court in the cause of the Illinois Steel Company against the Ashley Wire Company et al. Upon rendition of such judgment of affirmance, the following opinion, reported in 60 Ill. App. 179, was announced (Cartwright, J.):

"Defendant in error filed its bill March 7, 1894, in the circuit court of Will county, to foreclose a mortgage executed July 19, 1893, by the Ashley Wire Company, by the hand of C. H. Carpenter, its president, under its corporate seal, attested by James R. Ashley, its secretary, and recorded on the same day in the recorder's office of said county, where the mortgaged premises were situated, securing the payment of a promissory note for \$67,246.24, due in two years, with interest at 5½ per cent., and providing for the insurance of the buildings on the mortgaged premises in the sum of \$50,000 for the benefit of the mortgagee. It was stipulated in the mortgage that, in default of payment of interest when due, the whole principal and interest should, at the option of the mortgagee, become due, and the mortgage be foreclosed; and it was alleged in the bill that default had been made in the payment of interest due January 19, 1894, wherefore the mortgagee had elected to declare the whole indebtedness due. The other plaintiffs in error were made defendants with the Ashley Wire Company under averments that they had or claimed some interest in the mortgaged premises, which it was alleged were subject to the mortgage. It was also averred that the Ashley Wire Company was insolvent, and that George W. Bush had been appointed receiver of its property and estate, in pursuance of a bill filed for that purpose by the First National Bank of

Joliet. The Ashley Wire Company answered the bill, admitting that on July 19, 1893, it was largely indebted to the complainant, and that on that day the mortgage in question was duly recorded in the recorder's office of Will county, purporting to be executed by it to secure such indebtedness, but insisting that the mortgage was not binding on it because its officers acted without lawful authority in the execution of such mortgage. It was admitted that Bush was receiver of the company, and it was claimed that, when the mortgage was executed, the company was insolvent, and that complainant was aware of that fact. The First National Bank of Joliet, John Y. Brooks, and the Will County National Bank of Joliet filed answers, claiming rights as judgment creditors, and denying the validity of the mortgage. George W. Bush answered as receiver, setting up his appointment as such receiver, and his possession of the property, and neither admitting nor denying the other allegations of the bill. Replication having been filed, the proofs were heard by the court, and a decree was entered finding that the mortgage was a valid and binding security, and for a foreclosure of the same, and a sale of the mortgaged premises to pay the sum of \$72,752.86, being the amount due on the note, together with moneys advanced by complainant for insurance and interest thereon, and \$500 solicitor's fees, all of which were provided for by the terms and conditions of the mortgage. The only question in the case is whether the note and mortgage were binding obligations of the Ashley Wire Company.

"At the hearing the complainant produced and offered in evidence the note described in its bill, dated July 19, 1893, for \$67,246.24, payable two years after date, with interest payable semiannually, at 5½ per cent., signed by the Ashley Wire Company under the hand of C. H. Carpenter, its president, attested by J. R. Ashley, its secretary, and also the mortgage in said bill described, securing the payment of said note, with the provisions above stated, duly executed by the Ashley Wire Company under the hand of its said president, and its corporate seal attested by its said secretary, together with the certificates of acknowledgment and recording thereof in accordance with the averments of said bill. Complainant also proved that default was made in the payment of the installment of interest due January 19, 1894; that the Ashley Wire Company had no insurance on the mortgaged property after January 1, 1894; and that complainant effected such insurance, and paid \$1,500 in premiums on account of the same. It was then agreed by the defendants that, if complainant was entitled to a decree of foreclosure, it should recover \$1,500, and \$69.44 interest thereon, for insurance premiums. By this proof the complainant made out a prima facie case that the note and mortgage were valid obligations of the Ashley Wire Company, executed by its authority, and the defendants took upon themselves the burden of proving that it was not so executed. *Smith v. Smith*, 62 Ill. 493; *Sawyer v. Cox*, 63 Ill. 130; *Wood v.*

Whelen, 93 Ill. 153; *McDonald v. Chisholm*, 131 Ill. 273, 23 N. E. 596; *Glover v. Lee*, 140 Ill. 102, 29 N. E. 680; *Atwater v. Bank*, 152 Ill. 605, 38 N. E. 1017.

"It was contended by the defendants that the note and mortgage were not binding on the Ashley Wire Company because they were executed by its officers under authority conferred at a meeting of its board of directors which was not regularly convened in accordance with its by-laws, and which was held at a place not authorized by such laws, and also that the special provisions of the mortgage, such as declaring the debt due on default in payment of interest, were not binding because not specified in the record of the meeting. To support their claims the defendants offered evidence, and the proofs established the following facts: The by-laws of the Ashley Wire Company provided that its business should be managed by a board of seven directors, to be elected by the stockholders at their annual meeting, to be held on the first Thursday after the tenth day of July in each year. The officers of the company were a president, secretary, and treasurer, to be appointed by the board of directors from their own number, as soon as practicable after the election of such board. The by-law regulating meetings of the board of directors is as follows: '(4) Regular meetings of the board of directors shall be held quarterly, the first Thursday in the month, commencing October 5, 1882, at the office of the company in Joliet. The president or any two directors shall have the authority to call special meetings of the directors, when in his or their judgment he or they think the interests of the company demand their attention. And he or they shall require the secretary to give a reasonable notice to such directors, in writing or in person, of the time of such meeting, and at each regular or called meeting the secretary shall present a full report of the business transacted since the previous meeting of the board. Four directors shall constitute a quorum to do business at all meetings.' There was also a resolution of the board that the notice to directors should be in writing. An annual meeting of the stockholders was held at the office of the corporation in Joliet, July 13, 1893, at which H. S. Smith, S. H. Sweet, C. H. Conover, E. C. Hager, Charles Pettigrew, C. H. Carpenter, and J. R. Ashley were elected directors. Immediately on the adjournment of the stockholders' meeting the board of directors met, all being present except Hager. At that meeting C. H. Carpenter was elected president, and J. R. Ashley was elected secretary. The president and C. H. Carpenter and S. H. Sweet were appointed a committee to confer with complainant, the Illinois Steel Company, concerning its request for the cancellation of a contract under which the Ashley Wire Company had been buying wire rods from complainant, and the committee was directed to make such arrangements for the adjustment of the account due complainant as might be thought best, and to report at the next meet-

ing of the board of directors. The board then adjourned subject to the call of the president. The committee so appointed conferred with complainant, and on July 15, 1893, the president called a meeting of the board of directors, of which a notice was mailed to each director July 15, 1893, except the president and secretary. The notice mailed to the director Hager was as follows: 'July 15, 1893. E. C. Hager, Esq., Bay View, Mich.—Dear Sir: Pursuant to adjournment, the directors of the Ashley Wire Company are hereby requested to meet Wednesday, July 19th, 1893, at the hour of 1 p. m., at the Union League Club Rooms, Chicago. Matters of importance will be brought before this meeting for consideration, and a full attendance is requested. J. R. Ashley, Secretary. By order of the president.' The other notices were the same as this, except in the address. The president wrote the notices, and affixed the name of the secretary by means of a rubber stamp which was in the office of the corporation. In pursuance of the notice, a meeting was held at the time and place therein mentioned. H. S. Smith and Charles Pettigrew, two of the directors, sent to that meeting their resignation as directors because they were directors of the Illinois Steel Company, and deemed it improper to act in the matter of its claim. E. C. Hager did not attend the meeting, but S. H. Sweet, C. H. Conover, C. H. Carpenter, and J. R. Ashley, the remaining directors, were present and participated in the meeting, and its proceedings were duly entered in the records of the corporation. Every director either received written notice of the meeting or was present and took part in it, unless the notice mailed to Hager failed to reach him. The account with complainant was adjusted and was then due, the rate of interest to be paid was agreed upon by conference with the officers of complainant, the extension of time and security was agreed upon, and the execution of a note and mortgage for the unpaid account due, on or before two years from date, with interest at 5½ per cent., was authorized. The alleged illegality in convening this meeting of July 19th consists in the want of a statement in the notice of the particular business to be done at the meeting, the fact that the president affixed the secretary's name, and sent the notice by mail, and a claim that the notice was not received by the director Hager. It is also argued that the meeting could only be held at the office of the corporation in Joliet.

"In our judgment, a defense of this character is not now available to the defendants. The act sought to be impeached was within the general powers of the board of directors, and it has never been disavowed by the corporation. The record of the meeting of July 19th is the last entry in the record book of the corporation. No meeting of directors or stockholders has been held, and no action has been taken by the corporation or any director or stockholder in disaffirmance of the proceedings at that meeting, or in repudiation of

the note or mortgage. The record of the meeting in the book of the corporation was notice to its members, and the mortgage was recorded on the day of its execution. If the notice mailed to Hager was not received, he made no objection, and gave no notice of that fact, although informed by the records of the corporation and the public record of what had been done. Those affected by the act unquestionably may, and apparently do, prefer to ratify it as just and proper, even if irregularly done, and, of course, if that is the case, the other defendants have no right to interfere. All that has been done in the way of questioning the act of the agents of the corporation is the filing of an answer by a solicitor, presumably employed and directed by the president, who executed the note and mortgage. The repudiation of its obligation has never been authorized by the directors or stockholders, and we think that the mortgage is binding by acquiescence and ratification. *Atwater v. Bank, supra*; *Railway Co. v. Carson*, 151 Ill. 444, 38 N. E. 140.

"But if the alleged defenses as here made are proper to be considered, the first question that arises is whether complainant can be affected by a failure of the corporate agents to observe the rules and regulations enacted for the internal management of the corporate affairs. When the mortgage was made, the records of the corporation showed that power to make it had been conferred by the governing body of the corporation, having the management of its corporate affairs. The indebtedness was created in the ordinary course of business by the purchase of wire rods from which the corporation manufactured its product. It was due and unpaid, and complainant dealt in good faith, without notice of any irregularity. Defendants' claim is that the security so taken is invalidated if they are able to show that the signature of the secretary to the notices was made with a rubber stamp held by the hand of the president, or that the notice mailed to Hager in ample time, under a presumption that he received it, was not in fact received. There are cases where it has been held essential to the validity of an instrument that the meeting at which it was authorized was called in accordance with the rules governing the relations between the corporation and its agents, but they have never been recognized as affecting strangers to the corporation in this state. The rules laid down in such cases originated when the relations of corporations to the general business of the country were widely different from what they now are. Not many years ago, corporations were few in number, and organized for the execution of enterprises beyond the scope of such capital as could be aggregated in a partnership. Such concerns were naturally ponderous, and moved with much formality in the execution of their business. Their relations to the public generally were very limited. But now the

every-day business of the country is transacted by corporations. Every city and village is full of them, and they have largely supplanted the partnership in the store and the shop. The necessities of business require that the public, dealing with their officers in good faith on the strength of apparent power, should be protected against such claims as are here made. The courts of this state have always protected third parties dealing in good faith with corporations within the general scope of their powers. In *Smith v. Smith*, supra, it was held that third parties dealing with a corporation are not bound by rules adopted for its government, or required to know the provisions of its by-laws, which are private, and only accessible to the officers of the corporation; and that a deed not countersigned by the secretary was valid, although the by-laws required it to be so countersigned. In *Insurance Co. v. White*, 106 Ill. 67, although the corporation in that case was a foreign one, the rule was declared generally that rules and by-laws are not open to inspection by the public, and that persons not connected with the corporation are not presumed to know what they contain. We do not think that complainant was bound to know what provision or regulations had been made by the Ashley Wire Company for convening the meeting of its agents or governing body, but had a right to assume that they had been complied with.

"However, an examination of the objections shows them to be without merit. It certainly made no difference to anybody who held the rubber stamp; and, if the secretary did not know when it was done, he attended the meeting, acted as secretary, recorded its proceedings, and treated it as regularly called, and its directions as binding on him. He ratified the call, and it affected nobody in any view of the question.

"It was not necessary that the notice should state the business to be transacted, both because the meeting of July 13th was adjourned to meet at the call of the president when the committee appointed about this business was to report, and the business to be transacted was ordinary business of which no statement was required. It should certainly not be regarded as extraordinary business for a corporation to pay, or secure the payment of, an account contracted in the ordinary business of the corporation.

"The evidence that notice of the meeting was deposited in the post office, properly stamped, and addressed to Hager at Bay View, Mich., on July 15th, was prima facie proof that he received it. *Meyer v. Krohn*, 114 Ill. 574, 2 N. E. 495; *Young v. Clapp*, 147 Ill. 176, 32 N. E. 187, and 35 N. E. 372. This was met by testimony of Hager that he had no recollection of receiving the notice; that he had tried to rack his brains, so as to be positive about it, but was not able to be positive; and that he did not think

that he received it. The presumption that the letter was received is founded upon the regularity and certainty with which the mail is carried and delivered. When letters are properly stamped and addressed, the uniformity with which they are received is such that the failure to receive such letter is a very unusual circumstance, and we do not think that the presumption was overcome by mere failure of Hager to recollect, or his impressions on the subject. The by-law was silent as to the manner in which written notice of a special meeting of the board should be served. If it had provided for notice by mail, it would be immaterial whether Hager ever received the notice which was properly sent in due time by that method. It would be unnecessary to inquire whether it was received or not. But if the notice was received by Hager, it is equally immaterial by what means it was conveyed to him. We think that the circuit court was right in finding from the evidence that he did receive it, and therefore the method employed was of no consequence.

"The by-laws required that regular meetings of the board of directors should be held at the office of the corporation in Joliet. The business done at this meeting was an exercise of a power of the board as agents of the corporation, that might, in the absence of any prohibition, be performed at any place. *Reichwald v. Hotel Co.*, 106 Ill. 439. In enacting the by-law, the restriction as to place was not applied to meetings generally, but was limited to the regular meetings, and special meetings could be held at any place that would otherwise be lawful. The board had several times met in Chicago, without question or objection.

"As to the claim that the mortgage was invalid as to the special provisions not contained in the statutory form of mortgage, the proof is that the draft of the mortgage was present at the meeting. The record of the meeting shows that complainant's proposition was that the note should draw 6 per cent. interest, and after a conference it was agreed to accept 5½ per cent. The draft of the mortgage is shown by the evidence to have been changed accordingly. Other provisions were talked of, and the same paper discussed and amended was executed on the same day. The resolution referred to the identical mortgage executed. None of the objections made seem to us to have any force.

"It is urged that the numerous cases in which the rights of strangers to corporations, dealing in good faith with their officers in the exercise of apparent power conferred upon such officers as agents of the corporation, against claims that the act was not in fact legally authorized, do not apply to this case, because the mortgage was made to secure an existing debt. The debt was due, and, by making the mortgage, the corporation obtained an extension for two

years. It was not made as a donation, and we see no reason to deny complainant the right to rely on the presumptions that obtain in other cases. The decree will be affirmed."

Geo. S. House, for appellants. Garnsey & Knox and E. P. Prentice, for appellee.

BAKER, J. (after stating the facts). We not only have had the benefit of an oral argument, but have also carefully read and examined as well the briefs and arguments filed in the appellate court as the elaborate additional briefs and arguments submitted in this court. We concur in the judgment of the appellate court, and in the reasons given for its decision. There is nothing in the case that requires any further expression of opinion on our part. Additional grounds that would go in affirmance of the judgment might be stated, but we deem it unnecessary to add to what has already been said. The judgment is affirmed. Affirmed.

CARTWRIGHT, J., took no part in this court.

(163 Ill. 648)

POWELL v. DAILY et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

LANDLORD AND TENANT—LEASE—LIEN FOR RENT—WAIVER OF EXEMPTIONS—ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. A landlord who seizes property of a tenant under a provision in the lease giving him a lien for rent on all the tenant's property has the burden of showing that the property seized was owned by the tenant at the time the lease was executed. 61 Ill. App. 552, affirmed.

2. A landlord has no common-law lien on the property of his tenant for rent, but only a right to distrain, and his lien does not attach to property until the levy of a distress warrant thereon, before which time the title and possession can legally be transferred by the tenant to an assignee for creditors. 61 Ill. App. 552, affirmed.

3. The execution by an unmarried man of a lease giving his landlord a lien on all his property for rent, and waiving all exemptions, is a valid waiver, in favor of the landlord, of his statutory exemption under an assignment afterwards made by him for the benefit of his creditors. 61 Ill. App. 552, reversed.

Appeal from appellate court, Second district.

David E. Powell, as landlord of James H. Turpin, levied a distress warrant on property in the possession of John Daily, as Turpin's assignee for the benefit of creditors. Orders of the county court were affirmed by the appellate court (61 Ill. App. 552), and Powell appeals. Affirmed in part. Reversed in part.

James H. Turpin and Samuel Turpin leased from appellant a certain storeroom in Peoria for five years from September 15, 1891, at a yearly rental of \$1,900, payable in monthly installments. Among other provisions in the lease it was agreed by the

parties thereto that if the rent, or any part of it, should be behind or unpaid on the day whereon the same ought to be paid, it should be lawful for the lessor, at his discretion, to declare the term ended, and to repossess himself of the demised premises, and to distrain for any rent that might be due thereon upon any property belonging to the lessees, whether the same should be exempt from any execution or distress by law or not, and in that case the lessees agreed to waive all legal right they then had or might have to hold or retain any such property under any exemption laws in force in this state, or in any other way, "meaning and intending hereby to give the said party of the first part, his heirs, executors, administrators, and assigns, a valid first lien upon any and all goods and chattels and other property belonging to the said party of the second part as security for the payment of the said rent, and in manner and form aforesaid, anything hereinbefore to the contrary notwithstanding." At the date of the lease the lessees went into possession of the room, and immediately commenced business therein as merchants. Samuel Turpin eventually sold out his interest to James H. Turpin, and retired from the firm. The latter continued to do business until June 9, 1894, when he made a deed of assignment under the statute to John Daily of all his property, real and personal, which was properly executed, and recorded the same day, and the assignee accepted the trust, and took possession of the stock of goods of James H. Turpin, then in the store. On the 15th day of June, 1894, the rent due appellant, including \$153.33 becoming due on that day, was \$554.17, for which sum appellant issued his distress warrant on the 19th day of the same month, and levied, or claimed to levy, on the goods in the store. The assignee thereupon paid the rent from the date of the assignment until the 15th day of June, leaving a balance due the appellant of \$522.20. By leave of court the assignee entered into an agreement with the appellant whereby the levy on the distress warrant was released without prejudice to any of appellant's rights, and no further proceedings were had on the warrant. Afterwards, and within the time required by law, appellant presented his claim for the balance of the rent due him, duly verified by affidavit, and claimed priority of payment for his rent, alleging that he had caused the goods on the demised premises to be distrained for the same. On June 29, 1894, the assignor made his claim for \$100 exemptions under the statute, to which the assignee and appellant filed objections. The assignor was an unmarried man. The court, upon hearing, approved the report of the assignee, and allowed Turpin his \$100 exemptions, denied appellant's priority of claim, and ordered the assignee to pay out of the moneys in his hands, first, the costs, including \$100 to himself,

and next \$100 to Turpin, and the balance to be distributed pro rata among the latter's creditors who had proved up their claims, including appellant. To these several rulings allowing Turpin his exemption and disallowing the appellant's claim of priority of payment, appellant excepted, and appealed to the appellate court, where the order of the county court was affirmed. 61 Ill. App. 552. The appellate court having certified to the importance of the questions involved, appellant brings the case here by appeal.

McCulloch & McCulloch, for appellant.
R. H. Radley and Dan R. Sheen, for appellees.

BAKER, J. (after stating the facts). Appellant claims that by virtue of the provision in his lease he has a lien upon the property in the hands of the assignee. The lien sought to be given by the lease is upon property that was owned by the lessees at the time of the execution thereof. There is, however, no evidence that any portion of the property held by the assignee was owned by the lessees at the date of the lease. The burden of proving this fact was upon appellant; and, in the absence of such proof, it will be assumed, as against him, that the property in dispute is all after-acquired property. But the terms of the lease are ineffectual to create a lien on after-acquired property. *Borden v. Croak*, 131 Ill. 68, 22 N. E. 793. The contention of appellant that he has, nevertheless, a common-law lien, is equally unfounded. A landlord in this state has no common-law lien upon the property of his tenant for rent. *Herron v. Gill*, 112 Ill. 247; *Bank v. Adam*, 138 Ill. 483, 28 N. E. 955. He has at common law merely a right to distrain. His lien, other than his statutory lien upon crops grown or growing upon the premises demised, does not attach until after the goods have been levied upon under distress warrant. *Newspaper Co. v. Peterson*, 162 Ill. 158, 44 N. E. 411. Of his right to distrain, however, appellant did not avail himself in time, for the assignee had become invested with the title to and the possession of the goods several days before the distress warrant was issued. *Hadden v. Knickerbocker*, 70 Ill. 677; *Herron v. Gill*, supra.

Objection is made because the county court allowed the assignor his exemption after he had expressly waived it by the lease. In this ruling the court erred. The exception is allowed by the statute for the benefit of the debtor, and the rule is that a party may waive a statutory, or even a constitutional, provision made for his benefit. *Railway Co. v. Hock*, 118 Ill. 587, 9 N. E. 205; *Harris v. City of Chicago*, 162 Ill. 288, 44 N. E. 437. The clause in the lease by which the lessee waived his exemption is valid, and the court should have given effect to it. The case of *Recht v. Kelly*, 82 Ill. 147, referred to in the

appellee's brief as holding that a debtor cannot waive his right of exemption by an executory contract, is plainly distinguishable from the case at bar. In that case the debtor was the head of a family, residing with them, and the reasoning of the court was that the exemption is as much for the benefit of the family of the debtor as for himself; and hence he could not, by an executory contract, waive the provisions made by law for their support and maintenance. In this case, on the other hand, the debtor is an unmarried man, so the same reasoning would not apply. His right of exemption is a purely personal right, which he could relinquish if he chose. For the error indicated, the judgments of the appellate and county courts, in so far as they allow the claim of \$100 in favor of Turpin, one of the appellees, are reversed, and in all other respects the judgments are affirmed. Appellant will pay two-thirds of the costs of this court and Turpin the other third. Affirmed in part. Reversed in part.

OARTWRIGHT, J., took no part.

(163 Ill. 248)

DRAINAGE COM'RS v. VOLKE.

(Supreme Court of Illinois. Nov. 9, 1896.)

CERTIORARI—LAPSE OF TIME AS BAR—PROCEDURE
—DRAINAGE ACT—CONDEMNATION
PROCEEDINGS.

1. For lapse of time, short of the period of limitation for prosecuting a writ of error, to bar the right of a party to review proceedings by common-law writ of certiorari, it must be shown that since the making of the record sought to be reviewed, and on the assumption of its validity, something has been done so that great public detriment might result from declaring it invalid. 59 Ill. App. 283, affirmed.

2. The fact that after proceedings by drainage commissioners for condemnation of right of way for a ditch, which resulted in a judgment that the landowner was entitled to no damages, the commissioners proceeded to construct the ditch, does not bar the right of the landowner to review the proceedings by certiorari, as the quashing of such proceedings would not prevent a new legal condemnation. 59 Ill. App. 283, affirmed.

3. In proceedings by common-law writ of certiorari to review a record, the validity of the record must be determined from its face, and extrinsic evidence is not admissible. 59 Ill. App. 283, affirmed.

4. On the condemnation of right of way for a ditch under the farm drainage act (3 Starr & C. Ann. St. c. 42, § 20) the jury must award to the landowner at least the value of the land proposed to be taken, against which they have no right to consider benefits accruing to the remainder of the land, and a verdict and judgment awarding no damages are void. 59 Ill. App. 283, affirmed.

Appeal from appellate court, Second district.

Certiorari by Paulus Volke to review the record of proceedings before a justice of the peace by the drainage commissioners of Union drainage district No. 1 to condemn right of way for a ditch. A judgment quashing the record and proceedings was affirmed by the

appellate court (59 Ill. App. 283), and defendants appeal. Affirmed.

The following is the statement of the case made in the appellate court:

"On the 7th of June, 1894, appellee filed a petition for writ of certiorari, showing that on the 13th of March, 1893, the commissioners of the Union drainage district, a drainage district situated in Cook and Will counties, instituted proceedings before a justice of the peace to condemn a right of way for a ditch over appellee's land; that he was summoned as the owner of the land, and appeared; that a hearing was had before a jury, who found that appellee was entitled to no damages; that the commissioners thereafter entered upon the land, and made excavations, to the injury of the land, and that they threatened to make further excavations. The petition charges that no offer of settlement was made by the commissioners before instituting the proceedings before the justice of the peace; that no description of the land appears in the record of the district, so as to give the district title to any specific part of the land, and that there is no sufficient record in the district to justify the taking of any part of the land. A writ of certiorari issued and was served upon the commissioners and the clerk of the commissioners. In support of a motion to quash the writ and dismiss the petition appellants offered as evidence parol testimony showing that after the finding of the jury the commissioners entered upon the land, and constructed a ditch across it 5 feet deep, 22 feet wide on top, and 16 feet at the bottom; that other ditches, consisting of main drain five miles long and a branch drain of two miles, had been constructed at an expense of about \$12,000. But the court refused to consider the testimony, and overruled the motion to quash the writ and dismiss the petition. The clerk of the drainage commissioners then made the following return:

"State of Illinois, Will County—ss.: Before David S. Stephen, Justice of the Peace. In the matter of the application of drainage commissioners of Union district No. 1, in the town of Frankford, in the county of Will, and town of Rich, in the county of Cook, for assessment of damages of Paulus Volke, to land for drain 1893, March 13th, statement of drainage commissioners filed for requesting jury to assess damages of Paulus Volke to his land by reason of constructing over same. Venire of impaneling jury. Returned served by constable, Wm. H. Logan, as follows: 'Personally served the within notice on the within-named Paulus Volke, by reading the same to him this 16th day of March, 1893.' 1893, March 20th. Parties appear; venire returned, and following jury impaneled: Mark W. Hunt, G. J. Lankenau, W. M. Leffler, Fred Stauffenberg, Fred Balck, and Pete Pfeifer. Jury sworn, and court adjourned until 4 o'clock p. m. for the purpose of permitting the jury to view the

land. 1893, March 20th, 4 p. m. Case called upon hearing the allegations and proofs of the parties. The jury return their verdict that the defendant, Paulus Volke, is entitled to no damages. It is therefore considered by the court that Paulus Volke sustains no damages by reason of said drain; therefore cannot recover damages of said drainage commissioners. David S. Stephen, Justice of the Peace.

"Indorsed: 'Filed in my office March 24th, 1893. H. L. Luehrs, Drainage Clerk.'

"In addition to above transcript of file, attention of the court is invited to the plans, profiles, specifications, and map of said drainage district. Respectfully submitted, Fred Bruggeman, by J. W. D'Arcy. Filed Oct. 2nd, 1894.'

"October 2nd, 1894, defendants offered to make the same proofs and evidence as presented on the motion to quash the writ. The court ordered 'that the record and proceedings be quashed and held for naught.' To which order of the court the defendants excepted, and prayed an appeal."

J. W. D'Arcy, for appellants. Haley & O'Donnell, for appellee.

PER CURIAM. After a careful consideration of this case, we have arrived at the same conclusion as that reached by the appellate court, and have concluded to adopt the following opinion of that court, delivered by Mr. Justice Harker:

"Appellants' first point of contention is that the writ should have been quashed because of the lapse of time between the condemnation of the land and the suing out of the writ. Mere lapse of time alone, short of the limitation for the prosecution of a writ of error, will not bar the issuing of a common-law writ of certiorari. *Hyslop v. Finch*, 99 Ill. 171. To be barred by the laches of the petitioner, it must appear that since the making of the record sought to be reviewed, and upon its assumed validity, something has been done so that great public detriment or inconvenience might result from declaring it invalid. A good illustration of the rule when laches should bar is found in the case of *Trustees, etc., v. School Directors*, 83 Ill. 100. The petition for the writ is addressed to the discretion of the court, and so, when the petition is filed, either in resistance of an order for the writ or upon a motion to dismiss the petition, extrinsic evidence may be heard, not for the purpose of contradicting or enlarging the record, but to show that no injustice has been done the petitioner, or that great public detriment and inconvenience might result from quashing the proceedings. It is contended that the evidence offered by appellants to the effect that after the condemnation proceedings against appellee's land were had the commissioners spent some \$12,000 in digging ditches was sufficient to sustain their motion to quash the writ and dismiss the petition, and should have been considered by the court to that

end. It should be observed that the writ in this case does not question the organization of the drainage district. The quashing of the proceeding whereby appellee's land was condemned would by no means result in the loss to the district of what had been expended by the commissioners in constructing ditches. There is nothing in the way of appellants' proceeding again to condemn if they are unable to arrive at an agreement with appellee. We agree with the circuit court that the evidence offered by appellants on the motion to quash the writ and dismiss the petition was not sufficient. Clearly, it could not be considered on the hearing of the return to the writ made by the drainage clerk. The judgment to be entered on the return to a common-law writ of certiorari affects the validity of the record alone, and must determine from its face solely whether it is valid or invalid. To the contention of appellee that the proceedings should be quashed because the record is silent as to any attempt of the commissioners to procure the right of way by agreement with him before commencing the proceedings, it may be said that appellee would be in a better position to urge this point if his petition did not show that he appeared before the justice in answer to the summons and entered upon the trial of the question of damages without objecting that no attempt to settle with him had been made. For the reason that the record shows that the jury allowed appellee no damages for the land taken for the ditch the circuit court properly rendered judgment quashing the proceedings. The proceedings were under the farm drainage act, and the language governing the conduct of the jury is: "The jury shall hear the evidence offered in the case as to the value of the land proposed to be taken, and all damages consequent upon the construction of the proposed work, and may go upon the premises for the purpose of viewing them; and they shall return as their verdict the amount of damages found, if any, in favor of the owner or owners and against the commissioners." We do not think the words "if any" authorized the jury to return a verdict that appellee was entitled to no damage for the land actually taken for the ditch. They could have arrived at no such conclusion without considering benefits. But under the statute under which the proceedings were had the jury had no right to consider benefits. The provisions of this act must not be confused with those of the levee act. Our supreme court has held that the levee act and the farm-drainage act are separate and independent codes of law applicable to the subject of drainage. A district organized under the farm-drainage act is subject only to the provisions of that act, and those of the other act have no application to it. *Gauen v. Drainage Dist.*, 131 Ill. 446, 23 N. E. 633. Acting under this act, a jury must, in its verdict, find as damages the value of the ground for the ditch; and, if the tract through which the ditch passes is otherwise damaged, it must be included. The commissioners fix the classification of lands

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and assess the benefits. Judgment affirmed."

It may be further observed in respect to the evidence offered to prove laches on the part of the petitioner that it was not shown that the digging of the ditches and expenditure of the moneys therefor occurred before the filing of the petition for the writ. The petition was filed in June, and the hearing had in September, and, while the evidence showed that when the hearing was had the work had been done, and the money expended, it was silent as to the time. The judgment of the appellate court is affirmed. Judgment affirmed.

CARTWRIGHT, J., took no part.

(163 Ill. 502)

LESLIE et al. v. MOSER et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

TRUSTS—EVIDENCE TO ESTABLISH.

Testator, by his will, gave to his wife \$1,500 a year, to be paid quarterly, and made her executrix of his will. He appointed two of his sons trustees to hold certain bequests, and distribute the income of the same to his daughters. The will made no provision as to raising the \$1,500 to be paid to the widow. After the filing of the executrix's account, the heirs agreed that \$25,000 should be set apart for the purpose of raising the annuity. The agreement provided that the sum should be retained by the executrix as a trust fund for that purpose, and invested by her, and for a division of said fund at the death of the widow. *Held*, that a bill by certain of the heirs to compel the sons, to whom the mother had loaned a portion of the \$25,000 set apart, to invest said \$25,000 "as trustees," and setting forth the conditions of the will, and the agreement between the heirs, was insufficient to show that the sons held such property as trustees. 62 Ill. App. 555. reversed.

Appeal from appellate court, First district.

Action by Mary J. Moser and others against John H. Leslie and another, trustee of the estate of George Leslie, deceased. A decree for complainants was affirmed by the appellate court (62 Ill. App. 555), and defendants appeal. Reversed.

Breckenridge & Rich and F. L. Brooks, for appellants. Wilson, Moore & McIlvaine, for appellees.

WILKIN, J. George Leslie, of Chicago, died March 23, 1887, leaving Jane H., his widow, and Mary J. Moser, Belle Leslie, Agnes M. Alton, and Laura L. Clancy, daughters, and John H. Leslie, George H. Leslie, and Charles Leslie, sons, his only children, to whom he willed all his property. Among other bequests to his widow, who was named as executrix of the will, was a gift of \$1,500, to be paid to her in quarterly payments of \$375. She and the seven children agreed that \$25,000 of the assets of the estate should be invested for the purpose of raising this annuity. This action in chancery was brought in the circuit court of Cook county by appellees, four of the children, against appellants, two of the sons, "as trustees of the estate of George H. Leslie, deceased," to compel them to invest and secure the complain-

ants' part, being four-sevenths of said \$25,000. The defendants filed a general and special demurrer to the bill, which was overruled, and, abiding by their demurrer, a decree was entered against them, according to the prayer of the bill. This is an appeal from a judgment of the appellate court affirming that decree. 62 Ill. App. 555.

Appellants insist that, admitting the allegations of the bill to be true, as is done by their demurrer, it states no grounds for the relief prayed and granted. They treat it as a bill to enforce the performance of the agreement entered into between the widow and children setting apart the \$25,000 fund.

On the other hand, counsel for appellees contend that the duties of appellants, as trustees, grew out of the provisions of the will, and their dealings with the said fund, and they say the bill is not to enforce the contract, but to compel the performance of a trust obligation, which was the basis of said contract. Copies of the will and agreement are made exhibits to the bill. Does the bill show upon its face that it is the duty of the defendant to invest the \$25,000 fund?

The first question suggested by the argument of counsel is, can they be required to do so by reason of anything stated in the will? The provision under which \$1,500 a year is given to the widow is as follows: "I give, devise, and bequeath to my beloved wife the sum of fifteen hundred dollars per year (\$1,500), to be paid to her quarterly, in sums of three hundred and seventy-five dollars (\$375) each, so long as she shall live." Nothing whatever is said in any part of the will as to the assets out of which the sum shall be paid, how, or by whom, payments shall be raised or paid; neither is there anything in the will making appellants trustees of the estate generally. They are made trustees for certain purposes,—that is, hold the bequests, and distribute the income of the same to the daughters, accounting to the probate court, etc.; but we are unable to find any clause or provision in the will from which it can be said they occupied a trust relation to the estate, for the purpose of raising the \$1,500 to be paid to the widow, nor do we find anything in the allegations of the bill to that effect. True, it is alleged that the will was duly probated, "and that the said John H. and George H. Leslie were duly appointed trustees of said estate, under the directions of the judge of said probate court"; but it is not stated for what purpose they were so appointed, and, construed with the will, the allegations mean no more than that they were appointed trustees for the daughters. It is next alleged that at the time of filing the final account by the executrix, which was May 7, 1894, the complainants received the amounts due them under the will, leaving, however, the sum of \$25,000 in their hands, without security, which amount was reserved as a principal sum, capable of producing the amount bequeathed said widow during her life as an

annuity, four-sevenths of which will, at the death of their mother, belong to orators. The allegation is not that the money was left in their hands to be invested by them. There is the further allegation that the executrix is an elderly lady, unaccustomed to business, and under the direct influence of appellants, and, "as trustees under the will, she intrusted the entire charge of the funds of said estate to them, without any bond or security"; but here is no attempt to charge them with a trust relation as to the fund, or show in what way it became their duty to invest it. Again, it is alleged that, although the reports of the executrix show a large sum of money in her hands, no amount was ever invested to secure her annuity "until at the time of the filing of said account, in May, 1894, when the said John H. and George H. Leslie were induced to sign a contract, a copy of which, marked 'Exhibit B,' is made a part of the said bill"; that, when the contract was signed, it was verbally agreed by the executrix and heirs that one-half of four-sevenths of \$25,000 should be invested in three months from the date of said contract, and the balance in six months; that said sum of \$25,000, together with other moneys of said estate, being in charge and control of said trustees, had been used in the business of John H. and George H. Leslie, a firm composed of said trustees. Here is no attempt to show that by the terms of the alleged verbal contract appellants were to continue in control of, or make any investment of, the \$25,000. It is then alleged that none of the moneys of the estate have ever been invested otherwise than in said firm; "that orators, since the signing of said contract, have requested said trustees to perform the contract entered into in accordance therefor, but without avail"; and prays "that the said John H. and George H. Leslie be required to perform said contract, and that orators have such other relief as equity may require."

It seems clear, from the provisions of the will itself, that the duty of providing for the payment of the \$1,500 annually to the widow devolved upon her as executrix, and not upon appellants. She might have set apart \$25,000, or any other proper sum, for the purpose of securing to herself the payments, with or without the agreement or consent of the heirs. Undoubtedly, upon the facts alleged in the bill, without reference to the contract, she would have the right to compel appellants to pay over to her the sum of money in their hands; and it may be, if she had refused to do so, upon request, a court of equity would, upon a proper bill, compel her to perform that duty. It is doubtless true, under authorities cited by counsel for appellees, that a court of equity would compel her to so invest the principal fund, after she had set it apart, as to make it secure to those entitled to it, after it had served the purpose for which it was set apart. But this is not the question here, but rather, is there anything in the will, or allegations of the bill,

to show that appellants were under obligations to invest and secure the fund; and, as we have already said, we are unable to find anything in the will or allegations of the bill imposing any such obligation. As already shown, the bill does proceed upon the theory that their duties grow out of the contract, and the prayer is that they be compelled to perform that contract. That agreement first states the parties thereto, being the widow and all the above-named children. The first clause is: "That the sum of twenty-five thousand dollars (\$25,000) of the moneys of said estate shall be retained by said executrix as a trust fund, to secure the prompt and full payment to her of the sum of fifteen hundred dollars (\$1,500) per year, as provided for in and by said last will and testament of said George Leslie, deceased." The second clause provides that three-sevenths of the sum may be dealt with as agreed upon between the executrix, John H. Leslie, George H. Leslie, and Belle Leslie, during the lifetime of Jane H., and, at her death, the same, or proceeds, to belong, in equal parts, to John H., George H., and Belle Leslie, they relinquishing all right to any part of the remaining four-sevenths; it being also agreed that neither of them should be liable to said John H. in any manner for the remaining four-sevenths, nor for the annual income to be derived therefrom. The third clause, and the one material to the consideration of this case, is as follows: "Third. The remaining four-sevenths of said trust fund of twenty-five thousand dollars (\$25,000) shall be retained by said executrix as such, or her successor in the administration of such estate during her lifetime, and invested and reinvested by her, under the direction of the proper court, and the income thereof applied toward the payment of said annuity of fifteen hundred dollars (\$1,500). The said four-sevenths of said twenty-five thousand dollars (\$25,000) shall stand for and be the distributive shares of Charles C. L. Leslie, Agnes L. Alton, Laura L. Clancy, and Mary Moser in said trust fund; and the income thereof, whatever the same shall be, shall stand for and be the shares which said four heirs shall contribute toward said annuity. In no case shall said four heirs, or any thereof, or their shares in their father's estate be in any way resorted to, pay or make up more than a total of four-sevenths of said annuity. At the death of said Jane H. Leslie, said four-sevenths, so invested, or the proceeds thereof, or the balance remaining, shall belong, in equal parts, to the four heirs in this paragraph mentioned, and be distributed to them, or on their account, pro rata; the others of said heirs hereby waiving any rights, as heirs of said estate, to share therein. by the express language of this contract, the \$25,000 is to be retained, not by appellants, but "by said executrix, as such, or her successor in the administration of such estate, during her lifetime. It is to be invested and reinvested by her under the direction of the proper court." Even if it had been in any way the duty of appellants, under the provisions of the will, to act as trus-

tees of the fund in question, here is a plain agreement, entered into by all the parties interested, who seem to have been fully competent to contract for themselves, that the duty of holding and investing the fund should be performed by the executrix.

Upon every theory of the case, the demurrer to the bill should have been sustained. The decree of the circuit court and the judgment of the appellate court will accordingly be reversed, and the cause will be remanded, with directions to dismiss the bill. Reversed.

(184 Ill. 64)

HITTLE v. ZEIMER et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

VACATION OF JUDGMENT — DISCRETION OF COURT.

It was not an abuse of discretion to deny a motion to vacate a judgment rendered in the absence of plaintiff and his counsel, on account of the illness of the counsel, when the court was not satisfied from the showing that plaintiff had a good cause of action, and where a previous postponement had been made to the day on which the judgment was rendered on account of the illness of plaintiff's counsel, and on an agreement with his representative that it should be tried on the day set, other counsel being employed if necessary. 62 Ill. App. 170, affirmed. Wilkin and Phillips, JJ., dissenting.

Appeal from appellate court, First district.

Action in equity by Omar L. Hittle against Anna Zeimer and others. Judgment for defendants. An order denying a motion to vacate the judgment was affirmed by the appellate court (62 Ill. App. 170), and plaintiff appeals. Affirmed.

The appellant, Hittle, claiming to be the owner of the premises in controversy, alleged to be of great value, brought his bill in equity in the circuit court of Cook county against the appellees, alleging that they had clouded his title; that certain sales of said premises made by trustees under certain deeds of trust under which the defendants claimed title were fraudulent and void, and passed no title; and that the complainant ought to be allowed to redeem from said sales,—offering to pay whatever should be found just, and praying that the alleged clouds upon complainant's title might be removed, and his title to the premises confirmed, etc. The defendants (appellees here) answered, and claimed title to the premises in fee, and set up their claim of title from the government down through the immediate owners to themselves, claiming that the said sales of said trustees were valid and passed valid title to them in fee; that appellant and his grantors had instituted several suits in chancery, of a like nature, in which, or in some of which, final decrees had been rendered in confirmation of the defendants' title, and against appellant, and that one of said decrees had, on appeal, been affirmed by this court, in the case of *Sawyer v. Campbell*, 130 Ill. 186, 22 N. E. 458, and was res judicata as to the right and title of appellant in

said premises. The several appellees also filed their several amended cross bills, setting up the matters contained in their respective answers, and alleging that the complainant had no right, title, or interest, legal or equitable, in said premises, but that they (the said complainants in the cross bills) were the owners thereof in fee; that the title of appellant was fictitious, and was derived from a pretended conveyance from George F. Harding, his grantor, who had no title; and alleging that appellant was the mere agent and tool of said Harding, who, under cover of such fictitious transfer, and in the name of said Hittle, had caused the said suit to be brought, and was maintaining the same, to annoy the cross complainants and cloud their title, and with the object and purpose of levying blackmail against them. The cross bills prayed for an injunction restraining appellant, Harding, and others from entering upon said premises, and for a decree confirming the title in fee in cross complainants, and enjoining appellant and others aforesaid from in any manner interfering with the cross complainants' title to, or possession of, the said premises. Fraud, conspiracy, and other wrongdoing were freely charged in the pleadings upon both sides, and many questions were raised which would be important to consider only on appeal from the final decree. Neither appellant nor his counsel were present on the final hearing of the cause, but the cause was heard upon the evidence as adduced by the defendants to the bill, and cross complainants in the cause, after the issues had been fully made by the pleadings. At the term at which the final decree was entered, the complainant, by his counsel, appeared and moved the court to vacate and set aside the decree, and for a trial of said cause upon the merits. This motion was continued to a subsequent term, and heard upon an affidavit submitted by appellant. The court made an order overruling complainant's motion, and it is from this order that the complainant took his appeal to the appellate court, and this appeal is prosecuted from the judgment of affirmance of said appellate court.

The certificate of evidence, among other things, contains the following: "This cause came on for trial upon the regular chancery calendar upon the 8th day of May, A. D. 1895, and upon that day came a representative of William J. Ammen, Esq., one of the solicitors for the original complainant,—the other solicitor for the complainant, Hugh Crea, Esq., not being represented at all,—and stated to the court that William J. Ammen, Esq., was ill, and unable to undertake the trial of the case at that time. Thereupon it was agreed in open court between the representative of said William J. Ammen and the solicitor for the defendants and cross complainants and petitioners that said cause might be continued until the 16th day of May, A. D. 1895, upon the express under-

standing that if William J. Ammen, Esq., the solicitor for the complainant, was not recovered from his illness by that date, other counsel would be employed; and upon such understanding of counsel, and the representatives of the various parties, this court then and there continued the hearing of said cause until the 16th day of May, A. D. 1895, directing the parties to be ready at that time, and stating that the case must be tried upon that day, and that, if then counsel was still sick, others must be engaged. That, when said continuance was granted, nothing was said by the representative of said complainant to the effect that George F. Harding, a party to said cause, was sick." It appeared from the affidavit of Mr. Ammen that he had been the attorney of record in said cause for appellant from its beginning, and that appellant relied upon him to prepare and try the cause, and that Mr. Crea was also employed to assist as counsel, and that Harding was also of counsel, and that the cause had been fully prepared for trial, and that Ammen was prepared to try the same, with or without Crea and Harding, up to April 20, 1895, when he was taken ill; that his illness continued until after the case was tried, and was so severe that it wholly incapacitated him from taking any part in it, or from making, or causing to be made, any affidavit for a continuance.

Mr. Crea's affidavit was, in substance, as follows: "(1) That he is an attorney at law residing in the city of Decatur, Illinois, and that he has been in the active practice of his profession there for twenty-five years last past, and has occasionally practiced in the courts of said Cook county. (2) That William J. Ammen, an attorney at law, then of 170 East Madison street, in the city of Chicago, Illinois, prepared the original bill in the above-entitled cause; that afterwards affiant was employed as an attorney to act with said Ammen in the further prosecution and management of said cause, on behalf of the complainant in said bill; that said Ammen and affiant together argued a demurrer interposed to the original cross bills filed in said cause by the defendants; that such demurrer was sustained, and said cross bills amended; that said Ammen and affiant prepared answers to said cross bills, as amended; and that, so far as affiant had any knowledge, said Ammen and affiant are the only solicitors of record for complainant in said original bill. (3) That about the 15th day of May, 1895, affiant received at Decatur aforesaid a telegram from Chicago, informing affiant that the above cause would be reached on the 16th day of May for trial; that, for some time prior to the receipt of said telegram, affiant had been laboring under a severe attack of neuralgia of the head, which unfitted him for the transaction of business; that affiant went to Chicago from Decatur on the night of the 15th of May, arriving there the next morning at 7:30 o'clock; that, on going to the office of said Ammen, affiant learned from clerks in said office that

said Ammen was ill at his home in Edgewater, and that he had not been at his office for about ten days. Affiant then and there learned that Mr. George F. Harding, whose testimony on behalf of the complainant in said original bill was absolutely necessary, was absent in California. (4) That said cause was on the calendar of Judge Windes; that, about eleven o'clock in the forenoon of the day said cause was called for trial, affiant was in the court room of said Judge Windes; that affiant was then still laboring under said attack of neuralgia, and was, in consequence, wholly unfit and unable to enter upon the trial of said cause, either alone or as assistant to any other solicitor; that affiant, on behalf of the complainant in said original bill, when said cause was called for trial as aforesaid, stated to said Judge Windes that affiant was one of the solicitors for said complainant, and that said Ammen was the other, and that said Ammen and affiant had been for upward of two years associated together as said complainant's solicitors in said cause; that said Ammen, as affiant had been informed, was then ill and unable to leave his house; and that he had been ill for upward of ten days then past. Affiant further stated to said court that he (affiant) was ill, and utterly unfit then to engage in the trial of said cause as sole solicitor, or even as an assistant to another solicitor. And affiant further stated to Judge Windes that Mr. George F. Harding was an important witness on behalf of the original complainant, and that, even if affiant were physically able to engage in the trial of said cause, he could not do so with safety to his client in the absence of said Harding; that a question of notice and a question of possession were involved in the suit, and that such notice and possession could be proved fully only by said Harding; that affiant stated to said court that he had been informed said Harding had gone to California in consequence of his health being impaired. And affiant exhibited to said court a certificate in writing from a physician of Chicago, in which said physician stated that he advised Mr. Harding that he would be benefited by leaving Chicago for a time, or words to that effect. (5) After making the foregoing statement, affiant asked said Judge Windes to postpone the hearing of said cause for a reasonable time, until Mr. Harding's presence could be procured, and until Mr. Ammen should recover from the illness under which he was then laboring, as affiant had been informed as aforesaid; affiant further then and there stating to said judge that affiant expected he would so far recover his own health, within a few days, as to be able to take part in the trial of the cause, if a postponement thereof be granted. (6) That said judge was inclined to grant a postponement or continuance of the cause for the reasons stated by affiant, but the solicitors representing the defendants refused to consent to a postponement or continuance, and insisted on an immediate trial; that thereupon said judge said that at a former day of the term the cause

had been continued to the then day at the instance of the complainant, on the ground of the absence and illness of said Ammen, and that he (the judge) had stated, when granting such continuance, that, if Mr. Ammen remained ill, the complainant must procure some other lawyer in his stead, and therefore the defendants were entitled to an immediate trial. (7) That thereupon affiant said that he would like to have time to prepare affidavits for a continuance, and asked till two o'clock p. m. of said day for such purpose. That said judge replied that the day's session of the court would end at one o'clock p. m.; that he would allow some time for the preparation of affidavits, but that affiant must prepare them in the court room. That affiant, being too ill to do any work himself, went from the court room to a law office where he could have the aid of a stenographer and typewriter in the preparation of the necessary affidavits. That affiant was still suffering from the said attack of neuralgia in the head, and which had been aggravated by the labor, slight as it was, of making said appeal to the court for delay. That affiant made such haste as he could, under the circumstances, in the preparation of the affidavits. That when affiant left said court room a clerk in the office of said Ammen remained to watch the proceedings in Judge Windes' room. That within half an hour after affiant left said court room the young man who had so remained behind came to the office where affiant was, and informed him that Judge Windes had taken up the cause, that the trial thereof was in progress, and that defendants' counsel were introducing evidence under their answers and cross bills. (8) And that thereupon affiant ceased preparing affidavits for a continuance or postponement of such cause, and being unfitted for the transaction of business, for the reason aforesaid, affiant did not return to said court room, and did not take any part in the proceedings in the trial of said cause."

Other affidavits showed that appellant, Hittle, was abroad, having gone to Europe the previous year; that Harding, who was attorney in fact, and of counsel, for appellant, and who had been made party defendant to the cross bills, and who, it was claimed, was a necessary witness for appellant, had, in consequence of ill health, gone to California, and knew nothing of the proceedings had in said cause during the month of May, until after the final decree was rendered. The affidavit of Mr. Harding also set up some of the grounds upon which he was advised and believed that appellant, Hittle, was, to use his language, "entitled to recover to the extent of being given the right of redemption from the mortgages, or from the sale upon the mortgage, in form of a deed or trust, to Joel D. Harvey, foreclosed in May, 1877, by publication, upon the ground that said sale was made at a time when the property was rendered unsalable by the deliberate action of John McNab, who instigated, directed, and for whose benefit the

trustee, Joel D. Harvey, acted in selling the property as trustee; said McNab then holding the notes for the sale, to pay which said sale was made by said Harvey in May, 1877." His affidavit further stated "that the chief, if not the only, question remaining in said cause, is whether the said Omar L. Hittle has the right to redeem from the said sales made by the said Joel D. Harvey." Other affidavits were filed, some of which contained matter tending to show that the representative of appellant's counsel did not understand the terms upon which the trial of the cause was postponed from May 8th to May 16th.

N. P. Smith and Geo. S. Harding, for appellant. Pence & Carpenter, for appellees.

CARTER, J. (after stating the facts). We are of the opinion that the trial court did not abuse its discretion in refusing to vacate and set aside the decree in this case on the showing contained in the record before us. Appellant was charged with knowledge of the terms and conditions upon which the trial of the cause was postponed from May 8th to May 16th, and it was his duty to have prepared for the hearing set for the latter date by securing other solicitors, if the illness of those already employed continued, or at least to have been ready when the case was called for trial to show to the court that he had been unable, for sufficient reasons, to make such preparation. Had the case not been previously postponed for the same cause, and appellant given time in which to secure other counsel in case those then employed were unable to appear, the showing made would have presented a very different aspect. But there was a clear lack of diligence. It was not shown whether Mr. Crea, who for upward of two years had been associated with Mr. Ammen as counsel for appellant, was informed before May 15th of the postponement from May 8th to May 16th, or whether any steps whatever were taken by appellant, or by any of his counsel or those representing his counsel, in the eight days given for the purpose, to prepare for trial. Nor were the appellees or their counsel apprised that appellant would be unable to proceed with the trial, but they were allowed to put themselves in readiness for the hearing, by procuring the attendance of their witnesses, and otherwise, in the expectation that the direction of the court would be complied with, and the cause heard on the day fixed and agreed upon. The question is not presented whether it would not have been error for the court to overrule a motion for a continuance, had such a motion been made, and supported by affidavit showing the continued illness of Mr. Ammen, and that Mr. Crea had prepared to try the cause on the part of appellant, but had, because of illness occurring subsequent to May 8th, become unexpectedly unable to proceed with the trial. It may also well be that the trial court was not satisfied—as we are not—that the complainant had a meritorious case. The princi-

pal question upon which he relied, as shown by the affidavit of Mr. Harding (that is, that the sale of the property by the trustee under the trust deed was fraudulent, and that complainant had the right to redeem therefrom), had been decided adversely to his contention by this court in the cases of *Sawyer v. Campbell*, 130 Ill. 186, 22 N. E. 453, and *Harding v. Fuller*, 141 Ill. 308, 30 N. E. 1053, affecting the same title. The ruling of the trial court may be sustained on either or both of the grounds mentioned. No error was committed, and the judgment of the appellate court must be affirmed. Judgment affirmed.

WILKIN and PHILLIPS, JJ., dissent.

(164 Ill. 239)

STURGEON BAY & L. M. SHIP CANAL & HARBOR CO. v. LEATHEM et al.

(Supreme Court of Illinois. Nov. 9, 1896.)

CANAL COMPANIES—CHARTER—CONSTRUCTION.

1. A canal company authorized (Act Wis. 1864, April 23) to charge tolls upon all "boats, vessels, steamboats, and other craft used for the transportation" of freight or passengers along its canal, has no authority to charge tolls on tugs while towing freight or passenger vessels through the canal or on the return trip.
2. A canal company can only charge tolls which its charter authorizes it to charge.

Appeal from appellate court, First district.

Action by the Sturgeon Bay & Lake Michigan Ship Canal & Harbor Company against John Leathem and others. From a judgment of the appellate court affirming the judgment for plaintiff, it appeals. Affirmed.

Schuyler & Kremer and Herrick, Allen & Boyeson, for appellant. E. A. Sherburne, for appellees.

MAGRUDER, C. J. This is an action of assumpsit, begun by the appellant, the Sturgeon Bay & Lake Michigan Ship Canal & Harbor Company, against the appellees, to recover a certain amount claimed to be due to appellant for tolls charged to the appellees for the use of said canal in the running over and passing through its waters of certain propellers, schooners, barges, and tugs owned by the appellees. The declaration originally contained only the common counts, but it was subsequently amended by the addition of three special counts. The pleas were general issue, nul tiel corporation, and the statute of limitations, to the latter of which replications were filed. A jury was waived, and the cause was submitted by agreement for trial before the court without a jury. The amount claimed by the appellant to be due to it from appellees for tolls charged to them for the use of the canal by their vessels and tugs was \$3,460.63. Of this amount \$3,044.67 represented toll charges for the use of the canal by tugs operated by the appellees for the purpose of towing vessels, and \$415.96 represented toll charges against vessels belonging to appellees engaged in the business of carrying freight or passen-

gers, and not operated merely for towing purposes. The trial court disallowed the sum of \$3,044.67, and rendered judgment in favor of appellant for only \$415.96, holding that under its charter the appellant was not authorized to charge tolls for the use of the canal by the tugs belonging to the appellees. From this judgment, as being too small, the appellant took an appeal to the appellate court, where the judgment of the circuit court was affirmed, and appellant prosecutes its further appeal to this court from such judgment of affirmance.

The only question which we deem it necessary to consider is whether the appellant company had the power, under its charter, to charge tolls for the use of the canal by tugs engaged exclusively in the business of towing vessels. If it had no such power, then the items making up the sum of \$3,044.67 were properly disallowed, and the judgments of the lower courts were correct. To determine the question involved it is necessary to give a construction to a part of one of the sections of appellant's charter. The appellant is a corporation, organized under an act of the legislature of the state of Wisconsin approved April 23, 1864, and entitled "An act to incorporate the Sturgeon Bay and Lake Michigan Ship Canal and Harbor Company." This act was introduced in evidence. Section 7 and so much of section 8 of the act as it is necessary to quote here are as follows:

"Sec. 7. The said company shall have power to locate, construct and build a canal of such width, depth and dimensions as they shall deem proper and expedient for all classes of shipping on the Lakes between the head of Sturgeon Bay in the county of Door and Lake Michigan so as to connect the waters of said bay with said lake and to construct a breakwater and harbor on the lake shore at the mouth of said canal and to dredge and improve the said bay so as to make a convenient and safe anchorage and harbor in said Sturgeon Bay.

"Sec. 8. The directors shall have power to regulate tolls and charges upon all boats, vessels, steamboats and other craft used for the transportation of freight and passengers on and along the canal of said company and for the use of any steam tugs owned by said company, and to make such covenants, contracts and agreements with any person or persons, copartnership or corporation whatever as the execution and management of the business and the convenience and interests of the company may require, to make and establish such by-laws, rules, regulations and orders not inconsistent with the constitution and laws of the United States, or of this state, as they shall think proper for the well ordering of the affairs of the company."

It is assigned as error by appellant that the trial court held as law in the decision of the case the following proposition: "That under the provisions of the act of the leg-

islature of the state of Wisconsin under which the plaintiff is incorporated, the plaintiff was authorized to determine and fix the amount of tolls to be charged for the different classes of vessels named in the charter navigating the canal, provided such tolls were reasonable; and also held that this class includes steam tugs as well as other vessels, provided said steam tugs were in the carrying trade; but that they were not permitted to charge for steam tugs while towing vessels through the canal, or on the return trip after making such towage. That the plaintiff is not entitled to recover from the defendants for tolls upon such steam tugs." The proposition held as law gave a correct construction to section 8 of the charter. The directors were empowered to regulate tolls and charges upon all boats, vessels, steamboats, and other craft used for the transportation of freight and passengers on and along the canal. The reference here is to boats or vessels used for the purpose of carrying passengers or cargoes of freight. The evidence shows that the tugs operated by the appellees carried neither passengers nor freight, but were merely engaged in towing vessels having on board passengers or freight through the canal. The language of section 8 does not limit the power to regulate tolls and charges to boats and vessels used for the transportation of both passengers and freight at the same time. The reference is to boats and vessels used for the transportation of either passengers or freight. The meaning is the same as though the qualifying words were repeated before the word "passengers"; that is to say, as though the clause read, "boats, etc., used for the transportation of freight, and boats, etc., used for the transportation of passengers." The word "and" here has the meaning of "or." "It is often used interchangeably with 'or,' the meaning being determined by the context." 1 Am. & Eng. Enc. Law, p. 569, and cases in note 2. It is contended that the act should receive a liberal construction, and that, if it is liberally construed, the power to regulate tolls and charges upon tugs used for the towing of vessels, and not used for the transportation of freight and passengers, may be implied from the language of section 8. The privilege of charging tolls against tugs is not expressly granted by section 8, and therefore, upon well-settled principles, such grant cannot be implied. Where a canal is made pursuant to a legislative act, the right of the proprietors to toll is derived entirely from the act, and it is to be considered as if there was a bargain between them and the public, the terms of which are expressed in the statute; and the rule of construction is that any ambiguity in the terms of the contract must operate against the company and in favor of the public, so that the proprietors can claim nothing which is not clearly given to them by the act. If one construction of a provision in the act which

grants the privilege of exacting tolls under certain conditions or with certain limitations is in favor of the company and against the public, and another construction is in favor of the public and against the company, the latter will prevail. *Stourbridge Canal v. Wheeley*, 2 Barn. & Adol. 792. The doctrine of the *Wheeley Case* was indorsed by the supreme court of the United States in *Proprietors of Charles River Bridge v. Warren Bridge Co.*, 11 Pet. 420, and was referred to as a fair case for such an equitable construction of the charter as would give to the canal company by implication a right to the tolls they demanded, if a construction of that kind were allowable, and yet as a case which held that "the right to exact toll could not be implied, because such a privilege was not found in the charter." If the reasoning of the *Warren Bridge Case* be applied to the case at bar, the right to charge toll against tugs towing vessels through the canal cannot be implied from the language of section 8 because such right is not there expressly granted. In the later case of *Perrine v. Canal Co.*, 9 How. 172, it was held that, where the charter of a canal company authorized it to impose toll upon enumerated articles on board of a vessel passing through the canal, it had no power to demand toll from passengers passing through, or from vessels carrying passengers; the court saying: "A corporation created by statute is a mere creature of the law, and can exercise no powers except those which the law confers upon it, or which are incident to its existence. And, as no power is given to this corporation to demand toll from passengers, or from vessels on account of the passengers on board, it is very clear that no such power can be exercised, and no such toll lawfully taken."

Appellant's counsel insist that the appellant company is the owner of the canal, and has the common-law right of any owner to exact a compensation for the use of what belongs to it. This doctrine is not applicable here. The appellant corporation has no rights of property except those conferred by its charter, and can only exercise such rights of property as are necessary to effectuate the objects for which the legislature created it. "Whether it may lawfully demand compensation from a person whom it permits to pass over its property must depend upon the language of its charter, and not upon the rules of the common law." *Perrine v. Canal Co.*, supra. The judgments of the appellate and circuit courts are affirmed. Affirmed.

(164 Ill. 298)

ALSCHULER v. SCHIFF.

(Supreme Court of Illinois. Nov. 23, 1896.)

LANDLORD AND TENANT—SURRENDER OF LEASE—PAROL EVIDENCE.

1. In an action for rent upon a written lease under seal, parol evidence of a surrender of the

lease, and acceptance thereof by the lessor, is admissible. 59 Ill. App. 51, reversed.

2. It was a question of fact, for the jury to determine, whether there was an executed agreement for the surrender of the lease.

Appeal from appellate court, First district.

Action by Hanshel Schiff against Isaac Alschuler for rent. Judgment for plaintiff. Defendant appeals. Reversed.

This was an action brought by appellee against appellant to recover three months' rent, for the months of February, March, and April, 1894, at \$68 per month, on a lease under seal, dated April 5, 1893, and expiring April 30, 1894. At the May term, 1894, of the superior court of Cook county, a trial by jury was had, resulting in a verdict for defendant, appellee here. This verdict was, on motion, set aside, and a new trial ordered. On the second trial a jury was impaneled and heard the evidence. Plaintiff offered in evidence the lease under seal, and showed default in payment of rent for the months named. The defense was an oral surrender of the premises by appellant, accepted by appellee. The evidence upon which the surrender rests is given by appellant, in his brief, substantially as follows: On or about the 7th or 8th of January, 1894, the landlord, Schiff, asked for the January rent, 1894, which by the terms of the lease was due on the 1st of January, 1894. The tenant, Alschuler, stated to the landlord: "I will pay the rent, but I want you to fix up the place. I am damaged here every day, and I cannot stay here until it is fixed." Schiff said: "I won't fix anything for you. If you don't want to stay here, you can move out." The tenant said: "All right; I will take another place, and move out." And the landlord said: "All right." There was supporting testimony, coming from the witnesses H. Wolf, William Berkson, and O. S. Maser. The tenant at once acted upon the arrangement, procured another place, and moved into it. He gave the key to the premises to his bookkeeper, Maser, and he took it to the landlord, Schiff, by leaving it with his wife, who said she was glad of it. The evidence of O. S. Maser showed that Schiff was met the same evening by him, and they had a talk about the keys. Schiff told him he was much obliged to him for bringing them, and he asked the witness to come into a saloon to take something to drink, because he had done him a big favor. At the time of the conversation in which, it is agreed, the surrender took place, Alschuler called the landlord's attention to the condition of the premises at the time, and he told the landlord that his bottles continued to break; that the house was bad for months and months, and he had been asked for a few months to fix it, and did not do so. Maser testified, on this point, that Alschuler asked Schiff to fix up the place, as bottles were breaking on account of the dilapidated condition of the building. Schiff told him he was not fixing anything; if he was fixing it up, he would fix it up for himself; that he wanted possession of the place himself.

The appellant testified to having received, a week or two after he moved out, a notice, dated February 1, 1893, signed by the appellee, repudiating authority by his (appellee's) wife to accept the key, and refusing to accept a surrender of the lease, and stating that he would hold appellant to the terms thereof. When the plaintiff had concluded his case by offering the lease in evidence, he rested, without offering any testimony in rebuttal. After the opening statement of defendant's counsel, plaintiff's counsel demurred to the defense based on the evidence as above stated, but the court reserved its decision until the evidence was in. At the close of the evidence the court refused to submit the issues to the jury, but directed the jury to find a verdict for the plaintiff in the sum of \$204, which would cover the three months' rent claimed by the plaintiff. Judgment was therefore entered for this amount, and on appeal to the appellate court it was affirmed. The case comes to this court on appeal, upon a certificate of importance from that court.

Moses, Pam & Kennedy, for appellant. E. J. Walsh, for appellee.

PHILLIPS, J. (after stating the facts). The only question presented for the consideration of this court is whether the evidence offered by defendant should have been submitted to the jury,—whether the defense relied on, if established, would have authorized the jury to return a verdict in his favor. In other words, the question is whether the surrender of a written lease under seal can be shown by parol testimony. If it can, then the question as to whether there was a surrender of the lease was one of fact, which should have been submitted to the jury. There can no longer be any contention, in this state, over the general rule, insisted on by appellee, that a sealed executory contract cannot be altered, changed, or modified by parol agreement. This rule of the common law has been adopted by this court, and consistently followed in a long line of unbroken authorities. *Chapman v. McGrew*, 20 Ill. 101; *Hume v. Taylor*, 63 Ill. 43; *Barnett v. Barnes*, 73 Ill. 216; *Loach v. Farnum*, 90 Ill. 368; *Goldsborough v. Gable*, 140 Ill. 269, 29 N. E. 722. One good reason for such a rule is that a party will not be permitted to enforce a contract, or the opposite party to defeat its enforcement, by relying on a contract, part of which is in writing under seal, and part a parol agreement. The defense offered to be set up on this case, however, was not to change, alter, or modify the terms of a lease under seal, but to establish by parol testimony that such contract, or the lease, had been canceled and surrendered by agreement of the parties thereto, and that such contract was no longer in existence for any purpose. In all the cases above cited, and in other similar authorities of this court, it will be found that it has been held an executory contract under seal cannot continue to

remain in force with one element or provision altered or changed by an oral agreement. When such a contract is to be considered, and its enforcement sought, the court will not go beyond the instrument to inquire whether any of its terms have been changed by oral agreement. A distinction, however, must be drawn between contracts of this character, which are relied on as being in force, with some provision alleged to have been changed by oral agreement, and those which, it is insisted in defense, have been absolutely abrogated and surrendered by parol agreement of the parties thereto. A defendant might, by parol proof, show, in an action against him on a contract or lease under seal, that he had made full payment of all amounts due, and thus he was discharged. He might, also, by parol testimony, show an eviction, where there is no default by him in his lease, and this as a discharge. We know of no good reason why he may not also show, by parol proof, that, by agreement between the landlord and himself, he has been released from the terms and obligations of the lease, and has, in pursuance thereof, surrendered possession of the premises to the landlord. In *Baker v. Pratt*, 15 Ill. 568, it was held by this court that parol proof as to the surrender of a lease under seal was admissible. The same doctrine was adhered to in *White v. Walker*, 31 Ill. 422. A parol surrender has been held sufficient in *Allen v. Jaquish*, 21 Wend. 628. It is said by *Bigelow, J.*, in *Talbot v. Whipple*, 14 Allen, 177, that the rule of law, as now settled by the recently adjudicated cases, is that any acts which are equivalent to an agreement on the part of the tenant to abandon, and on the part of the landlord to resume possession, of the demised premises, amount to a surrender by operation of law. In *Harms v. McCormick*, 30 Ill. App. 125, it was said by the court: "Whether there had been an agreement for a surrender, or not, the jury were to decide upon parol evidence. There is no statute of frauds in this state requiring surrender to be in writing. It was for the jury to determine, upon the conflicting testimony, what was the effect; and that is an end of the controversy." We hold it to be the law of this state that, where it is not sought to alter or change the terms of a contract under seal, still leaving it in force, but where the object is to show that such instrument has been abrogated, canceled, and surrendered, the question is one of fact for a jury, and evidence thereon is admissible. In the present case we do not pass upon or determine whether or not the evidence offered by defendant was sufficient to sustain his defense. That is not our province. We do hold, however, that such evidence, tending to show a surrender and acceptance, should have been submitted to the jury; and it was a question of fact for the jury to determine if there was an executed agreement for the surrender of the lease. *Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. 478. It was error in the trial court to strike out

defendant's evidence, and to instruct the jury to find for the plaintiff; and the judgment of the appellate court, affirming the judgment of the superior court, is reversed, and the cause remanded. Reversed and remanded.

(164 Ill. 171)

BUTLER v. BUTLER et al.

(Supreme Court of Illinois. Nov. 10, 1896.)

**TRUSTEE—REMOVAL—RIGHTS OF BENEFICIARIES—
PERVERSION OF TRUST.**

1. In a proceeding to remove trustees named in a will, and appoint a new trustee, the beneficiaries are necessary parties.

2. Where a trust deed provides that the trustees "will invest the same, and keep the same invested, in their discretion," and pay the income to certain beneficiaries named, the purchase by the trustees of lands, opening a coal mine thereon and mining operations, were a perversion of the trust. 61 Ill. App. 57, affirmed.

3. Beneficiaries in a trust may pursue the proceeds of the trust property, and charge with the original trust any property in which they may be invested, as against all who have actual or presumptive notice of the trust.

4. Where a trustee, in perversion of the trust, invests the money in coal lands, one loaning money to him for the purpose of carrying on mining operations on such land, with knowledge of such perversion, cannot recover, as against such trust fund, the money so advanced. 61 Ill. App. 51, affirmed.

Appeal from appellate court, Third district.

Bill by Salome E. Butler against Jeanie M. Butler and others for an accounting and other relief. A decree dismissing the bill was affirmed by the appellate court (61 Ill. App. 51), and complainant appeals. Affirmed.

McClernand & Butler and Palmer, Shutt, Drennan & Lester, for appellant. Brown, Wheeler & Brown, McGuire & Salzenstein, David McKeown, and W. L. Gross, for appellees.

BAKER, J. William Butler died testate on January 11, 1876. He left surviving him three children,—Salome E. Butler, the appellant; Speed Butler, since deceased; and Henry Wirt Butler. The sixth clause of the will was as follows: "I do further devise to said Jacob Bunn and John W. Bunn, or the survivor, the sum of twenty-five thousand dollars (\$25,000.00), in trust that said trustees or the survivor will invest the same, and keep the same invested, in their discretion, and after the payment of taxes and assessments upon said fund, and upon real estate hereinafter devised for the use of my beloved son Speed Butler, will pay the remainder of the annual income arising therefrom, from time to time, as he may require such payments, to my said son Speed Butler, during the full term of his natural life; and upon the further trust that, after the death of my said son Speed Butler, the annual income arising from said sum of twenty-five thousand dollars shall be divided into as many parts as my said son Speed shall have heirs of his body surviving him, and including and counting as one of such heirs Jeanie M. Butler, the present wife of the said Speed Butler, as long and

during the time she may remain unmarried and the widow of the said Speed, and will pay to the said Jeanie M. Butler as long as she remains unmarried and the widow of the said Speed, annually, one child's part of the remainder of the said income, and will annually pay to the guardian or guardians of such child or children of the said Speed, to each one child's part of said remaining income, until they respectively arrive at the age of twenty-one years, and will, as such child or children respectively arrive at the age of twenty-one years, pay to each its proportion of said sum of twenty-five thousand dollars and the accumulations thereof, reserving, however, therefrom, a sum sufficient to pay to said Jeanie M. Butler said one child's part as long as she may live unmarried and the widow of the said Speed, and will, upon the death of Jeanie M. Butler, pay over to such child or children as aforesaid, or upon the marriage of the said Jeanie M. Butler will pay the same to such child or children as aforesaid; and upon the further trust that if the said Speed should die, and leave surviving him no child or children, or descendants of child or children, said trustees will pay said sum of twenty-five thousand dollars, with the then accumulations thereof, to my general heirs, reserving, however, a sum sufficient to produce said child's part for the use of Jeanie M. Butler as long as she lives as such widow and unmarried, and will, upon the death or marriage of the said Jeanie M. Butler, pay over such reserved portion to my general heirs." A similar trust was created by the will, with the same trustees, as to the sum of \$50,000, for the benefit of Salome E. Butler, the appellant; and also a similar trust, with same trustees, as to \$25,000, for the benefit of Henry Wirt Butler. Still other trusts, both as to specified sums of money and as to specified real estate, were created by the will, and there were devises therein in fee and not in trust; but for the purposes of this appeal it is unnecessary to particularly mention these other trusts and other devises. On February 17, 1879, Salome E. Butler, Speed Butler, and Henry Wirt Butler exhibited their bill in chancery in the Sangamon circuit court against said Jacob Bunn and John W. Bunn, trustees, and John T. Stuart, executor of the estate of said William Butler, deceased, and such proceedings were had in the cause as that at the May term, 1879, of the court, said Jacob Bunn and John W. Bunn resigned as trustees, and their resignations were accepted by the court; and upon an accounting it was found by the court that the personal assets of the estate of the testator were insufficient to make the full amount of the money legacies, and thereupon the fund of \$25,000 provided for in the sixth clause of the will was reduced to \$20,001.54. The court having discharged the trustees designated by the testator, it appointed and constituted Speed Butler to be trustee under clause 6 of the will, and as such to receive said last-mentioned sum of money, "to hold and deal with the same according to the several trusts and limitations at-

taching to the same under the testator's will," and similar decrees made Salome E. Butler and Henry Wirt Butler trustees, respectively, as to the separate funds in which they each, respectively, had life estates. In conformity with the provisions of the decree, the \$20,001.54 that constituted the fund under said clause 6 of the will was paid over to Speed Butler. At the time of the death of the testator, and also at the time of the entry of the decree, the appellee Jeanie M. Butler, wife of said Speed, was living, as also were his three, and only three, children,—Jeanie E. Butler (now Frazee), Arnold W. Butler, and Annie L. Butler (afterwards Loose); but neither the wife nor the children were made parties to the bill or proceeding; and at that time said Speed had no other property save the prospective income from 129 acres of entailed land. With a portion of the trust money received by him, Speed Butler bought from the McCrellis heirs 60 acres of land; and the language used in the deed was: "Convey and warrant to Speed Butler, of the county of Sangamon and state of Illinois, trustee for Annie L. Butler, Elizabeth J. Butler and Arnold W. Butler." And with another portion he bought from the Chicago & Alton Railroad Company about 5 acres of land adjoining the 60 acres; and the deed therefor contained this language: "Conveys and quitclaims to Speed Butler, trustee, Annie L. Butler, Jeanie E. Butler, and Arnold W. Butler." He thereupon began to sink a coal shaft upon the 65 acres of land so purchased, and in so doing exhausted the residue of the money received from the trustees named in his father's will. Speed Butler thereupon borrowed from appellant \$13,000; and they joined in the execution of an agreement, which bore date May —, 1881, and was recorded June 14, 1881; and Speed assumed therein to contract "as trustee of Annie L. Butler, Jeanie E. Butler, and Arnold W. Butler," and to sell to appellant the one-fourth interest in the coal mine. Said instrument was before this court in a suit brought against appellant as surviving partner of Speed Butler, and it was held that she was, as to third parties, a co-partner. *Bank v. Butler*, 149 Ill. 575, 36 N. E. 1000. And on the same 14th day of June, 1881, said Speed Butler caused to be recorded in the recorder's office a deed bearing date the preceding day, wherein he, naming himself "trustee for Annie L. Butler, Jeanie E. Butler, and Arnold W. Butler," assumed to convey and warrant to appellant the one-fourth interest in the mine. Both the agreement and the deed were afterwards retained in his possession; and it seems that appellant signed the contract without reading it, her brother informing her that it was a security for the \$13,000 borrowed from her; and she afterwards, in 1884, loaned him an additional \$5,000. The mine was opened and developed during the year 1881, and during that and the three succeeding years Speed Butler took large quantities of coal therefrom. On April 8, 1885, he died, insolvent and very considerably in debt. Since

the death of Speed Butler, the appellees, who are the beneficiaries, as reversioners, under the trust created by the sixth clause of the will of William Butler, have been in the possession and control of the mine and of the lands connected therewith, and have received the rents, issues, and profits of the same. Appellant filed her original bill herein on May 12, 1894; and on March 1, 1895, her amended bill, upon which the hearing was had, was filed by leave of court. Upon the coming in of the answers and replications, the cause was submitted to the circuit court upon the pleadings, exhibits, and testimony, and that court dismissed the original and cross bills for want of equity; and that decree was subsequently affirmed by the appellate court.

It is stated by appellant that the suit is for an accounting and recovery by one partner, held liable for partnership debts as a partner, against the parties in possession of the partnership property. The case seems to have a dual aspect. It is claimed—First, that appellant entered into a co-partnership agreement with Speed Butler in a coal-mining venture, and that appellees, having succeeded to the rights of said Speed, and being in the possession and enjoyment of the partnership property, are liable to account to appellant in respect to said partnership property; and, second, that appellant, having loaned and advanced to Speed Butler moneys which were used in developing the coal mine of appellees, is in equity entitled to a lien for the recovery of such moneys. The wife and children of Speed Butler were cestuis que trustent in the fund created by the sixth clause of the will, and therefore necessary parties to the chancery proceeding wherein the trustees named in the will were removed, and a new trustee appointed in their place. Said wife and children not being parties, the appointment made was invalid as to them, and gave to the trustee appointed no authority to make any contract or do any act that would be binding upon their reversionary rights and interests. The turning of the trust fund over to him was, as to them, a wrongful diversion of it from the hands of those rightfully entitled to the custody and care of it. It was a specific sum of money that was devised to the trustees, and they were to "keep the same invested in their discretion," and, after the payment of taxes on "said fund" and on certain other mentioned property, pay the income arising therefrom to the life tenant, and, after his decease, to the reversioners in designated proportion, and at the respective times specified in the will pay to each reversioner his or her fixed "proportion of said sum and accumulations thereof." It is plain from the provisions of said clause, and from the language used therein, that it was the intention of the testator that the trustees should invest said money, and keep it invested, as a fund, in interest-bearing securities that were readily convertible into money; and when Speed Butler used the money in purchasing lands, and in

opening the coal mine thereon and in mining operations, such acts were a perversion of the fund. And this would be so even if it were true (which it is not) that he was lawfully, in respect to the rights of appellees, substituted as trustee in the place and stead of the testamentary trustees. It was the mandate of the decree appointing him trustee, and under which he received the money, that he should "hold and deal with the same according to the several trusts and limitations attaching to the same under the said testator's will and the provisions thereof." Appellant was a co-complainant with Speed Butler in the bill wherein the decree was obtained which took the trust fund out of the hands of the trustees named in the will, and placed it in the possession and under the control of said Butler. She, of course, had full knowledge that none of the appellees, or those to whose interests they have succeeded, were parties to the proceeding or bound by the decree entered therein. She, presumably, had full notice of the contents of the will of her father, under which she took and held so many and such large interests, and of the provisions of the decree of court rendered at her instance. The recorded deeds from the McCrellis heirs and from the Chicago & Alton Railroad Company charged her with constructive notice that the trust fund had in part been invested in the lands on which the mine was located. The recitals in the agreement of May, 1881, which she signed, show that she therein assumed to deal with Speed Butler "as trustee" of appellees. From the other evidence in the record, and from the evidence as a whole, there can be no doubt she knew that the moneys that were invested in the lands and in the mine were the trust fund created by the sixth clause of the will, and in which the wife and children of her brother had the reversionary interest. Knowing all this, she was bound to know that, in the absence of express authority, said fund could not be employed in trade or speculation, or in the opening and operating of coal mines. She was also bound to take notice that without such special authority the trust fund or property could not be embarked in a co-partnership business. The case of *Bank v. Butler*, 149 Ill. 575, 36 N. E. 1000, which is largely relied on by appellant, falls far short of showing that there was a valid partnership, for the indebtedness of which the trust property would be liable. That decision merely held that under the agreement signed by Speed Butler and appellant, and the circumstances of the case, she (appellant) was liable as a partner for the debt there in question, and as to third parties. It was there expressly said, "No question as to the liability of the trust estate of any cestui que trust arises on this record." It is wholly immaterial whether, by the deeds from the McCrellis heirs and from the railroad company, the titles to the several tracts of land vested in Speed Butler, or by force of the statute of uses the complete legal

titles vested in his infant children named in the conveyances. As we have already seen, appellant is chargeable with notice of the trust, and of the rights, interests, and equities of appellees in the lands and mining property; and it is the settled doctrine of courts of chancery that cestuis que trustent may pursue the proceeds of trust property, and charge with the original trust any property in which they may be invested, as against all who have actual or presumptive notice of the trust. *Breit v. Yeaton*, 101 Ill. 242.

It is urged that the trust money was already invested in the lands and in the coal mine, and were exhausted, and the mining plant still incomplete and unproductive, when the money of appellant came to the aid of the enterprise, and saved the trust moneys from being entirely lost. It is at least doubtful whether the advancement of the money which enabled Speed Butler to finish opening up the mine, and operate it for four years or more, was for the best interest of, or beneficial to, the reversioners. Within that time he took out and exhausted the coal under about one-third of the entire tract of the land, and, considering the proximity of the land to the lines of the Chicago & Alton and Wabash Railroads, it may well be questioned whether the completion and working of the mine left the property, after the expiration of the life interest of Speed Butler therein, more valuable than it would have been without the expenditure of the moneys of appellant. Besides this, reimbursement for improvements made upon the lands of others, through confidence in a defective title, will not be allowed, except where the true owners are compelled to come into court and seek relief in equity; and here it is appellant, and not appellees, that brought suit, and the latter are asking no relief. *Williams v. Vanderbilt*, 145 Ill. 238, 34 N. E. 476. In contemplation of a court of equity, appellees do not own the land and property as heirs at law of Speed Butler, but as reversioners under the will of William Butler; they do not stand in the shoes of the former, but are cestuis que trustent, whose rights and interests have been jeopardized and injured by his misconduct; and the acts and doings of appellant were in furtherance of his maladministration of their estate. There is no error in the decree of the circuit court, or in the judgment of the appellate court. They are affirmed. Affirmed.

(164 Ill. 181)

SCHUMACHER et al. v. BELL et al.

(Supreme Court of Illinois. Nov. 23, 1896.)

FRAUDULENT CONVEYANCES — EVIDENCE — APPEAL AND ERROR.

1. Under Myer's Rev. St. c. 59, § 4, providing that every conveyance made with intent to disturb, delay, hinder, or defraud creditors or other persons shall be void as against such creditors, purchasers, or other persons, conveyances by a defendant, after suit brought, of a part of his property, and of the balance after service of summons upon him, but before judgment in

the action, to his son, a young man apparently theretofore possessed of no property, are void as against the judgment creditor. 61 Ill. App. 644. affirmed.

2. Errors not urged by appellant in his opening brief cannot be presented in a reply brief.

Appeal from appellate court, Second district.

Suit by Sarah Bell and others against Henry Schumacher and others to set aside fraudulent conveyances. Decree for plaintiffs. Defendants appealed to the appellate court, which affirmed the decree (61 Ill. App. 644), and defendants appeal. Affirmed.

This was a bill in chancery, filed in aid of an execution, and to set aside certain conveyances of real and personal property, and subject it to the lien of the execution. Appellant Henry C. Schumacher had been surety on a dramshop bond of one Jacob Helmuth, against whom a judgment had been rendered in favor of appellees on account of the unlawful sale of liquor to the husband of appellee Sarah Bell, and his consequent death by accident, resulting therefrom. Subsequently, on February 25, 1892, suit was begun on the dramshop bond on which Henry C. Schumacher was surety. Previous and up to that time it is conceded that he was the owner of a large amount of personal property, aggregating in value something over \$1,500. He was also owner of a farm of 103 acres, and worth about \$6,000, and free from incumbrance, and also a house and two lots in the town of Bristol. On February 27th,—two days after having been sued on the dramshop bond,—Henry C. Schumacher transferred all of his personal property to his son, William, by a bill of sale for a consideration of \$1,500. On the same day Henry C. Schumacher and Dorothy Schumacher, his wife, now dead, conveyed the Bristol house and lot, where they were then living, to their son, William, and he then conveyed it to his mother. On February 29, 1892, the summons in the dramshop case was served on him, and on March 4, 1892, he and his wife, Dorothy, executed a mortgage for \$3,000 on their farm to their son, William, and he made an assignment of that mortgage to his mother. And on the same day Henry Schumacher and wife made a deed of their farm to William for a pretended consideration of \$6,000, and he gave his father a mortgage for \$6,000. On March 12, 1892, other conveyances were made to correct errors. On March 23, 1892, a judgment was rendered for \$3,000 on the dramshop bond for the use of appellees and against Henry C. Schumacher. On May 2, 1892, an execution was issued and served on Henry C. Schumacher, and a demand made for payment; and the sheriff, being unable to find any property, returned the execution unsatisfied, June 25, 1892. On June 25, 1892, another execution was issued, and levied on the farm, and this bill was filed in aid of that execution. The bill alleges that all these conveyances were fraudulent, and without consideration. On the filing of the bill a temporary injunction was ordered, restrain-

ing defendants from making any further disposition of this property. Dorothy Schumacher died pending a hearing, and her heirs were made party defendants. On application of defendants below, the venue was changed to the circuit court of Kane county. On a hearing a decree was entered in accordance with the prayer of the bill setting aside these conveyances, and subjecting the farm levied on to the lien of the execution. The injunction was made perpetual till the judgment of appellees should have been satisfied. On appeal to the appellate court of the Second district the decree was affirmed. To reverse the judgment this appeal is prosecuted to this court.

A. C. Little, G. W. Avery, and S. Alschuler, for appellants. B. F. Herrington, for appellees.

PHILLIPS, J. (after stating the facts). The only question urged by appellants in their original brief and argument filed in the appellate court and refiled in this court is that there was no sufficient proof of fraud in the execution of the bill of sale of personal property and in the conveyances of real estate from Henry C. Schumacher to his son, William, to justify the decree rendered by the circuit court. Section 4, c. 59, Myer's Rev. St., provides as follows: "Every gift, grant, conveyance, assignment or transfer of, or charge upon any estate, real or personal, or right or thing in action, or any rent or profit thereof, made with intent to disturb, delay, hinder or defraud creditors or other persons, and every bond or other evidence of debt given, suit commenced, decree or judgment suffered with like intent, shall be void as against such creditors, purchasers or other persons." While it is an established rule of law that fraud is never presumed, but must be proven by the party alleging it, yet such proof need not necessarily consist of direct evidence. It may be shown by proof of attending facts and circumstances which raise the inference of fraud. *Bear v. Bear*, 145 Ill. 21, 33 N. E. 878; *Treadwell v. McEwen*, 123 Ill. 253, 13 N. E. 850. In the case of *Bryant v. Simoneau*, 51 Ill. 324, it was said by the court in the opinion: "It is urged, that fraud must be proved, and not inferred. This is true, but, like all other facts, it may be proved by circumstances. We should seldom, if ever, expect to prove fraud by the admissions of a party, nor should we expect to find direct and positive evidence of the fact. Whatever circumstances, when proven, convince the mind that the fraud charged has been perpetrated, is all that is required. *Bullock v. Narrott*, 49 Ill. 62; *Gray v. St. John*, 35 Ill. 222; *Boles v. Henney*, 32 Ill. 130. While fraud cannot be established by circumstances that merely raise a suspicion, yet when they are so strong as to produce conviction of the truth of the charge, although there

may remain some doubt, then it is proved. This is believed to be the extent of the rule that fraud must be proved. Any other application of the rule would render it impracticable and useless. If it cannot have the force we have given it, and stand, then the demand of justice would require its abrogation. If it must prevail, and none but positive evidence could prove fraud, then the rule would not only promote, but it would aid in concealing, fraud. But such can never be the effect or scope of the rule." Transactions tainted with fraud, or those which are, in effect, for the purpose of defrauding others, are generally secret in their nature. They are concocted for a purpose in its nature unlawful, and their various details and steps are attempted to be concealed from the public. Such fraudulent transactions are not susceptible of the same direct and positive proof as are other facts, and therefore the wise policy of the law provides that they may be so shown by proof of such circumstances from the existence of which the inference of fraud is presumed. Where a bill alleges fraud, and proof is offered which raises such inference, the fact that no explanation is offered of such transactions by the party charged is a further fact to be considered, and inference may be drawn therefrom. *Draper v. Draper*, 68 Ill. 17.

In this case none of the conveyances sought to be set aside were made until after suit was brought against Henry C. Schumacher and a portion of them were made after service of summons against him, and but a few days before judgment. The farm in question, worth \$6,000, in addition to a large amount of personal property, was conveyed to a son aged about 23 or 24 years, and who was apparently, before the purchase, possessed of no property. No explanation was offered in any manner by defendants of these transactions. Without entering into details of all the facts relied on, which would not, perhaps, be of any value in any other case, it is sufficient to say that we agree with the findings of the circuit and appellate courts that there was but one object intended, and that was to defeat the collection of this judgment which was about to be rendered against appellant Henry C. Schumacher.

Appellants, in their brief filed in the appellate court and refiled here, relied upon one error only to reverse the decree of the circuit court, and that was that the fraud charged was not sufficiently proven. No authorities were cited to sustain the points argued. After the filing of appellees' brief and argument a very extensive reply brief was filed, citing many authorities, and attempting to set up new errors not previously argued. Such practice is not permissible. *Pratt v. Trustees*, 93 Ill. 475. When errors are not insisted on by appellant in his opening brief, it comes too late to present them in a reply brief. A practice of this kind would be very unfair to appellee, and would

deprive the court of the benefit of any argument appellee might have made if the objection had been made at the proper time. *Railroad Co. v. Helsner*, 45 Ill. App. 143. We see no reason to disturb the judgment of the appellate court affirming the decree of the circuit court, and it is accordingly affirmed. Affirmed.

CARTWRIGHT, J., took no part.

(164 Ill. 224)

CITY OF CHICAGO et al. v. UNION STOCK-YARDS & TRANSIT CO.

(Supreme Court of Illinois. Nov. 9, 1896.)

MUNICIPAL CORPORATIONS—USE OF STREETS FOR RAILWAY—ESTOPPEL—NUISANCE—OPERATION OF RAILWAY—ABATEMENT—EQUITY.

1. A city is estopped to deny the authority of a railway company to lay its tracks across streets where it has acquiesced for 20 years in such use of its streets, and has required the company to expend considerable sums in the improvement of the street crossings, such as the erection of gates, lights, and sidewalks, authorized it to construct depots, and passed many resolutions mentioning the tracks as established monuments in fixing street grades, etc.

2. That the use by a stock-yards company of its tracks for transporting cattle constitutes a nuisance, by reason of the stench arising therefrom, does not authorize the city to remove the tracks from street crossings, where the company was authorized to also use the tracks for the transportation of other freight.

3. Smoke and noise incident to the operation of a railroad do not constitute a nuisance, so as to authorize the city to compel the removal of the tracks from the streets.

4. A railway company may enjoin a city from unlawfully removing its tracks from the streets, though the company had exceeded its charter powers, as the maxim that he who comes into equity must come with clean hands does not apply, the company's illegal action being disconnected with the matter in suit.

Appeal from circuit court, Cook county; John Gibbons, Judge.

Suit by the Union Stock-Yards & Transit Company against the city of Chicago and others. There was a decree for complainant, and defendant the city of Chicago appeals. Affirmed.

The appellee filed its bill in equity to restrain appellant and its commissioner of public works from removing, or causing to be removed, the railroad tracks, side tracks, switches, and turnouts which constitute the railroad connecting appellee's stock yards, on the west, with the Illinois Central and Michigan Central Railroads, on the east end, with intermediate connecting roads, in pursuance of a resolution of appellant's city council adopted on the 26th of March, 1894. This resolution was as follows: "Resolved, that the commissioner of public works be, and he is hereby, directed to notify the Union Stock-Yards and Transit Company to cause its railroad tracks to be removed at once off and from the following avenues and places, viz.: Butterfield street, Burnside street, State street, Wabash avenue, Michigan avenue, Indiana avenue, Prairie avenue, Calumet avenue, Vincennes avenue,

Union avenue, Langley avenue, 41st street, Cottage Grove avenue, Ellis avenue, Lake avenue, and Washington avenue, running east from Lake avenue; and that, unless said company proceed to remove the same within ten days after such notice, the commissioner of public works shall cause the same to be removed at the expense of said company." The streets named in the resolution are intermediate streets crossed by the railroad, and the removal of the tracks from one or more of these streets would destroy the continuity of appellee's line of road, and sever the connection thus made between its stock yards and two or more railroads. The tracks sought to be removed are two main tracks, one laid in the year 1865, and the other in 1875. At the time of the passage of this resolution, appellee or its lessees had maintained and operated the first-named track for upward of 29 years, and the second track for upward of 20 years. The city answered the bill, claiming that the said tracks were unlawfully in the streets mentioned, and also that, in their use and operation by appellee, they constituted and were a nuisance; claimed the right to have the said tracks removed from said public streets, and to abate the nuisance. The bill and answer were sworn to, and a motion was made by the complainant for preliminary injunction, which was heard on the bill, answer, and affidavits. Before the motion was decided, it was stipulated by the parties that the bill, answer, and affidavits be treated as depositions, and that the hearing should be a final one, and the decree entered in the cause a final decree. The decree was entered in accordance with the prayer of the bill, finding "that the complainant has a lawful right to maintain and operate the railroad tracks, side tracks, switches, and turnouts as laid and maintained by it at and prior to the time of the filing of said amended bill, on the said right of way mentioned in said amended bill, and more particularly described as the right of way of the Union Stock-Yards and Transit Company, extending from the Illinois Central Railroad, near the shore of Lake Michigan, on the east, to the stock yards of said Union Stock-Yards and Transit Company, on the west, in the county of Cook and state of Illinois, being the railroad tracks, side tracks, switches, and turnouts shown on the plat, marked 'Exhibit C,' to said amended bill, and filed with the same, and that the defendants have no legal right to remove said railroad tracks, side tracks, switches, and turnouts, or any part thereof, as directed by the said resolution of the city council of the city of Chicago, passed on the 26th day of March, 1894, set forth in said amended bill." And the city and its officers were "perpetually enjoined from removing or causing to be removed the said railroad tracks, side tracks, switches, turnouts, or any part thereof on the said right of way of the complainant, the Union Stock-Yards and Transit Company, * * * extending from the Illinois Central Railroad, on the east, to the stock yards of the Union Stock-

Yards and Transit Company, on the west." The city appealed to this court from that decree.

The appellee company was incorporated by special charter approved and in force February 13, 1865. By section 2 of the charter, the company was authorized to locate and maintain, at a point to be selected by it, within a territory named, south of the city limits, "the necessary yards, buildings, railway lines, tracks, etc., for the reception, safe-keeping, feeding and watering, and for the weighing, delivery and transfer of cattle and live stock, and also dead and undressed animals," and "for the accommodation of the business of a general union stock yard for cattle and live stock," including the erection of one or more hotel buildings, "for the convenience of drovers, dealers and the public doing business" at the yards. Section 3 of the act provided as follows: "The said company shall construct a railway with one or more tracks, as may be expedient, from the grounds which may be selected for its yards, so as to connect, outside of the city of Chicago, the same with the tracks of all the railroads which terminate in Chicago, the lines of which enter the said city on the south, between the lake shore, in the southeast corner of said city, and on the west between said last-named point and the north line of section number 19," etc., "and shall have power and authority to locate and from time to time to renovate, change, alter, construct and reconstruct and fully to finish and maintain its said railroad or railroads, side tracks and connections, and to transport or allow to be transported thereon, between said railroads and cattle yards, all cattle and live stock and persons accompanying the same, to and from said yards, and may also transport or allow to be transported between the railroads entering said city, and so connected by the road or roads hereby authorized, by steam or other power, freight and property of every kind, as well as stock and cattle. * * * The said company shall have the right, with the consent of the proper authorities having control thereof, to locate or construct its road across any street or highway, doing as little damage and discommoding the public as little as may be consistent with the use of said tracks so laid." In 1865, after obtaining its charter, the appellee located its road, and, by condemnation and purchase, procured the right of way between said streets where its tracks are now located; but there is a controversy between the parties as to whether appellee obtained the consent of the proper authorities having control of the streets in question before laying its tracks across said streets. Further facts will be found stated in the opinion of the court.

Hamline, Scott & Lord and Perry Trumbull, for appellant. Winston & Meagher, J. J. Herlick, and J. P. Wilson, for appellee.

CARTER, J. (after stating the facts). It is in the first place contended by appellant that

appellee has not maintained its right to the decree enjoining appellant from removing the railroad tracks from the streets in question, because, as it is claimed, there is no competent evidence in the record that appellee ever obtained the consent of the municipal authorities of the village of Hyde Park and the town of Lake, through which village and town the railroad was built, to lay the tracks across such streets. It is not denied that such consent was necessary, but appellee insists that the required consent was in fact given, although no record of the action of the village and town authorities in respect to the matter could be found. Much of the argument is devoted to the question of the competency of the testimony of numerous witnesses admitted by the court on behalf of appellee to prove that meetings of the village and town authorities were in fact held, and consent voted to lay the tracks across the streets in question, without any sufficient proof that any record of any such meetings and vote was ever made, or, if made, could not, upon proper search, be found. We do not deem it necessary in the decision of the case to enter upon any discussion of either the evidence or the law on this branch of the case. We are satisfied that the evidence, when fully and fairly considered, shows that the municipal authorities, respectively, of the village and town, and of their successor, the city of Chicago, have, by long acquiescence and by many affirmative acts, recognized the right of appellee to maintain and operate its road across these streets. During the period of more than 20 years since the last track was laid, appellee has, in obedience to the commands of the municipal authorities, expended considerable sums of money in improvements at the street crossings, in constructing and repairing culverts, planking the crossings, erecting and maintaining safety gates and electric lights, constructing plank and cement walks and other improvements beneficial to the general public and the municipalities, as well as to the appellee itself. The board of trustees of Hyde Park approved the plat of the right of way of appellee through the village in 1883, and the same year adopted a resolution permitting private parties to lay tracks to their coal yards connecting with appellee's road as laid, gave permission to appellee to build depots, and from time to time, before the annexation of the village to Chicago, passed many orders and resolutions making mention of these tracks as established monuments in fixing grades and directing other public work. The same course of recognition was followed after annexation by the city of Chicago, up to within a short time before the passing of the resolution directing the removal of the tracks; and it is now too late for appellant to raise the question of the lack of original consent of its predecessors to the laying of the tracks. It is estopped therefrom upon the plainest principles of equity, and the subsequent ratification shown upon this record should be deemed

equivalent to precedent authority. For some authority, reference may be had to the following cases: *Gregsten v. City of Chicago*, 145 Ill. 451, 34 N. E. 426, and authorities cited; *Babbage v. Powers*, 130 N. Y. 281, 29 N. E. 132; *Jennings v. Van Schaick*, 108 N. Y. 530, 15 N. E. 424; *Township of Pembroke v. Railway Co.*, 14 Am. & Eng. R. Cas. 117; *Connett v. City of Chicago*, 114 Ill. 239, 29 N. E. 280; *Town of Bruce v. Dickey*, 116 Ill. 534, 6 N. E. 435; *Gregsten v. City of Chicago*, 145 Ill. 462, 34 N. E. 426; *Girdley v. City of Bloomington*, 68 Ill. 47; *Chicago, R. I. & P. R. Co. v. City of Joliet*, 79 Ill. 25; *Chicago & N. W. Ry. Co. v. People*, 91 Ill. 251; *Martel v. City of East St. Louis*, 94 Ill. 87; *People v. Maxon*, 139 Ill. 306, 28 N. E. 1074; *Chicago & N. W. Ry. Co. v. West Chicago Park Com'rs*, 151 Ill. 204, 37 N. E. 1079.

It is true, the evidence shows that the trustees of Hyde Park refused permission to lay the second track in 1875, and later brought an action of ejectment against appellee to oust it from Caroline (since Fortieth) street, not embraced in the resolution of the council; but judgment was rendered in favor of appellee, and, after a new trial was taken under the statute, the suit was dismissed for want of prosecution. But these and other acts of the village authorities, so far as they tend to disprove consent, and to disprove the facts upon which the alleged ratification and estoppel rest, are met by proof that the municipal authorities finally acquiesced in the claim of appellee that it had the right to lay the second track under the consent, which, it seems, was not then questioned, had originally been given to locate its road through the village. It is not material here whether the company had such right or not. It is sufficient if, by long acquiescence and acts of recognition, and by inducing appellee to expend large sums of money in improving the crossings of its road over these public streets, and in erecting depots, and in making other improvements which would be useless if the continuity of the line of the road were broken, appellant is now precluded, upon principles of equitable estoppel, from asserting that the tracks already laid should be removed as unlawful obstructions to the streets. That this road, like all others, is subject to regulation and control under the general police power, does not affect the particular branch of the case above mentioned.

The next contention is that appellee, in using the road, and allowing it to be used, for the purpose designated in its charter,—that is, in transporting, and allowing to be transported, “thereon, between said railroads [the connecting lines entering the city from the south] and cattle yards, all cattle and live stock,” has created and maintained, and is now maintaining, a public nuisance of great magnitude within the city of Chicago, destructive of the values of private property located, and of the comfort and health of the people residing, in the vicinity of said road.

The proof, as made on this point by the city, and not denied by the company, is, in substance, that, when the road was first constructed, it was outside of the city limits, and through a sparsely-settled community, but that, by the annexation of Hyde Park and the town of Lake, it is now within the city limits, and that the lands in the immediate vicinity of the road have become occupied by the residences of many people; that churches, school-houses, and many costly residences are now located near appellee's said road; that freight trains loaded with live stock, offal, manure, and other noxious substances are passing over or standing on these tracks almost continually, at all hours of the day and night; that the stench from the filthy cars, the smoke, dust, and cinders from the overloaded engines, are carried into the houses, dwellings, churches, and other buildings to such an extent as to be highly injurious to the comfort and health of the people there living or assembled, and to property, real and personal, situated near the road. There can be no doubt that the proof (though, by agreement, made only by affidavits) is sufficient here to show that, in the use now being made of the road, a serious nuisance is maintained, and it would be a reproach to the law if it afforded no remedy. But is the destruction of the complainant's tracks a proper or permissible remedy? The breaking of the continuity of the line by the removal of the tracks from the street crossings would, of course, destroy the substantial value of the road,—at least, of that part of it lying east of the Chicago, Rock Island & Pacific Railroad,—and would, so far as we can see, impose on appellee a great and unnecessary loss. If it be conceded that, notwithstanding its charter, appellee may be restrained from transporting live stock over this road, on the ground that the necessary result of such a use of the road is to maintain an intolerable nuisance, injurious to the public health, in view of the changed condition of the locality from a sparsely-settled to a populous district, it does not by any means follow that appellee may be compelled to remove the road itself. It is difficult to fix bounds to the general police power of the state; and it was held in *Butchers' Union Slaughterhouse Co. v. Crescent City Live-Stock Landing Co.*, 111 U. S. 746; 4 Sup. Ct. 652, that, as to two subjects embraced in the general police power,—that is to say, the public health and public morals,—the legislature cannot limit the exercise of those powers to the prejudice of the general welfare. It was there said: "The preservation of these is so necessary to the best interests of social organization that a wise policy forbids the legislative body to divest itself of the power to enact laws for the preservation of health and the repression of crime." But it is unnecessary to express any opinion here as to whether appellee is or is not protected by its charter in using its road for the transportation of all live stock to its stock yards from the railroads with which it

connects. This is not a bill to restrain such use of the road, and it cannot be said that, under the charter, the road cannot be used for any other purpose. This is a bill to restrain the city from summarily removing the tracks from the streets; and if they are lawfully there, and can under the charter be used for some lawful purpose other than transporting live stock or other things or substances which, by reason of stench arising therefrom or otherwise, are injurious to the health and general welfare of the community through which the road is located, then their removal cannot be compelled, even if such injurious use might be prohibited. *Dill. Mun. Corp.* § 378; *Wood, Nuis.* § 740; *Brightman v. Inhabitants of Bristol*, 65 Me. 426; *Chicago, R. I. & P. R. Co. v. City of Joliet*, 79 Ill. 25.

The charter confers power on the company "to transport or allow to be transported thereon, between said railroads and cattle yards, all cattle and live stock and persons accompanying the same, to and from said yards, and may also transport or allow to be transported between the railroads entering said city, and so connected by the road or roads hereby authorized, by steam or other power, freight and property of every kind, as well as stock and cattle." Section 3. It will be noticed that this provision of the charter authorized appellee to transport or allow to be transported over its road, between the connecting railroads, "freight and property of every kind, as well as stock and cattle." If the transportation of "stock and cattle" were prohibited, the road might be useful and valuable for the transportation of "freight and property" of every other kind, in which authorized use of the road no such nuisance as would compel its removal would be created. It cannot, of course, be claimed that the city may compel the removal of all railroad tracks from the public streets simply because those who live near the tracks are disturbed by those annoyances which are incident to the operation of all railroads. As it was said in *Chicago, R. I. & P. R. Co. v. City of Joliet*, 79 Ill. 25, and *Illinois Cent. R. Co. v. Grabill*, 50 Ill. 244: "Such consequences of the construction and use of railroads must be borne by all living near them, without complaint, and without hope of redress, for they are inseparable from the purposes and objects of such structures." Many provisions of ordinances of the city of Chicago in evidence might be resorted to for the suppression of many of the acts complained of which are by no means "inseparable from purposes and objects" of this road. We agree with counsel for appellee that a distinction must be taken between the structure itself and the use to which it has been put. The unlawful use may be prevented without destroying the structure which has been lawfully erected. The power in the city to abate nuisances is not denied, but it does not follow that the city may, as the easiest way to abate the nuisance, destroy valuable private property, susceptible of use for a lawful purpose.

By one or more of the several counsel representing appellant, it is contended that appellee had no standing in a court of equity to restrain the city from removing its railroad tracks from the street, because it did not come into court with clean hands, but had itself violated the law, and exceeded its own charter powers, by engaging in business for which it was not incorporated, and that all relief should have been denied to the complainant on its bill on this ground, if for no other. The point as stated by counsel, with their citation of authorities, is as follows: "The stock-yards company is the moving party in this case. When a party, as actor, comes into a court of equity, seeking relief, who has in his prior conduct acted illegally in reference to the subject-matter in question, then the doors of a court of equity will be shut against him in limine. Such a party does not come into court with clean hands." 6 Am. & Eng. Enc. Law, pp. 707, 708, and notes; 1 Pom. Eq. Jur. § 397; 1 Story, Eq. Jur. § 64e; Palmer v. Harris, 60 Pa. St. 156; Medicine Co. v. Wood, 108 U. S. 218, 2 Sup. Ct. 436; City of Chicago v. Wright, 69 Ill. 318; Holman v. Johnson, Cowp. 341; Haight v. Bergh, 3 N. J. Eq. 386; Atwood v. Fisk, 101 Mass. 363; Kahn v. Walton (Ohio Sup.) 20 N. E. 204-209; Pond v. Smith, 4 Conn. 297. In support of this contention, it is shown that instead of confining the passenger service of the road to the transportation of persons accompanying live stock, as provided in the charter, appellee allows the road to be used by other companies in running their suburban passenger trains over it, to the number of six or more every day, between Van Buren and Lake streets, and to switch such trains back and forth over the crossings, in such a manner as to be dangerous to human life; and that, to use the language of counsel, "contractors and dealers in stone, gravel, and other material used in the paving of streets receive large quantities of gravel and crushed stone over said tracks, and a switch therefrom near Grand boulevard; that the noise occasioned by the continual shoveling of crushed stone and gravel from the cars standing on the switch into wagons, to be hauled to the different parts of the city, causes great annoyance to the residents of the neighborhood." And it is pointed out that it is provided in the charter that "nothing in this act contained shall be deemed, taken, or construed as conferring upon the company hereby created any powers or authority to maintain or operate a railroad for the conveyance of passengers or freight in the city of Chicago" (section 11); and that "any willful violation of any of the provisions of this act by the company hereby incorporated, shall work an absolute forfeiture of all rights, privileges and immunities conferred by this act, and the franchise hereby conferred shall become utterly void." Counsel do not claim that a forfeiture of the charter may be declared in this proceeding, but insist that, as it appears in the case that appellee is engaged in illegal acts in the use of its road, it does

not come into court with clean hands, and is not, therefore, entitled to equitable relief. We cannot accede to this view, but are of the opinion that the maxim invoked cannot have any just application to the facts of this case. If a defendant to a bill in equity brought by a corporation could defeat it by simply showing that the complainant had committed ultra vires acts, then no corporation so guilty could ever obtain equitable relief in any case. The maxim must have the same application as between individuals; and, as said in Bispham's Principles of Equity (page 48), it "only applies to the particular transaction under consideration, for a court will not go outside of the case for the purpose of examining the conduct of the complainant in other matters, or questioning his general character for fair dealing." The wrong must have been done to the defendant himself, and must have been in regard to the matter in litigation. 1 Pom. Eq. Jur. §§ 387, 434; 6 Am. & Eng. Enc. Law, 708. See, also, Kadish v. Association, 151 Ill. 531, 38 N. E. 236; Dering v. Earl of Winchelsea, 1 Cox, Ch. 318; Ansley v. Wilson, 50 Ga. 418; Sylvester v. Jerome (Colo. Sup.) 34 Pac. 760; Langdon v. Templeton, 66 Vt. 173, 23 Atl. 866; Bate-man v. Fargason, 4 Fed. 32. If appellee has forfeited its charter by acts ultra vires, the state may enforce such forfeiture by an appropriate action, but the company cannot be denied relief in a proper case in a court of equity because of such acts.

It cannot be maintained that the decree confers on appellee any greater right than it had before the decree was rendered. It can have no greater right to create or maintain a nuisance than it had before. The finding in the decree that appellee has the right to maintain and operate the road, and the injunction against the city and its officers from removing the tracks as threatened, are not an adjudication of the question whether appellee has created and maintained a nuisance or not, or whether or not it is authorized by its charter to do so; but the company is left, as it was before, and as all others are, whether natural persons or artificial entities, amenable to the laws of the state and of the city in which it is located. Nor do we see any serious objection to the decree because it covers the whole road. The bill and evidence were broad enough to cover the entire line, and a multiplicity of suits should be avoided. The decree of the circuit court is affirmed. Decree affirmed.

(164 Ill. 80)

SHOENBERGER v. CITY OF ELGIN.

(Supreme Court of Illinois. Nov. 9, 1896.)

CONTRACTS—CONSTRUCTION—RISKS OF CONTRACTOR.

Under a contract with a city to construct a newly-designed apparatus for filtering water, to stand certain tests, the risk that the apparatus will stand the tests and demands made upon it is upon the contractor. 59 Ill. App. 384, affirmed.

Appeal from appellate court, First district.

Bill by Edward H. Riddell against George K. Shoenberger and the city of Elgin for an account. The defendant Shoenberger filed a cross bill against the city. A decree in favor of the cross complainant having been reversed by the appellate court (59 Ill. App. 384), he appeals. Affirmed.

Oliver & Mecartney, for appellant. Clifford & More, for appellee.

CARTER, J. Edward H. Riddell brought his bill in equity in the circuit court of Cook county against the city of Elgin and George K. Shoenberger, to compel the latter to account and pay over to him the amount found to be due for his alleged share of the profits of constructing and putting in a filtering plant for the city of Elgin, and to enjoin the city from making any further payments to Shoenberger. The contract for putting in the plant was in writing between Riddell and the city, with specifications attached, and its performance by Riddell was guaranteed in writing indorsed thereon by Shoenberger. Afterwards, to protect the latter, Riddell assigned to him the contract, and, as between himself and Riddell, Shoenberger undertook the performance of the contract himself; Riddell to act as superintendent, and to receive \$5 per day (but not to aggregate more than \$250) and a share in the profits. There was no agreement by the city to substitute Shoenberger for Riddell, but the evidence shows the city still regarded Riddell as the principal, and Shoenberger as a subcontractor only. The city made payments, during the progress of the work, to Shoenberger, under a power of attorney given to the latter by Riddell. Answers were severally filed by the city and Shoenberger, and the latter filed his cross bill claiming upward of \$4,000 for extra work and material. Issues were made upon the bill and cross bill, and evidence was taken before the master, who reported the same to the court with his conclusions, finding that the contract price for the plant was \$12,500, of which the city had paid Shoenberger \$8,000, and should pay him the balance, of \$4,500, and for extras \$2,507 additional. Exceptions were filed to the report, which were overruled by the court, and a decree rendered dismissing Riddell's bill, and finding in favor of Shoenberger on his cross bill against the city the amount recommended by the master for extras, and what remained unpaid of the contract price; the city having, during the pendency of the suit, paid the most of it, and not disputing its liability in that regard except to claim credit for certain claims paid by it chargeable to the contractor. The trial court also allowed interest on the net amount found due at the rate of 5 per cent. from the date of

the report. Riddell withdrew his exceptions and abandoned the cause before the final decree, but the city of Elgin appealed, and the appellate court found against Shoenberger as to the extras and interest, reversed the decree, and remanded the cause, with directions to enter a decree against the city for \$494.57, without costs. 59 Ill. App. 384. Of this amount \$75 was for a tool furnished by Shoenberger; the rest the city admitted to be due, and alleged its readiness to pay. From the judgment of the appellate court, Shoenberger prosecutes this appeal.

We think it unnecessary to set out here the contract and specifications in extenso or in substance: but we have carefully examined and considered them, and the evidence showing the construction placed upon them by the parties during the progress of the work as well as that relating to all the questions at issue, and we agree with the appellate court that the risk out of which the claim for extras principally grew was upon the contractor, and that Shoenberger was not entitled to any allowance for extras. Nor was the city liable for interest. *City of Chicago v. People*, 56 Ill. 327; *Commissioners v. Dunlevy*, 91 Ill. 49. The exceptions of the city to the master's report should, in the respects mentioned, have been sustained. We shall not reverse the finding for Shoenberger as to the \$75 for the ratchet and wrench which was not included in the contract, for, whether the employé of the city had authority to purchase it or not, the evidence tends to show that the city used and appropriated it, and the liability to pay for it ought to follow. We shall not in this case inquire whether it was one of equitable cognizance or not, for the parties have proceeded as if it were. Appellant, by his cross bill, asked for the relief, and the appellee admits that it owes substantially all that is allowed. The judgment of the appellate court is affirmed. Judgment affirmed.

(164 Ill. 42)

WADSWORTH et al. v. LAURIE.

(Supreme Court of Illinois. Nov. 10, 1896.)

ATTACHMENT—GROUNDS—FRAUD.

1. To warrant the issuance of an attachment on the ground that a debtor has disposed of his property to defraud creditors, the disposition must have been actually, as distinguished from constructively, fraudulent. 63 Ill. App. 507, affirmed.

2. The fact that an application by a member of a firm for the appointment of a receiver for the firm was made at an unusual hour, and that the order of appointment was erroneously made by a judge in vacation, does not show a fraudulent disposition of the firm property, authorizing the issuance of an attachment.

Appeal from appellate court, Third district.

Action by George W. Laurie against Archibald C. Wadsworth and others. From a judgment of the appellate court (63 Ill. App.

507) affirming the judgment of the trial court, defendants appeal. Affirmed.

Morrison & Worthington and Richard Yates, for appellants. Owen P. Thompson and J. A. Bellatti, for appellee.

PER CURIAM. After a careful consideration of this case we have concluded to adopt the two opinions of the appellate court rendered in different branches of the case, and another submitted with it. They are as follows:

"These cases all stand upon substantially the same ground. A joint-stock company, known as the Central Illinois Banking and Savings Association, was organized December 14, 1867, with a capital stock of \$100,000, divided into one thousand shares of \$100 each, for the purpose of transacting a general banking business. The articles of association provided for the election of a board of thirteen directors, who were to elect a president, vice president, and a cashier, with various other provisions in regard to the mode of conducting the business, among which was one to the effect that stock in the association should be assignable and transferable only on the books with the consent of the board of directors; and, in case of refusal by the president or cashier to assent to such transfer of stock, the holder should be entitled to require the association to take it at a price to be ascertained in a specified way. The association was to continue for twenty years, and started with some twenty-eight members. Certificates of shares were issued in the usual form, and from time to time these were transferred [canceled], the stock being sold to other persons, or to the company, until, on the 25th day of August, 1893, when the bank suspended, all the stock outstanding was held by the persons who were named as defendants in the cases now under consideration. On that day the present appellants filed a bill in chancery in the circuit court, in which they named themselves and the others who were made defendants herein as the sole and only holders and owners of stock in said association, and obtained an order placing the assets of the concern in the hands of a receiver. The present actions were severally brought by depositors to recover the balances due them when the bank suspended. The only defense made at the trial was on the pleas of nonjoinder, in which it was averred that the various persons who had signed the articles of association were jointly liable, and should have been joined as defendants. This theory of nonjoinder rests upon the assumed fact that none of the parties named in the pleas had transferred their stock in the manner provided by the articles of association. They had merely sold at private sale without notice to any one, and without the consent of the board of directors, or a transfer on the books of the association; yet in

every instance when the sale was made to other persons the old certificates were assigned and canceled, and new ones issued instead; and when the bank bought, the certificates were merely assigned and canceled. In a word, the mode prescribed by the articles for such transfer was not observed, though the bank in every instance recognized the transfer as valid and dealt with the assignee without objection. Some of these transfers were made before the plaintiffs began doing business with the bank, and some after. As far back as 1878, the bank bought in some of the stock, and continued to do so until it had acquired some \$40,000 of individual holdings. Most, if not all, of the transfers since the accounts of the present plaintiffs began were to the bank, the last one having been made on the 27th day of May, 1892. One of the persons named in the pleas, Mrs. Eliza C. Adams, held no stock in her own name, but 128 shares were held by L. W. Brown, one of the defendants, as trustee for her; the certificates being issued to Brown as trustee, and he having executed a declaration of trust to that effect. Conceding that the transfers were not strictly according to the form and mode prescribed by the articles of association, yet, if they were recognized and acquiesced in by the bank,—i. e. those stockholders remaining, who exercised the functions of the association,—they cannot be heard to say as a matter of defense, when sued upon the obligations of the bank, that these stockholders who had so transferred must be joined as defendants. Whatever might be the rights of creditors, the effect of such transfers, as between the parties thereto, was to substitute the assignees for the assignors, with a corresponding transfer and release of liability in every instance. When the bank issued a new certificate of stock, it accepted the person named therein for all purposes instead of the former holder, and when the bank itself bought the stock it assumed all the burdens of the former holder. Such was the necessary legal implication; otherwise the transaction was mere child's play. Cases cited in the briefs where creditors sought and were permitted to hold as partners stockholders who had not withdrawn according to the articles of association, are not in point. That is not the question here, but whether those who remain as stockholders can compel the creditors to join as co-defendants other former stockholders who have retired with their consent, although not in the exact manner pointed out by the articles. Those articles were for the benefit and protection of the members of the association in the first instance, and certainly it is competent for the association and its members, as between themselves, to waive any of the provisions thereof; and when they have done so they are estopped to set up the irregularity. This view will dispose of the pleas of nonjoinder as to all the parties named therein except Mrs. Adams. As already stated, there was no stock standing in her name.

It appears that her husband acquired 128 shares of the stock many years ago, and for some purpose, presumably proper, caused a certificate for that amount to be issued to her brother, L. W. Brown, as trustee, and the latter executed a declaration of trust, showing that he held it for her use and benefit. The stock was carried on the books in the name of L. W. Brown, trustee, though dividends were paid to Mrs. Adams directly. The bank recognized Mr. Brown as the holder of the stock, and so in point of law he was. The equitable right was in Mrs. Adams, but the legal right was held by him. In a proceeding at law, as this was, he was the proper person to consider as the holder of that stock. So far as disclosed by the facts in this record, she was not regarded by the bank as a stockholder, nor can the person now sued for the debt of the bank set up as a defense hereto that she should have been joined as a defendant. In this case, also, the appellants confined their discussion of the subject of nonjoinder to William Brown and Mrs. Adams, though the plea itself seems to be the same as in the other cases, including all those who signed the articles of association originally. Wm. Brown sold his stock to the association in 1890, was never afterwards regarded by it as a member, and stands on the same footing as the other individuals whose interests were thus absorbed. * * *

"The affidavit for attachment alleged that Lloyd W. Brown, within two years prior to the date, had 'fraudulently conveyed or assigned and disposed of his effects and property, or a part thereof, so as to hinder and delay his creditors.' A plea was filed traversing the affidavit, and the issue was tried by jury. At the close of the testimony the court instructed the jury to find the issues for the defendant, which was done. It is now urged that therein the court erred. The evidence relied upon by the plaintiff to support the attachment was: (1) That on the 8th day of May, 1893, the said Brown conveyed to W. E. Vietch, cashier of the Central Bank, 1,004 acres of land for the express consideration of \$75,000, which was filed for record August 26, 1893,—the day following the appointment of the receivers on the bill in chancery heretofore referred to. (2) The filing of said bill under and pursuant to which said receivers were so appointed and took possession of all the assets of said bank. (3) A trust deed, executed by said Brown to E. P. Kirby, September 13, 1893, covering some 1,500 acres of land, to secure sundry items of indebtedness to different persons, aggregating over \$98,000. (4) A mortgage by said Brown to Mrs. Adams, dated July 20, 1893, covering 800 acres of land, to secure an indebtedness of \$60,000, and any additional sum that might afterwards be loaned by the mortgagee to the mortgagor.

"In disposing of the question here presented it is important to ascertain, in the first

place, what is the meaning of the statutory provision upon which the writ of attachment was based. The supreme court have construed that statute in the case of *Commission Co. v. Druley*, 156 Ill. 25, 41 N. E. 48. In substance, the ruling is that the writ may not issue for mere constructive fraud as contradistinguished from fraud in fact. In other words, though the transaction be such that a court of equity might regard it as constructively fraudulent, and therefore subject to be set aside at the instance of the creditors, yet, unless there was fraudulent purpose or design actuating the defendant, the case is not within the statute. Applying the rule so announced to the facts in proof, we entertain no doubt that the plaintiff wholly failed to sustain the charge made in the affidavit, and that the court was perfectly justified in the instruction to find for the defendant.

"Regarding the first transaction,—the deed of a valuable tract of land to Vietch, cashier of the bank,—it appears that the purpose was to strengthen the bank; and, while the deed was absolute on its face, it was subject to a condition that the grantee should hold the land for the protection of the bank, the grantor to enjoy merely the use and occupancy; and that, when the necessity for such protection should no longer exist, the lands were to be reconveyed to the grantor. Conceding, for the sake of argument, that equity would hold such a transaction as voidable at the instance of creditors, yet very clearly there was no dishonest purpose manifested thereby. On the contrary, the purpose was laudable,—i. e. to secure and protect the creditors of the banking house of which the grantor was one of the members,—and as a matter of fact the lands so conveyed were appropriated by the receiver as a part of the bank assets; and the plaintiff will, as a creditor of the bank, receive his due share of the proceeds. As to the filing of the bill to wind up the concern, and, as a preliminary step, placing the assets in the hands of a receiver, we are unable to discover fraud, either actual or constructive. When it was ascertained that by reason of the existing conditions the bank could no longer be conducted with safety, it was the legal duty of those in control to suspend and take such course as would insure a fair distribution of the assets among the creditors. It would have been indictable to continue receiving deposits when the fact of insolvency was known. As a matter of prudence, and in justice to all concerned, the first public announcement would be that receivers had been appointed. The honest object being to secure an equitable distribution of the assets, it was entirely proper to place the entire estate in the custody of the law. The fact that the application for a receiver was made at an unusual hour, and that the order was made by a judge in vacation, cannot be urged as proof of fraudulent purpose. It was necessary to proceed with

haste, and, on account of the absence of counsel, the application was somewhat delayed. Nor was the defendant to be charged with a fraudulent purpose merely because, as a matter of law, it is not competent for a judge acting in vacation to appoint a receiver. While knowledge of the law is to be inferred for certain purposes, yet this is a mere legal presumption. It is a maxim that ignorance of the law does not excuse, but fraud is not to be inferred from or predicated upon an act otherwise blameless because done without legal authority. Here the defendant acted upon the advice of counsel, and obtained an order from the judge of the circuit court, which was supposed to be regular, and was not very uncommon as a matter of practice. No doubt he acted in good faith, and it would be a gross perversion of the law to make this act the basis for a writ of attachment on the ground of fraud.

"Some stress is laid upon the alleged fact that the bank was kept closed on the 25th of August upon the mere pretext of the death of the mother of Mr. Vietch, the cashier, but, in view of all the proof, we regard the point as requiring no consideration.

"As to the deed of trust and the mortgage, there is nothing upon which the charge of fraud can rest. It does not appear that those conveyances were in bad faith, or that the several debts they were given to secure were either colorable, or misstated in any particular. Regarding the proof as a whole, we are satisfied a verdict for the plaintiff would necessarily have been set aside. In such a state of case it is proper to instruct the jury to find for the defendant. *Simmons v. Railroad Co.*, 110 Ill. 340."

So far as the first branch of the case is concerned, all questions of fact upon which the judgment rests have been finally settled against appellants by the affirmance of the appellate court, and but little else remains of the controversy. Some criticism is made upon some of the instructions, but no sufficient grounds are pointed out in this respect to authorize a reversal of the judgment. The point is made that the circuit court erred in admitting in evidence on the part of the defendants on the trial of the issue of nonjoinder the bill in chancery filed by the plaintiffs on their application for a receiver. The bill was brought by the plaintiffs for the appointment of a receiver, and to dissolve the partnership, and wind up its affairs. The fact that the plaintiffs did not make the defendants parties to that bill was some evidence, in connection with its allegations and purpose, that they did not then regard them as partners in the concern. The bill was properly admitted. See, also, opinion in *Wadsworth v. Duncan* (filed at the present term of this court) 45 N. E. 132. Finding no error in the record, the judgment of the appellate court will be affirmed. Judgment affirmed.

(164 Ill. 116)

BRADY v. COLE et al.

(Supreme Court of Illinois. Nov. 23, 1896.)

RESCISSION OF CONTRACT—FRAUDULENT REPRESENTATIONS—EVIDENCE—ACKNOWLEDGMENTS.

1. Where, in a suit to set aside conveyances made by plaintiff, on the ground that she was induced to make them by fraudulent misrepresentations, it appears that plaintiff was the owner of a lot occupied as a homestead, and incumbered by a mortgage; that a real-estate agent represented to her the advantages of trading her lot for a larger tract in another subdivision, and that he could get her a house built on this larger tract by a contractor, who would take two lots off it in payment; that she authorized the agent to effect the deal; that the owner of the larger tract refused to trade at the valuation placed on her lot by plaintiff; that the agent found a third person who agreed to trade his lot for plaintiff's, and that the owner of the larger tract was willing to trade it for this third lot; that plaintiff and the agent went to the office of the third person, where plaintiff executed to him a deed of her lot, and received a deed to his lot, after being asked if she fully understood the matter; that the value of the equities in the two lots was about equal; that the agent who had an option on the larger tract had it conveyed to himself, and then deeded it to plaintiff in exchange for the lot she had acquired from the third party; that the deal did not turn out as plaintiff expected, and that she could not get a house built on the larger tract in exchange for lots off it; that the house she had built there was sold under decree foreclosing a mechanic's lien; and that plaintiff had not offered to reconvey nor to place all parties in statu quo, except by averment in the bill that she was and had been at all times ready to reconvey,—plaintiff is entitled to no relief.

2. Where the grantee himself takes the grantor's acknowledgment, waiving her homestead right in the property conveyed, and subsequently, with his attorney and a notary, calls on the grantor, who, in their presence, admits her signature to the deed, and that she had given it in good faith, intending at the time to convey her homestead interest, the acknowledgment taken by the notary at that interview, certifying to the waiver and release of the grantor's homestead rights, is valid, and cannot be impeached by the evidence of the grantor.

Appeal from circuit court, Peoria county; T. M. Shaw, Judge.

Bill in chancery, filed by Marietta Brady against Cyrus J. Cole and others, seeking to set aside conveyances of real estate made by her. Decree was entered dismissing the bill. Plaintiff appeals. Affirmed.

A bill in chancery was filed by appellant in the circuit court of Peoria county, seeking to set aside certain conveyances of real estate made by her, on the ground of false and fraudulent misrepresentations made to her, and also have declared void a notary public's acknowledgment to a deed conveying her homestead. In September, 1893, she was the owner in fee of lot 22 in Proctor & Stone's addition to Peoria, subject to a mortgage of \$600, which lot was occupied by her as a homestead for herself and family. She alleges in her bill that she was solicited by one Cole to exchange her property for a certain other larger tract in Geiger's subdivision; that it was of a certain value, and that he could procure a contract to build her a house on the land by a contractor, who would take two lots

off the tract in payment, and in the end she would not be compelled to make any greater payment or outlay of money than the amount of \$600, for which she was already liable on her homestead. The advantages of the entire transaction were presented to her in glowing terms by the real-estate agent, Cole, and she promptly authorized him to act as her agent in the consummation of the deal. One of the appellees, C. T. Heald, held the title to the tract in Geiger's subdivision; but, when Cole made application for an exchange, it was declined, on account of the value placed by Mrs. Brady at that time on her homestead. Subsequently Cole represented to her that he could exchange her property for a lot owned by one of the appellees, John E. Goodrich, and known as the "Barker Avenue Lot," and that he could then exchange that for the Geiger tract. She assented to this, and went to Goodrich's office, where she executed a deed to him for her homestead, and in return received a deed for the Barker avenue lot. The record very clearly shows that the equity of each property was about the same. Goodrich asked, at that time, if Mrs. Brady fully understood the matter, and Cole responded for her that she did. Goodrich himself took Mrs. Brady's acknowledgment to the deed in which he was grantee. A short time afterwards Cole, who had an option on the Geiger tract, procured a deed from Heald, and conveyed it to Mrs. Brady. Heald knew that Cole was trading with Mrs. Brady, and received as part of the purchase price from Cole a mortgage from Mrs. Brady, and also her equity in the Barker avenue property. Cole gave attention, apparently, to most of the business for Mrs. Brady, and negotiated for the building of a house. A proposition was made by Yeager, a contractor, to build it, which was accepted by Mrs. Brady in writing. The house was built, but not paid for, and was subsequently sold under a decree for mechanic's lien, and bought in by Heald, who held a mortgage for part of the purchase price. Attention being subsequently called to the fact that the acknowledgment of the deed from Mrs. Brady to Goodrich was imperfect, from the fact that it had been taken by Goodrich himself, Mrs. Brady caused to be filed and recorded a notice stating that she was the owner in fee of lot 22 in Proctor & Stone's addition, and that the deed from her to Goodrich, dated in September, 1893, was obtained through fraud, and was void. Thereupon Goodrich took steps to have the acknowledgment corrected. Together with Cornwell, his attorney, and Frey, a notary public, he called upon her for the apparent purpose of getting a new acknowledgment. The testimony as to what occurred at this interview is somewhat conflicting, but the weight of the evidence established that Mr. Frey was introduced as a notary, and that Mrs. Brady said that she had signed the deed waiving her homestead. At that time she seemed to find no fault with Goodrich, but said he had acted gentlemanly, but Mr. Cole had taken some ad-

vantage of her. At that time it was proposed to Mrs. Brady that, as to the exchange between her and Goodrich, if she would deed him back the Barker avenue property, he would reconvey her homestead. However, based on this interview, a new certificate of acknowledgment was made by Frey as notary on the deed from Mrs. Brady to Goodrich. The prayer of the bill is to have all the conveyances set aside, on the ground of fraud and collusion in attempting to defraud appellant of her homestead property, or, in default of that, that the acknowledgment of the deed to Goodrich be set aside, and she be declared to have not waived her homestead right in the property. On a hearing in the circuit court a decree was entered dismissing the bill, and from that decree this appeal is prosecuted to this court.

W. T. Whiting, for appellant. Winslow Evans and Hammond & Wyeth, for appellees.

PHILLIPS, J. (after stating the facts). There are two questions presented in this case for the consideration and determination of this court,—being, in substance, whether there were such fraudulent misrepresentations made to appellant, of which appellees Goodrich and Heald had notice, to induce her to make these exchanges of property, as would call upon a court of equity to set aside the conveyances; and, also, whether or not the second acknowledgment of the Goodrich deed was obtained by fraud, or whether there was, in law, a proper acknowledgment.

A misrepresentation, in order to constitute a fraud, must be made for the purpose and with the design of procuring the other party to act,—of inducing him to enter into the contract or engage in the transaction. Pom. Eq. Jur. § 879. It can hardly be contended by appellant, and, in fact, we think is not, that any misrepresentations were made to her by either Goodrich or Heald. On the contrary, she did not have any conversation with either before the transaction was practically consummated. She called at the office of Goodrich with her agent for the express purpose of deeding him her homestead and receiving his lot in exchange. The extent of the conversation, as appears from this record, was that he asked if she fully understood the matter, and then if she had time to wait while he prepared the deed. She alleges she did not have knowledge of the incumbrance on his lot or the special tax. Both were clearly expressed in the deed which was delivered to her, and it was incumbent on her to take notice of its conditions. Unless it appears, by the fraudulent acts of the opposite party, she was prevented from knowing the conditions and terms of the instrument accepted by her, she is bound by them. It appears, however, from the evidence, that the value of the Goodrich property, after deducting the mortgage and tax, was so nearly equal to the value of her own property above the incumbrance, that she was not in any way defrauded in value. If

no misrepresentations were made directly to appellant by appellees Goodrich and Heald before the transaction, then it must sufficiently appear that such representations were so made by Cole, for the purpose and with the design of inducing her to act and engage in the transaction, and that such misrepresentations were known to Goodrich and Heald, and participated in and taken advantage of by them. It is not sufficient that Cole's statements that she was making a good trade and bettering her condition, and that she could sell enough lots off the tract of land purchased by her to pay for her house, were mere matters of opinion. The mere expression of an opinion held by the party making it cannot, standing alone, be held a misrepresentation. The statement must be the affirmation of a fact. *Hubbell v. Meigs*, 50 N. Y. 480. The reason of this rule is that, while the person to whom the representations are made has a right to rely on them, he is assumed to be equally able to form his own opinion and to come to as correct a conclusion as the other party, and therefore cannot claim to be misled by such opinion. Promises for the future, and hope of realizing speculative profits, are not present fraud. It must be of a fact at the time or previously existing. *Long v. Woodman*, 58 Me. 49; *Burt v. Bowles*, 69 Ind. 1; *Fouty v. Fouty*, 34 Ind. 433; *Bethell v. Bethell*, 92 Ind. 318.

As we have heretofore said, the deal between Mrs. Brady, for her homestead, and Goodrich, for the Barker avenue property, was in no sense unfair, as the record shows the equities were nearly equal. Cole held an option on the Geiger tract, and afterwards made the conveyance himself to appellant. Courts of equity do not aid parties who do not use their own discretion and judgment upon matters of this character. *Tuck v. Downing*, 76 Ill. 71. As we view this matter from the record presented to us, it was not of a character different from the ordinary business transaction. Heald was not willing to use appellant's homestead property at the value fixed on it in exchange for the Geiger tract, but, when the matter was suggested, agreed to take the equity in the Barker avenue lot. Appellant then voluntarily, and without misrepresentation on the part of Goodrich, traded for his property, and was not defrauded. She then exchanged with Cole for the Geiger tract, which he acquired from Heald; but the promises and predictions made by Cole as to the sale of lots off that tract, and other promises made by him, were not consummated, and it resulted unfortunately. Fraud is never presumed. It must be affirmatively shown, like any other fact. *Wright v. Grover*, 27 Ill. 426; *Boles v. Henney*, 32 Ill. 130; *People v. Lott*, 38 Ill. 447; *Carter v. Gunnels*, 67 Ill. 270; *Schroeder v. Walsh*, 120 Ill. 403, 11 N. E. 70. It was not so shown in this case, and it was not error for the circuit court to so hold. Moreover, it was the duty

of the appellant, if she was entitled to a rescission of these conveyances, to have tendered back what she had received, and offered to place all parties in statu quo. It is a familiar rule, and settled by a long line of authorities, that where a party discovers that fraud has been practiced upon him in the making of a contract, it is his duty at once to repudiate the contract, and tender back what has been received by him under its terms, so that all the parties may be placed as nearly as possible in the position occupied before the contract was consummated. *Linington v. Strong*, 107 Ill. 295; *Dowden v. Wilson*, 108 Ill. 257; *Kelsey v. Snyder*, 118 Ill. 544, 9 N. E. 195; *Greenwood v. Fenn*, 136 Ill. 146, 28 N. E. 487; *Brown v. Brown*, 142 Ill. 409, 32 N. E. 500; *Day v. Investment Co.*, 153 Ill. 293, 38 N. E. 567. In this case such rule was not followed, except the mere allegation in the bill that she was, and had been at all times, ready to reconvey the property. This was not sufficient. Goodrich had proposed, if she was dissatisfied, to reconvey if she would deed him back the Barker avenue lot.

It is contended, however, that, even though the proof be not sufficient to authorize a decree setting aside these deeds and rescinding the different transactions, this court should still declare the acknowledgment to the Goodrich deed, taken by Frey, to be void, and not to waive homestead, and that appellant be permitted to retain her homestead interest therein. The circumstances attending the taking of this acknowledgment are not entirely clear, owing to the conflict in the evidence of the different parties. The first acknowledgment had been taken by Goodrich, the grantee. The evidence established that, at the time he, together with Cornwell and Frey, called upon appellant, she admitted the signature to the deed to be hers, and that she had given it in good faith to Goodrich, and, at the time it was given to him, intended to convey to him her homestead interest. She said she had since understood there was an error in the acknowledgment, and had given notice that the deed was void. The certificate of Rudolph Frey, the notary, shows that this deed was acknowledged before him on this date, together with a release and waiver of the rights of homestead. It is a rule that the acknowledgment of a deed cannot be impeached for anything but fraud, and in such cases the evidence must be clear and convincing beyond a reasonable doubt. The mere evidence of the party purporting to have made the acknowledgment cannot overcome the officer's certificate, nor will it with slight corroboration. *Russell v. Theological Union*, 73 Ill. 337. "To impeach such a certificate, the evidence should do more than produce a mere preponderance against its integrity in the balancing of probabilities. It should, by its completeness and reliable character, ful-

ly and clearly satisfy the court that the certificate is untrue and fraudulent." *Monroe v. Poorman*, 62 Ill. 524; *McPherson v. Sanborn*, 88 Ill. 150; *Marston v. Brittenham*, 76 Ill. 611. The authorities very clearly lay down the rule that evidence offered to impeach a certificate of this character must fully and clearly satisfy the court that the certificate of the officer is false and fraudulent, and even a preponderance of evidence less than sufficient to establish a moral certainty to that effect is not sufficient. In this case the certificate of the officer is supported by his own testimony, and that of two other witnesses, one of them the grantee, as against the testimony of appellant, the grantor, an interested party, and another witness, Mrs. Dikeman, whose evidence, however, is not very satisfactory. Taken as a whole, the evidence offered to impeach this certificate is not of the clear, convincing character required by the rule as heretofore shown to exist. Moreover, we have heretofore held in this case that the exchange of properties between appellant and Goodrich involving this deed was valid, and free from any taint of fraud. To now hold that she was entitled to an estate of homestead in this property, without requiring her to deed back to Goodrich the property acquired from him, would be manifestly unjust, and not in accordance with the principles of a court of equity. It would materially decrease the value of the property conveyed to him. Appellant practically admits she cannot place him in statu quo, having conveyed and disposed of the property she acquired from him. The acknowledgment was valid. It was not error in the circuit court to enter a decree ordering the bill of appellant to be dismissed, and such decree is accordingly affirmed. Affirmed.

(164 Ill. 186)

UNION CENT. LIFE INS. CO. v. DURFEE.

(Supreme Court of Illinois. Nov. 10, 1896.)

FOREIGN INSURANCE SOCIETY—TAX ON GROSS RECEIPTS—CONSTITUTIONALITY—WHEN OPERATIVE—TO WHOM APPLICABLE—RECORD—PRESUMPTION.

1. 1 Starr & C. Ann. St. c. 73, § 29, which requires foreign insurance companies, where laws exist which require a like tax from companies organized under the laws of Illinois, to pay to the auditor certain taxes, but does not provide for the assessment of such taxes by any authorized officer, is not in violation of Const. art. 9, § 1, which provides that "the general assembly shall provide such revenue as may be needed by levying a tax by valuation, * * * and not otherwise; but the general assembly shall have power to tax * * * insurance * * * interests or business in such manner as it shall from time to time direct by general law uniform as to the class upon which it operates." *Insurance Co. v. Swigert*, 104 Ill. 663, followed.

2. 1 Starr & C. Ann. St. c. 73, § 29, which provides that whenever the existing or future laws of any state shall require of insurance companies incorporated under the laws of Illinois, and having agencies in such other state, any deposit or the payment of any tax, license fee, etc., greater than the amount required for such

purposes from similar companies by the then existing laws of Illinois, then all companies of such state establishing or having an established agency in Illinois shall be required to pay to the auditor for taxes, license fees, etc., an amount equal to the amount required by the laws of such other state, becomes operative on the enactment by the other state of the law with the additional requirements, and it is immaterial that there are no Illinois companies doing business in such state. *Insurance Co. v. Swigert*, 21 N. E. 530, 128 Ill. 244, followed.

3. 1 Starr & C. Ann. St. c. 73, § 30, which requires every agent of an insurance company incorporated by the authority of any other state or government to return to the proper officer of the county, town, or municipality in which the agency is established, in the month of May, annually, the amount of net receipts of such agency of the preceding year, which shall be subject to taxation for all purposes at the same rate at which other personal property is there taxed, relates to fire, and not life, insurance companies.

4. In an action by a foreign life insurance company to recover from the auditor a tax of 2½ per cent. paid under protest on its gross receipts in this state for the year 1895, it will be presumed, in the absence of proof to the contrary, that the tax of 2½ per cent. imposed by defendant was the only tax levied for 1895.

Appeal from circuit court, Sangamon county; Jacob Fouke, Judge.

Action by Union Central Life Insurance Company against Bradford K. Durfee, insurance superintendent, to recover taxes paid under protest. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Hamilton & Fullenwider, for appellant. M. T. Moloney, Atty. Gen., T. Y. Scofield, and M. L. Newell, for appellee.

CRAIG, J. This was an action brought by Union Central Life Insurance Company against Bradford K. Durfee, insurance superintendent of the state, to recover back the sum of \$5,427.43, paid under protest. The parties entered into a stipulation in writing, in which the facts were all agreed upon, and a trial was had before the court without a jury, resulting in a judgment in favor of the defendant. The facts are as follows:

The plaintiff, the Union Central Life Insurance Company, is a corporation organized and doing business under the laws of the state of Ohio, and is engaged entirely and exclusively in the life insurance business. That heretofore, and for several years, the said plaintiff has been doing a life insurance business in the state of Illinois, having been regularly admitted to do said business in said state of Illinois, as is required by the statutes of the state of Illinois, and that it has heretofore complied with all the laws of the state of Illinois regulating the business of life insurance as done by such foreign life insurance company as is the plaintiff. That during the year 1895, and for several years prior thereto, it had established agencies and transacted life insurance business within the said state of Illinois, and had fully complied with all the laws of said state regulating such business of life insurance, and had a proper and lawful certificate of authority to do such life insur-

ance business in said state of Illinois. That the plaintiff, in the month of January, 1896, filed with the defendant, as superintendent of insurance of the state of Illinois, its annual statement, as required by said superintendent of insurance, showing, among other things, the gross amount of the premiums received by the plaintiff in the said state of Illinois during the year 1895, and that such report was satisfactory to said insurance superintendent, and that such statement of the amount of the premiums received by said company was filed with the said insurance superintendent in compliance with the statutes of the state of Illinois. That the amount of the premiums so received in gross by the plaintiff for the year 1895 was \$217,097.10. That the defendant, as insurance superintendent of the state of Illinois, received said report and statement, and approved the same, and thereupon assessed against the plaintiff $2\frac{1}{2}$ per cent. of said gross amount of the premiums so received by the plaintiff as a tax on the same, claiming the right to assess such tax against the plaintiff under the statutes of the state of Illinois, hereinafter referred to and set forth; and that said defendant, as such insurance superintendent, presented to the plaintiff a bill for $2\frac{1}{2}$ per cent. tax on the said sum of \$217,097.10 gross premiums received by the plaintiff in Illinois in the year 1895, which tax amounted to the sum of \$5,427.43, which sum of money the insurance superintendent, the defendant in this cause, demanded of the plaintiff under penalty of revoking the license of the plaintiff to do life insurance business in the state of Illinois, for nonpayment of said tax, as is provided by the laws of the state of Illinois in such cases. That after such demand so made by the defendant as such insurance commissioner, the plaintiff did, on the 17th day of April, 1896, protest against the payment of the said sum of money as a tax upon its gross receipts as aforesaid, and denied the validity of such tax, and denied the right of said defendant, as such insurance superintendent, to force the collection of the same from the plaintiff as such tax under any laws of the state of Illinois; and, after so protesting and denying the validity of said tax and the law under which said insurance superintendent claimed the right to impose and collect such tax, and the right of said defendant, as such insurance commissioner, to collect and receive the same from the plaintiff, the plaintiff made payment of the said sum of \$5,427.43, the amount of said taxes as aforesaid, to the said Bradford K. Durfee, under protest, and under and in pursuance of the following stipulation:

"It is hereby stipulated and agreed between B. K. Durfee, insurance superintendent of the state of Illinois, and the Union Central Life Insurance Company, of the state of Ohio, that said company shall pay to the said B. K. Durfee, under protest, the sum of \$5,427.43, being the amount claimed by said insurance superintendent as due from said company for taxes

for the year 1895, being two and one-half per cent. upon gross business or premiums received by said company upon its business transacted in said state of Illinois during the year 1895, under section 20 of the general insurance law of said state, passed and approved by the legislature thereof March 26, 1869; said sum of money to be held by said B. K. Durfee to abide the result of an action to be brought by said company against him to recover back said sum, and to test the validity of the law; it being understood and agreed between the parties hereto that said action shall be prosecuted without unreasonable delay to final judgment in the supreme court of said state of Illinois, and both parties shall abide said judgment. April 17th, 1896. That the said defendant claims authority, as insurance superintendent of the state of Illinois, to assess and collect said tax of two and one-half per cent. upon the gross receipts of the plaintiff in the state of Illinois for the year 1895 under and by virtue of the laws of the state of Illinois and the laws of the state of Ohio, and more particularly under the following statutes of the state of Illinois: '(Reciprocity.) Sec. 20. Whenever the existing or future laws of any other state of the United States shall require of life insurance companies incorporated by or organized under the laws of this state, and having agencies in such other state, or of the agents thereof, any deposit of securities in such state for the protection of policy holders, or otherwise, or any payment for taxes, fines, penalties, certificates of authority, license fees, or otherwise, greater than the amount required for such purposes from similar companies of other states by the then existing laws of this state, then and in every such case, all life insurance companies of such states establishing, or having heretofore established, an agency or agencies in this state, shall be and are hereby required to make the same deposit, for a like purpose, with the state treasurer of this state, and to pay to the auditor for taxes, fines, penalties, certificates of authority, license fees, or any other obligation, an amount equal to the amount of such charges and payments imposed by the laws of such other state, upon the companies of this state, and the agents thereof.' Laws 1869, p. 234. And also under the following laws of the state of Ohio: 'Sec. 2745. Every agency of an insurance company incorporated by the authority of any other state or government shall return to the auditor of each county in which such company does business, or from which it collects premiums on or before the first day of May, annually, the amount of the gross premium receipts of such agency for the previous calendar year, in such counties, which shall be entered upon the tax list of the proper county, and be subject to the same rate of taxation, for all purposes, that other personal property is subject to at the place where located; and the whole of such tax shall be due and payable on the twentieth day of November next ensuing; provided, that in making the first

return under this act no company shall be required to make a return of receipts previously placed upon the duplicate, under the act to which this is amendatory, requiring the return to be made in the month of May. And it shall be the duty of the superintendent of insurance, in the month of December, annually, to charge and collect from all such companies such a sum, as added to the sum paid to the county treasuries will produce an amount equal to two and one-half per cent. on the gross premium receipts of such companies, as shown by their annual statement, under oath, to the insurance department; provided, however, that if, by the laws of any other state, territory, or nation, a larger tax than two and one-half per cent. is charged companies organized under the laws of Ohio, then the superintendent of insurance shall charge a like tax upon companies from such state, territory or nation doing business in this state; and provided, further, that for the purpose of making the charge for the fractional year 1888, the superintendent of insurance may require, under oath, such information additional to that contained in the annual statement as is, in his judgment, required. If any such company refuse to pay said tax, after demand therefor has been made, or if it shall make any false statements of its gross premium receipts, the superintendent of insurance shall revoke the license of such company to do business in this state. If, at any time, said superintendent has reason to suspect the correctness of the return made of the gross premium receipts of any such company, he may, at the expense of the state, make an examination of the books of such company, or of its agents, for the purpose of verifying the same. All taxes collected under the provisions of this section, by the superintendent of insurance, shall be paid by him, upon the warrant of the auditor, into the general revenue fund of the state.' Passed April 12, 1889. It is further hereby stipulated and agreed that during the entire year of 1895, and from thence hitherto, there was no life insurance company incorporated or organized under the laws of the state of Illinois, doing a life insurance business in the state of Ohio, or having any agencies or transacting any life insurance business in said state of Ohio; and that during the entire year of 1895, and from thence hitherto, was not and is not now any corporation incorporated or organized under the laws of the state of Illinois actively engaged in doing a life insurance business, nor authorized by the insurance superintendent to issue and write policies during that period, and hence no such Illinois life insurance company has made application to the proper officers of the state in Ohio, for license to do such life insurance business or establish agencies in the state of Ohio for that purpose during the period named. And it is further stipulated and agreed that the plaintiff, the Union Central Life Insurance Company, has in all respects complied with all of the laws of the state of Illinois regulating the

doing of a life insurance business by a life insurance company from a foreign state, and that it has paid to the said defendant the said above amount of money for taxes under protest, to be held by the defendant according to the stipulation hereinbefore set forth until the final decision of the supreme court in this case as to the right of defendant to collect and hold said money, and to retain and apply it as insurance commissioner of the state of Illinois. [Signed.]"

It is first claimed that section 20, supra, is invalid, because it requires, or purports to require, insurance companies from foreign states, where laws exist which put in force said section 20 of our statute, to pay to the auditor certain taxes, and does not provide for the levy or assessment of such taxes by any officer or agency authorized by the law of Illinois to levy or assess taxes; that said section is invalid, as contrary to section 1 of article 9 of the constitution, which is as follows: "The general assembly shall provide such revenue as may be needful by levying a tax by valuation so that every person or corporation shall pay a tax in proportion to the value of his, her or its property, such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, showmen, insurance, telegraph, and express interests or business in such manner as it shall from time to time direct by general law uniform as to the class upon which it operates." If this section contained nothing but the first clause, the position of counsel might be regarded as tenable, but under the last clause the legislature is at liberty to tax insurance in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates. In view of this clause of the section of the constitution, no substantial objection is perceived to the mode provided for by section 20 in connection with the section of the Ohio statute set out in the statement. But it will not be necessary to discuss this question. The same question was raised, considered, and decided in *Insurance Co. v. Swigert*, 104 Ill. 663, and the decision there is conclusive of the question.

It is next contended that section 20 is invalid, and not in force as against the plaintiff, an Ohio company, until there is some life insurance company in existence in Illinois capable of doing business in Ohio. This question was raised and decided in *Insurance Co. v. Swigert*, 128 Ill. 244 (21 N. E. 532). It was there held: "The time when our law requires a foreign insurance company doing business in this state to pay the same license fees, etc., required by the laws of the foreign state of companies of this state doing business therein is whenever the existing or future law of such other state shall require

companies of this state to pay license fees, etc., for the privilege of doing an insurance business therein." As that case is conclusive of the question, further discussion is rendered unnecessary.

It is next contended in the argument that this statute (section 20) is not valid to authorize the insurance superintendent to tax and collect 2½ per cent. on the gross premium receipts of the plaintiff during the year 1895 in the state of Illinois. It will be observed that the section of the Ohio law set out in the statement of facts provides that every agent of an insurance company incorporated by authority of any other state doing business in the state of Ohio shall make an annual return of the gross premium receipts, and the same shall be entered upon the tax list of the proper county, and be subject to the same rate of taxation that other personal property is. It then provides, in case this taxation in the various counties does not amount to 2½ per cent. on the gross premium receipts for the year, then the superintendent of insurance shall charge and collect from such companies such a sum as added to the sum paid to the county treasurer will produce an amount equal to 2½ per cent. on the gross premium receipts of such companies. It will also be observed that section 20 of our statute, set out in the statement, provides that whenever the law of any other state requires of life insurance companies organized under the laws of this state to pay a larger amount for taxes than the amount required from similar companies of other states in this state, then all life insurance companies doing business in this state shall be required to pay to the auditor for taxes an amount equal to the amount of such payments imposed by the laws of such other state upon the companies of this state. Under these two provisions it is evident appellant was required to pay 2½ per cent. on the gross premium receipts, and that is the amount appellant was assessed and required to pay by the insurance superintendent. But it is said appellant was assessed for taxation under section 30, c. 73, of the statute (1 Starr. & C. Ann. St. p. 1327), and the insurance superintendent had no authority to tax it 2½ per cent. over and above that assessment. That section of the statute is as follows: "Every agent of any insurance company, incorporated by the authority of any other state or government, shall return to the proper officer of the county, town or municipality in which the agency is established, in the month of May, annually, the amount of the net receipts of such agency of the preceding year, which shall be entered on the tax lists of the county, town and municipality, and subject to the same rate of taxation, for all purposes, state, county, town, and municipal—that other personal property is subject to at the place where located; said tax to be in lieu of all town and municipal licenses; and all laws and parts of laws inconsistent here-

with are hereby repealed." Upon reference to Hurd's Rev. St. 1893, pp. 830, 832, it will be found that this section of the statute has no application to life insurance, but it is one section of an act entitled "An act to incorporate and govern fire, marine and inland navigation insurance companies." If this section relates to fire, and not life, insurance companies,—which we think it does,—then it has no bearing whatever on the case under consideration. But, aside from this consideration, there is no evidence in the record that appellant was taxed for the year 1895 under section 20, *supra*, or in any other manner, except by the insurance superintendent; and we will presume, in the absence of proof to the contrary, that the tax of 2½ per cent. imposed by appellee was the only tax levied for the year 1895, and, as that tax was authorized by the statute, the judgment of the circuit court was correct, and it will be affirmed. Affirmed.

(164 Ill. 273)

HAKES v. NATIONAL STATE BANK OF TERRE HAUTE.

(Supreme Court of Illinois. Nov. 23, 1896.)

ACTION ON NOTE—PLEADING.

1. In an action by an indorsee upon a note negotiable and transferable by indorsement under the laws of Illinois, it is unnecessary to allege that the note is negotiable under the laws of Indiana, where it was executed.

2. The fact that a note negotiable under the laws of Illinois is not so under the laws of Indiana, where it was executed and transferred by indorsement, is a matter of defense to be pleaded and proved.

Appeal from appellate court, Second district.

Action by the National State Bank of Terre Haute, Ind., against Emerson Hakes. Judgment for plaintiff, which was affirmed on appeal. 61 Ill. App. 501. Defendant appeals. Affirmed.

Mayo & Widmer, for appellant. E. Callahan, for appellee.

BAKER, J. This was an action of assumpsit, brought by appellee, against appellant, in the circuit court of La Salle county. The declaration contained the common counts and a special count on a promissory note. There was an affidavit of claim filed. Appellant pleaded to the common counts, with an affidavit of merits, and demurred to the special count. The demurrer was overruled. Thereupon appellee dismissed as to the common counts; and, appellant abiding by his demurrer, judgment was rendered against him for \$1,074.27 and costs. The special count averred that the defendant, on the 19th day of June, 1894, at Terre Haute, Ind., to wit, at, etc., made and delivered to one Jacob A. Parker his promissory note, which was payable at the National State Bank of Terre Haute, Ind., to the order of said Jacob A. Parker, three months after the date thereof; and that the payee, at the same time and place, assigned said note by indorsement thereon, under

his hand, to plaintiff. It was also alleged that the note contained the following provision: "The drawers and indorsers severally waive presentment for payment and notice of protest and nonpayment of this note, and all defenses on the ground of any renewal or extension of the time of its payment that may be given by the holder or holders to them or either of them." Appellant's contention is that the instrument declared on, owing to the provision above quoted, is not, under the law merchant, a negotiable promissory note; and that, there being no allegation that the paper is negotiable under the law of Indiana, the declaration fails to show a right of action in the plaintiff. In our opinion, however, the declaration is sufficient. That, under the laws of this state, the note is negotiable and transferable by indorsement, there is no dispute. Appellant expressly agreed to pay "to the order of" Parker, and it will be presumed that the note is likewise negotiable under the laws of Indiana, and that the note was executed and the assignment thereof made in conformity with the laws of that state. It was not incumbent upon the plaintiff to aver that the note is negotiable and transferable by indorsement under the laws of Indiana, in order to show a right of action in himself. If the plaintiff could not maintain an action in his own name under the laws of that state, this was matter of defense, which should have been pleaded and proven like any other fact. *Rossa v. Crist*, 17 Ill. 450; *Smith v. Whitaker*, 23 Ill. 309; *Chumaseo v. Gilbert*, 24 Ill. 294, 651; *Miller v. Wilson*, 146 Ill. 523, 34 N. E. 1111. Appellant's demurrer was properly overruled. There is no error in the record, and the judgment of the appellate court will be affirmed. Affirmed.

CARTWRIGHT, J., took no part.

(164 Ill. 163)

PROUTY v. TILDEN.

(Supreme Court of Illinois. Nov. 9, 1896.)

DEED—DESCRIPTION—PLAT—POSSESSION—NOTICE
—ADVERSE POSSESSION—INTERRUPTION.

1. A plat found among the papers of a grantee after his death, bearing on its face the name of the grantor in his own handwriting, is admissible to show that the deed of a certain number of feet of land, described as commencing at a certain corner of two streets at their intersection, was made with reference to the width of the streets, as shown on the plat, which width was that then contemplated, and afterwards made, but greater than then existing; such plat having been seen at the time the deed was made, the grantee having immediately afterwards, during the life of the grantor, fenced the premises in accordance with the plat, and the controversy as to the location of the land having arisen long after the making of the deed, when the parties thereto were dead.

2. A grantee is put on inquiry as to the title of one in actual possession of land at the time the deed is taken.

3. The running of the statute in favor of one in actual possession under a deed, having the land inclosed, is not interrupted by entry of one claiming under a later deed, who enters and

makes a cross fence, which is immediately after removed by the one in possession.

Appeal from circuit court, Cook county; R. W. Clifford, Judge.

Ejectment by Charles B. Prouty, assignee, against Harriet C. Tilden. Judgment for defendant. Plaintiff appeals. Affirmed.

This is an action of ejectment by appellant against appellee to recover a tract of land described in the declaration as a certain parcel of land, with the appurtenances, lying in the county of Cook and state of Illinois, to wit: "That part of lots six (6) and seven (7) in Brown's subdivision of the north half of the southwest quarter of the southwest quarter of section thirty-four (34), township thirty-nine (39) north, range fourteen (14), east of the third principal meridian, described as follows: Commencing at a point on the east line of Wabash avenue, thirty-three (33) feet to the south line of said lot seven (7); running thence east, along the south line of lots seven and six (6), aforesaid, to a point eight and a half (8½) feet west of the east line of lot six (6), aforesaid; thence north, parallel with the east line of said lot six (6), sixty-four (64) feet; thence west, parallel with the south line of lots six (6) and seven (7), one and one-half (1½) feet; thence south, parallel with the east line of said lot six (6), thirty-one (31) feet; thence west, on a line parallel with the said south line of said lots six (6) and seven (7), to the place of beginning." Both parties to this litigation claim title through a common source, one George T. Abbey. Abbey conveyed to William M. Tilden (from whom appellee derived her title), by deed dated April 15, 1869, that part of lots 6, 7, and 8 in said Brown's subdivision bounded as follows: "Commencing at the southeast corner of Wahpanseh avenue and Wabash avenue, at their intersection; thence, running south, on the east line of Wabash avenue, 264 feet; thence east 154 feet; thence north 264 feet, to Wahpanseh avenue; thence west, on the south line of Wahpanseh avenue, to the place of beginning." By deed dated August 30, 1870, George T. Abbey and wife conveyed to Emma E. Eaton, plaintiff's grantor, that part of lots 6, 7, and 8 lying east of Wabash avenue, in Brown's subdivision of the N. ½ of the S. W. ¼ of the S. W. ¼ of section 34, township 39 N., range 14 E., of the third P. M. At the date of each of these conveyances, lots 6 and 7, respectively, measured from north to south—namely, from the south line of Wahpanseh avenue to the north line of Fountain street—297 feet; and Wahpanseh avenue, at its intersection with Wabash avenue, was only 33 feet wide, as shown by the plat of said lots 6, 7, and 8 in evidence, and also by the testimony of the witnesses Charles C. Fowler and F. C. Rossiter. By the same plat, it is also shown that lots 6 and 7 were, respectively, 132 feet wide from east to west; and that the opening and extension of Wabash avenue through the entire length of lot 7, and over and upon the west 100 feet thereof, was contemplated. And

by a partition deed, dated January 2, 1869, between Charles A. Eaton and wife, from whom said George T. Abbey acquired his title, and Rebecca C. Stampofski and husband, Wabash avenue is designated as a street 100 feet wide. By that deed, the parties, as tenants in common of said lots 6, 7, and 8, partitioned the same between them thus: All that part of said lots "which lies east of the street, 100 feet wide, and designated as a continuation of the street known as 'Wabash Avenue,' through said" above-named lots, "was conveyed and set over to said Charles A. Eaton; and all that part of the same lots lying west of said street was conveyed and set over to said Rebecca C. Stampofski." At the time of these conveyances, Wahpanseh avenue (now Thirty-Seventh street) was only 33 feet wide at its intersection with Wabash avenue. Wabash avenue was not then opened to the width of 100 feet, but was opposite this lot or tract of land but about 63 feet wide. On the same day the deed conveying the premises to Tilden was made, a trust deed was executed by the latter, to secure a part payment of the purchase money. The evidence discloses the fact that this deed of trust was drawn by one of the witnesses, who identifies a plat found among the papers of Mr. Tilden as a plat he saw about that time, and the plat is of this tract. It has on its face the signature of George E. Abbey, in his own handwriting. Other witnesses testified to its being his signature on the plat. This fact is clearly shown by this evidence. By this plat, Wabash avenue is shown to be 100 feet wide along this land, and Wahpanseh avenue (now Thirty-Seventh street) is shown to be 66 feet wide. An alley 8 feet wide is shown running parallel with Wabash avenue, and 154 feet from the latter. Shortly after the execution of the deed to Tilden, he fenced the land, placing his fence along Wabash avenue as if it had been extended 100 feet wide, and along Thirty-Seventh street as if it was 66 feet wide, and along the side of the alley 154 feet from Wabash avenue, and parallel therewith. The exact date on which this fence was built is not shown, though the weight of evidence shows it was prior to the summer of 1870, as it was used for pasture by Mr. Tilden one year or longer, and was rented as a garden one year before the great fire of 1871. This suit was instituted April, 1891. The evidence shows that fence was maintained until 1891 in a more or less degree of usefulness. About 1876 it is claimed by appellant's assignor that she fenced the south 33 feet of the Tilden tract. From the weight of the evidence, the entire tract was inclosed by the Tilden fence; and about 1876 appellant's grantor trespassed on his possession, and built a cross fence, cutting off that 33 feet. Within a few days after his construction, that cross fence was removed by Tilden, when he discovered it. To plaintiff's declaration, the defendant pleaded the general issue and the statute of limitations of 20 years. On trial before the judge, without a jury, a verdict was found for the

defendant, and the plaintiff prosecutes this appeal. Plaintiff submitted several propositions to be held as law, some of which were refused, others held, and others modified. The errors assigned include the refusal and modification of propositions, the admission of the plat in evidence, and the finding by the court on the evidence.

M. P. Brady, for appellant. Ball, Wood & Oakley, for appellee.

PHILLIPS, J. (after stating the facts). The trial court admitted in evidence the plat of the tract of land which was found among the papers of William M. Tilden after his decease, in 1886, which bore on its face the name of his grantor, George T. Abbey, in the handwriting of the latter, and which was seen about the time of the execution of the deed and trust deed by the attorney writing the last-named instrument, the original being produced. More than 22 years had elapsed after the execution of the deed by Abbey to Tilden before any hostile title was asserted against the title thus conveyed. When that conveyance was made, and this grantor in the deed was still alive, Tilden fenced the premises, and had his deed of record; and the manner in which the fence was placed was in strict accordance with the plat, and recognized Thirty-Seventh street or Wahpanseh avenue as 66 feet wide, with Wabash avenue extended as of the full width of 100 feet, with an alley along the entire tract parallel with Wabash avenue. If the starting point of the description in the deed from Abbey to Tilden is placed with reference to the plat found among Tilden's papers, which shows Thirty-Seventh street 66 feet wide, then the description would extend the tract conveyed 33 feet further south than would be the case if Thirty-Seventh street were assumed to be but 33 feet wide, and in that case the description would include the premises in controversy. Where a long time has elapsed after a transaction, and persons who could probably have given important testimony are dead, we cannot expect the same exactness and minute details in the evidence of witnesses as when transactions are more recent; and in such cases courts will take into consideration such facts and circumstances as will tend to throw light on the subject-matter. We hold it was not error to admit the plat in evidence. By the plat which it is apparent came from Abbey, and the other circumstances, it is clear he sold with reference to that plat, and the purchaser and his grantees would have a right to have the streets and alleys so shown remain open forever, free from all claim or interference of the vendor or those claiming under him. The exhibition of a plat which shows a tract of land is bounded by certain streets and alleys is, in fact, a declaration it is so bounded. It is an act coupled with a fact shown on its face. It amounts to a declaration that the property is bounded as shown by

that plat. The distances marked, showing they would carry the boundary to the street, is equivalent to a declaration that the street is the boundary. Tilden being in actual possession when the assignor of appellee acquired her title, she was put on inquiry as to his title. It was notice to put her on inquiry. Had such inquiry been made, she could have learned the fact.

The appellant asked the court to hold two propositions substantially the same, which were to the effect that the beginning point in running the boundary was to be determined by the deed itself, and the southeast corner of said streets as they existed at the time of the deed was the beginning point. The court modified by adding "unless the instrument dedicating, or attempting to dedicate, is read in conjunction with the deed to Tilden." There was no error in so modifying those propositions. The plat was evidence to be considered in connection with the deed. The assignor of appellant, being thus put on inquiry as to the title of Tilden, by reason of his possession, can stand in no better relation to the land and title than would her grantor. The deed to Tilden effected a conveyance of the land in controversy. He being in possession under a deed which conveyed him the title, he fenced the tract, and maintained that fence, and remained in actual possession for more than 20 years before this suit was brought. That possession was actual, open, and notorious, with a good and sufficient title. The assignor of appellant, in 1876, entered the premises, and made a cross fence, cutting off the south 33 feet. Finding the property inclosed, appellant's assignor had no right to interfere with the possession. His entry was that of a trespasser and wrongdoer. *Lee v. Town of Mound Station*, 118 Ill. 319, 8 N. E. 759. When she found another in actual possession, her remedy was by ejectment, to settle the question of title. The possession of Tilden had never been released or abandoned, and no right existed in the assignor of appellant to invade that possession. *Gage v. Hampton*, 127 Ill. 87, 20 N. E. 12. A wrongful act, a mere trespass, could not be an act which dispossessed Tilden, and prevented the running of the statute. Under either defense, the finding and judgment of the circuit court of Cook county was correct, and it is affirmed. Affirmed.

(55 Ohio St. 539.)

LAKE SHORE & M. S. RY. CO. v. ORNDORFF.

(Supreme Court of Ohio. Jan. 26, 1897.)

CARRIERS—EJECTMENT FOR REFUSAL TO PAY FARE—RIGHTS OF PASSENGER—STOP-OVER TICKET.

1. When a person having in charge a child of sufficient age to require payment of fare takes passage on a railroad, such person becomes liable for the payment of the child's fare, and, upon refusal to pay, both may be ejected from the train at the next station.

2. When such person has paid fare, or purchased a ticket which is taken up by the con-

ductor, such conductor must, before ejecting such person and child, return or offer to return to such person the unused value of such ticket or fare over and above the fares of both for the distance already traveled.

3. If the ticket is such that a stop-over may be had thereon, the conductor may tender a stop-over check instead of money, but to retain the ticket and expel the parties from the train renders the company liable in damages.

(Syllabus by the Court.)

Error to circuit court, Fulton county.

Action by Sarah B. Orndorff against the Lake Shore & Michigan Southern Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

In the month of September, 1891, Sarah B. Orndorff, defendant in error, purchased a ticket for herself from Kendallville, in the state of Indiana, to Wauseon, in the state of Ohio, and got aboard one of the regular passenger trains of the plaintiff in error, and took with her into the car her little boy, aged nine years. The conductor came around, and took up her ticket, and punched it, and demanded half fare for the boy, which she refused to pay. He informed her that she must pay half fare for the boy, or both get off at the next station, Corunna, six miles east. Upon arriving at Corunna, she still refused to pay, and also refused to get off, and he thereupon removed her and the boy as gently as possible, using no unnecessary force; she at the same time demanding the return of her ticket, and he refusing to return the same, as it was already canceled. After she and the boy had been put out onto the platform of the station, she offered to pay the boy's fare, and they again got upon the train, and she paid his fare, and they rode in safety to Wauseon, where they left the train and went to their home. The ticket was what is known as a "stop-over ticket," entitling her to a stop-over check at any station. She afterwards commenced an action against the railroad company for damages for unlawfully ejecting her from the train, resulting in personal injury, and shocking and wounding her feelings. Upon trial in the common pleas court she recovered a judgment for \$700, which was reduced to \$400 by the circuit court, and then affirmed.

Upon the trial the counsel for the railroad company requested the court to charge the jury as follows: "(1) The plaintiff, Sarah B. Orndorff, being a passenger upon defendant's train, was responsible for the fare of a child under her charge and control, and upon plaintiff's refusal to pay the railroad fare or such child, the defendant, by its officers and agents, had the right to remove both plaintiff and the child from the train, although plaintiff had paid her own fare, and the conductor had refused to return same to her. (2) In this case, the minor child was accompanying his mother from Kendallville to Wauseon, and boarded the train with his mother at Kendallville, was in plaintiff's charge and under her control, and she was, in law, re-

sponsible for his presence in the car, and it was plaintiff's duty, in law, to see that his fare was paid. The defendant was under no obligation to carry the boy without being paid therefor, and had a right to demand the fare of the plaintiff, and, upon refusal so to do, the defendant had a right to remove both from the train. (3) If, in effecting such removal, the conductor used no more force than was necessary to overcome the resistance made by the plaintiff, and therein did no bodily injury, then the plaintiff is not entitled to recover, and your verdict should be for the defendant. (4) It was the duty of the plaintiff, after refusing to pay the fare of her minor son, to leave the train at Corunna, after notice so to do by the conductor, and, upon refusing so to do, the conductor was justified in removing her therefrom, using no more force than was necessary to accomplish the same." The court refused to charge as requested, and proper exceptions were taken to such refusal.

The court charged the jury as to the right of the conductor to eject her and her boy from the train as follows: "When the conductor demanded of the plaintiff that she pay the fare of or furnish a ticket for the child in her charge, her own child, it was her duty so to do, and, upon her refusal, and persisting in such refusal, the conductor had a right at the first station to stop and remove both her and the child from the train, if she refused to get off without such removal, providing, however, that he first restored or offered to restore to her the unearned value of the ticket he had taken from her for the ride from Kendallville to Wauseon. Therefore, before exercising the right to eject her from the car, and before ejecting her from the train, it was his duty to either tender her the ticket he had taken, and demand the regular fare of herself and child for the distance they had already ridden, or, if he retained the ticket, to tender her the difference between the price paid for the ticket at Kendallville and the regular fare of herself and child from Kendallville to Corunna, or tender her a stop-over check for herself from Corunna to Wauseon and demand the fare of the child from Kendallville to Corunna. If he did none of these things, but retained her ticket, and, while so retaining her ticket, he ejected the plaintiff and her child from the cars at Corunna, and while in the line of his duty as defendant's employé, and as such agent and conductor, then she will be entitled to a verdict at your hands."

Proper exceptions were taken to this charge by counsel for the railroad company, and a motion filed for a new trial, which was overruled. The judgment having been affirmed by the circuit court, a petition in error was filed in this court, seeking to reverse the judgments below.

E. D. Potter, Thomas Emery, and Geo. C. Green, for plaintiff in error. W. W. Touville, for defendant in error.

BURKET, J. (after stating the facts). If the charge of the court as given was right, there was no error to the prejudice of the railroad company in the refusal to charge as requested. In the charge as given the court fully conceded the right of the conductor to eject the defendant in error for nonpayment of fare for her boy, but held it to be his duty, before ejecting her, to restore or offer to restore to her the unused value of her ticket over and above the fare of both from Kendallville to Corunna. While the court held the conductor to this duty, it gave him the option to perform the duty either by returning the ticket and demanding the fare of both for the distance already traveled, or by tendering a stop-over check for herself from Corunna to Wauseon and demanding fare for the child from Kendallville to Corunna, or by tendering her the difference in money between the price of the ticket and the fare of both from Kendallville to Corunna. This charge concedes to the company all its rights, if not more.

Upon her refusing to pay fare for the boy, the company had a right to put both off the train at the next station, and collect fare for the boy at that station, but it had no right to confiscate her ticket to Wauseon, and appropriate the same to its own use, without compensation to her. Before putting her off the cars, the conductor should have returned to her the unused value of her ticket, either by paying such value to her in money, or by giving her a stop-over check and collecting fare for the boy for the distance already traveled. If the ticket was already canceled, so as not to avail her on another train, its return would have been of no value to her, and this the company knew, while she may not have known it. In such case it was the duty of the conductor to give her a stop-over check, or compensate her in money to the amount of the difference between the cost of the ticket and the fares of both to Corunna. As between her and the company, the conductor represented the company, and the rights and liabilities of the parties were the same as if the company had been present and transacted the business through its highest officers; and therefore neither the inconvenience of making change, nor the want of authority on part of the conductor to pay the unused value of the canceled ticket, can shield the company from liability. As the ticket was such as to entitle the holder to a stop-over at any station, the contract of carriage was not an entire but a severable contract; and, upon notice to the conductor that she desired to stop at an intermediate station, it was his duty to give her a stop-over check; and, when he was about to forcibly eject her from the train, it was still more his duty to give her such check. It was his duty, before commencing to eject her from the train, to either pay her the unused value of her ticket over and above the fares of both for the distance already traveled, or give her a stop-over check and demand the fare of the boy, and, if this had been done,

she would most likely have paid the boy's fare, and avoided the disagreeable scene which followed. At all events, it was her right to have the unused value of her ticket restored to her before being ejected from the train. True, she was in the wrong in refusing to pay fare for the boy, but the company was also in the wrong in retaining the unused value of her ticket, and in ejecting her before returning or offering to return to her such value, either in money or stop-over check. Her wrong did not warrant the company in expelling her from the train without returning to her the remaining value of her ticket. The expulsion was, therefore, unlawful, and the company became liable to respond in damages.

There is always liable to be more or less friction between the traveling public and transportation companies, and, while railroads should be fully protected in the enforcement of their reasonable rules, passengers must be protected in their rights of property, and against unreasonable annoyances. The case of *Railroad Co. v. Hoeflich*, 62 Md. 300, and *Wood, Ry. Law*, § 353, cited by plaintiff in error, only go to the extent that, upon refusal to pay fare for a child, both the child and person having it in charge may be ejected from the train. Nothing is there said as to the right to have the unused fare returned. The charge of the court in the case at bar fully conceded all that is covered by these two authorities. The following cases are in point, and throw some light upon the question under consideration in this case: *Wardwell v. Railway Co.*, 46 Minn. 514, 49 N. W. 206; *Bland v. Railway Co.*, 55 Cal. 570; *Vankirk v. Railway Co.*, 76 Pa. St. 66.

We find no error in the record. Judgment affirmed.

(151 N. Y. 172)

DAVIS v. CORNUE et al.

(Court of Appeals of New York. Dec. 15, 1896.)

INJUNCTION—RESTRAINING ACTION UNDER PROBATE DECREE—JURISDICTION—FOREIGN JUDGMENT—PLEADING.

1. The supreme court of New York may enjoin distribution of an estate under a decree of probate in another state procured by fraud, where some of the defendants appear, and it is not shown that the others have not been or may not be summoned, though the bulk of the property involved is in the other state; and a refusal to exercise such jurisdiction is erroneous. 37 N. Y. Supp. 788, reversed. Bartlett, Gray, and Haight, JJ., dissenting on the ground that it is discretionary to take jurisdiction of an action to enjoin proceedings under a foreign judgment.

2. A complaint alleging that plaintiff had made an agreement with some of the defendants, who were his brothers and sisters, to defend actions involving an estate in which all were interested, for one-half of the interests which might fall to the other contracting parties; that one of defendants' brothers was a devisee under the will of their father; that such brother and some of the other defendants fraudulently conspired to procure a decree admitting the will to probate and distributing the estate, to the prejudice of plaintiff's rights; that plaintiff was not a party to the

proceedings in which such decree was rendered; and that, if distribution under such decree is not enjoined, plaintiff will lose his interest in the estate,—states a cause of action against all the defendants, including those who were not parties to the agreement.

Appeal from supreme court, appellate division, First department.

Action by Erwin Davis against Ellen S. Cornue and others for an injunction. From a judgment of the appellate division (37 N. Y. Supp. 788) reversing an interlocutory judgment overruling a demurrer to an amended complaint, plaintiff appeals. Reversed.

Logan, Demond & Harby, for appellant. Stern & Rushmore, for respondents.

MARTIN, J. In March, 1890, Andrew J. Davis died in the state of Montana, possessed of a large amount of real and personal property in that state, in the state of New York, and elsewhere within the United States. He left, him surviving, the plaintiff, who was a brother, and the defendants, who, with the exception of Anson Malby, were his brothers and sisters, or the surviving children of deceased brothers and sisters. The plaintiff and defendants Ellen S. Cornue, Joshua G. Cornue, and Harriet R. Sheffield are residents of this state. Other of the defendants reside elsewhere. At the time of his death, Andrew J. Davis was supposed to have been unmarried, and to have died intestate; but, soon after, one Thomas J. Davis appeared, and claimed to be his son and sole heir. In view of this and other apprehended claims of a like nature, two of the brothers and three of the sisters of the decedent entered into an agreement with the plaintiff whereby the latter agreed to institute, prosecute, and defend the necessary actions to establish the rights of the parties against Thomas J. Davis and all others making like claims, and to pay all the necessary expenses of such litigation, not exceeding \$200,000. In consideration of such agreement by the plaintiff, it was by the other parties agreed that the plaintiff should receive one-half of the amount that each party to the contract was or should become entitled to recover from the estate of Andrew J. Davis. The plaintiff was to receive such share directly from the estate, or its legal representative. Shortly after this agreement was made, an alleged will of Andrew J. Davis was found, by which John A. Davis, a brother of the testator and one of the parties to the agreement, was made sole residuary legatee of the testator, subject to three legacies, which need not be considered. Upon the discovery of this will, John A. Davis executed a new agreement to the plaintiff, which recited the former contract, and provided that it should be applicable to the estate coming to him under the will of Andrew J. Davis, so far as the plaintiff was concerned. Subsequently John A. Davis offered the will for probate in the district court of the Second

judicial district in the county of Silver Bow, in the state of Montana. The probate of this will was contested by four of the defendants, who were not parties to the plaintiff's agreement. While the contest was pending, and in January, 1893, John A. Davis died intestate, leaving a widow and several children. His son John E. Davis was appointed administrator of his estate, and substituted as the proponent of the will of Andrew J. Davis. At this stage of the proceedings, and while the contest was still pending, the defendants, with full knowledge of the two agreements mentioned, entered into a fraudulent and corrupt agreement or conspiracy to divide the assets and proceeds of the estate of Andrew J. Davis among themselves, and to deprive the plaintiff and the defendants Calvin P. Davis, Diana Davis, Harriet Wood, and Elizabeth S. Bowdoin of their rightful shares and interests therein. In pursuance of such agreement or conspiracy, it was stipulated by and between the defendants that the defendants Henry A. Root, Sarah M. Cumming, Harriet R. Sheffield, and Henry A. Davis should withdraw their objections to the probate of the will, discontinue their contest, and allow the same to be admitted to probate; thereby cutting off the rights of the plaintiff and the defendants Calvin P. Davis, Diana Davis, Harriet Wood, and Elizabeth S. Bowdoin, as next of kin and heirs at law of Andrew J. Davis. It was also stipulated that the estate should be divided among the defendants Ellen Cornue, Joshua G. Cornue, Harriet R. Sheffield, Henry A. Davis, Andrew J. Davis, Jr., John E. Davis, Edward A. Davis, George W. Davis, Charles G. Davis, Maurice A. Davis, Thea Jane Davis, Sarah M. Cumming, Mary Louise Dunbar, Elizabeth S. Ladd, and Charles H. Ladd, in proportions that need not be stated. In pursuance of such fraudulent stipulation, the will was admitted to probate, and a decree of distribution entered in accordance with its terms, dividing the estate among persons not mentioned in the will, and excluding the plaintiff and other of the defendants from any share or interest therein, either under the agreement, or as heirs or next of kin of Andrew J. Davis. Neither the plaintiff, nor any of the defendants excluded in the division of the estate of Andrew J. Davis, was a party to the proceeding in which such decree was made. The court making the decree had no jurisdiction to do more than to reject or admit the will to probate, and administer the estate according to its terms. All further proceedings were null and void. The defendants have little, if any, property, outside of their interest in that estate, and, except for such interest, they have no financial responsibility. A portion of them reside in various states other than the state of New York. If the estate is divided among them according to such decree, the interests and shares of the plaintiff and certain of the defendants will become dissipated and lost, and

it will be impossible for them to recover their rights therein, secure their share thereof, or to save themselves from being effectually defrauded and deprived of their shares therein. A multiplicity of actions will be required to recover such interest, and, even if such actions are brought, they will be wholly insufficient and inadequate to accomplish that purpose, and therefore great and irreparable injury to them would be the result. The foregoing is a brief statement of the substance of the complaint, and of the facts admitted by the defendants' demurrer. The relief sought by this action is that the defendants who, under the decree mentioned, were to receive or distribute this property, be enjoined from distributing it, or taking or receiving any part thereof, without recognizing or providing for the rights of the plaintiff and the excluded defendants, until those rights shall be determined.

The questions of law which are certified to this court for determination are (1) whether the supreme court had jurisdiction of this action, and (2) whether the complaint states facts sufficient to constitute a cause of action. Thus, if the court might have declined to entertain jurisdiction, or might, in its discretion, have refused to restrain the defendants served from accepting and disposing of any portion of the estate, still, as no such question has been certified to this court, it is not before us for determination, as this court has power only to answer the questions thus presented. Code, § 190. In determining these questions, all the allegations stated in the complaint, as well as all that can be implied from them by reasonable and fair intendment, must be regarded as admitted by the defendants' demurrer. When this rule is given its proper effect, it becomes obvious that the complaint in this action is not subject to the objections urged against its sufficiency. That the court had jurisdiction of the persons of the demurring defendants and of the plaintiff cannot be denied. It in no way appears that the other defendants have not been, or may not be, properly served with process in this action, and the court thus obtain jurisdiction of all the parties. Moreover, a portion of the property belonging to the estate of Andrew J. Davis is within the jurisdiction of the courts of this state. It is a familiar rule that a court of equity may render a decree in regard to property, even when in another state or country, and, in effect, stay the execution of a foreign judgment, or a judgment recovered in a federal court, when the parties are within the jurisdiction of the court. Pomeroy, in his work on Equity Jurisprudence (volume 3, § 1318), says: "The jurisdiction to grant such remedies is well settled. Where the subject-matter is situated within another country or state, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which directly affect and operate upon the person of the de-

fendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or refrain from certain acts towards it, and it is thus ultimately, but indirectly, affected by the relief granted." He mentions, as examples of this rule, suits for specific performance, the enforcement of express and implied trusts, relief on the ground of fraud, final accounting, settlement of partnerships, and the like. The same principle is recognized by this court in *Dobson v. Pearce*, 12 N. Y. 156, and *Stevens v. Bank*, 144 N. Y. 50, 39 N. E. 68. In the former case the plaintiff in a judgment recovered in this state brought an action upon it in the state of Connecticut, and the defendant in the judgment filed a bill in equity against the plaintiff in the courts of that state, alleging that the judgment was procured by fraud, and praying relief against it. The plaintiff in the judgment appeared and litigated the equity suit, and upon the trial the court decided that the judgment was obtained by fraud, and enjoined the plaintiff from prosecuting the action upon it. The original judgment was subsequently assigned, and the assignee brought suit thereon in this state, where it was held that the judgment of the Connecticut court was conclusive evidence that the original judgment rendered in this state was obtained by fraud. The decision in that case is therefore a direct authority to the effect that a court of one state may, where it has jurisdiction of the parties, determine the question whether a judgment between them, rendered in another state, was obtained by fraud, and, if so, may enjoin the enforcement of it. The decision in the *Stevens Case* is to the effect that courts of this state have power to set aside a judgment or decree obtained by fraud, although it was obtained in the United States court. In that case an action brought in the supreme court of this state was removed into the United States circuit court, and the question of the validity of the judgment of the United States court arose in an action subsequently brought in the state court. Upon an appeal to this court from a judgment of the latter, it was held that, while the state courts have no authority to stay proceedings in actions in federal courts, yet, when the parties to such an action are residents of the state, a court of equity may act in personam upon such parties, and direct them to proceed no further in the suit. In delivering the opinion in that case, Judge Bartlett quoted, with the approval of the court, the rule laid down by Judge Story, which is as follows: "Although the courts of one country have no authority to stay proceedings in the courts of another, they have undoubted authority to control all persons and things within their own territorial limits. When, therefore, both parties to a suit in a foreign country are residents within the territorial limits of another country, the courts of equity in the latter country may act in

personam upon those parties, and direct them by injunction to proceed no further in such suit. In such a case these courts act upon an acknowledged principle of public law in regard to jurisdiction. They do not pretend to direct or control the foreign court, but, without regard to the situation of the subject-matter of the dispute, they consider the equities between the parties, and decree in personam according to those equities, and enforce obedience to their decrees by process in personam." The learned judge who delivered the opinion in that case then adds, "This is the acknowledged rule in England and in this country," and cited numerous cases as sustaining that doctrine.

The authorities already referred to are adverse to the contention of the respondents, and seem to be decisive of the questions under consideration. We are of the opinion that the court had jurisdiction and authority to award a judgment against the defendants in personam, restraining them from receiving and dissipating the funds belonging to the estate of Andrew J. Davis, and that the complaint states facts sufficient to constitute a cause of action. It follows that the questions certified to this court should be answered in the affirmative, and that the judgment of the appellate division should be reversed, and that of the special term affirmed, with costs, with leave, however, to the respondents to withdraw their demurrer and answer the complaint within 20 days after notice of the judgment, upon the payment of the costs of the demurrer and costs of the appeals herein.

BARTLETT, J. (dissenting). The salient points brought out by the perusal of the complaint are that only the plaintiff and 2 heirs at law, out of 20 or more, reside in the state of New York; that there is before the court on this demurrer but 1 heir at law; that the court has jurisdiction neither of the entire subject-matter nor all of the parties; that the plaintiff asks no relief except a perpetual injunction; that no rights are sought to be adjudicated in this suit. In answering the questions certified as to jurisdiction, and as to whether the complaint states a cause of action, I do not pass on the sufficiency of the complaint, assuming plaintiff was in a court having power to deal with all the questions involved, as it is only necessary at this time to determine whether, under the admissions of the demurrer, there are facts established showing a cause of action of which the court below might have entertained jurisdiction. In view of the location of the subject-matter, the residence of the parties, and the pending litigation in Montana, I am of opinion that the court below properly declined jurisdiction. It is true, the complaint avers property in Montana, New York, and elsewhere; but against this vague and indefinite allegation, which would be true, as to this state, if there was a bank balance of \$50

here, we have the fact that the Montana probate court has assumed jurisdiction, and made a decree of distribution. Jurisdiction is not claimed in the briefs by reason of subject-matter located here, but is rested upon the power of the court to enforce its judgment in personam, as against the Montana decree. All that the plaintiff seeks in this jurisdiction is a permanent injunction, acting upon two heirs at law residing in this state, and such others as he may be able to serve, enjoining them from receiving shares under the Montana decree. The heirs residing elsewhere are at liberty to receive their interests under the decree, and the executors can proceed with the due administration of the estate, so far as we are advised by this record. It is manifest that the plaintiff can only secure adequate relief in a court of equity having jurisdiction of the subject-matter and parties, or having jurisdiction of all the parties, with full power to enforce its decree in personam. The learned counsel for the plaintiff states that he does not complain of admitting the will to probate, but of the alleged fraudulent agreement, and the decree of distribution based thereon. Nevertheless, he fails to ask for an adjudication of plaintiff's rights under the original agreement, and of the effect of the alleged fraudulent agreement, and the judgment of distribution carrying it out. He demands no decree that shall adjudge the rights of all the parties, and enable the legal representatives to wind up and distribute the estate. This is not an oversight, but is consistent with the theory of the case as argued by appellant's counsel. He says in his final brief, "The decision of this court will be binding only upon those over whom we have obtained our jurisdiction here, but it will be a precedent in the other suits of a similar nature that we have brought in other states for the same purpose." No general adjudication is contemplated, and the course pursued may lead to opposing decrees in different states, and this fact is of itself a good ground for declining to entertain jurisdiction. *Harris v. Pullman*, 84 Ill. 27.

In this connection the familiar rule is invoked that a court of equity may render a decree in regard to property, real or personal, in another state, and, in effect, stay the execution of a foreign judgment, or a judgment recovered in a federal court. The foundation of this jurisdiction is the presence of the parties in interest before the court, and the opportunity thus afforded to enforce the decree in personam. Mr. Pomeroy points out this rule with much clearness (3 Pom. Eq. Jur. § 1318) as follows, viz.: "Where the subject-matter is situate in another state or country, but the parties are within the jurisdiction of the court, any suit may be maintained and remedy granted which directly affect and operate upon the person of the defendant, and not upon the subject-matter, although the subject-matter is referred to in the decree, and the defendant is ordered to do or to refrain from certain

acts towards it, and it is thus ultimately, but indirectly, affected by the relief granted." The learned author, as illustrating this principle, refers to suits to compel the specific performance of a contract to convey land situate in another state, to enforce express or implied trusts, to secure relief on the ground of fraud, and to obtain a partnership accounting. The counsel for the plaintiff refers us to the recent case in this court of *Stevens v. Bank*, 144 N. Y. 50, 39 N. E. 68, as sustaining this action. It is true that in the case cited the appellants were enjoined from proceeding with a sale of premises under a decree of the circuit court of the United States, but this relief was granted in an omnibus suit, bringing in all parties in interest, and praying to set aside, as fraudulent, a prior judgment between some of the parties in the supreme court of the state of New York, and upon which the decree in the federal court was founded. The case cited is an apt illustration of the power of a court of equity, having all the parties before it, to enforce its decree in personam, without attacking the jurisdiction of the United States circuit court, or questioning the validity of its decree. The court also had jurisdiction of the subject-matter. The courts in England have gone so far as to hold that it rests in the discretion of the court having jurisdiction of the parties to determine whether it will restrain the litigation in a foreign court, or refuse the injunction and allow it to proceed. The question in such a case is how the matter in controversy can be most expeditiously adjusted, and the ends of justice obtained. *Bunbury v. Bunbury*, 1 Beav. 318; *Hyde v. Kemble*, 1 Sim. & S. 7; *Wedderburn v. Wedderburn*, 2 Beav. 208. In *Jones v. Geddes*, 1 Phil. Ch. 724, an injunction granted, on a suggestion of fraud, to restrain a party resident in England from prosecuting a suit in the court of session in Scotland to enforce a legal security against lands situate in that country, was, on appeal, dissolved, on the ground that, although the remedy afforded by the high court of chancery in cases of fraud was more effectual and complete than in the Scotch court, the question between the parties might, upon the whole, be more conveniently litigated, and with a more conclusive result, in Scotland than in England. See, also, 1 High. Inj. §§ 106, 107. In the case at bar, if the court below had acquired jurisdiction of all the parties, it might even then have been a question addressed to its sound discretion whether it would have retained the cause, or required the parties to proceed in the state where a court of competent jurisdiction had entered upon the administration of the estate in controversy. It would have presented the question of the due and orderly administration of justice under the comity of states. How much stronger is the argument, in view of the fact that the court below had not acquired jurisdiction of all the parties, and is in no condition to proceed with the trial of the cause? This is peculiarly a case where the local tribunals

should assume jurisdiction. The estate of the deceased is in due course of administration in the Montana probate court, and all of the parties in interest hostile to plaintiff have appeared in that proceeding. The decree recites that the estate in respect of which the probate is applied for "does not exceed the value of three million dollars," thus disclosing a large amount of property within the jurisdiction. If it proves to be the fact that the probate court has exceeded its jurisdiction in making the decree of distribution on the stipulation of parties, then it is essential that the aid of a local court of equity should be invoked, having power to enjoin the execution of the decree, and to finally determine the rights of all concerned in the estate as legatees, heirs at law, and next of kin, or as assignees, legal or equitable. The fact that the estate would be thus tied up in Montana, where so many of the interested parties have already appeared, renders it very probable that all concerned in the final distribution will be compelled to submit to the jurisdiction, if a suit in equity is brought where the subject-matter is located. It would seem that, in so far as the power to bring about this result rests in the discretion of the court below in assuming or declining jurisdiction, it should relegate the parties to the forum best calculated to do full justice to all concerned.

The precise result which the plaintiff seeks to secure in his present selection of remedies is not clear. There is no allegation that any of the estate has been paid out under the Montana decree. It is not claimed that the demurring defendant is possessed of any portion of the estate. This is not an action to enforce a lien against the fund in the hands of the distributees. As before pointed out, the plaintiff's object is to secure a perpetual injunction in every state where an heir at law can be found, enjoining him from receiving his share under the Montana decree. Assuming that plaintiff is successful in obtaining such an injunction against every heir at law outside of the state of Montana, how much nearer is he to a final determination of this controversy? Does not the obvious fact remain that resort must be had to a court of equity having full jurisdiction to determine the validity and effect of the original contracts, the fraud as alleged, the rights of all the parties, and to enter a decree of distribution that will protect the executor in winding up the estate? It seems to me clear that, even if it be assumed that the court below was vested with the partial and fragmentary jurisdiction invoked by plaintiff, it would have been contrary to the weight of authority, and opposed to the best interests of all the parties, to have exercised it. It is not necessary for the purposes of this case to define the exact limits of the jurisdiction of a court of equity in this state, under the facts alleged, as I prefer to rest this dissent upon the power of the court, in the exercise of a sound discretion, to decline jurisdiction.

The point is made that, under the questions certified for our determination, the judgment must be reversed, for the reason that the question as to jurisdiction does not call upon us to consider whether the supreme court had the discretion to refuse to entertain the action under the circumstances. It appears to me that this court cannot, under any fair or reasonable interpretation of the provisions of the Code, be confined to a strictly categorical answer. We are called upon to decide whether, upon the face of the complaint, the court below had jurisdiction of the action, and the interrogatory opens up this question in all its phases. I am of opinion that the complaint does state a cause of action, and that the court below had a limited jurisdiction, in a technical sense, but, within its discretionary power, it could decline to exercise it. This being the legal situation, we cannot assume, under the record as it stands, that the supreme court did not dispose of the case by the exercise of its discretion. The interlocutory judgment appealed from should be affirmed.

ANDREWS, C. J., and O'BRIEN and VANN, JJ., concur with MARTIN, J., for reversal. GRAY and HAIGHT, JJ., concur with BARTLETT, J., for affirmance.

Judgment reversed.

(151 N. Y. 190)

PEOPLE ex rel. KEENE v. KINGS COUNTY et al.

(Court of Appeals of New York. Dec. 15, 1896.)

BRIDGE BETWEEN COUNTIES — LIABILITY TO CONSTRUCT — PUBLIC HIGHWAYS — HOW CREATED.

1. The liability of counties to construct bridges over waters dividing them only exists where there is a lawful highway which would be connected by them, and of which the bridge would form a part.

2. A turnpike road, built by a private corporation in 1836, but abandoned by the company in 1878, and thereafter used by the public as a highway, and recognized as such by the county authorities of the two counties in which it was located, such authorities passing resolutions directing that a bridge be constructed over a stream between the counties to connect the two parts of the road, is a lawful public highway.

Appeal from supreme court, general term, Second department.

Application by Roswell W. Keene for a writ of mandamus to compel the board of supervisors of Kings and Queens counties to construct a bridge across a stream which divides said counties. From a judgment of the general term (36 N. Y. Supp. 1131) affirming a final order directing the issuance of a peremptory writ, defendants appeal. Affirmed.

Francis H. Van Vechten, for appellants. Roswell W. Keene, respondent, in pro. per.

ANDREWS, C. J. The decision on the former appeal (142 N. Y. 271, 36 N. E. 1062), overruling a demurrer to the alternative writ, adjudged that on the facts stated the duty to

construct a bridge over Newtown creek rested upon the counties of Kings and Queens. It was alleged in the writ that Newtown creek was the boundary between the two counties, and this was conceded on the trial of the issues made by the return, and must be taken as an undisputed fact on this appeal. It was claimed on the part of the defendants on the argument of the demurrer that it did not sufficiently appear upon the allegations of the writ that Maspeth avenue was a public highway. This was an essential fact, for the reason that the liability of towns or counties to construct bridges over waters dividing them only exists where there is a lawful highway which would be connected by, and of which the bridge would form a part. *Beckwith v. Whalen*, 70 N. Y. 430. But it was held on the former appeal that it sufficiently appeared by the writ that Maspeth avenue was a public highway, and the decision proceeded on that assumption. After the decision on the demurrer, the defendants made a return to the writ, denying, among other things, that Maspeth avenue was a lawful highway, and upon the trial of the issues the history of Maspeth avenue and the facts bearing upon the controverted question were shown. The jury, under the direction of the court, found that Maspeth avenue was a public highway. This ruling presents the only question of any importance on this appeal. The facts are undisputed, and, if they established that Maspeth avenue was a lawful highway, and a finding to the contrary would have been set aside as contrary to the evidence, the ruling of the trial judge was justified. It is undisputed that from the year 1836 to the present time Maspeth avenue, on each side of Newtown creek, has been used as a public highway. It is also undisputed that from 1836 to the year 1878 a bridge was maintained spanning the creek, connecting the two parts of Maspeth avenue at that point. The avenue was not laid out under the general highway system of the state. It was originally a turnpike road, constructed by the Maspeth Avenue & Toll-Bridge Company, a turnpike corporation incorporated by chapter 113 of the Laws of 1836. The charter described the termini and general course of the road to be constructed, and authorized the company to construct and maintain a toll bridge over Newtown creek to make a continuous line. The duration of the charter was fixed by the original act at 30 years and was extended 15 years by a subsequent statute. The road was laid out and particularly described by commissioners appointed by the governor pursuant to the provisions of the Revised Statutes. 1 Rev. St. (2d Ed.) p. 581 et seq. In 1867, under the authority of chapter 598 of the Laws of 1867, a new corporation, known as the Maspeth Avenue & Bridge Company, was formed by the consolidation of the turnpike company and a railroad company. The new company possessed all the powers, and was made subject to all the restrictions, contained in the charters of the constituent

companies. In the same year the new corporation executed a mortgage on its property and franchises, which was foreclosed in 1873, and one Stanford became the purchaser on the sale. In 1875 or thereabouts the taking of toll was discontinued, and the bridge became decayed, and fell down, or was removed, and has never been replaced. Since 1878 neither of the two corporations mentioned nor the purchaser on the mortgage foreclosure have, so far as appears, exercised or claimed any right in Maspeth avenue. The inference is fully justified by what appears in the record that the parties interested abandoned to the public the roadway, and the road has been used by the public as an ordinary highway since the year 1878. In 1891 a formal dissolution of the Maspeth Railroad & Bridge Company, and a forfeiture of its charter and franchises were decreed in an action brought by the attorney general in the name of the people, in which the representatives of the purchaser on the foreclosure sale in 1873 were joined with the company as defendants.

We think there can be no doubt, on the undisputed evidence, that the part of Maspeth avenue lying in the county of Queens had become, long before this proceeding was instituted, a lawful public highway. It not only has been used as a highway for a long period, but under the highway system the town in which it is located has assumed to control it. It has for several years past been annexed to a road district, and public money has been appropriated and expended by the town authorities in making and repairing it. In addition, it has been recognized by the board of supervisors of Queens county as a highway, which will be hereafter more particularly referred to. The policy of the state, as indicated by legislation, is that public roads constructed by turnpike or other corporations under special charters or general statutes shall, on dissolution of the companies which constructed them, or their abandonment by such companies, become and be thereafter treated as public highways. The first section of the act, chapter 262 of the Laws of 1838, declares that "whenever any turnpike corporation shall become dissolved or the road discontinued, its road shall become a public highway and be subject to all legal provisions regulating highways." The third section makes substantially the same provision as to a toll bridge, when the corporation owning it shall become dissolved. By the act, chapter 87 of the Laws of 1854, plank and turnpike road companies organized under the act of 1847 are authorized, with the consent of stockholders, to abandon the whole or any part of their roads, and the statute declares "the plank or turnpike road, or the portion thereof so surrendered, shall cease to be the road or property of the company, and revert and belong to the several towns through which it was constructed." It was held in *Heath v. Barmore*, 50 N. Y. 302, that the act of 1854 applied as well to a plank road constructed on lands acquired by the company, and which before were not part of a highway, as to a plank

road constructed on an existing highway. The act, chapter 780 of the Laws of 1872, indicates the same public policy as the prior acts mentioned.

This case seems to be within the words of the act of 1838. The successor of the turnpike company has been dissolved, and the turnpike and bridge were long since abandoned by the former owners. The purchaser on the mortgage foreclosure stands in the same situation as the corporation to whose rights he succeeded. Laws 1866, c. 780. But, irrespective of the act of 1838, the public authorities of the counties of Kings and Queens have recognized in the most emphatic way that Maspeth avenue was and is a public highway. Prior to the institution of these proceedings, petitions had been presented to the boards of supervisors of both counties for the construction of a bridge to connect the two parts of Maspeth avenue, and in 1890 resolutions were passed by both boards directing that a bridge should be constructed. Subsequently, in 1891, the boards, desiring legislative sanction for the expenditure of a larger sum of money for this purpose than had been contemplated, caused an act to be prepared and presented to the legislature authorizing the work, which was enacted as chapter 290 of the Laws of 1891, but no proceedings were taken under it because the bill was in violation of article 3, § 18, of the constitution, which, among other things, prohibits the passage by the legislature of a private or local bill for building bridges, except in certain specified cases. The act was unnecessary, as the existing statutory authority was adequate to authorize the construction of the bridge by the two counties, as we held on the former appeal. The acts of the boards of supervisors to which reference has been made were explicit admissions by the public authorities of both counties that Maspeth avenue was then a public highway, extending into both counties, for otherwise there would be no obligation on either to construct the bridge. It does not appear that the authorities of Kings county had worked or improved the part of the avenue in that county. But the action of the board of supervisors of Kings county is quite as significant upon the question whether the part of Maspeth avenue in that county was a public highway as any action of the town authorities would have been. It furnishes reasonable ground for the presumption that the rights of the turnpike company and its successors in and to Maspeth avenue, if any existed, had in some way been extinguished, and that it had become a legal public highway. It was not shown that the corporate authorities of Kings county had ever refused to recognize it as a highway, and no explanation was attempted to be made of the action of the board of supervisors so as to make it consistent with the claim that it had not acquired the character of a public highway. We think that upon the facts proved the judge was authorized to

direct a finding that Maspeth avenue, as laid out in 1836, was, and now is, a public highway. This disposes of the only material question on this appeal, and the order appealed from should therefore be affirmed. All concur. Order affirmed.

(151 N. Y. 186)

DE WOLFE v. ABRAHAM et al.

(Court of Appeals of New York. Dec. 15, 1896.)

CAUSES OF ACTION — JOINDER — SLANDER AND FALSE IMPRISONMENT.

1. Under Code Civ. Proc. § 484, allowing several causes of action to be united, "where they are brought to recover * * * (2) for personal injuries, except libel, slander; * * * (3) for libel and slander;" and providing that it must appear on the face of the complaint that causes so united belong "to one of the foregoing subdivisions,"—causes of action for slander, and for the false imprisonment of plaintiff at the times the words were uttered, cannot be united. 89 N. Y. Supp. 1029, reversed.

2. Nor do such causes arise "out of the same transactions," within subdivision 9 of said section, though they originated at the same time.

Appeal from supreme court, appellate division, Second department.

Action by Florence Angell De Wolfe against Abraham Abraham and others for slander. From an order of the appellate division (39 N. Y. Supp. 1029) reversing an order denying plaintiff's motion to amend the complaint, defendant appeals. Reversed.

Paul E. De Fere, for appellants. John C. Coleman, for respondent.

BARTLETT, J. The plaintiff sued the defendants, merchants in the city of Brooklyn, for slander, alleging that, at their place of business, and in the presence and hearing of a large number of people, the defendants, through their lawful agents, charged plaintiff with theft, in that she had stolen from them a certain ring. The plaintiff's counsel, in opening the case to the jury, stated that the alleged slander was not uttered by the defendants, or either of them, but by a clerk or salesman in their employ, that plaintiff, at the time of the slander, was falsely imprisoned by a detective of defendants; and that the plaintiff sought to recover damages for false imprisonment and the slander. Thereupon the counsel for defendants moved, upon the complaint and the opening, for a dismissal, upon the ground that the defendants were not liable for the slander of their clerk, and that the complaint was solely for slander. This motion was denied, and the plaintiff was allowed to withdraw a juror for the purpose of applying to the special term for leave to amend her complaint, so as to allege a cause of action for false imprisonment against the defendants. A motion was accordingly made at special term, and the justice presiding held that the proposed amended complaint contained a union of the causes of action for slander and false imprisonment, and denied the mo-

tion. On appeal the appellate division reversed the order of the special term, and allowed the amendment, holding that "injury at the same time to the person by physical violence and to the character by language may well be regarded as parts of a single tort." The question of law is certified to us, "whether, under all the circumstances of the case, the plaintiff should have been allowed to amend her complaint for slander by adding thereto the statement of a cause of action for false imprisonment."

We are unable to agree with the conclusion, reached by the learned appellate division, that injury at the same time to the person by physical violence and to the character by language may well be regarded as parts of a single tort. We think to so hold is to ignore a distinction that exists in all jurisdictions where the common law is administered. It is not necessary, however, to examine precedents, as the Code of Civil Procedure (section 484) is decisive of this appeal. This section provides that the plaintiff may unite in the same complaint two or more causes of action, whether they are such as were formerly denominated legal or equitable, or both, where they are brought to recover as set forth in nine subdivisions. The second, third, and ninth are the only ones material to this controversy. They read as follows: "(2) For personal injuries, except libel, slander, criminal conversation or seduction. (3) For libel or slander. * * * (9) Upon claims arising out of the same transaction or transactions connected with the same subject of action and not included within one of the foregoing subdivisions of this section." The section then provides generally "that it must appear upon the face of the complaint that all the causes of action so united belong to one of the foregoing subdivisions of this section." It thus appears that the legislature has indicated with great clearness and particularly the causes of action that may be united in the same complaint. The test is very simple, as all causes of action united must belong to the same subdivision of the section we are considering. False imprisonment is an injury to the person, and is embraced within subdivision 2, while slander is in express terms excluded therefrom, and placed in subdivision 3. The plaintiff's case is not aided by subdivision 9 of the section, which provides for uniting causes of action upon claims arising out of the same transaction. It does not follow that two causes of action, originating at the same time, arose, as matter of law, out of the same transaction, or are proved by the same evidence. *Anderson v. Hill*, 53 Barb. 245, 246. In the case last cited the general term of the supreme court held that causes of action for assault and battery and slander could not be united in the same complaint. Mr. Pomeroy, in his work on Code Remedies (section 474), in commenting on that case, says: "Two events happened simultaneously, the beating and the

defamation, but neither was a 'transaction,' in any proper sense of the word. The wrong which formed a part of one transaction was the beating; that which formed a part of the other was the malicious speaking. The plaintiff's primary rights which previously existed were broken by two independent and different wrongs. The only common point between the causes of action was one of time, but this unity of time was certainly not a 'transaction.'" The separate and distinct nature of the causes of action of false imprisonment and slander are apparent when we apply the test, under the circumstances of the case at bar, whether the same evidence would prove the plaintiff's case in the two actions. It is obvious that it would not. In the action for false imprisonment, plaintiff must show an unlawful arrest and detention. In the action for slander, the proof would be the uttering of the slander in the presence of others, its falsity, if justified, and extrinsic evidence of malice, if any existed. The measure and proof of damages in the two causes of action would be entirely different. The order appealed from should be reversed, with costs, the order of the special term should be affirmed, and the question of law certified to us is answered in the negative. All concur. Ordered accordingly.

(151 N. Y. 196)

FOLEY v. ROYAL ARCANUM.

(Court of Appeals of New York. Dec. 15, 1896.)

INSURANCE — CONSTRUCTION OF CONTRACT — WITNESS — PRIVILEGED COMMUNICATIONS — PHYSICIANS.

1. Where a certificate in a beneficiary society provides that it is issued on condition that the statements in the application for membership be made a part of the contract, the word "statements" includes a warranty in the application as to representations therein, and a waiver of all provisions of law preventing the applicant's physician from disclosing communications relative to his patient's physical condition.

2. The act amending Code Civ. Proc. § 836, so as to provide that a waiver of the law forbidding a physician to disclose, as a witness, information acquired in attending patients, can only be made on the trial, does not apply to an action on a policy issued before the amendment, and containing an express waiver of the privilege as to communications between the insured and his physician. 28 N. Y. Supp. 952, affirmed.

Appeal from supreme court, general term, Second department.

Action by Annie Foley against the Royal Arcanum on a mutual benefit certificate. From a judgment of the general term (28 N. Y. Supp. 952) affirming a judgment entered on a dismissal of the complaint, plaintiff appeals. Affirmed.

John M. Gardner, for appellant. S. M. Lindsley, for respondent.

HAIGHT, J. This action was brought to recover the amount alleged to be due upon a benefit certificate. The defendant is a fraternal beneficiary society, and as such issued to Jeremiah B. Foley a benefit certificate for

\$3,000, payable upon his death to his widow. The certificate was issued on the 5th day of April, 1890, and Foley died on the 14th day of July thereafter, leaving the plaintiff, his widow, him surviving. The defense interposed was misrepresentations as to his physical condition, and breach of warranties with reference thereto. The representations complained of were to the effect that he had no hemorrhoids, or diseases of the genital or urinary organs. The evidence taken at the trial tended to show that he was afflicted with these diseases; that he had consulted physicians with reference thereto, and had been advised to go to the hospital and submit to an operation, prior to his making his application for insurance herein; that, shortly after his application was allowed and the certificate issued to him, he went to a hospital in the city of New York, and submitted to an operation; and that he shortly thereafter died in the hospital. The evidence with reference to his physical condition was without substantial dispute, and, upon the theory that his statements were warranties, no question of fact was presented which it was necessary to submit to the jury. The application was in writing, signed by Foley, and, among other things, contained the following: "I do hereby warrant the truthfulness of the statements in this application, and consent and agree that any untrue or fraudulent statement made herein or to the medical examiner, or any concealment of facts by me in this application, * * * shall forfeit the rights of myself and my family or dependents of all benefits and privileges therein." And further: "I hereby expressly waive any and all provisions of law now existing, or that may hereafter exist, preventing any physician from disclosing any information acquired in attending me in a professional capacity or otherwise, or rendering him incompetent as a witness in any way whatever; and I hereby consent and request that any such physician testify concerning my health and physical condition, past, present, or future." The benefit certificate issued to him, among other things, provided that it was issued "upon condition that the statements made by him in his application for membership in said council, and the statements certified by him to the medical examiner, both of which are filed in the supremesecretary's office, be made a part of this contract." It is now urged that the "statements" referred to in the certificate do not include the warranty or waiver embraced in the application, and that such warranty and waiver became no part of the contract. This view, we think, should not be adopted. From the reading of the certificate, application, and medical examination, which is also signed by Foley, it is quite apparent that it was the understanding and intention of the contracting parties that the application was to become a part of the contract. We do not overlook the rule that, in construing contracts of insurance, we

should be strict as to the insurer, and liberal as to the insured. It does not in this case permit an escape from the manifest intention of the parties. To limit the word "statements," appearing in the certificate, to that which he has stated in the application with reference to his physical condition, excluding all other assertions, we think, would be too narrow and technical. The word, as commonly used, has a more comprehensive meaning. It is a formal embodiment in language of matter communicated to another. It is, to express the particulars of; to represent fully in words; make known specifically; explain; narrate; to recite facts, etc. See Cent. Dict. It is not necessarily limited to the statement of a fact or the substance of a case, but may include the provisions of a contract. The application, as we have seen, contained a warranty as to the correctness of the representations made, and also a waiver of the applicant's right to exclude the evidence of physicians who had treated him. He stated that he warranted, and that he waived, and, from allusions made in the certificate thereto, the conclusion is irresistible that it was the intention of the parties to make the warranty and the waiver a part of the contract.

A more serious question is presented with reference to the waiver. It is contended that a waiver before the trial is against public policy, and that the law at the time of the trial did not permit it. The law, as it stood at the time the contract was made, provided that "a person duly authorized to practice physic or surgery, shall not be allowed to disclose any information which he acquired in attending a patient, in a professional capacity, and which was necessary to enable him to act in that capacity." Code Civ. Proc. § 834. Section 836 provided that "the last three sections apply to every examination of a person as a witness, unless the provisions thereof are expressly waived by the person confessing, patient or the client." At the time of the trial the last section had been amended so as to require the waiver to be made upon the trial. It will thus be seen that the right to waive is given by the express provisions of the Code. The right of the legislature to establish rules of evidence, and to make them applicable to all trials thereafter had, is unquestioned, but it cannot pass an act impairing the obligations of a contract. The waiver, as we have seen, was a part of the contract. It was made to induce it. It was authorized by the Code, and is binding upon the parties, unless the making of it at that time was against public policy. In *Re New York L. & W. R. Co.*, 98 N. Y. 447-453, Earl, J., in delivering the opinion of the court, says: "Parties, by their stipulations, may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional, rights. They may stipulate for shorter

limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations, not unreasonable, not against good morals or sound public policy, have been and will be enforced; and generally all stipulations made by the parties for the government of their conduct or the control of their rights in the trial of a cause or the conduct of a litigation are enforced by the courts." In *Re Coleman's Will*, 111 N. Y. 220, 19 N. E. 71, an attorney of the testator was requested to sign the attestation clause of the will as a witness. It was held that this was an express waiver, within the meaning of section 836 of the Code. In this case it will be seen that the waiver was before the death, and intended to take effect after death, upon the probate of the will. *Ruger, C. J.*, in delivering the opinion of the court, says with reference thereto: "It cannot be doubted that, if a client in his lifetime should call his attorney as a witness in a legal proceeding, to testify to transactions taking place between himself and his attorney, while occupying the relation of attorney and client, such an act would be held to constitute an express waiver of the seal of secrecy imposed by the statute; and can it be any less so when the client has left written and oral evidence of his desire that his attorney should testify to facts, learned through their professional relations, upon a judicial proceeding to take place after his death? We think not. *McKinney v. Railroad Co.*, 104 N. Y. 352, 10 N. E. 544. The act of the testator in requesting his attorneys to become witnesses to his will leaves no doubt as to his intention thereby to exempt them from the operation of the statute, and leave them free to perform the duties of the office assigned them, unrestrained by any objection which he had power to remove." In *Adreveno v. Association*, 34 Fed. 870, the action was upon a certificate of insurance which contained a clause of waiver similar to the one we have under consideration. The statute of Missouri (Rev. St. 1879, § 4017) provided that: "The following persons shall be incompetent to testify: A physician or surgeon, concerning any information which he may have acquired from any patient while attending him in a professional character, which information was necessary to enable him to prescribe for such patient as a physician or to do any act for him as a surgeon." *Thayer, J.*, said: "The statute is construed in this state as conferring a privilege, merely, that may be waived. It is not declaratory of any public policy. The public is not concerned in excluding the testimony of a physician as to the condition of a patient, if the patient himself does not object to such disclosures. In this respect the courts of this state follow the rulings in New York and Michigan under a similar statute, as appears by the cases of *Cahen*

v. Insurance Co., 41 N. Y. Super. Ct. 296; *Railroad Co. v. Martin*, 41 Mich. 667, 3 N. W. 173. As the patient is at liberty to waive the privilege which the law affords him, it appears to me it is immaterial whether the patient waives the privilege by calling the physician to testify in his behalf, or whether he waives it, as in this case, by a clause contained in the contract on which the suit is brought; and, if the patient himself waives the privilege by a clause contained in the contract, that waiver, in my judgment, is binding on any one who claims under the contract, whether it be the patient himself or his representative." See, also, *Alberti v. Railroad Co.*, 118 N. Y. 77-85, 23 N. E. 35, 37; *Rosseau v. Bleau*, 131 N. Y. 177-184, 30 N. E. 52, 53. It appears to us that these cases dispose of the question under consideration, that the waiver is not in contravention of any principle of public policy, and that the amendment to section 836 of the Code, made after the contract, has no application. The judgment should be affirmed, with costs. All concur, except *MARTIN, J.*, not voting. Judgment affirmed.

(151 N. Y. 204)

DURYEA v. MACKKEY et al.

(Court of Appeals of New York. Dec. 15, 1896.)

ADMINISTRATOR—POWER TO MORTGAGE—ESTOPPEL.

1. A temporary administrator appointed pending a will contest has no authority, by virtue of his office, to mortgage the real estate of the decedent.

2. Pending a will contest, a temporary administrator was appointed. On refusal of probate of the will, by an order of court, he mortgaged the real estate, to obtain money for attorney's fees and costs. The decree was reversed. *Held*, that remainder-men who did not appear at the contest of the will, or know of the mortgage, or consent to its execution, were not estopped to deny its validity.

Appeal from supreme court, general term, Second department.

Action by John Duryea against John Mackey and others to foreclose a mortgage. From a judgment of the general term (26 N. Y. Supp. 1120) affirming a judgment in favor of plaintiff, defendants John Mackey, Jacob Mackey, and Freelove Lewis appeal. Reversed.

Albert G. McDonald, for appellants. Oscar Frisbie, for respondent.

ANDREWS, C. J. On the 6th day of May, 1882, when the mortgage for the foreclosure of which this action was brought was executed, the title to the mortgaged premises was in the heirs at law of Henry Cock, or in the defendants John Mackey, Solomon Cock, Jacob Mackey, and Freelove Lewis, devisees under his will. The testator, Henry Cock, died on the 31st day of March, 1881, leaving a will, whereby he appointed the defendant John Mackey the executor, and devised to him a life estate in the premises in question, with remainder to the other defendants named. The will was presented by the executor, John Mackey, for probate, soon after the death of

the testator, and probate was contested by certain persons; and on the 1st day of February, 1882, the surrogate entered a decree refusing to admit the will to probate, and awarding to the attorneys who appeared for the parties on the contest, including the attorneys for the proponent and the defendant Solomon Cock, costs and allowances, to be paid out of the estate of the decedent, amounting in the aggregate to \$1,600. The defendants Jacob Mackey and Freelope Lewis did not appear by attorney on the contest, and, so far as appears, they took no part therein. The defendant John Mackey, pending the contest, had been appointed temporary administrator of the estate. There were no moneys in his hands out of which the costs awarded by the decree could be paid, and the surrogate, on the same day on which the decree was entered denying probate of the will, made an order based on the written consent of the attorneys for John Mackey and Solomon Cock, and of the attorneys for the contestants, authorizing John Mackey, the temporary administrator, to borrow the sum of \$2,000 "as such temporary administrator, and to execute a proper bond and mortgage upon the real estate of which said Henry Cock died seised, to secure the payment of the same." Thereupon the temporary administrator borrowed of the plaintiff the sum mentioned, and, as security therefor, executed to him his bond in his official character, and the mortgage now in question. The money borrowed was applied by the temporary administrator to pay the costs and allowances awarded in the decree of the surrogate, and the sum of \$400 was received and retained by his attorney. Subsequently, on appeal to the supreme court, the decree of the surrogate denying probate of the will was reversed, and the will admitted to probate. The interest on the mortgage was paid by John Mackey for eight years, and payments were then discontinued. This action was brought to foreclose the mortgage. The defendant John Mackey, the life tenant, and the defendants Jacob Mackey and Freelope Lewis, two of the devisees in remainder, defended, on the ground that the mortgage was executed without legal authority, and was void; but the defense was overruled as to all of the defendants by the special term, on the ground that they were estopped to deny its validity, and the general term, on appeal, affirmed the judgment of foreclosure entered on the decree of the special term.

The judgment is manifestly erroneous as to the defendants Jacob Mackey and Freelope Lewis. The temporary administrator had no authority to mortgage the real estate of the decedent by virtue of his office. A temporary administrator, as such, takes no title to the real estate of a decedent, and can by no act of his, by virtue of his office, sell, charge, or incumber it, or in any way affect or prejudice the right of heirs or devisees. The mortgage executed by the temporary administrator in this case, which purported

to bind the whole estate, was therefore ineffectual to charge the interests of the devisees in remainder, unless the order of the surrogate authorizing the mortgage was a lawful exercise of his jurisdiction, or unless they have estopped themselves from questioning its validity. It is very clear that the order of the surrogate was without jurisdiction. The statute defines with great precision the power of surrogates in respect to the sale or mortgage of the real estate of decedents for the payment of debts, and the procedure to be taken. Code Civ. Proc. § 2749 et seq. The proceedings are to be instituted by petition presented by an executor or administrator other than a temporary administrator, or by a creditor. See section 2750. A citation must be issued, and proofs taken, and a formal adjudication made. It is sufficient to say that in this case there was no semblance of a proceeding under the statute. Nor did the surrogate acquire any jurisdiction to make the order granted by him from the consent of the attorneys who appeared on the contest of the will. His jurisdiction to order the sale or mortgage of the real estate of a decedent can only be exercised in the manner and by the procedure prescribed in the statute. His jurisdiction is limited, and substantial compliance with the procedure prescribed is necessary to the validity of any order he may make for the sale or mortgaging of the estates of decedents. The mortgage in question, therefore, did not bind the interests of the remainder-men, unless they are precluded upon the doctrine of estoppel. The temporary administrator took under the will a life estate. His interest, whatever it was, he could sell or mortgage. He procured the money on the mortgage on the representation that he was authorized to borrow it on the security of the land, and that all the parties in interest had consented to its execution. We think there can be no doubt that, in a court of equity, he cannot be heard to question that the mortgage was effectual to bind his life estate; and we are inclined also to the opinion that Solomon Cock, who expressly consented to the execution of the mortgage, is bound also, and that his interest in the land is subject in equity to the incumbrance.

But, as to the defendants Jacob Mackey and Freelope Lewis, there is no evidence which, according to established rules, precludes them from insisting that their interests in the land are not bound by the mortgage. They did not sign the consent presented to the surrogate. They were not consulted or advised as to borrowing the money. They did not know that the mortgage was to be executed, and first knew of its existence after the money had been obtained, and the mortgage had been delivered. It is possible that the testimony of Jacob Mackey may warrant the inference that he heard in a vague way that money was to be borrowed to pay the expenses of the litigation over the will. But it

falls far short of establishing that he knew that it was proposed to mortgage his interest in the land for that purpose. Although Jacob Mackey and Freeloove Lewis may have been benefited by the application of the money borrowed to pay the costs of the litigation, which, by the surrogate's decree, were charged on the whole estate of the decedent, this fact has no legal bearing in the case. The land could not be mortgaged without their consent, and, if they have been involuntarily benefited by the application of the money, they cannot be required to contribute to the extent of such benefit, through an enforcement of the mortgage. The case, on principle, seems very plain. The defendants Jacob Mackey and Freeloove Lewis did not consent to the mortgage, and they did not act and made no representation upon which the plaintiff relied, nor was there silence on their part when there was any occasion or duty to speak. *Thompson v. Simpson*, 128 N. Y. 270, 28 N. E. 627, and cases cited. The judgment has no foundation in law as to the appellants Jacob Mackey and Freeloove Lewis, and must therefore be reversed as to them. The situation is such that a new trial should be ordered generally, and on the new trial the rights of all the parties may be settled and defined. The judgment should be reversed, and a new trial ordered. All concur. Judgment reversed.

(151 N. Y. 210)

PEOPLE v. YOUNGS.

(Court of Appeals of New York. Dec. 15, 1896.)

REVIEW ON APPEAL—COURTS—DESIGNATION OF TERMS—CURING IRREGULARITIES—EXPERT WITNESSES—OPINION EVIDENCE—HARMLESS ERROR—IMPEACHING WITNESS.

1. An issue of fact determined by a jury upon evidence which is sufficient, though capable of diverse and opposing inferences, will not be disturbed on appeal.

2. Code Civ. Proc. § 232, requiring the supreme court justices, on or before December 1st in every second year, to appoint special terms, is merely directory as to date, and the fact that an appointment is not made on that day will not invalidate the term.

3. Any irregularity in the designation by the appellate division justices, prior to January 1, 1896, of special terms of court, arising from the fact that the appellate division had no legal existence until such date, was cured by a redesignation when the justices convened on that day.

4. Where a term of court was appointed by the body which the constitution and statute had designated for that purpose, and the grand jury was regularly drawn according to the forms of law, the fact that, in appointing such term the law was not strictly complied with is not ground for setting aside a conviction under an indictment found in that court.

5. It is not error to permit a medical expert, who has made a personal examination of a patient for the purpose of determining his mental condition, to give his opinion as to that condition at the time of the examination, without first disclosing the particular facts on which the opinion is based.

6. A nonexpert witness may not express an opinion on the subject of insanity or sanity, but must state the impression that the acts and declarations of the person concerning whom the in-

quiry is made produced on his mind at the time.

7. Error in allowing a nonexpert witness to state that defendant was rational is harmless where it appears from the entire evidence that the witness was only giving his impression, derived from the acts and declarations of defendant.

8. A medical expert, having testified that crying in most, if not in all, cases was no indication of insanity, was asked on cross-examination whether he had ever examined one H., and on objection to the question it was proposed to show that H. cried a good deal as defendant did, and that he was sent to an insane asylum on the doctor's certificate, but there was no offer to prove that H.'s crying was recognized by witness as a symptom of insanity, or that it influenced his action in making the certificate. *Held*, that the question and offer showed no basis for impeachment of the witness, and was properly rejected.

9. While the supreme court may grant a new trial for errors of law, though no exceptions were taken, it must appear that the accused was prejudiced by the erroneous rulings.

Appeal from supreme court, trial term.

William Youngs was convicted of murder, and appeals. Affirmed.

Louis H. Reynolds, for appellant. Z. S. Westbrook and L. F. Fish, for the People.

O'BRIEN, J. The defendant was convicted of murder in the first degree, and appeals to this court for a new trial. There is no dispute whatever with respect to the fact that on the 14th day of December, 1895, at the place charged in the indictment, the defendant shot and killed his wife with a revolver, having deliberately fired two shots at her, both of which took effect, and one of them inflicting a mortal wound producing death. The facts and circumstances attending the commission of the act are fully disclosed by the record, but it is not necessary to repeat them here at much length. The defense was insanity, or at least the existence, at the time of the commission of the act by the defendant, of such mental disturbance or defect of reason as to render him irresponsible for his act. Some proof was given by the defendant tending to support this defense, which was answered by the people by proof of his acts and declarations before and after the shooting, and by the testimony of medical experts to the effect that the defendant was sane at the time he committed the act charged. It cannot be and is not seriously claimed by the learned counsel for the defendant, that the verdict of the jury in finding that the defendant was responsible is against the weight of evidence, or that there is any just ground for complaint in that respect. It is proper to say that, after a careful examination of all the testimony in regard to the mental condition of the defendant at the time of the homicide, it does not fairly permit any other conclusion than that the shooting was the willful, deliberate, and premeditated act of a person who understood perfectly well the nature, quality, and consequences of his act. Indeed, but for the atrocious circumstances attending and preceding the act, and the absence of all cause, provocation, or apparent motive for the commission of the

crime, the defendant's responsibility, in the legal sense, could scarcely be doubted. It appears that the defendant and the deceased had been married something over six years, and had two children. They lived together until the month of October, 1895, when the deceased left the defendant, and entered the hospital for treatment of a private disease which she claimed had been communicated to her by the defendant. This disease seriously affected her health, and destroyed the sight of one of her eyes. Whatever may be the truth as to the responsibility of the defendant for his wife's condition, it is quite clear that she believed that he was the author of the wrong, and refused to live with him any longer, and finally threatened to apply for a divorce. The proof would seem to indicate that the wife looked upon the defendant with feelings of hatred and disgust, but that he was anxious to have her return, and resume her marital relations with him. He attempted to bring this result about through the intervention of friends and neighbors and otherwise, but failed. When he became convinced that his wife intended to separate from him, he sold his household effects, with the intention, apparently, of leaving the place. The deceased returned from the hospital about a week before the homicide, and with her children went to the house of a neighbor, where she had been invited by his wife and grown-up daughter, who evidently sympathized with her misfortunes. The defendant was, or pretended to be, jealous of the relations that existed between his wife and this neighbor, in whose house she had, for the time at least, taken up her abode; and this is the only motive suggested for the commission of the crime. Whatever may have been the real state of the defendant's feelings on this subject, there is no proof in the record to indicate that he had the slightest cause to suspect that anything improper had taken place between them, or was likely to. The deceased wife seems to have sought the shelter of this neighbor's house, for the time at least, for herself and children, and he and his wife and daughter extended it to her as an act of kindness. On the 14th day of December, 1895, the defendant went to this house, armed with a revolver, entered through the kitchen door without any warning or invitation, then passed into another room, where his wife was, and there fired the shot which caused her death. It appears that for some days prior to the homicide the defendant had the revolver in his possession, and practiced with it, and that he made various statements to different persons in the neighborhood with respect to his wife, and his intentions towards her, which the jury was warranted in interpreting as threats on his part to take her life.

Looking at the case upon the merits, it is impossible to find any ground for the interference of this court. The questions in the case were for the jury, and the verdict is

well supported by the evidence. While this court has the power, in a capital case, to review the facts, and to grant a new trial when satisfied that the accused has not had a fair trial, or when it appears that injustice has been done, yet it must observe the rules and principles which apply to all tribunals exercising appellate jurisdiction. It is the province of the jury to determine questions of fact depending upon conflicting evidence, and to declare by their verdict what the truth is; and when the issue of fact is once determined upon evidence which is sufficient, even though it may be capable of diverse and opposing inferences, this court has no more right than the trial court to substitute its own judgment in the place of that of the jury, or to usurp its legitimate functions. *People v. Kerrigan*, 147 N. Y. 210, 41 N. E. 494. There cannot be any serious ground for the claim, and, indeed, it is not claimed that this is a case which would justify this court in interfering with the facts as determined by the jury.

We can only consider, upon this appeal, certain exceptions taken at the trial, and which have been urged upon the argument as grounds for the reversal of the judgment. The defendant was indicted at a term of the court held on January 20, 1896, which was appointed by the justices of the appellate division in the Third department on December 3, 1895. On January 1, 1896, the same justices reconvened and made the appointments for terms of courts as before, thus ratifying what had been done at their first meeting. The justices were required to make these appointments by article 6, § 2, of the new constitution, and also by section 232 of the Code of Civil Procedure.¹ It is true that by the provisions of the Code they were required to make the appointments before the 1st day of December, 1895; but this, we think, was directory, and the fact that they did not make the designations until three days afterwards does not, we think, affect the validity of the act. The constitution conferred upon them this power in explicit language, and their jurisdiction was not affected by the circumstance that the act was not performed on the precise day that the legislature had designated for that purpose. It is further said that, as the appellate division had no legal existence under the constitution until January 1, 1896, the designation of the terms of the court on December 3, 1895, was premature. It is true that the jurisdiction of the appellate division as a court was not complete until January 1, 1896, and exists from that day only. But we think that this fact would not exclude the power of the justices after their appoint-

¹ Code Civ. Proc. § 232, provides that on or before December 1, 1877, and every second year thereafter, the justices of the supreme court must appoint the times and places for holding special terms of the supreme court and courts of oyer and terminer within their department.

ment, and before that day, to assemble and designate the terms of the court, and assign the justices who were to preside therein. The constitution required them to perform this duty without designating any time, and the legislature, under the constitution, had directed the performance of the act prior to the 1st of December. The designation of the particular day was, as we have already remarked, directory, and the observance of the date was not essential to the jurisdiction to perform the act.

But if it could be shown that there was any irregularity in the designation made by the appellate division justices arising from the fact that they did not constitute a court until the 1st day of January, 1896, still we think that the irregularity, if any, was cured by the redesignation on that day, when the jurisdiction of the court became complete. We think, therefore, that there is no substantial ground upon which the legality or regularity of the court where the indictment was found can be questioned. *People v. Herrmann*, 149 N. Y. 190, 43 N. E. 546. But, even if this were otherwise, and it could be said that the designation of the terms of the court was not in strict compliance with the constitution or the statute, the objection would not, we think, avail the defendant. The court in which the indictment was found was appointed to be held by the body which the constitution and the statute had designated for that purpose. The grand jury was regularly drawn from the body of the county, summoned and sworn, as provided by law. It was at least a *de facto* jury, selected and organized under the forms of law, and that was sufficient for the protection of all the defendant's constitutional rights. *People v. Petrea*, 92 N. Y. 128.

It appears by the record that certain medical experts were called as witnesses by the prosecution, who testified that they had made a personal examination of the defendant with reference to his sanity, and were then asked whether, in their opinion, he was sane at the time of such examination. These questions were objected to by the defense as incompetent, but the objection was overruled, and there was an exception. It is now urged that these experts should not have been permitted to express an opinion without first stating the facts upon which such opinion was based. The testimony of experts is an exception to the general rule which requires that the witness must state facts and not express opinions. In such cases the opinion of the witness may be based upon facts so exclusively within the domain of scientific or professional knowledge that their significance or force cannot be perceived by the jury, and it is because the facts are of such a character that they cannot be weighed or understood by the jury that the witness is permitted to give an opinion as to what they do or do not indicate. In such cases it is the opinion of the witness that is supposed to

possess peculiar value for the information of the jury. Of course, all the facts or symptoms upon which the opinion is based may be drawn out also either upon the direct or cross-examinations. It is undoubtedly the better practice to require the witness to state the circumstances of his examination, and the facts, symptoms, or indications upon which his conclusion is based, before giving the opinion to the jury. But we think that it is not legal error to permit a medical expert, who has made a personal examination of a patient for the purpose of determining his mental condition, to give his opinion as to that condition at the time of the examination, without, in the first instance, disclosing the particular facts upon which the opinion is based. The party calling the witness may undoubtedly prove the facts upon which the opinion is based, and, as we have already observed, that is doubtless the safer practice. It may also be true that the court, in the exercise of a sound discretion, may require the witness to state the facts before expressing the opinion, and in all cases the opposite party has the right to elicit the facts upon cross-examination. But the precise question here is whether the court committed an error in permitting the witness to give the opinion before the facts upon which it was founded were all disclosed, and we think that, when it is shown that a medical expert has made the proper professional examination of the patient in order to ascertain the existence of some physical or mental disease, he is then qualified to express an opinion on the subject, though he may not yet have stated the scientific facts or external symptoms upon which it is based. *People v. Kemmler*, 119 N. Y. 580, 24 N. E. 9; *People v. Taylor*, 138 N. Y. 393, 34 N. E. 275; *People v. Hoch*, 150 N. Y. 291, 44 N. E. 976.

The prosecution called several persons as witnesses, who were not experts, and they testified to various acts and conversations with the defendant at or about the time of the homicide, and they were then asked whether those acts and conversations were rational or irrational, and the answer was that they were rational. These answers were received under objection and exception by the defendant's counsel. It is now urged that these questions were improper; that the inquiry should have been, not whether the defendant was absolutely rational or otherwise, but as to the opinion or impression which the witness derived from his acts and conversations at the time on this subject, or with reference to his mental condition. It is doubtless true that such is the form of the question which the courts have long sanctioned for the examination of nonexpert witnesses. They are not allowed to express an opinion on the subject of sanity or insanity, or as to whether the party was in fact rational or irrational, but only to state the impression that the acts and declarations of the party concerning whom the inquiry is made produced upon their minds

at the time. *Paine v. Aldrich*, 133 N. Y. 544, 30 N. E. 725; *Clapp v. Fullerton*, 34 N. Y. 190; *O'Brien v. People*, 36 N. Y. 276. But, while these questions were improper in form, it is quite apparent, when the whole examination is read, that the witnesses were all the time stating nothing more than their opinions and impressions derived from the acts and conversations stated, and such must have been the understanding of the court and jury. There was, no doubt, a technical error committed in permitting the district attorney to propound the questions in that form, but it is equally clear, we think, that the defendant was in no way harmed or prejudiced by the ruling. When the testimony given by these witnesses is carefully examined, it will be seen that it amounts to nothing more than the impressions which the witnesses derived from the acts and conversations related, and there is no reason to believe that it was understood by the jury in any other sense. Moreover, it should be observed that the objection to the question to these witnesses as well as that to the experts was so general as not fairly to indicate the ground now urged against the ruling.

It appeared from the testimony of the defendant's witnesses that for some time prior to the homicide, and while his wife was in the hospital, and when it became known to him that she intended to separate from him, he was seen to exhibit considerable emotion, and on some occasions to shed tears. It was upon his acts, statements, and general appearance on such occasions that the witnesses called in his behalf formed their opinions in regard to his mental condition. Whether his condition at these times was due to any mental disease or to his intemperate habits, was, of course, a question for the consideration of the jury. But the principal medical expert called by the people was asked whether those acts and this conduct on the part of the defendant did not indicate insanity. The witness stated, in substance, that crying in most, if not in all, cases is no indication of insanity; that it is more an indication of returning sanity, as the insane never cry. On cross-examination he was asked by the defendant's counsel whether he had ever examined a man named Jacob Heiser. This question was objected to as incompetent, and the counsel then stated that the purpose was to show that the same symptoms existed in the case of Heiser, and upon the doctor's certificate he was sent to an insane asylum; that he cried a good deal, as the defendant did. The court sustained the objection, and excluded the answer. No exception appears to have been taken to this ruling. We cannot say that the ruling was erroneous without injecting into the offer some things which it does not contain as it appears in the record. We could, perhaps, fairly assume that the doctor who made the certificate upon which Heiser was sent to the asylum was the witness then upon the stand; but there was no offer to

show that the man had been sent to the asylum upon the same indications that existed in the case of the defendant, and upon those alone. If such had been the offer, the inquiry was, perhaps, admissible as tending to affect the credibility of the witness and the value of his opinion with the jury. Whether the witness had or had not at some time examined another person, was, upon its face, a collateral and immaterial inquiry. There was no error in excluding the answer, unless it appeared from the offer that it was a proper basis for impeaching the witness by proof of some act or declaration out of court which was contradictory of or inconsistent with his testimony already given. What the counsel proposed to show was that Heiser was sent to the asylum upon the doctor's certificate, though he cried as the defendant did. It was not proposed to show that this was the ground upon which the certificate was made, or even that the witness observed or knew of any such symptom in his case. In order to render the question competent as a basis of impeachment, it should have appeared from the offer that the witness made a certificate or statement in another case contradictory of or inconsistent with his testimony at the trial. To say that Heiser cried at some time or frequently was of no consequence, since it was not proposed to go further, and show that the witness recognized it as a symptom of insanity, or that it entered into and influenced his action in making the certificate.

Legal error cannot be predicated upon an offer to impeach a witness when the offer is expressed in language so vague and indefinite. The court may properly exclude such collateral matters, unless it is made to appear clearly that the evidence will tend to impeach or discredit the witness, and it seems to us that the offer made by the defendant's counsel did not meet this requirement. A question, or an offer of proof intended to be the foundation of the impeachment of a witness, should be clear and specific. If it does not embrace all the elements of a contradictory or inconsistent act or statement made out of court, it may properly be excluded. The question and the offer, when read together, did not necessarily indicate to the court any proper basis for an impeachment of the witness. But, even if all this were otherwise, there is no reason to believe that the defendant was in any degree prejudiced by the ruling. It was, at most, a technical error in excluding a collateral inquiry into the conduct of the expert in granting a certificate in another case, and there is no ground stated to justify the belief that, had it been pursued, it would have resulted in anything that could have benefited the defendant upon the issues in the case. The power of this court to grant a new trial upon erroneous rulings at the trial is ample, even if no exception has been taken; but in such a case it should appear that some principle or rule of law has been violated, to the prejudice of the accused. If it appeared

in this case that the accused had been or might have been prejudiced by an erroneous ruling, we would not hesitate to grant a new trial, though no exception appears in the record. But a careful examination of the whole case has satisfied us that the ruling, even if deemed to be erroneous, was of no consequence, and could have had no effect upon the result. The power to grant a new trial for legal error must be exercised in conformity with another provision of the statute, which requires that judgment upon an appeal must be rendered without regard to technical errors or defects, or exceptions which do not affect the substantial rights of the parties. Code Cr. Proc. § 542. The rulings which we have referred to, and which are discussed at length upon the brief of the defendant's counsel, fall, as we think, within the provisions of this section. On the whole case we are compelled to say that the record does not disclose any substantial ground upon which this court would be justified in interfering with the judgment, and it must, therefore, be affirmed. All concur; BARTLETT, J., in result. Judgment affirmed.

(146 Ind. 293)

FIELD v. BROWN et al.

(Supreme Court of Indiana. Nov. 24, 1896.)

JURY—RIGHT TO JURY TRIAL—ACTION—EQUITABLE DEFENSE—ASSUMPSIT—COMPLAINT—SUFFICIENCY.

1. Rev. St. 1894, § 412 (Rev. St. 1881, § 409), provides that issues of law and of fact in causes that, prior to June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court, and issues of fact in all other causes shall be triable as the same are now triable; that, in case of the joinder of causes of action which, prior to said date, were of exclusive equitable jurisdiction, with causes of action or defenses which, prior to said date, were designated as actions at law, and triable by jury, the former shall be triable by the court, and the latter by a jury, unless waived, etc. *Held* that, where a complaint states both equitable and legal causes of action, in separate counts, the causes of action may be severed, and those of a legal character be tried by a jury.

2. In assumpsit for money had and received, it appeared from the answers that defendants, except one, were bankers; that, between February, 1887, and January, 1891, they received from plaintiff and his agents, by way of deposit, more than \$300,000, all of which they had paid out on plaintiff's checks; and that the deposits consisted of 600 items, and the payments on the checks of 800 items. *Held*, that the defense was not equitable, on the ground that the transactions for investigation were "long accounts."

3. In assumpsit for money had and received, where the complaint alleges the receipt of money by defendant to the use and benefit of plaintiff, it need not allege a demand.

Appeal from circuit court, Lawrence county.

Action by Joseph Field against Clark Brown and others. There was a judgment in favor of defendants, and plaintiff appeals. Reversed.

Joseph Giles, W. H. Talbott, Zaring & Hotel, and Harvey Morris, for appellant. Wm. Ferrell, Alspaugh & Lawler, W. P. Rogers, and Elliott & Elliott, for appellees.

HACKNEY, J. The only question presented by the record is as to whether any of the issues joined in the lower court were triable by a jury. The suit was by the appellant, in three paragraphs of complaint. The first sought a recovery for money had and received, and was in the ordinary form; the second sought an accounting, and the recovery of the balance to be ascertained; and the third alleged fraud in certain stated settlements, to set aside such settlements, to obtain an accounting, and to recover the amount to be ascertained in his favor. The appellant concedes, and correctly, we have no doubt, that the second paragraph presented an issue of equitable cognizance prior to the 18th day of June, 1852. The third paragraph was of like character, and would have invoked the same jurisdiction. The first paragraph, however, tendered an issue triable at law, and not in chancery. This conclusion is conceded by the appellees. By the statute (Rev. St. 1894, § 412; Rev. St. 1881, § 409) it is provided that "issues of law and issues of fact in causes that prior to the 18th day of June, 1852, were of exclusive equitable jurisdiction, shall be tried by the court; issues of fact in all other causes shall be triable as the same are now triable. In case of the joinder of causes of action or defenses which, prior to said date, were of exclusive equitable jurisdiction, with causes of action or defenses which, prior to said date, were designated as actions at law and triable by jury,—the former shall be triable by the court, and the latter by a jury, unless waived," etc. It is manifest, from the language of this statute, that there may properly be joined causes or defenses one of which is triable by the court and the other by a jury. So it does not follow that, because the second and third paragraphs of complaint presented causes triable only by the court, the cause presented by the first paragraph was thereby "drawn into equity," and was triable only by the court.

The cases of *Evans v. Nealis*, 87 Ind. 267; *Carmichael v. Adams*, 91 Ind. 526; *Railway Co. v. Griffin*, 92 Ind. 487; *Miller v. Bank*, 99 Ind. 272; *Lake v. Lake*, Id. 339; *McBride v. Stradley*, 103 Ind. 465, 2 N. E. 358; *Towns v. Smith*, 115 Ind. 490, 16 N. E. 811; and *Monnett v. Turple*, 132 Ind. 482, 32 N. E. 328,—have been cited for the appellees in support of the contention that the primary features of the case presented by the complaint, as a whole, were of equitable cognizance, and that the entire case, therefore, became subject to equitable jurisdiction. There is no doubt, from those cases and others, that, where equity takes jurisdiction of the essential features of a cause, it will determine the whole controversy, though there may be incidental questions of a legal nature. The case of *Carmichael v. Adams* illustrates that rule. There, in a single paragraph of complaint, the plaintiff sought to recover upon a note and to foreclose a mort-

gage securing it. It was held that the essential relief sought (the foreclosure of the mortgage) was of equitable cognizance, and that the incidental question (that of ascertaining the amount due upon the note) passed within the equitable jurisdiction. We have read carefully all of the cases cited, and none of them can be construed as holding that numerous causes of action, stated in various paragraphs of complaint, may not be severed, and those of an equitable nature tried by the court, and those of a legal character tried by a jury. If the cases could be so construed, they would certainly be in direct conflict with the statute cited. It is insisted, however, that the issues as formed upon this paragraph of complaint,—that is to say, those introduced by the answers, when considered in connection with said paragraph of complaint,—become of equitable cognizance, and triable by the court. The answers were numerous, and included answers in denial, payment, set-off, and former adjudication,—all legal defenses; and it appeared from other answers that the appellees other than Brown were bankers, and that, between February, 1887, and January, 1891, they received from the appellant and his agents, by way of deposit, large sums, aggregating more than \$300,000, all of which they had paid out upon appellant's checks, and that the deposits consisted of 600 items, and the payments upon checks consisted of 800 items. As to any of the last-mentioned answers, it may well be doubted whether any one of them is more than an argumentative plea of payment, or in denial of the allegations of the first paragraph of complaint. They present no affirmative issue, and seek no affirmative relief. The statute we have quoted very plainly recognizes the right to join legal and equitable causes of action, and also to join legal and equitable defenses. This right is one of the features of our Code practice. While we have seen that legal and equitable causes may have been joined, though we should look to the answers to carry the questions arising upon the first paragraph of complaint into the class designated as equitable, we are not able to reach the conclusion that any equitable defense is pleaded in any of such answers.

The insistence of appellees' learned counsel is that the answers last mentioned disclosed that the transactions for investigation were "long accounts," and, from their complex and multifarious character, subjected them to the jurisdiction of the chancellor. To this proposition are cited a number of decisions,—one a Wisconsin case, the decision in which is based upon section 2864 of the Revised Statutes of that state, authorizing a reference in matters involving complicated accounts. Others are New York cases, decided with reference to section 1013 of the Code of that state, authorizing the submission of such accounts to a referee. Another is *Dubourg de St. Colombe v. U. S.*,

7 Pet. 625, where the trial judge, in an injunction suit, heard the evidence of the matters in question, and it was held that such matters should have been referred. From the nature of the suit it was of equitable cognizance, regardless of the inquiry which the court held should have been referred. Tied. Eq. Jur. § 533, is also cited, but the author there discusses the growth of the old common-law action of account render into the equitable suit for an accounting, by reason of the more satisfactory aids in the nature of discovery within the latter jurisdiction. He then shows that a suit for an accounting may be had, as an equitable remedy, where the accounts are all on one side, and there are circumstances connected with the transaction which create great complications or difficulties in the way of a settlement at law; where there are mutual accounts, and there is great difficulty of securing a satisfactory accounting; or where the monetary obligations arise between parties occupying a fiduciary relation. Bisp. Eq. § 484, is cited by appellees. It is there said: "While the jurisdiction of courts of chancery in matters of account is limited by the considerations above stated, and perhaps by others, it is, nevertheless, difficult to draw the line with absolute precision. It may, however, be affirmed that, in all cases in which an action of account would be a proper remedy at law, the jurisdiction of a court of equity is undoubted; and that this jurisdiction will extend, moreover, to all cases of mutual accounts, and also to cases in which the accounts are all on one side, but are very complicated and intricate, although such accounts would not be cognizable in the common-law action, as not existing between those parties by and against whom account render will lie. In short, the jurisdiction of the chancellor covered all cases for which account render would lie, besides many to which that action did not extend." Some of the limitations referred to in the section quoted are stated in section 483 of that work: "It must not be supposed, however, that a court of chancery can draw to itself every transaction between individuals in which an account between the parties is to be adjusted. Its jurisdiction is limited by certain restrictions. A court of equity cannot take cognizance of every action for goods, wares, or merchandise sold and delivered, or for money advanced, where partial payments have been made, or of every contract, express or implied, consisting of various items, in which different sums of money have become due, and different payments have been made. * * * Where the receipts or payments, or both, are all on one side, a bill for an account will not lie." To clearly comprehend the meaning of the author in these sections, we must look to the definitions of the phrases "bill for account" and "account render." They were formerly employed in the common-law practice to denote the procedure by which an accounting was secured, and, as indicated by Tiedeman, *supra*, the frequent inadequacy

of the remedy at law or by jury trial gave rise to the equitable remedy. But this did not carry into equity every proceeding to enforce the collection of an unliquidated demand consisting of several items. "The difficulty of drawing the line with absolute precision" between those demands of an equitable and those of a legal nature has resulted in the more modern action of assumpsit, a legal remedy, and the suit for an accounting, an equitable remedy. Burrill, Law Dict. "Account," p. 22; Bouv. Law Dict. "Account," p. 85; 2 Greenl. Ev. §§ 34, 35; Bisp. Eq. §§ 479, 480, 481, 482; Enc. Pl. & Prac. pp. 84, 85. In the latter it is said: "'Account,' sometimes called 'account render,' was a form of action at common law against a person who, by reason of some fiduciary relation, was bound to render an account to another, but refused to do so. In England the action early fell into disuse. And, as it is one of the most dilatory and expensive actions known to the law, and the parties are held to the ancient rules of pleading, and no discovery can be obtained, it never was adopted to any great extent in the United States. But the action of account was adopted in several states, principally because there were no courts of chancery in which a bill for an accounting lay." Pennsylvania, Connecticut, and Illinois are cited as some of the states adopting the old practice. It is by reason of these changes from the ancient to the modern rules of practice, as here illustrated, that the appellant's second and third paragraphs of complaint presented causes of equitable jurisdiction, and that his first paragraph presented a cause of legal jurisdiction. The former would, under the old practice, have been causes of common-law jurisdiction. The latter is now the 'action of assumpsit.

It is claimed, however, that the latter paragraph is insufficient as a plea of assumpsit, as no demand is alleged. It is a plea of general assumpsit, where the law implies the promise of the defendant, and is not special, where an express promise must be alleged. See 2 Enc. Pl. & Prac. p. 990. It alleges the receipt of money by the appellee to the use and benefit of the appellant, and in such cases the law implies the obligation to pay. It is known as a "common count," and is a common-law modification of the action of assumpsit. Phil. Code Pl. § 369. While it is not, perhaps, consistent with the reformed rules of code pleading, in that it contains conclusions, and rests upon the fiction of an implied promise, yet it has been recognized in this state as a proper pleading, in which no allegation of a demand was necessary. *Spencer v. Morgan*, 5 Ind. 146; *Robinson v. Skipworth*, 23 Ind. 311; *Ferguson v. Dunn's Adm'r*, 28 Ind. 58; *Spears v. Ward*, 48 Ind. 541; *Hennel v. Board*, 132 Ind. 32, 31 N. E. 462; 3 Work, Prac. p. 13. See, also, *Grannis v. Hooker*, 29 Wis. 65; *Bates v. Cobb*, 5 Bosw. 29; *Adams v. Holley*, 12 How. Prac. 326; *Betts v. Bache*, 14 Abb. Prac. 279; *Goelth v. White*, 35 Barb.

76. The theory of the common count for money had and received by the defendant to the use of the plaintiff is that, where the money is had to the use of another, and has not been applied, there is no right to retain it, and the law implies the promise which corresponds with the duty. See *Brand v. Williams*, 29 Minn. 238, 13 N. W. 42; 2 Chit. Gen. Prac. (11th Am. Ed.) § 899; *Knapp v. Hobbs*, 50 N. H. 476; *Bank v. Smith*, 5 Conn. 71.

The decision cited by appellant's learned counsel against the sufficiency of the first paragraph of complaint is *State v. Sims*, 76 Ind. 328, where the allegation was that the defendant was indebted "for money had and received of the plaintiff at his special instance and request," as shown by a bill of particulars annexed. It was said: "It is not alleged in the complaint that the money was had and received for the use of the appellant. If it were, no bill of particulars would be necessary. *Spears v. Ward*, 48 Ind. 541. The statement is that the money was received from the appellant by the appellee at the special instance and request of the appellee. That, alone, would not create any indebtedness, and does not show a cause of action," etc. The complaint was not of the character of that here in question, and the decision does not cover the point in controversy in this case. The objection to the pleading before us is not made upon an assignment of cross error, but is urged upon the theory that, though the trial court may have erred in refusing a trial by jury if the paragraph had stated a cause of action, the result was proper because of the insufficiency of the paragraph. As the basis for this proposition, counsel rely upon the rule that intermediate errors will not reverse where the ultimate judgment is correct. There is no question about the rule, but it has this qualification: "If the wrong ruling asserts a definite and clearly-marked theory, unless the record shows the contrary, and that theory is wrong, and probably works injury, there is error." *Elliott, App. Proc.* § 590. And if a ruling upon the formation of the issues is wrong, it may be corrected by the court, but it must be done at such time and in such manner as not to prejudice the rights of the pleader. *Elliott, App. Proc.* §§ 695, 696, 697.

Treating the error as in the overruling of a demurrer to the first paragraph of complaint, the theory asserted by the ruling was that the appellant might recover thereon without proof of demand. The subsequent action of the court in denying a jury trial, so far from correcting that error, would have been the most palpable deception and injustice to the appellant, who was entitled to amend, but was deprived of the right by a ruling having no apparent reference to his pleading. Treating the error as in refusing a jury trial, we do not perceive how that error was cured by the former erroneous rul-

ing, and especially are we unable to discover how that method of curing the error would not result in injustice to the appellant, who was entitled to have the court follow the theory adopted in the formation of the issues, and, if any change of theory were adopted, that it might be done without prejudice to his rights. Neither the first paragraph of complaint nor any of the answers thereto seeks an accounting, and that great complications or difficulties are in the way of a settlement at law is assumed only from the allegation that numerous transactions had been involved in the dealings of the parties. Nor was there any intimation of a fiduciary relation between the parties. We do not think, however, that the dividing line between causes or defenses of equitable and those of legal cognizance is to be ascertained by counting the items of account subject to inquiry. If an accounting is necessary or desirable, by reason of the complicated condition of the transactions in dispute, an appeal may be made to the equitable jurisdiction of our courts, either by complaint or cross complaint, seeking such relief. But it has never, in this state, been deemed a cause for equitable relief that one may set forth an account of numerous items. As early as *Cummins v. White*, 4 Blackf. 356, it was held that "equity has no jurisdiction over accounts, however numerous and important the charges, where there is no mutuality of dealing, and discovery is not required; but law has." That there should appear affirmatively some cause for equitable relief, independently of the presentation of numerous items of account, before the equity side of the court will be opened to entertain the question, is manifest. This proposition has been clearly held in *Grafton v. Reed*, 26 W. Va. 437; *Bowen v. Johnson*, 12 Ga. 9, and *Upton v. Paxton* (Iowa) 33 N. W. 773. No error was committed in refusing a jury trial as to the second and third paragraphs of complaint. The questions arising upon the first paragraph of complaint were of legal cognizance, and triable by a jury; and, for the error in denying a jury trial thereof, the judgment as to that paragraph is reversed, with instructions to grant a new trial as to such paragraph of complaint and the issues thereunder.

(146 Ind. 249)

JOSEPH et al. v. WILD.

(Supreme Court of Indiana. Nov. 24, 1896.)

LICENSE — REVOCATION — CONSIDERATION — BONA FIDE PURCHASER — NOTICE — APPEAL — HARMLESS ERROR — BILL OF EXCEPTIONS.

1. A license to erect a stairway over the licensor's land for entrance to the upper story of a building to be built by the licensee, is, after execution, irrevocable.

2. A contract between the owners of adjoining unimproved lots, whereby the one is to erect the wall of his proposed building on the division line, which the other is to have the right to use in the construction of his building, and al-

so a stairway over the land of the latter for entrance to the upper story of the former's building, which he is to have the right to maintain until replaced by a permanent stairway, to be constructed when the latter builds, is supported by a valuable consideration, when executed by the former.

3. The maintenance of such stairway is notice to a purchaser of the land over which it is maintained of the right of the person to maintain the same.

4. The execution of such contract by the erection of the building and the temporary stairway is such a performance as will entitle the person to maintain the same until the building and joint stairway is erected on the adjoining land.

5. The fact that the land over which the stairway is erected has greatly increased in value is immaterial.

6. It is not reversible error to sustain a demurrer to a paragraph of an answer, where the facts therein pleaded were admissible under the general denial, which was also pleaded.

7. The record must affirmatively show that the longhand copy of the evidence was filed with the clerk before it was embodied in the bill of exceptions, and signed by the judge.

Appeal from circuit court, Hamilton county; Samuel H. Doyal, Judge.

Action by Leonard Wild against Julius Joseph and others. There was a judgment for plaintiff, and defendants appeal. Affirmed.

William Booth and Fertig & Alexander, for appellants. Shirts & Kilbourne, for appellee.

MONKS, J. This action was brought by appellee against appellants to enjoin them from tearing down a stairway, the property of appellee. It is alleged in the complaint: "That appellee was in 1880, and still is, the owner of certain real estate (describing it) in the city of Noblesville, Hamilton county, Ind., and that one Haymond W. Clark was the owner of a strip of real estate 35 feet in width, adjoining appellee's said property on the north, which was unimproved. That at said date appellee had decided to improve his said real estate, the same fronting on the public square in said city, by the erection of a two-story business block thereon. That it was the purpose of said Clark to improve his portion thereof, but he was not ready then to do so. It was agreed between appellee and said Clark that appellee should proceed and build his said two-story business block, putting the north wall thereof upon the line between the real estate owned by appellee and said Clark, and that, when said Clark should improve his own property, he should have the use of said wall so put up by appellee; in consideration of which it was agreed that until said improvement should be made appellee should have the right to egress and ingress into the second story of his block by way of an outside stairway resting upon said real estate of said Clark, and that, when a building should be erected on the strip of ground then owned by said Clark, a permanent stairway should be constructed along the north side of said wall, leading from said public square, so as to furnish ingress and egress to the second stories of each of said buildings. Pursuant to said agreement, in the year 1880, appellee did so improve his portion of said prop-

erty by the erection of said two-story business block, and did so construct said outside stairway along the north wall of said building, and leading from the public square, which has ever since been the sole and only means of egress from and ingress to the second story of the business block built by appellee, and the said stairway has been openly and continuously maintained at all times since by appellee without objection. That appellee, relying upon the agreement with said Clark, erected said building with a view to thereafter have a permanent joint stairway, and constructed said outside stairway to obtain access to said second story until the permanent stairway was built, and has maintained it ever since. That afterwards appellants Nelson and Nelson became the owners of the ground formerly owned by said Clark, and the same has not been improved by the erection of any permanent buildings thereon. That they are threatening to tear down and remove said stairway, and prevent appellee from having access to the second story of his said building, etc. That there are five rooms in said second story, the only access to which is by way of the stairway aforesaid; and four of said rooms are now occupied by tenants, and, if said stairway is removed, as threatened, such tenants would have no means of access thereto." After the commencement of said action, appellants Joseph and Joseph purchased the real estate formerly owned by Clark of their co-appellants, and were on their own application made defendants to said action. Appellee filed a supplemental complaint, setting up the fact of their purchase, and that they claimed the right to tear down said outside stairway, etc. Appellants each filed separate demurrers for want of facts to the complaint and supplemental complaint, which were overruled. Appellants Joseph and Joseph filed an answer in five paragraphs, and appellee's demurrer to each paragraph thereof for want of facts was sustained to the second and fifth paragraphs, and overruled as to the other paragraphs. The cause was tried by the court, and a finding made in favor of appellee, upon which judgment was rendered against appellants. Appellants Joseph and Joseph filed a motion to modify the judgment, and for a new trial, which were, respectively, overruled. The said rulings of the trial court against appellants are each assigned as error.

The first proposition urged is that the complaint is bad, for the reason that the parol contract set forth is void under the statute of frauds. The allegations in the complaint show that appellee, pursuant to the contract alleged, and relying thereon, erected the two-story business block, and placed the north wall on the line dividing his real estate from that owned by Clark, the other party to the contract, and that he built the outside stairway along the north side of said north wall leading to the second story of said building, and that no provision was made for ingress to or egress from said second story except by this stairway, and that

without the same no access could be had to the second story of said building, and that said stairway has been continuously maintained and used for more than 15 years without objection. These allegations show a performance of the contract by appellee on his part. Regarding the contract as a mere license to erect the outside stairway, a large sum of money having been expended in the erection of said building on the faith thereof, and the stairway having been constructed on the faith thereof, the same has been executed by appellee, and must be deemed irrevocable. *Ferguson v. Spencer*, 127 Ind. 66, 25 N. E. 1035; *Nowlin v. Whipple*, 120 Ind. 596, 22 N. E. 669; *Buchanan v. Railroad Co.*, 71 Ind. 265; *Hodgson v. Jeffries*, 52 Ind. 334; *Parish v. Kaspere*, 109 Ind. 586, 10 N. E. 109; *Burrow v. Railroad Co.*, 107 Ind. 432, 8 N. E. 167, and cases cited; *Simons v. Morehouse*, 88 Ind. 391; *Nowlin v. Whipple*, 79 Ind. 481; *Snowden v. Wilas*, 19 Ind. 10; *Le Fevre v. Le Fevre*, 4 Serg. & R. 241; *Rerick v. Kern*, 14 Serg. & R. 267; *M'Kellip v. M'Ilhenny*, 4 Watts, 317; *Swartz v. Swartz*, 4 Pa. St. 353; *Ebner v. Stichter*, 19 Pa. St. 9; 2 Am. Lead. Cas. 570, 571, 573; *Browne*, St. Frauds (5th Ed.) § 310, p. 39. An executed parol license, however, may become an easement upon the land of another, and may impose a servitude on one estate in favor of another. *Nowlin v. Whipple*, 120 Ind. 599, 22 N. E. 669; *Hazelton v. Putnam*, 3 Pin. 107, 3 Chand. 117; 54 Am. Dec. 158, and note, 166; *Dark v. Johnston*, 55 Pa. St. 170; *Huff v. McCauley*, 53 Pa. St. 206; *Thompson v. McElarney*, 82 Pa. St. 174; *Meek v. Breckenridge*, 29 Ohio St. 642, 650; *Legg v. Horn*, 45 Conn. 415; 2 Am. Lead. Cas. 577, 578; *Washb. Easem.* (4th Ed.) pp. 27-29.

It is next insisted that the complaint is bad, because there was no consideration for the agreement. A valuable consideration may consist of any benefit, delay, or loss to another party. *Starr v. Earle*, 43 Ind. 478, 480. The facts alleged in the complaint show a valuable consideration within this definition of the said words. Under the well-known maxim that "that which is sufficient to put a party upon inquiry is notice," the erection and maintenance of the stairway for more than 15 years on the real estate owned by Clark was sufficient notice of the contract and rights of appellee thereunder to all claiming under Clark. *Campbell v. Railroad Co.*, 110 Ind. 490, 493, 11 N. E. 482, 483; *Robinson v. Thrallkill*, 110 Ind. 117, 119, 10 N. E. 647, 648; *Ellis v. Bassett*, 128 Ind. 118, 121, 122, 27 N. E. 344, 345, and cases cited.

Appellants also contend that the facts alleged in the complaint show that the contract remains unexecuted, for the reason that Clark and his successors have received no benefit therefrom. It is stated in the complaint that the outside stairway was to remain for the use of appellee's building until such time as the adjacent owner should erect a building upon his land, at which time a permanent stairway was to be built for the use of both parties upon the line occupied by the outside

stairway. The complaint shows that appellee has fully performed his part of the contract; that he has erected his building in good faith, relying upon the contract, and made no provision for access to the second story of his building except by such outside stairway. Appellee is not seeking to compel the erection of the building and stairway adjoining his own under the contract. He only asks to enjoin appellants from tearing down the present stairway until such building and joint stairway are erected. Neither Clark nor those claiming under him are under any obligation to erect said building, but they have the right, under the contract, to do so whenever they see proper. But under the facts alleged in the complaint appellants have no right to tear down or otherwise interfere with the use of said stairway by appellee, or those claiming under him, merely because they have not exercised their privilege to erect a building and joint stairway, as provided in the contract. Until such time as the building and joint stairway are erected on the adjoining land, appellee and those claiming under him have the right to keep the outside stairway in repair, and use the same without interference from appellants.

It is insisted by appellants Joseph and Joseph that the demurrer to the supplemental complaint should have been sustained, for the reason that the supplemental complaint does not contain any averment that they threatened to tear down the stairway. The appellants Joseph and Joseph purchased the real estate described after the commencement of this action, and after a temporary restraining order had been granted. The supplemental complaint alleges "that said Josephs, and each of them, are now and still claiming the right to tear down and destroy said stairway, and claim that said appellant has no right to maintain the same," etc. Considering the complaint and supplemental complaint as one pleading, the objection urged is not tenable. It follows that the court did not err in overruling the demurrers to the complaint and supplemental complaint.

Appellants Joseph and Joseph next contend that the court erred in sustaining the appellee's demurrer to their fifth paragraph of answer. The error, if any, committed by the court in sustaining the demurrer to this paragraph of answer was harmless, for the reason that all evidence that could have been given under said paragraph was admissible under the first paragraph of answer,—the general denial. It is earnestly insisted that that part of the fifth paragraph of the answer which alleges "that when said contract was made the Clark real estate was not worth over \$50 per front foot, and has increased in value at this time to \$300 per front foot, and that the city of Noblesville has trebled in population and wealth, * * * and many other changed conditions, and that under the pres-

ent conditions the granting of a perpetual injunction would be of actual advantage to appellee of \$1,500, and of loss to appellants Joseph and Joseph of a corresponding amount by taking so much of their property, and bestowing it on said appellants without consideration," was a good answer in bar. The fact that the maintenance of said stairway will be of great value to appellee and loss to appellants was not sufficient to constitute a defense to the action. Parties cannot be relieved from their contracts and acts thereunder upon the sole ground that they did not foresee all their consequences. *Hodgson v. Jeffries*, 52 Ind., on page 338. After the judgment was rendered, appellants Joseph and Joseph moved the court "to modify the same so as to provide that they or their grantees might at any time remove said stairway for the immediate purpose of erecting new and permanent buildings on their ground adjoining appellee's said building, and that in erecting said new building said appellants, their heirs and assigns, be not required to construct or provide any stairway for the use of appellee in lieu of the stairway now existing." Appellee has the right, under the contract, as we have shown, to maintain said outside stairway until the building and joint stairway are erected on the adjoining lot. The only way appellants can end appellee's right to maintain said outside stairway is by erecting the building and joint stairway. It follows that the motion to modify the decree was properly overruled.

The questions presented by the motion for a new trial depend for their determination on the evidence. We cannot consider any question raised by the motion for a new trial, for the reason that the evidence is not properly in the record. The evidence in the cause was taken down by a shorthand reporter, and it is sought to certify the longhand manuscript of the evidence to this court, under section 1 of an act approved March 7, 1873 (Acts 1873, p. 194). The record shows that the bill of exceptions was signed by the trial judge on October 23, 1895, and the record does not show that the longhand copy of the evidence was filed in the clerk's office before the bill of exceptions containing the same was signed by the judge. It is settled law in this state that under said act of 1873 the longhand copy of the evidence must be filed in the clerk's office before it is embodied in the bill of exceptions and signed by the judge, and this fact must be affirmatively shown by the record. *Carlson v. State* (Ind. Sup.) 44 N. E. 660; *Rodgers v. Eich* (last term) 45 N. E. 93; *Manley v. Felty* (last term) 45 N. E. 74; *De Hart v. Board, etc.*, 143 Ind. 363, 41 N. E. 825; *Smith v. State* (Ind. Sup.) 42 N. E. 1019; *Beatty v. Miller* (last term) 44 N. E. 8; *Hamrick v. Loring* (last term) 45 N. E. 107. No available error appearing in the record, the judgment is affirmed.

(146 Ind. 811)

BOARD OF COM'RS OF HUNTINGTON COUNTY v. BONEBRAKE.

(Supreme Court of Indiana. Dec. 2, 1896.)

APPEAL—LAW OF THE CASE—DEFECTIVE BRIDGES—CONTRIBUTORY NEGLIGENCE—QUESTION FOR JURY—EVIDENCE—TRIAL—SPECIAL VERDICT—HARMLESS ERROR.

1. On a second appeal the case is governed by a decision on the former appeal as to a particular question, regardless of whether the question arose both times in the same manner.

2. In an action against a county for injuries caused by a defective bridge, plaintiff testified that he had no prior knowledge of the defects. It appeared that, prior to the accident, a petition was circulated for signatures in plaintiff's neighborhood, and was placed in plaintiff's hands, in which it was stated that the bridge was in a defective condition, and in which it was sought to procure the county board to rebuild the bridge. *Held*, that the question of plaintiff's knowledge was for the jury, whether or not he read the petition.

3. One not knowing of a defect in a bridge may ride over it merely for pleasure without being guilty of negligence.

4. In an action against a county for injuries caused by a defective bridge, an interrogatory, "Was not the plaintiff's fall and injury occasioned solely by reason of the rotten, defective, and doty condition of the timbers of said bridge, and the failure of the defendant to repair the same?" did not submit a question of law, nor violate Acts 1895, p. 248, relating to interrogatories and answers, in that it was so framed as to require the finding of more than one fact.

5. An interrogatory, "In what sum was this plaintiff damaged by reason of the injury received by him by the collapse of said bridge?" did not seek to elicit more than one fact, nor the statement of a conclusion of law.

6. An interrogatory, "Was not said injury received without any fault or negligence of the plaintiff?" involved both the law and the facts, and was hence improper, since the conclusion of negligence is not for the jury where a special verdict is returned.

7. An interrogatory, "Was the plaintiff, in passing over said bridge, * * * exercising such care, caution, and prudence as persons of ordinary prudence would and do exercise under like circumstances?" did not require the statement of a legal conclusion.

8. In an action against a county for injuries caused by a defective bridge, the jury found specially that the injury resulted from the decayed condition of the bridge, of which defendant had knowledge, and failed to repair; that plaintiff had no knowledge of the defects; that he went on and over the bridge slowly and carefully; and that he could not have seen its defects. *Held*, that an interrogatory calling for the ultimate conclusion of fact as to contributory negligence was improper.

9. Improper findings in a special verdict do not defeat the verdict, but are disregarded.

10. Interrogatories which seek mere evidentiary findings relating to knowledge, or absence of knowledge, on the part of plaintiff, of defects in a bridge, by reason of which he was injured, are not proper.

11. In an action against a county for injuries caused by a defective bridge, error in giving a general instruction with reference to defendant's duty to keep the bridge in repair, when a special verdict is required, is harmless.

12. In an action for personal injuries caused by defects in a bridge, on an issue of plaintiff's knowledge of the defects, it was immaterial that there was a great deal of contention, prior to the accident, between the road supervisor and the trustee, about the repair of the bridge.

Appeal from circuit court, Whitley county; W. L. Penfield, Judge.

Action by Simon H. Bonebrake against the board of commissioners of the county of Huntington for personal injuries caused by a defective bridge. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Milligan, Whitelock & Cook, for appellant. Marshall, McNagny & Clugston and R. A. Kaufman, for appellee.

HACKNEY, J. This is the second appeal in this cause, the former decision being reported in *Bonebrake v. Board*, 141 Ind. 82, 40 N. E. 141. The action was by the appellee to recover damages on account of personal injuries sustained in the crushing of a public bridge under the weight of a traction engine upon which he was riding. As will be seen from the report cited, the appellee succeeded on the former appeal, and that one of the questions decided arose upon the action of the trial court in sustaining the demurrer of the board to the evidence. The principle then adhered to was that counties were required to keep such bridges in proper repair, and that a failure to do so, resulting in injury, without contributory negligence on the part of the person injured, subjected the counties to liability for such injury. In the trial, resulting in the judgment from which the present appeal is prosecuted, the lower court followed, in its rulings, the theory upon which said appeal was decided, and the appellee recovered a judgment for \$6,500. After the decision of this court in *Bonebrake v. Board*, supra, it was held by us, in *Board v. Allman*, 142 Ind. 573, 42 N. E. 206, that no liability rests upon counties for injuries resulting from the failure to repair public bridges; and the appellant now insists that, upon the holding of the latter case, the appellee's complaint stated no cause of action, and that the lower court erred in rendering judgment, upon the special verdict, in favor of the appellee. Opposing this insistence, the appellee urges that the decision upon the former appeal in this cause established "the law of the case," which must be adhered to, and which determines the sufficiency of the complaint. It is a general rule, many times followed in this state, that a decision of this court shall constitute "the law of the case," so far as the principle involved is applicable, throughout all stages of the cause thereafter. *Hawley v. Smith*, 45 Ind. 183; *Dodge v. Gaylord*, 53 Ind. 365; *Kress v. State*, 65 Ind. 106; *Test v. Larsh*, 76 Ind. 452; *Railroad Co. v. Reed*, 83 Ind. 9; *Board v. Pritchett*, 85 Ind. 98; *Gerber v. Friday*, 87 Ind. 366; *Board of Com'rs v. Indianapolis, P. & O. Ry. Co.*, 89 Ind. 101; *Rinard v. West*, 92 Ind. 359; *Anderson v. Kramer*, 93 Ind. 170; *Armstrong v. Harshman*, Id. 216; *Davis v. Krug*, 95 Ind. 1; *Jones v. Castor*, 96 Ind. 307; *Forgerson v. Smith*, 104 Ind. 246, 3 N. E. 886; *Walker v. Heller*, 104 Ind. 327, 3 N. E. 114; *Pittsburgh, O. & St. L. Ry. Co. v. Hixon*, 110 Ind. 225, 11 N. E. 285; *Machine Co. v. Gray*, 114 Ind. 340, 16 N. E. 787; *Mason v. Burk*,

120 Ind. 404, 22 N. E. 119; Nickless v. Pearson, 126 Ind. 477, 26 N. E. 478; Lillie v. Trentman, 130 Ind. 16, 29 N. E. 405; Railway Co. v. Wynant, 134 Ind. 681, 34 N. E. 569; Railway Co. v. Hill, 7 Ind. App. 255, 34 N. E. 646. See, also, 2 Van Fleet, Former Adj. p. 1302; Elliott, App. Proc. 578. In *Forgeron v. Smith*, supra, it was said: "But where the questions are necessarily involved, and where the conclusion declared could not have been reached without either expressly or impliedly deciding such questions, the judgment on appeal rules the case throughout all its subsequent stages." Similar expressions of the effect of the rule are contained in many of the cases cited. If, therefore, it is the question decided, the rule of law applied, that shall operate throughout the case, it cannot be important to look to the manner in which that question arose, whether upon demurrer to complaint, answer, or evidence. If the conclusion were otherwise, the rule would easily lose its force, and confusion inextricable follow from holding, upon demurrer to the evidence, that a given state of facts permitted a recovery, while that same state of facts, pleaded in a complaint, constituted no cause of action. We must hold, therefore, that the appellant is precluded by "the law of the case" to insist that the county was not required to keep the bridge in repair, and was not liable for the consequences of its failure to do so. We do not intimate a view of the case if the complaint had been amended or the evidence were different, either as to the performance of the duty to repair or as to the contributory fault of the appellee.

But one other ruling of the trial court is covered by the assignment of errors, and that is in overruling appellant's motion for a new trial, and several objections are made to that ruling. An interrogatory was submitted to the jury asking if "the southeast corner of the bridge sagged down 6 inches immediately prior to the time of the accident," and it was answered, "No evidence to show what the condition was immediately prior to the accident." Appellant moved to require the jury to answer said interrogatory more specifically, and that motion was overruled. The testimony of the witness cited as affirming that the bridge, at the corner mentioned, was "sagged down 6 inches immediately" before the accident, was to the effect that, some four years prior to the accident, the bridge had, at the west end, "washed out, until it had settled about 6 or 8 inches at the corner." This, said witness further testified, was at a time when he repaired the bridge at the west end, where it had washed out. The evidence does not relate to the inquiry either as to the time or the part of the bridge which had sunken down, and there was no error in refusing to require more specific answer to the interrogatory. The weight of the evidence upon the question of the appellee's knowledge of the defective condition of the bridge at the time he drove upon it is discussed by counsel. Ap-

pellee testified that he had no knowledge of defects, and it appeared that, prior to the accident, a petition was circulated for signatures in appellee's neighborhood, and was placed in his hands for examination and signature, in which petition it was stated that said bridge was in a defective condition, and it was sought to procure the county board to rebuild it. This statement of the petition was not shown to have been read by the appellee, but, if it had been so testified, the evidence would stand in conflict, and we could not assume the province of the jury in passing upon it.

It is next contended that the answers to interrogatories 31, 35, and 36 were not sustained by the evidence. Said interrogatories, with the answers, were: "No. 31. Was the plaintiff proceeding slowly and carefully over said bridge on said day? A. Yes." "No. 35. Was not the plaintiff's fall and injury occasioned solely by reason of the rotten, defective, and doty condition of the timbers of said bridge, and the failure of the defendant to repair the same? A. Yes. No. 36. Was not said injury received without any fault or negligence of the plaintiff? A. Yes." As we understand counsel for appellant, they support their contention upon this proposition by the evidence that the appellee did not own the engine, was not employed to ride upon or manage it, and was upon it only by the license of those in charge, and that he was therefore guilty of contributory negligence. While it is suggested by appellee's learned counsel that the same evidence of contributory negligence was passed upon in the former opinion of this court, and was held not sufficient to establish such contributory negligence, and that the question made by appellant's counsel is foreclosed by the law of the case, and while this proposition is not questioned by the appellant, it does not appear that one not knowing of a defect in a bridge should forego riding over it, unless he has legitimate business requiring him to do so, or that he might not, without negligence, ride over it for mere pleasure. It is further objected that interrogatory 35 submitted to the jury a question of law, and violated the act relating to special verdicts in the form of interrogatories and answers (Acts 1895, p. 248), in that it was so framed as to require the finding of more than one fact. In our opinion, counsel err in both propositions. There is no question of law involved in the inquiry as to the cause of the bridge's fall, and there was but one fact which was sought from the evidence of the circumstances or conditions. Interrogatory 45 asked: "In what sum was this plaintiff damaged by reason of the injury received by him by the collapse of said bridge?" This inquiry did not seek to elicit more than one fact, nor the statement of a conclusion of law. Counsel merely suggest that it does, and do not offer a reason supporting them. No reason occurs to us for their construction of the interrogatory.

Interrogatory 32 was as follows: "Was the

plaintiff, in passing over said bridge, * * * exercising such care, caution, and prudence as persons of ordinary prudence would and do exercise under like circumstances?" This interrogatory and that numbered 36, it is contended, each submitted to the jury a question of law. The conclusion of negligence is not for the jury where a special verdict is returned. *Railroad Co. v. Spencer*, 98 Ind. 186; *Railway Co. v. Bush*, 101 Ind. 582; *Conner v. Railway Co.*, 105 Ind. 62, 4 N. E. 441; *Railway Co. v. Burger*, 124 Ind. 275, 24 N. E. 981; *Railway Co. v. Lynch* (Ind. Sup.) 44 N. E. 997. It involves both the law and the facts. Interrogatory 36, therefore, was improper. The degree of care which persons of ordinary prudence would exercise under given circumstances, is such as the law pronounces sufficient to relieve the actor from fault. As to whether that degree of care has been exercised may be determined from the facts disclosing the conduct of the party, the primary facts proven, or, in cases where the jury may draw the ultimate inference or conclusion from the primary facts, it may be disclosed by a statement that the conduct of the party, the primary facts being also given, was such as would have been that of persons of ordinary prudence under like circumstances. Negligence exists when one has failed to exercise that care which persons of ordinary prudence and caution would exercise under like circumstances. Whether that degree of care has been exercised is a conclusion of fact, and does not involve a question of law, or the statement of a legal proposition. In reaching that conclusion, the conduct of the party is not measured by any legal test or standard, but it is measured by the ideal ordinary person, whose care and prudence are not of the very highest, nor yet of the very lowest, but are such as, from the common observation of men, we conceive to occupy a position between these extremes. He is called a person of ordinary prudence and caution. When the facts disclose that an injury has been received under circumstances in which the injured party has acted as would this ideal person, then the law is applied by the court, and the legal conclusion and the judgment of due care follow. That the finding of the jury that the injured party acted with such prudence and caution as this ideal person would have acted is not the equivalent of a finding of freedom from negligence is made clear when we observe that such finding permits the court to apply the legal rule that such prudence and caution shall constitute due care; while, if the finding of nonnegligence were properly returnable, the court would have no duty but to render judgment. The distinction may possibly be made clearer by recalling that, where a general verdict is to be returned in a negligence case, the court may properly instruct the jury that if it is found to be a fact that the plaintiff, in the occurrence, acted with such care and caution as a person of ordinary prudence and caution

would have acted under like circumstances, then, as a matter of law, he was not negligent. If that which would thus be designated as a fact were a proposition of law, the instruction so framed would become absurd, in that it would direct the jury that, if a legal proposition should be found, a legal conclusion—the synonym of such proposition—would follow. This distinction between a finding of nonnegligence and a finding of the facts which the law denotes nonnegligence was recognized in *Railway Co. v. Miller*, 141 Ind. 533, 37 N. E. 343. The interrogatory numbered 32 did not ask the statement of a legal conclusion, nor did it inquire for one of the primary facts establishing the appellee's conduct, but it was an inquiry as to the ultimate conclusion of fact authorized to be drawn only from primary facts. As to whether this was permissible depends upon the inquiry as to whether this was one of the cases where the jury is permitted to return the ultimate fact. Such a case is that where two or more inferences may be reasonably drawn; that is, where, upon the facts, one impartial, sensible man may reasonably draw one inference, while another impartial and equally sensible man may reasonably draw the opposite inference. *Smith v. Railroad Co.* (Ind. Sup.) 40 N. E. 270; *Railway Co. v. Grames*, 136 Ind. 39, 34 N. E. 714. The present case is not of that class. Here it was found that the injury resulted from the decayed condition of the bridge, of which condition appellant had knowledge, and failed to repair the same; that the appellee had no knowledge of the defective condition of the bridge; that he went upon and over said bridge slowly and carefully; and that he could not have seen its defects. These were the essential primary facts, in connection with those of the injury, which required the conclusion from the court, in applying the law of the case, that appellee should recover. They established a duty neglected, with resultant injury, sustained without contributory fault. The interrogatories 32 and 36, therefore, although unauthorized, were not essential to the support of the judgment, and, if cast out, would not impair the verdict. It is an established rule of practice that improper findings in a special verdict do not defeat the verdict, but should be disregarded. *Railway Co. v. Miller*, 141 Ind. 533, 37 N. E. 343; *Jones v. Casler*, 139 Ind. 382, 38 N. E. 812; *Insurance Co. v. Stout*, 135 Ind. 444, 33 N. E. 623; *Railway Co. v. Treadway*, 143 Ind. 689, 40 N. E. 807, and 41 N. E. 794.

Complaint is made that the court rejected several interrogatories, propounded by the appellant, such as: Did the plaintiff frequently cross the bridge? Did he see a petition for a new bridge? Was he asked to sign such petition? Did he know of the defective condition of the bridge? Was he injured in a runaway, after the accident of the falling bridge? Several of these inquiries sought merely evidentiary findings, relating to the fact of knowledge, or the absence of knowledge, on

the part of the appellee, of the defects in the bridge. There were interrogatories and answers properly covering the facts in dispute upon that question. Besides, it is not the proper practice to find merely evidentiary matters. The inquiry as to an injury in a runaway, if answered in the affirmative, would have given us no light upon the question as to whether the damages were excessive, and we suppose that could have been its only purpose. We could not know that such injury was slight or serious, whether it was upon the limbs or parts of the body injured in the bridge accident, or whether the jury considered such injury apart from that occasioned by the falling of the bridge, and allowed nothing on that account. It is objected, also, that the damages, \$6,500, were excessive. There was conflict in the evidence as to the character and extent of the appellant's injuries, some of the evidence for the appellant tending to show that, to some extent, he feigned greater disabilities than he really suffered from. The jury found that he was permanently disabled; that from the occurrence, in July, 1890, to the time of the trial, in September, 1895, he suffered great bodily pain continuously, and was rendered incapable of performing labor upon the farm; that he was "crushed, bruised, and maimed in his hips and spine"; and that he was, prior to said injury, "a strong, vigorous man, able to perform the work on his farm." Much evidence supports these findings, and we cannot pass upon the conflict, and determine whether they were supported by a preponderance of the evidence.

Two additional questions presented involve the propositions already decided with reference to "the law of the case,"—the overruling of appellant's motion for judgment on the verdict, and the sustaining of appellee's motion for judgment on the verdict. It is complained, further, that the court erred in giving a general instruction with reference to the appellant's duty to keep the bridge in repair, when a special verdict was required. An error in such an instruction would not be available, because it could not be applied by the jury. *Railway Co. v. Lynch*, supra; *Woollen v. Wire*, 110 Ind. 251, 11 N. E. 236.

No error in the instruction is pointed out, and we perceive none. Only one other question is suggested, and it is not discussed; that is, that the court refused to permit appellee to answer appellant's question as to whether "there wasn't a great deal of contention in that neighborhood between Tobias Myers, the road supervisor, and Mr. Provines, the trustee, about the repair of the bridge * * * and other bridges" prior to the accident. The inquiry did not relate to the appellee's knowledge of any defects in the bridge, and, if answered in the affirmative, it does not occur to us that it could have had any bearing upon the case.

Finding no available error in the record, the judgment is affirmed.

(147 Ind. 274)

WESTERN UNION TEL. CO. v. STATE.¹

(Supreme Court of Indiana. Dec. 2, 1896.)

TAXATION—ENFORCEMENT—PENALTY—APPEAL—REVIEW.

1. After suit has been commenced to recover delinquent taxes, the defendant cannot escape the 50 per cent. penalty imposed by Act March 6, 1893, in case of suit, by tender of the amount of taxes with costs to date of tender.

2. A judgment will not be reviewed to determine whether it is excessive, unless a motion to modify was made in the trial court.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Action by the state of Indiana against the Western Union Telegraph Company. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Chambers, Pickens & Moores, for appellant. W. A. Ketcham, Atty. Gen., Merrill Moores, and Smith & Korbly, for the State.

PER CURIAM. Almost every question raised on this appeal has already been considered and decided in favor of appellee in the cases of *Telegraph Co. v. Taggart*, 141 Ind. 281, 40 N. E. 1051; *Id.*, 163 U. S. 1, 16 Sup. Ct. 1054; *State v. Adams Exp. Co.*, 144 Ind. 549, 42 N. E. 483; and *W. U. Tel. Co. v. State* (at last term) 44 N. E. 793. A question raised in appellant's brief, if it were properly presented by the record, is found in the objection made to the action of the court in overruling appellant's motion for a modification of the judgment. After the taxes due by appellant for the year 1895 had become delinquent, and this action was brought for their collection, under provisions of section 11 of the act of March 6, 1893 (Acts 1893, p. 374), in the manner detailed in *W. U. Tel. Co. v. State*, supra, and after a demurrer to appellee's complaint had been overruled, and a demurrer to appellant's answer sustained, but before the finding of the court or the entry of judgment, the appellant came into court, and tendered the amount of taxes due, together with 10 per cent. penalty for delinquency, and with court costs. The tender was refused by the appellee, for the reason, among others, that the offer did not include the 50 per cent. penalty provided for in the statute in case of suit brought by the state for collection of such delinquent taxes. We think the tender made was insufficient. For reasons given in *W. U. Tel. Co. v. State*, supra, the 50 per cent. penalty accrues on the bringing of the suit. The right of the state to this penalty becomes inchoate at the moment of the delinquency, but does not actually accrue until the suit is brought. So the mechanic or material man has a right to a lien on a building as soon as labor is done or material furnished, but the lien is not actually acquired until notice is given. Had the state not brought suit, the right to the penalty would not have accrued. The right of the state to the penalty was the same as its right to the taxes themselves, both depending upon

¹ Rehearing denied.

the same statute. The right to the taxes accrued by reason of the assessment, and that to the penalty by reason of the delinquency in payment and the suit brought for collection. The office of the court was but to declare the law in its judgment, and this was done by including with the taxes the penalty that had already accrued. A payment of the taxes, with penalty in case of delinquency, if made before suit brought, would, of course, have prevented suit, and hence avoided the 50 per cent. or suit penalty. But the state could not be put to the expense of a suit, and then, by a tender of payment, be deprived of the means provided in the statute as compensation for such expense. The case is analogous to the collection of attorney's fees, in relation to which it has been held that the right to the fees accrues as soon as the debt becomes due, and services of an attorney are engaged for its collection. A tender of the principal and interest would not prevent a judgment for the whole amount due, including attorney's fees. *Moore v. Staser*, 6 Ind. App. 364, 32 N. E. 563, and 83 N. E. 665. Appellant insists, besides, that in any case the suit penalty of 50 per cent. should have been calculated only on the taxes assessed and unpaid, and not upon the taxes and 10 per cent. penalty for delinquency. This question, also, we do not feel called upon to decide, inasmuch as it was not raised in the motion to modify the judgment. A judgment for some amount was properly rendered, and a motion to modify was necessary as to any error or excess in the amount of the judgment. *Association v. Spears*, 115 Ind. 297, 300, 17 N. E. 570, 572, and other cases cited in note to section 763, Elliott, App. Proc. "Where any part of a judgment is valid," as said in the case cited, "it will stand unless proper steps have been taken by objection duly presented to the court to secure a modification or amendment, by amending or rejecting the part which is wrong." There was in the case at bar a motion to modify the judgment, but in this motion the demand was that no judgment should be rendered against appellant for any amount, because (1) of the tender made, and (2) of the unconstitutionality of the law. The constitutionality of the law has been frequently affirmed, as appears from the cases first cited in this opinion; and we think we have shown above that the tender made was insufficient. Judgment affirmed.

(146 Ind. 303)

WABASH PAPER CO. v. WEBB.

(Supreme Court of Indiana. Dec. 1, 1896.)

BILL OF EXCEPTIONS—FILING—MASTER AND SERVANT—NEGLIGENCE.

1. The filing of a bill of exceptions in open court is equivalent to a filing in the clerk's office.

2. A servant, 19 years old, and bright and intelligent, is negligent in attempting to step over a revolving shaft on which there was an oil cup and set screw, which required him to step about

14 inches high and 2½ and 8 feet long, instead of passing out by either of two other ways, which were usually used, and comparatively safe, though he testified that he was unaware of the presence of the screw or cup, where the evidence showed that he had for three weeks been working around the machinery and oiling it, close to the screw and cup.

3. The failure of an employer to box gearings and revolving shafts in a paper mill is not negligence where the usual and ordinary care was used in the maintenance of the machinery.

Appeal from circuit court, Grant county; J. L. Custer, Judge.

Action by Charles Webb against the Wabash Paper Company. There was a judgment for plaintiff, and defendant appeals. Reversed.

O. H. Bogue, W. G. Sayre, and Brownlee & Paulus, for appellant. A. E. Steele, Alvah Taylor, and H. C. Pettit, for appellee.

HOWARD, J. Appellee was injured in the paper mill of appellant, his employer, and thereupon brought this action for damages, alleging that his injury was caused by the negligence of appellant. In appealing from the judgment rendered in favor of appellee, appellant assigns as error: (1) The insufficiency of the complaint; (2) the overruling of the motion for judgment on the answers to interrogatories; and (3) the overruling of the motion for a new trial. We have read the complaint, and find it carefully drawn, and not subject to the criticisms urged against it by appellant. Neither do we think the court erred in overruling the motion for judgment on the answers to interrogatories notwithstanding the general verdict. The facts found specially, while perhaps not of themselves sufficient to authorize a judgment in favor of appellee, yet, taken, as they must be, without intendment, do not seem to be in irreconcilable conflict with the general verdict.

Appellee objects to our consideration of the bill of exceptions containing the evidence, as not being in the record. There is a court entry showing the filing of the bill in open court. This entry erroneously refers to the bill as appellant's "longhand transcript of the evidence," whatever may be meant by that phrase. The paper so filed, however, is also, and properly, styled "appellant's bill of exceptions"; and an examination of the paper shows it to be, in due form, such a bill, containing, incorporated therein, the longhand manuscript of the evidence taken at the trial. The unnecessary words in the court entry may be rejected as surplusage. Because the bill was filed in open court, it does not follow that it was not filed in the clerk's office, as required by law. The filing with the clerk in open court is equivalent to a filing in the clerk's office. There is also some irregularity in the clerk's certificates as to the filing of the longhand manuscript of the evidence and its incorporation in the bill; but it is sufficiently shown, as we think, that the manuscript was first filed in the clerk's office, and then incorporated in the bill of exceptions before the bill was presented to the judge, and that the

bill was presented to the judge within the time limited, and was itself then filed. This is all that is required.

From the evidence it appears that the accident to appellee occurred at about 6 o'clock on the evening of November 7, 1892. Appellee was then nearly 19 years of age, active, and intelligent for his age, and with good eyesight and hearing. He understood his work well, had been engaged in the appellant's paper mill for a year and nine months, and in the room where he was hurt for three weeks previous thereto. The mill ran night and day, one set of hands working for a week during the day, and another for the same time during the night, after which they changed places during the next week, and so on. Appellee had worked in the room where he was injured for two weeks during the day and for one week during the night, and at the time of the accident was about to begin his second week's night work. The room where he worked was well lit by electricity during the night, and was so lit when his injury occurred. He was the "third man," being next under the tender and back tender. Among his duties were "to do the oiling and cleaning up." He was "general roustabout about the machine," and oiled the machinery every day or night when he was working. After coming into the room on the evening in question, he hung up his coat and hat, and, with another young man, stood for a short time talking to several girls who were at work. He had not yet put on his overalls, when the tender called him to assist in guiding a sheet of finished paper from the "reel" to the "cutter." These machines stand one in front of the other, with an open space between them of 26½ inches, through which the running sheet of paper passes from the rolls, to be cut into such sizes as desired. The paper runs two feet above the floor at one of the machines and four feet at the other. The evidence is conflicting as to whether the sheet sagged in the open space on this occasion. It usually sagged when first connected with the cutter, and then ran "taut." When appellee was called to assist in guiding the paper to the cutter at this time, he stood inside, or on the east of the machines, and took one edge of the paper in his hands, while the tender stood on the west or front side, and held the other edge. The paper was several feet in width, and they held it until it was caught by the cutter, after which it ran automatically. Appellee was then to leave his place, and come back to the front or west side of the machines. The usual way of returning was to stoop under the running paper and pass back by the open space between the machines. One could also reach the front by passing out to the east and around north of the cutter. To go this way appellee had to first pass through a 10-inch space between a pulley on the north and a shaft support on the south. He would then be in a small square with shafting and other machinery on every side. Out of this square

the exit that seems to have been provided by appellant was to the southeast, between two stands or supports, at right angles to each other, on the one of which rested the end of the "reel" shaft and on the other the end of the shaft that turned the "cutter." This space was 19 inches in width. The cutter shaft was connected at its north end, at right angles, by 14-inch gearing, with the shaft which directly operated the cutter. Near to the gearing, on a "friction clutch" over the cutter shaft, was an oil cup, and about one-fourth the way around the clutch from the oil cup was a set screw to hold the clutch close to the shaft. When the machinery was in motion, the cutter shaft made from 65 to 100 revolutions in a minute. The evidence is again in conflict as to whether the oil cup and set screw could be seen when the shaft was so revolving. The cup and the screw each projected from the clutch about an inch and three-quarters. Appellee, when passing out to go around to the front did not return west under the running paper, but went east. He did not, however, go out by the exit to the southeast. He says the floor there was slippery with oil. He started to go out across the cutter shaft, near the clutch and gearing; and there he fell over, his left leg striking between the gearings, by which it was crushed and torn. The shaft and clutch over which he attempted to step were about 14 inches high; and, to get over, one "would have to step about 14 or 15 inches high, and maybe between 2½ and 3 feet in length." His testimony is that he was thrown upon the gearing by having his clothing, near his left foot, caught by the oil cup and the set screw. He says he did not see either the cup or the screw, that these could not be seen when the shaft was revolving, that the shaft was always revolving when he saw it, and that he had no knowledge of the existence of either the cup or the screw. He admits that he was constantly about this machinery during the time his work was on, that it was his duty to oil it and clean it, that he had oiled this shaft close up to the clutch, "just as close as he could get at it." But he says that for the reason that the shaft was in motion he never saw the cup or screw. He knew that set screws and oil cups are found on revolving shafts, and that it is dangerous to step over them. He had often passed from the rear to the front of the machines, going directly under the running paper, or by the exit between the ends of the shafts of the two machines. The reason that he gives for not going under the paper on this occasion is that the paper was sagged to the floor. It appears, however, that in such a case the paper could be raised up by hand, and one could thus pass under; and this seems to have been the usual way. The reason given for not passing out by the open 10-inch exit, as already suggested, is that once before he had slipped on the oiled floor going that way, and he feared that now he might fall against the pulley near the end of the cutter shaft. Other witnesses did not find this

way at all dangerous. Besides, it was one of appellee's duties to keep the floor clean of oil. It is not doubted that, without regard to the presence of the oil cup and set screw, the attempt to pass over the revolving shaft, 14 inches above the floor, especially so near to the clutch and gearing, was hazardous; and it is the theory of the appellant that in attempting this high and long step the appellee missed his footing, and was so thrown into the gearing. Whether this be correct, or whether, as the jury found, the accident was caused by his clothing being caught by the oil cup and set screw, still the exit chosen by him over the turning shaft and near to the gearing seems to have been a very dangerous one. The evidence shows that it was a rare thing for any one to go out that way. Whether his duty required him to hurry about, is not clear from the evidence. But, even if it did, that would not justify him in taking this hazardous route, when, even if the paper were sagged, by waiting a moment the sag would have been taken up; or he might lift it, as others did, and thus certainly pass back in safety by the way he came, to say nothing of going by the open 19-inch passage. But, even granting all that appellee contends for,—that the 19-inch exit was dangerous by reason of the oily floor, that the sagged paper obstructed the return by the way he came, and that he did not see and did not know of the presence of the oil cup and set screw,—still we do not think that he has shown himself free from negligence. He was almost a man of full age, was bright, active, and intelligent, had worked in this mill for nearly two years, and in and about this particular machinery for three weeks, oiling even the very shaft and clutch at the point where he was hurt. He knew, as he says, of the danger of stepping over projecting oil cups and set screws on revolving shafts. We think, consequently, that if he did not see or know of the cup and screw which he claims caused his injury, he ought to have seen them and known of them. *Railroad Co. v. Stick*, 143 Ind. 449, 41 N. E. 365. Witness after witness testified that the cup and screw could be seen by any one who looked at the place they were. We do not think he could work right there for three weeks, even oiling at the very place, without seeing them. It rather seems probable, as one or two witnesses testify, that he was in a hurry to get around to continue his conversation with those with whom he had been talking when called by the tender to assist in running the paper from the reel to the cutter. Besides, we are unable to see from the evidence adduced that the appellant was in any way at fault. The jury find, as the evidence also shows, that the paper mill and machinery were constructed and maintained after approved plans, of good pattern and design, of good materials, adapted to the use for which they were intended, and such as are in use in the best paper mills. It is possible that gearings, set screws, pulleys, belts, and other such exposed parts of machinery might

be rendered more safe by being boxed. But well-conducted mills are operated without this extra care; and, if usual and ordinary care is shown in the procurement and maintenance of machinery, that is all that can be asked. Extraordinary care cannot be demanded, and the usual and ordinary risks attendant upon work about such machinery are hazards of the service which are assumed by the employé. And if it be conceded that the oil cup and set screw could not be seen when the shaft was in motion, yet we cannot, for that reason, say that such necessary and usual attachments constitute a hidden defect to one who for nearly two years has been an employé in the paper mill where they are found, and who for three weeks has been engaged in the very room where they are used, constantly working around, oiling, and cleaning the very machinery to which they are attached. The evidence adduced on the trial was not, as we think, sufficient to support the essential allegations of the complaint, and hence not sufficient to sustain the verdict. Judgment reversed, with instructions to grant a new trial.

(147 Ind. 148)

REED v. KALFSBECK et al.¹

(Supreme Court of Indiana. Dec. 1, 1896.)

DRAINAGE ASSESSMENT—VALIDITY—SUBROGATION—QUIETING TITLE—TENDER.

1. In proceeding for construction of a drain under Act 1883, p. 173, § 1, providing that it shall be sufficient to give the court jurisdiction to fix a lien on land benefited if the land is described as belonging to the persons who appear to be the owners according to the last tax duplicate, an assessment in case the land is so described is valid, as against the actual owner, though he does not so appear on the tax duplicate.

2. A purchaser at a sale to enforce the state's lien for a drainage assessment is, in case the sale is invalid, subrogated to the lien of the state to the extent of the amount thereof discharged by the money paid by him.

3. To entitle the owner of land to quiet his title as against a purchaser at a sale to enforce a drainage assessment, who, by reason of his purchase, was subrogated to the state's lien to the extent it was discharged by the money paid, he must tender the amount of the purchaser's lien.

Appeal from circuit court, White county; T. F. Palmer, Judge.

Action by Collin M. Reed against Detze Kalfsbeck and others. There was a judgment for defendants, and plaintiff appeals. Affirmed.

Reynolds & Sills, for appellant. Chas. O. Spencer, R. J. Million, and R. P. Davidson, for appellees.

JORDAN, C. J. Appellant institutes this action to quiet his title to certain real estate situated in White county, Ind. He alleged in his complaint that he was the owner in fee simple of the lands described, and that the defendant's claim of title was "unfounded," and a cloud upon his title, and he demanded that his title be quieted, and that appellee's claim be adjudged null and void. Appellee answered the complaint by a general denial,

¹Rehearing denied, 46 N. E. 466.

and under the issues thus joined a trial was had, and there was a special finding of facts, and as a conclusion of law the court found that appellant was not entitled to have the title of the real estate in dispute quieted against appellee, and rendered judgment accordingly. The error assigned by appellant in this court is based upon the court's conclusion upon the special finding. The facts in this case apparently show a chain of title to the land in controversy to Adaline Clark, William Wille, and Colin M. Reed. That before the commencement of this action these parties died, leaving the appellant and certain other persons as their heirs at law, and in 1895 these other heirs conveyed their interest to appellant. In June, 1875, one Fuller conveyed these lands to one Bushnell, but Fuller, in 1859, had conveyed the same real estate to John L. King, a remote grantor of appellant, and this latter deed was recorded in 1860; consequently Fuller's deed conveyed no title or interest to Bushnell. In November, 1877, Bushnell attempted by deed to convey the lands to William Turpie, and subsequently, in 1879, the latter attempted to convey them to Alexander S. Brown. This deed to Brown was recorded November 8, 1879. For the years of 1882, 1883, and 1884, the real estate in question was, according to the tax duplicate in the office of the county auditor, assessed for taxation in the name of Alexander S. Brown, and from said duplicate he appeared to be the owner thereof during the aforesaid mentioned years. In 1883 the remote grantors of appellant, then owners of the land, quit paying taxes thereon, and took no action concerning the same until a short time before the beginning of this action. On September 3, 1884, one David Byroad, the owner of lands which would be benefited by drainage, but which could not be accomplished in the best and cheapest manner without affecting other real estate, applied to the circuit court of White county for the construction of a public ditch or drain under the statutes then in force. That such proceedings were had in accordance with said statutes that on September 30, 1884, the White circuit court referred Byroad's petition to the commissioners of drainage. These commissioners made their report to the court on November 20, 1884, but upon a hearing of objections upon the part of certain landowners this report was referred back to the commissioners, who subsequently, on May 8, 1885, made another report. In this report the commissioners assessed benefits to several tracts of land in the name of Alexander S. Brown, and among the same was the tract in controversy, upon which the benefits were assessed by reason of said drainage at \$75. After making this report, on May 26, 1885, the court made an order approving the benefits mentioned in the report, and ordered that the ditch be established. These proceedings appear to be substantially in compliance with the statute rel-

ative to drainage of lands. On September 6, 1886, the commissioner of drainage, in the name of the state of Indiana, commenced an action in the White circuit court against Alexander Brown to enforce the collection of the \$75 so assessed as benefits against the land in dispute. Such proceedings were had in said action that the defendant Brown, who it appears had been duly served with notice of said action, was defaulted, and there was a finding by the court that there was due the state of Indiana, for the use of the commissioner of drainage, the sum of \$75 upon said assessment, and the further sum of \$12 for attorney's fees, and that the same was a lien upon the real estate now in suit, and the court ordered it to be sold in payment and satisfaction of this lien. Under and by virtue of this decree the sheriff of White county, after duly advertising the time and place of sale, sold said land on July 2, 1887, at public auction, to one Jitce Kalfsbeck, for \$25, and issued to him a certificate of purchase, which, for a valuable consideration, he assigned and transferred to the appellee Detze Kalfsbeck, and on September 2, 1895, the sheriff executed to the appellee a deed on said certificate for the lands in question, under which, prior to the commencement of this action, he took possession. Under these facts counsel for appellant insist that the latter is shown to be the owner in fee of the realty described in the complaint, and that his right to a decree quieting his title cannot be denied or defeated by any claim asserted by the appellees under the drainage proceedings. Appellant's contention, specifically stated, is that Brown was not the real owner of the land at the time he was made a defendant to the action to foreclose the ditch lien; hence the insistence is that, as the true owner was not a party to the foreclosure suit, the sale of the land by the sheriff under the decree is void, and that no title or interest passed by the sheriff's deed to the appellee. Upon the part of appellee's counsel it is contended that the foreclosure proceedings were valid, and they further say that, conceding that the sheriff's deed did not vest the title to the land in the appellee, still a lien was created by the drainage proceedings, which was discharged, at least in part, by the amount bid and paid at the sheriff's sale by the purchaser, from whom appellee obtained the certificate of purchase, and this lien to the extent of the amount discharged by the sale inured to the benefit of appellee. That appellant is not entitled to cut off this lien by a decree quieting title, without first paying or tendering the amount due to appellee. This, we think, is the controlling question to be considered in this appeal, and a determination thereof does not require us to decide as to the validity of the decree of foreclosure. The facts show that the land at the time Byroad petitioned the circuit court for the construction of the public ditch appeared upon the tax duplicate in the name

of Alexander S. Brown. This petition was filed under the amendatory act of 1883 (Acts 1883, p. 173). Section 1 of this act provides that: "Whenever any owner or owners of lands which would be benefited by drainage, which cannot be accomplished in the best and cheapest manner without affecting other lands, shall desire such drainage, he, she or they may apply for such drainage by petition to the circuit court or superior court of the county in which the lands of the petitioner or petitioners are situated. The petition shall describe in tracts of forty acres according to fractions of government surveys, or less tracts, * * * which it is believed shall be affected by the proposed drainage, and give the names of the owners thereof, if known, and if unknown shall so state. Such petition shall be sufficient to give the court jurisdiction over the lands described therein, and power to fix a lien thereon if they are described as belonging to the person who appears to be the owner according to the last tax duplicate or record of transfer kept by the auditor of the county where the same is situate." Section 5 provides that: "The filing of the petition shall be deemed notice of the pendency of the proceedings to all persons whose lands are named in the petition, and the filing of the report of the commissioners locating the work and fixing the amount of the assessments, shall be deemed notice of the pendency of the proceedings to all persons whose lands are named therein, and not named in the original petition, and amount of the assessments made or approved and confirmed by the court, shall be a lien upon the lands so assessed, from the time of filing the petition, except where lands are omitted in the petition and afterward assessed and reported by the commissioners, and, as to such lands, the assessment shall be a lien from the date of filing the report of commissioners." It is shown by the express terms of the statute from which we have quoted that, in order to give the court jurisdiction over the lands, and power to fix a lien thereon, it is not required at all hazards to give the names of the actual owners thereof, but it will suffice "if they are described as belonging to the person who appears to be the owner, according to the last tax duplicate, or record of transfer." This provision seems to have been followed in the drainage proceedings involved in this cause, as the name of Alexander S. Brown, the apparent owner, according to the tax duplicate, was given; hence it follows, we think, that the court had jurisdiction and power to fix a lien for the benefits assessed against the land. This principle was affirmed and adhered to and the reasons sustaining it fully stated in *Kepler v. Wright*, 136 Ind. 77, 35 N. E. 1017, and in *Carr v. State*, 103 Ind. 549, 3 N. E. 375. The real owner of lands who permits or suffers them to remain upon the tax duplicate or transfer records in the name of another can have no good

grounds for complaint if the ditch petitioner describes such lands in the name of the person whom the tax duplicate indicates to be the owner. We do not mean to say, however, that this will bar the actual owner, upon seasonably applying to the court, from being admitted to defend, as it is the policy of the law to permit the real party in interest to defend the same. *Bell v. Cox*, 122 Ind. 153, 23 N. E. 705. Upon the face of the facts as they appear in the special finding, it is disclosed that a lien was fixed and attached to the land in dispute for the benefits assessed, and it does not appear that appellant, or any one in his behalf, has discharged the same, or has offered so to do. If no title passed to the appellee by the sheriff's deed, for the reason, as insisted by appellant that the foreclosure and sale were invalid, nevertheless he would be, at least, entitled to be subrogated to the lien of the state to the extent of the amount discharged by the money paid at the sheriff's sale. *Watkins v. Winings*, 102 Ind. 330, 1 N. E. 638; *Bodkin v. Merit*, 102 Ind. 293, 1 N. E. 625; *Short v. Sears*, 93 Ind. 505. No fact appears showing that the appellant at any time paid or offered to pay appellee the part due him upon the lien under the circumstances.

By his complaint the appellant alleged that he was the owner in fee and appellee's claim or interest, which he asserted, was unfounded. The latter was thereby challenged to bring forward and assert as a legal or equitable defense all claims, title, interest, or liens of whatever character which he had and held, and in failing to do so he would, by a decree quieting appellant's title, have been forever precluded from asserting the same. This is the firmly settled rule, and has been approved and enforced many times by this court. The appellee seems to have responded to appellant's challenge, and properly availed himself of a defense under his statutory denial in accordance with section 1055, Rev. St. 1881. Under his general denial he was authorized to introduce any facts upon the trial which, according to the principles of equity, as applied by courts of chancery, would defeat the appellant in obtaining a decree quieting his title to the land in question. *East v. Peden*, 108 Ind. 92, 8 N. E. 722. If it appeared that appellee had any interest in the land, or existing lien, it could not be cut off by an action to quiet title. *Johnson v. Murray*, 112 Ind. 154, 13 N. E. 273. Appellee was not compelled, as insisted by appellant, to become an actor by way of a cross complaint, asking affirmative relief, but he had the right, under his answer, to rely upon any equitable or legal defense to defeat the claim of his adversary. *East v. Peden*, supra. As we heretofore said, the inquiry need not be directed to the validity of the foreclosure proceedings, and the sale thereunder; for, if we concede the invalidity of these, the controlling question back of this arises, was the appellant entitled, in this

action, to a judgment quieting his title, and thereby sweeping away the part of the state's lien satisfied by the proceeds of the sheriff's sale, without paying or tendering the amount due to the appellee thereon under his right to subrogation? This question, we are of the opinion, must be answered in the negative. It would be unjust to permit the appellant to have a recovery quieting his title, and in this manner escape the payment in whole or in part of a valid lien existing against the realty. As the facts found show at least a substantial claim in favor of appellee, it cannot be cut off by a decree quieting title, unless it is shown that the appellant paid or tendered the amount due thereon. It is clear, we think, that there is no principle of law or equity that will sustain the contrary. While we do not deny but what the court may, in a proper case, enter a qualified decree declaring the fee to be in the plaintiff subject to the lien asserted by the defendant, yet it is a rule of general application that, where one seeks to quiet his title against one holding and asserting a valid lien, he cannot do so unless he pays or tenders the payment of the lien. This principle is supported by many decisions of this court. See *Shannon v. Hay*, 106 Ind. 589, 7 N. E. 376; *Ragsdale v. Mitchell*, 97 Ind. 458; *Montgomery v. Wasem*, 116 Ind. 343, 15 N. E. 795, and 19 N. E. 184; *Prezinger v. Harness*, 114 Ind. 491, 16 N. E. 495; *Jackson v. Smith*, 120 Ind. 620, 22 N. E. 431; *Bluel v. Tucker*, 121 Ind. 249, 23 N. E. 81; *Montgomery v. Trumbo*, 126 Ind. 331, 26 N. E. 54; *Schlissel v. Dickson*, 129 Ind. 139, 28 N. E. 540; *Browning v. Smith*, 139 Ind. 280, 37 N. E. 540. It follows that under the facts the appellant was not entitled to a decree quieting title against appellee. Judgment affirmed.

(146 Ind. 374)

BALTIMORE & O. S. W. RY. CO. v. YOUNG.¹

(Supreme Court of Indiana. Dec. 4, 1896.)

RAILROAD CROSSING COLLISION — NEGLIGENCE — PROXIMATE CAUSE.

A complaint for injury received at a railroad crossing, alleging that the railroad and highway were at such grades that an approaching train could not be seen by one on the highway till reaching the intersection; that plaintiff was familiar with the regular time of trains on the road; that, as he approached the crossing, it was not time for a train, and he had no notice or knowledge that one would then pass; "that as he was carefully and prudently driving along said highway, * * * approaching said * * * crossing, he listened, and looked carefully for a train, but heard none; that no * * * signal of any kind [was] given, and he drove * * * upon said crossing; * * * whereupon a * * * train, * * * running * * * 60 miles an hour, without any notice or warning * * * ran against and upon him, in his wagon," inflicting the injuries complained of, "through no fault or negligence on his part,"—while sufficient as to allegations of negligence and absence of contributory negligence, is not as to allegations of proximate cause.

¹See 54 N. E. 731.

Appeal from circuit court, Sullivan county; W. W. Moffett, Judge.

Action by Marshall Young against the Baltimore & Ohio Southwestern Railway Company. Judgment for plaintiff, and defendant appeals. Reversed.

E. W. Strong, W. R. Gardiner, J. T. Hays, and W. H. De Wolf, for appellant. Rely & Emison, for appellee.

HACKNEY, J. The appellee sued and recovered for personal injuries sustained by him in a collision of a train with his wagon at the crossing of a highway and the railway of the then Ohio & Mississippi Railway Company, since consolidated with other companies and constituting the appellant. The complaint alleged that the crossing was upon a sharp descending grade, and the railway for a half mile north of the crossing ran through a cut 30 feet deep; that, 200 feet east of the highway, and within 20 feet of the railway, was a large and tall frame building, which obstructed a view of the railway by persons upon the highway approaching the crossing towards the east; that the highway, for the distance of a quarter of a mile before reaching the crossing, as he was going, was much lower than the railway at the crossing; that, by reason of said conditions, a train approaching said crossing from the northeast could not be seen within a quarter of a mile of said crossing, nor until the intersection was reached, by one traveling in the direction in which the appellee was driving. It was alleged that the appellee was familiar with the regular time of trains upon the road; that, as he approached the crossing, it was not the time for a train at that point, and he had no notice or knowledge that a train would then pass said crossing; that "as he was carefully and prudently driving along said highway, * * * approaching said railway at said crossing, he listened and looked carefully for a train, but heard none; that no bell was rung, nor whistle blown, nor signal of any kind given, and he drove along said highway, and upon said crossing, at the place aforesaid; whereupon a long, heavy passenger train of cars, running at the rate of 60 miles an hour, without any notice or warning as aforesaid, ran against and upon him, in his wagon," inflicting the injuries complained of, "through no fault or negligence on his part." The appellant insists that its demurrer to the complaint should have been sustained, and the contention is now made that it was insufficient in its allegations of negligence and of the absence of contributory negligence on the part of the appellee, and that it failed to allege facts disclosing that the negligence of the company was the proximate cause of the injury.

It is the general rule in actions for negligence, and it is the rule in cases of the character of the present, that at least three

propositions must concur before a liability arises: Negligence on the part of the defendant, which negligence is the proximate cause of the injury complained of, and that negligence of the person injured does not contribute to the injury. *Railway Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37; *Railway Co. v. Stick*, 143 Ind. 449, 41 N. E. 385; *Faris v. Hoberg*, 134 Ind. 269, 33 N. E. 1028; 16 Am. & Eng. Enc. Law, 422; *Elliott, R. R.* §§ 1155, 1156; *Railway Co. v. Conn*, 104 Ind. 64, 3 N. E. 636; *Corporation v. Mathews*, 92 Ind. 213; *Railway Co. v. Enger*, 4 Ind. App. 261, 30 N. E. 924; *Stone Co. v. Wray*, 10 Ind. App. 324, 37 N. E. 1058; *Railroad Co. v. McKean*, 40 Ill. 218; *Cosgrove v. Railway Co.*, 13 Hun, 329; *Barringer v. Railway Co.*, 18 Hun, 398. It has been so many times held that a complaint for negligence, to be sufficient, must allege the negligence of the defendant, and the freedom of the plaintiff from negligence, that we need not cite authority, upon the question of pleading, with reference to these two elements. We are not impressed with the claim that, with reference to these two elements of the case, the complaint is insufficient. The allegations of failure to give signals of the approach of the train to the crossing of the highway are sufficient, we have no doubt, to disclose the violation of a duty expressly enjoined by statute. *Rev. St. 1894*, §§ 5307, 5308 (*Rev. St. 1891*, §§ 4020, 4021). The general allegation of freedom from fault on the part of the appellee has always been held sufficient in this state. The cases holding this rule have been fully collected in a note to 5 Enc. Pl. & Prac. p. 7. Nor do we agree with counsel for the appellant that the particular allegations as to the care exercised by the appellee are at variance with the general allegation of freedom from negligence. We may suggest, however, that, if the sufficiency of the complaint rested upon the particular allegations of care on his part, it would be very doubtful if it would be sufficient.

As to the essential element of liability that the negligence of the defendant shall be the proximate cause of the injury, it has been specially held, as a question of pleading, that the fact must affirmatively appear, to constitute a good complaint. *Railway Co. v. Conn*, supra; *Corporation v. Mathews*, supra; *Railway Co. v. Enger*, supra; *Stone Co. v. Wray*, supra; *Pennsylvania Co. v. Gallentine*, 77 Ind. 322; *Railway Co. v. Krapf*, 143 Ind. 647, 36 N. E. 901. With reference to this element of liability it is said, in *Elliott, R. R.*, supra: "The rule supported by the weight of authority, we think, is that one who violates the law is a wrongdoer; that, ordinarily, the omission of the statutory duty is negligence per se; and that, where the omission is established, such negligence arises as a matter of law. But such omission by no means conclusively establishes the company's liability, for the injured party must be free from fault, and the negligence

of the company must have been the proximate cause of his injury, to enable him to recover,"—citing many authorities. Again, it is said, in the same section: "In no event is the omission to give the statutory signals sufficient, of itself, to make out a case, for there must be evidence showing that it was the proximate cause of the injury." In the complaint before us there is no allegation supplying this element of the liability sought to be enforced. To hold the complaint sufficient, we would be required to infer, from the alleged negligence of the company, the generally alleged care of the appellee, and his injury from the collision, that the company's negligence was the cause of the injury. Such an inference does not necessarily arise from the facts mentioned. Like facts were alleged in *Railway Co. v. Conn*, supra, and this court refused to draw this inference; and in *Pennsylvania Co. v. Gallentine*, supra, the complaint was held to be insufficient because it failed to show "that the injury was caused by, or resulted from, the negligence of the defendant." In *Railway Co. v. McKean*, supra, it was said, of a statute requiring signals at crossings, similar to our statute, supra, that "It is very evident the legislature did not intend to declare, nor have they so declared, that this omission of duty shall, per se, render them liable to damages for injuries. The injury must be shown, by circumstances at least, to have been the consequence of, or caused by, such neglect." In *Barringer v. Railway Co.*, supra, and in *Cosgrove v. Railway Co.*, supra, it was held that the failure to give signals, the injury of the party, and his freedom from negligence did not justify a recovery, if the collision was from his inability to control his horse. It is said: "In such case the plaintiff cannot recover, not because the deceased was guilty of contributive negligence, but simply because his death was not caused by the negligence of the defendant." In *Railway Co. v. Krapf*, supra, a complaint for negligence was held bad for a failure to allege facts from which it could be inferred that the injury would not have happened but for the negligence of the defendant. Under the rule in that case the complaint before us is bad. There is no allegation that the appellee could have heard the signals, if given, nor that he could have avoided the collision if he had heard them before going upon the track. There is not even the general statement that the collision or injury was due to the omission of the company to give signals. We are not here dealing with the manner in which the fact should be alleged, but the question decided is that the complaint has no allegation of fact requiring the inference that the alleged negligence of the company was the proximate cause of the injury. The lower court, therefore, erred in overruling said demurrer, and the judgment is reversed, with instructions to sustain said demurrer.

(16 Ind. App. 398)

HARLAN v. JONES.

(Appellate Court of Indiana. Dec. 1, 1896.)

MALICIOUS PROSECUTION—WHEN LIES—DEFENSE—APPEAL—HARMLESS ERROR.

1. Malicious prosecution will lie against one who procures a search warrant requiring a search of plaintiff's property for stolen goods, though the proceedings do not "involve any charge of crime," especially since Rev. St. 1894, §§ 1688, 1689 (Horner's Rev. St. 1896, §§ 1619, 1620), which provide for issuing search warrants, do not require that the owner of the property to be searched shall be charged with the commission of a crime.

2. One who procures a search warrant requiring certain property to be searched for stolen goods cannot, in an action for malicious prosecution by the owner of such property, set up the defense that the affidavit filed by him did not, in law, authorize the issuance of the writ.

3. In an action for malicious prosecution, in which there is a general denial, it was harmless error to sustain a demurrer to a paragraph setting up matters showing the existence of probable cause and the nonexistence of malice, since all such facts are admissible under the general denial.

4. It is also harmless error to sustain a demurrer to a paragraph which counts on the good faith of defendant and his acting under the advice of a justice to whom he related all the facts.

Appeal from circuit court, Fayette county; F. S. Swift, Judge.

Action by Ephraim Jones against James M. Harlan for malicious prosecution. Judgment in favor of plaintiff. Defendant appeals. Affirmed.

McKee, Little & Frost, for appellant. Conner & McIntosh, for appellee.

GAVIN, J. Appellee recovered judgment against appellant for malicious prosecution by maliciously and without probable cause instituting proceedings for a search warrant, and procuring a warrant commanding the searching of appellee's house for certain goods alleged to have been stolen. The affidavit described the goods, averred they had been stolen and were believed to be concealed in a certain house, known as the "Cooley House," and further asked, if they were not found there, that appellee's house should also be searched. The warrant was so issued, and appellee's house searched by virtue of it.

It is contended by counsel that the complaint is bad because the "proceedings did not involve any charge of crime" against appellee. That procuring a search warrant is such a proceeding as may be the foundation of an action for malicious prosecution is not, and cannot be, controverted. Carey v. Sheets, 67 Ind. 375; Whitson v. May, 71 Ind. 269; Flora v. Russell, 138 Ind. 153, 37 N. E. 593; Tuell v. Wrink, 8 Blackf. 249; Fisher v. Hamilton, 49 Ind. 341. It is not requisite that the affidavit or indictment should have sufficiently charged the defendant with a crime to authorize him to maintain an action for malicious prosecution. Stanciliff v. Palmeto, 18 Ind. 321; McCullough v. Rice, 59 Ind. 580; Schattgen v. Holnback, 149 Ill. 646, 36 N. E. 969; Matilek v. Crump, 62 Mo. App. 21; Shaul v. Brown, 28 Iowa, 37; Forrest v. Collier, 20 Ala. 175;

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Dennis v. Ryan, 65 N. Y. 385. The statute (sections 1619, 1620, Horner's Rev. St. 1896; sections 1688, 1689, Rev. St. 1894) which provides for the issuing of search warrants does not require that the owner of the property to be searched shall be charged with the commission of a crime. In the cases in 67 and 71 Ind., cited above, no such charge appears to have been made. It comes with an ill grace from appellant to now say that his affidavit did not, in law, authorize the issuance of the writ, when he expressly asked for it, and obtained that which he asked, and subjected appellee to all the indignity which would have followed had the affidavit been in all respects sufficient. In Collins v. Love, 7 Blackf. 416, it was expressly decided that, in such suits as this, the complaint is not objectionable because the alleged charge does not authorize the issuing of the warrant. Appellant, having instituted the proceeding maliciously and without any probable cause, and prosecuted it to an unsuccessful termination, must now answer for his wrong.

Appellant filed an answer of general denial, together with two special paragraphs. The second paragraph set up matters showing the existence of probable cause and the nonexistence of malice. All these facts were admissible under the general denial. Consequently there was no harmful error in sustaining a demurrer to this answer. Kniss v. Holbrook (Ind. App.) 44 N. E. 563. The same may be said of the third paragraph, which also counts upon the good faith of appellant, and his acting under the advice of a justice, to whom he related all the facts. The paragraphs were at best but special denials. We find in the record no just cause for reversal. Judgment affirmed.

(16 Ind. App. 340)

BROWN v. HIATT.

(Appellate Court of Indiana. Nov. 24, 1896.)

APPEAL—FINDINGS OF FACT—HIGHWAYS.

1. A finding of fact on conflicting evidence will not be disturbed.

2. The failure to grade and use a highway to its full width does not constitute an abandonment of the part not used.

Appeal from circuit court, Tipton county; L. J. Kirkpatrick, Judge.

Action by Eliphalet C. Hiatt against Horace G. Brown and another. Judgment for plaintiff, and defendant Brown appeals. Affirmed.

Kane & Kane, for appellant. John F. Neal, for appellee.

ROSS, J. The appellee, Eliphalet C. Hiatt, brought this action against the appellant, Horace G. Brown, to declare and foreclose the liens of two assessments made for street improvements. The appellant William H. Ramsey, the assignor of such assessment liens, was made a party to answer as to his interest. The appellee recovered in the court below, and the appellant Horace G. Brown has

appealed to this court, and has notified his co-appellant, William H. Ramsey, to join therein, but the latter has not joined in the appeal. The court below made a special finding of facts, with conclusions of law thereon. Two specifications of error have been assigned in this court, namely: First, that the court erred in its conclusions of law upon the facts found; and, second, that the court erred in overruling the appellant's motion for a new trial.

It is urged that some of the facts found by the court, and embraced in the special findings, are erroneous, in that the evidence preponderates against such finding. Counsel do not intimate that there is no evidence to sustain the court's finding, but they say: "We are confident that the decided preponderance of the testimony shows" the facts to be different from what the court has found them to be. If counsel's statement is true, "that the decided preponderance of the testimony" tends to show a state of facts different from what the court has found, nevertheless, under the rule that prevails in appellate courts, we cannot disturb the finding if there is any reasonable evidence to sustain it. Counsel admit that there is evidence which, standing alone, would warrant the finding, but simply insist that the preponderance of the evidence is to the contrary. The rule so firmly established in this jurisdiction, that the appellate court will not weigh the evidence, and determine upon which side it preponderates, was adopted, and has been adhered to, upon the theory that the trial court, ever on the alert to protect the rights of all parties, and, having noted the evidence as it was given on the trial, has concluded, not only that the verdict or finding is supported by a preponderance of the reputable evidence, but that the verdict or finding is on the side of the real justice and equity of the case. The rule originated upon the theory alone that the trial court had done its duty in this respect, and on account of the advantages which it had over the appellate tribunal, to know the truth and the weight to be given to the testimony, it has been adhered to. True, cases sometimes come before the court wherein it seems the trial court has been unmindful of its duty, and has sustained a verdict simply upon the theory that, a jury having decided upon the weight of the evidence, that decision should not be disturbed, even though to the mind of the court the evidence preponderates the other way. When the trial court so rules, it is unmindful of its duty, and makes itself but a figurehead in the trial of cases. While it is, no doubt, the duty and province of a jury to decide between conflicting testimony, and determine the existence or nonexistence of a fact from a preponderance of the evidence, yet it is also the duty of the court, when asked, to review the evidence, and determine whether or not the jury have properly decided from a preponderance of the evidence. In this case the court below tried

the case without the intervention of a jury; and, in considering the evidence and making the finding, we must assume that it gave the evidence the same careful scrutiny and consideration it would have bestowed had it been reviewing it after considered by a verdict. The trial court has decided that the worthy evidence establishes the facts as found, and, inasmuch as the evidence is conflicting, that finding is binding upon this court.

The facts found by the court about some of which there is a controversy, and which present the questions urged on this appeal, are that the street ordered improved was for many years prior to 1871 a public highway in Hamilton county, and in that year said highway and the adjoining lands were regularly annexed to and made a part of the city of Noblesville; that said highway was 63 feet wide, and was named and known as "Anderson Street"; that, in its improvement, no part of appellant's land was taken or appropriated, and that no proceedings were ever instituted to appropriate appellant's land, nor were any damages paid, assessed, or tendered him; that appellant's father, who was the owner of said property at the time the improvement was made, knew it was being done, but made no objection, except that he sent by mail to the contractor doing the work a written notice notifying him that said city had no right to make the improvement, and that he would not pay any assessment. This notice was not received by said contractor until after he had commenced the work, and had a large portion of the street graded. The findings as to the compliance with the law in making the improvement seems to be regular and complete.

We cannot concur in the view of appellant either that a part of the highway in question was abandoned because not graveled and used as a passageway, or for the further reason that the adjoining landowners for a time, at least, obstructed it with their fences. Nor was it abandoned because the board of county commissioners granted to a toll-road company the right to use and occupy it for a toll road, and they only used a part of it, to wit, 40 feet thereof, allowing the balance to grow up in grass, etc. There are few, if any, highways in the state of Indiana that are actually used to their extreme width, and yet the fact that they are not graded, graveled, and used to the extreme width does not indicate an abandonment of the part not actually used. Counsel say that this nonuser showed an abandonment and vacation. We think it insufficient to show an abandonment, especially in view of the fact that the public is now insisting that it never was abandoned. It never was vacated, because the court did not find that it was vacated, and our attention has not been called to any evidence showing that it was ever vacated by legal proceedings.

It is also insisted that the court erred in rejecting certain evidence offered by the appellant on surrebuttal. This contention is with-

out merit—First, because no ruling is shown by the court upon which to base the contention; and, second, this evidence, if admissible, should have been given in chief to sustain the defense pleaded in appellant's answer.

This disposes of all the questions urged for our consideration, and we find no error warranting a reversal of the judgment of the court below. Judgment affirmed, at the cost of the appellant, Horace G. Brown.

DAVIS, J., not participating.

(16 Ind. App. 352)

ANGLEMYER v. BLACKBURN.

(Appellate Court of Indiana. Nov. 24, 1896.)

APPEAL—HARMLESS ERROR—PLEADING—RULE OF COURT.

1. Where a defendant recovers on a counterclaim an amount exceeding plaintiff's demand, the overruling of a demurrer to the same matter pleaded as a defense, if erroneous, is without prejudice.

2. A paragraph in an answer pleading a counterclaim is not demurrable when any of the matters therein pleaded constitute a cause of action.

3. A circuit court has power to make and enforce a rule fixing the limit of time within which a motion for change of venue must be filed.

Appeal from circuit court, Miami county; J. T. Cox, Judge.

Action by Jeremiah Anglemyer against Thomas J. Blackburn. Judgment for defendant, and plaintiff appeals. Affirmed.

Conner, Rowley & McMahan, for appellant. Nott N. Antrim, for appellee.

REINHARD, J. The appellant has assigned as errors (1) the overruling of his demurrer to the fifth paragraph of appellee's answer; (2) the overruling of the demurrer to the appellee's counterclaim, numbered paragraphs 6 and 7, and in each of said rulings; (3) the overruling of appellant's motion for a venire de novo; (4) the overruling of the appellant's motion for a new trial. The appellant instituted this action to recover of appellee an alleged indebtedness of \$250. The complaint alleges "that on the 7th day of September, 1893, the said parties made an exchange of certain real estate situate in the counties of Miami and Fulton, in the state of Indiana, and conveyed the same by deed to each other. In making said exchange of real estate, as aforesaid, there was a difference in the value thereof in favor of the plaintiff in the sum of \$250, which said defendant then and there promised and agreed to pay the plaintiff; but plaintiff says said defendant has not paid said sum, nor any part thereof; but that the same, with interest thereon, at 6 per cent. per annum, is due, but remains wholly unpaid, for which, and all proper relief, plaintiff demands judgment." In the fifth paragraph of the appellee's answer, it is averred that the defendant "admits that on the 7th day of September, 1893, he promised and agreed to pay to said plaintiff the sum of \$250, as a difference then

and there supposed to be due plaintiff upon the exchange of real estate as alleged in plaintiff's complaint, but defendant says that the consideration for said promise and agreement failed in this, to wit: that a portion of the consideration given defendant for his conveyance to plaintiff of the real estate in Fulton county, referred to in his complaint, and defendant's promise to pay said \$250, consisted of a lot of lumber situate in a mill yard near the town of Gilead, the undivided half of which mill yard was sold and conveyed by the plaintiff to said defendant, in exchange, in part payment for said Fulton county real estate, which lumber was of the value of \$30.03; that a further part of the consideration given to said defendant for his said conveyance to plaintiff, of the real estate in Fulton county, referred to in his complaint, and defendant's promise to pay plaintiff said \$250, consisted of a lot, to wit, 39,822 feet of timber, of the value of \$323; that the plaintiff had not at the time of said agreement, and has not since, any title to said lumber or timber, and has at no time conveyed to said defendant any title thereto, or given him possession thereof, or any part of the same." There is no averment, either in the complaint or in the answer above set forth, which shows the respective amounts at which the real estate of either party was estimated. The complaint and the answer demurred to, when construed together, disclose the following facts: Appellant conveyed to appellee certain real estate in Miami county, together with certain lumber, of the value of \$30.03, and certain timber of the value of \$323. In consideration of this, the appellee conveyed to appellant certain real estate in Fulton county, and promised to pay the appellant the sum of \$250, which he has failed to pay, and for which appellant brings this action. Appellant has failed to deliver the lumber and timber, and has no title to the same.

The appellant earnestly insists that this pleading is fatally defective in that it attempts to answer the entire complaint, when in fact it answers only a part. Whether this answer is subject to the objections urged, or to others that might be named, we need not determine. The same matters set forth in the fifth paragraph of the answer are also pleaded as a counterclaim. The verdict of the jury shows that they found for the defendant on his counterclaim, assessing the damages at \$300. This amount is sufficient to counterbalance any sum that might have been found due the appellant on his cause of action. Disregarding the answer, therefore, nothing could possibly be due the appellant on his complaint, in any event. Consequently, if the ruling upon the demurrer to the answer in question was erroneous, the error was harmless, and cannot result in a reversal of the judgment.

It is next insisted that the court erred in overruling the demurrer to the counterclaim.

The counterclaim proceeds upon the theory of a warranty of title and a breach of said warranty by reason of a failure of title. It is urged that the pleading is bad, because it alleges no value of the real estate conveyed to the appellee. It is alleged, however, that the lumber and timber which the appellant agreed to deliver to the appellee were of the value of \$30.03 and \$323, respectively, and that the appellant failed to deliver the same, or any part thereof, having no title to the same. We fail to perceive the necessity for averring the value of the real estate. If the parties made a contract, as alleged, by virtue of which the appellant agreed to deliver certain lumber and timber of a certain value, and he failed to do so, the appellee was damaged the value of such lumber and timber, regardless of the value of the land conveyed. The appellee had the right to stand upon the terms of the contract. If the land he received was worth more than enough to counterbalance any loss in the lumber and timber, this would not give the appellee the right to recoup the excess in the value of the land, as against the deficit arising upon the lumber or timber transaction. According to the averments of the counterclaim, the appellant agreed to deliver to the appellee the lumber and timber mentioned, and, if he failed to do so, the appellee had the undoubted right to recover of him the value of the same. If, in the exchange, the appellee received the best end of the bargain, we cannot help the appellant. It was his own contract, and the law will compel him to live up to it, in the absence of any fraud or mistake.

Another objection urged to the counterclaim is that any warranty of title of the real estate could be evidenced only by the deed of conveyance executed, and that the deed should have been made an exhibit. We do not think the pleading bad, even if it be conceded that any warranty pertaining to the land must be contained in the deed; and in an action for such breach the deed must be made an exhibit. Granting that appellant can recover nothing on account of the warranty of title of the land, he can still recover for the failure to deliver the timber and lumber.

What we have just said applies also to the other paragraph of the counterclaim. It is averred in this pleading that appellant, in the exchange of real estate, agreed to deliver to appellee certain logs to which he had no title, and did not deliver to him, and that he was damaged in a certain amount. It is true that there is a further averment as to a certain mill and other property which appellant agreed to convey and turn over to appellee, and of its condition as warranted, and as it actually was; but, without regard to any other property than the logs, we think a valid cause of action is shown in the appellant's failure to deliver the logs, and this is sufficient. If the complaint, or, in this case, the counterclaim, discloses a right to recover on

any of the items declared upon, the demurrer must be overruled, although as to other items the pleading may be defective. If the appellee is entitled to some relief, the counterclaim is sufficient, although not entitled to all the relief demanded. *Levi v. Hare*, 8 Ind. App. 571, 36 N. E. 369.

The appellant was not entitled to a venire de novo. The verdict was not defective. The fact that the jury, in one portion of the verdict, found for the appellee as to the attachment proceedings, and in the other found for the appellee on his counterclaim, does not render the verdict so uncertain that a judgment could not be rendered upon it. The verdict is sufficiently plain to be understood. 1 Works, Prac. § 970; *Thornt. Juries*, § 273.

It is finally contended that the court erred in overruling appellant's motion for a change of venue. A rule of the trial court, certified to this court, requires such applications to be made before issues are formed. To have granted the change would have been a violation of this rule. The certification of the rule to this court was properly made. *Rout v. Ninde*, 111 Ind. 597, 13 N. E. 107. The court had power to make such rule. *Redman v. State*, 28 Ind. 205; *Ringgenberg v. Hartman*, 102 Ind. 537, 26 N. E. 91; *Jones v. Dupert*, 123 Ind. 594, 23 N. E. 944. The application was properly refused. Judgment affirmed.

(16 Ind. App. 401)

CHICAGO & E. R. CO. v. LONG.

(Appellate Court of Indiana. Dec. 1, 1896.)

RAILROAD COMPANIES—FIRES—ACTION FOR DAMAGES—SUFFICIENCY OF COMPLAINT—APPEAL—HARMLESS ERROR.

1. In an action against a railroad company for damages by fire, a complaint which alleges that defendant negligently permitted a fire to originate on its right of way, and negligently permitted it to escape upon plaintiff's land, and to burn the soil and crops thereon, is sufficient.

2. In an action against a railroad company for damages by fire, plaintiff asked his witness what a certain person said to another person (named) about the fire having been started from an engine on the railroad. *Held*, that any error in overruling an objection to the question was harmless, where the answer was not responsive.

Appeal from circuit court, La Porte county; Lucius Hubbard, Judge.

Action by James S. Long against the Chicago & Erie Railroad Company to recover damages to plaintiff's land and crops by fire alleged to have been negligently permitted to escape from defendant's right of way. Judgment in favor of plaintiff. Defendant appeals. Affirmed.

William O. Johnson, J. W. Crumpacker, and William Johnson, for appellant. F. E. Osborn and J. H. Bradley, for appellee.

LOTZ, C. J. The appellee sued the appellant to recover damages done to his lands and crops by fire alleged to have been negligently permitted to escape from the appellant's right of way, and recovered a judg-

ment in the court below. The complaint is in four paragraphs. Demurrers were overruled to each, and these rulings are assigned as error. The appellant, however, only considers the ruling as to the fourth paragraph, thereby waiving the rulings as to the others. The fourth paragraph avers, in substance, that the defendant negligently permitted a fire to originate on its right of way, and negligently permitted it to escape upon the plaintiff's lands, and to burn the soil and crops thereon. The paragraph is sufficient. *Railroad Co. v. Burden* (Ind. App.) 43 N. E. 155.

The next error assigned is the overruling of appellant's motion for a new trial. On the trial of the cause the appellee propounded to his witness Iseminger this question: "What, if anything, did Mr. Bailey say to Mr. Corroll about the fire having been started from an engine on the railroad, which was then burning?" Appellant's objection to this question was overruled, but as the answer was not responsive to the question, and nothing was stated as to the origin of the fire, the error, if any, was harmless. Objections were made to certain questions propounded to this witness as being leading. This was matter in the sound discretion of the court, and there was no abuse of that discretion in this instance. The appellee's objection was sustained to certain questions propounded to appellant's witness Penestone relating to the value of the hay destroyed. But, as the witness was subsequently permitted to give his opinion as to the value of the hay, there was no harm in this ruling. Complaint is also made of other rulings of the court in excluding certain evidence offered by appellant. We have examined these objections, and find no reversible error in the record. Judgment affirmed.

(16 Ind. App. 420)

BARNETT v. STEVENS et al.

(Appellate Court of Indiana. Dec. 3, 1896.)

MECHANICS' LIENS—WAIVER.

Defendant, owner of an hotel, contracted with plaintiff for certain improvements, materials for which had to be specially manufactured. After their manufacture, but before the improvements had been made, defendant sold the hotel, rescinded the contract for improvements, and refused to take the materials, and plaintiff filed a mechanic's lien against the hotel for the materials. Plaintiff subsequently sold the materials to defendant's grantees, and, under a new contract with them, used them in making the improvements in the hotel. *Held*, that plaintiff, by reasserting title to the materials, and selling them to defendant's grantees, waived any rights under the lien claim previously filed.

On rehearing. Denied.

For former opinion, see 43 N. E. 661.

DAVIS, J. Counsel for appellees on petition for rehearing has earnestly and ably argued the questions involved in this appeal. On the theory that the material had been prepared and constructively furnished for improvement of the hotel property prior to the 20th of June,

we may assume that appellees were then in position to enforce the lien for \$435 against the appellant and the property. In other words, appellant was liable for the material so furnished, and the amount was secured by the lien. This is on the theory that appellees had parted with the title to the material. They certainly could not retain the title to the material, and enforce the lien therefor against Barnett and his property, at the same time. In other words, if they owned the material after the 20th of June, then it is evident that the material had not prior thereto been, in fact, furnished by them in making the improvement. Their right of action on the lien filed on June 20th was waived and lost by subsequently asserting title to the material, and selling the same to the Clarks. In other words, appellees cannot now maintain and enforce the lien filed on June 20th for material which they afterwards sold to the Clarks, although it was subsequently used in making the improvement. If they had filed a lien after they furnished the material for the improvement, they could have enforced it against Barnett and the property. In other words, after furnishing said material, no notice of an intention to hold a lien on the property was filed. The effort, however, in this action, is to enforce a lien, filed on June 20th, for material afterwards sold and furnished by appellees to the Clarks, and subsequently used in the improvement of the hotel property. The material must be furnished, either actually or constructively, for use in the improvement, before the lien can be acquired. The lien can only be acquired by filing the notice as provided in the statute. It is true, the material was furnished by appellees for the improvement, and that it was in fact used in the improvement of the hotel property, but it was so furnished and used after the lien sought to be enforced in this action was filed. The fact that Barnett repudiated his contract with appellees, and that he at all times was the equitable owner of the property, and that appellees furnished the material used in making the improvement, did not create the lien. The lien is a creature of the statute, and can only be created by filing the notice after the material is furnished. In this case it clearly appears that, after the lien was filed on June 20th, the appellees retained the actual possession of the material, and that they subsequently sold it to the Clarks, and that, after they furnished and used the material in making the improvement, they filed no notice of their intention to hold the lien. Notwithstanding Barnett accounted to the Clarks for the improvement made by appellees during the time the Clarks were in possession of the property, the appellees were entitled to "the fruits of their toil and industry," but the court has no power to create a lien in their favor for the purpose of securing this result. Their misfortune arises out of the failure to file the proper notice "within sixty days after performing such labor or furnishing such material."

In other words, appellees waived any rights in their favor, arising out of the constructive furnishing of the material to Barnett prior to June 20th, by afterwards in fact selling such material to the Clarks for a different price. The fact that Barnett unjustly repudiated his contract with appellees, and that he "requested plaintiffs to see the persons to whom he had sold said hotel about the same," did not, in the absence of the statutory notice, create a lien against him or the hotel property for the material subsequently furnished and used by them in making the improvement. It clearly appears, in the same connection, that, immediately before the request was made, "plaintiffs tendered said Barnett said urinals, closets, and other work, and offered to set them up and complete them in said hotel in accordance with said contract, but Barnett refused to accept said offer, or to allow said work to be done." Assuming that this act of Barnett's was wrong and unjust, the undisputed fact remains that appellees afterwards furnished the material in making the improvement, and we know of no principle of law under which they can now enforce against Barnett and the hotel property the lien filed on June 20th for material afterwards sold by them to the Clarks, and subsequently used in making such improvement. If appellees had, after the 20th of June, treated the material as belonging to Barnett, or as having been furnished for the improvement under the contract with him, a different question would be presented; but, on the contrary, they afterwards retained possession of the material, assumed to be the owners thereof, and sold the same for a different price to the Clarks, and, after furnishing and using the same in making the improvement, failed to file any notice of an intention to hold a lien therefor. The petition for rehearing is overruled.

(164 Ill. 58)

EMPIRE LAUNDRY MACHINERY CO. v. BRADY.

(Supreme Court of Illinois. Nov. 23, 1896.)

APPEAL — OBJECTIONS NOT RAISED BELOW — NEGLIGENCE.

1. That a special finding is not supported by the evidence cannot be urged for the first time on appeal.

2. The seller of a wringer operated by hand power sent a machinist to arrange it so as to apply steam power. The machinist requested the purchasers' manager to assist him in adjusting the belt. When the machinery was started the wringer was pulled loose from the floor because not sufficiently fastened by the machinist, and the manager was killed without fault on his part. *Held*, that the seller was not exempt from liability because the wringer had been previously accepted by the purchasers.

Appeal from appellate court, First district.

Action by Sarah A. Brady, administratrix of the estate of Stafford N. Brady, deceased, against the Empire Laundry Machinery Company to recover damages for the death of plaintiff's intestate, caused by defendant's negligence. From a judgment of the appellate

court (60 Ill. App. 379) affirming a judgment for plaintiff, defendant appeals. Affirmed.

This was an action on the case, brought by appellee against appellant, to recover damages for the death of her husband and intestate, Stafford N. Brady. In March, 1889, the deceased was an employé of the firm of Wilson & Fuchs, who were engaged in the operation of a laundry, their principal business being the cleaning of soiled towels and cloths, which, when cleansed, were used for wiping machinery. Brady was salesman and superintendent of the laundry, in which two other employés were engaged. At that time appellant was engaged in the manufacture and sale of laundry machinery, washers, and wringers. In February or March, 1889, Wilson & Fuchs purchased from appellant's company an ordinary laundry wringer, consisting of two wooden rollers in an iron frame, and weighing from 75 to 100 pounds. It rested on four feet, which were arranged for castors, and also each of the feet had an opening to receive the screws or bolts by which it might be fastened to the floor. At the time of the accident the wringer was fastened to the floor by two wooden screws or bolts. When sold, the wringer had a handle on the fly wheel with which to operate it. Appellant was told, at the time, that it might be desired to use it for power, and was informed that it could be done by taking off the handle and putting on pulleys for a belt. In a few days after its purchase it was changed to a power machine by taking off the handle and placing upon the shaft pulleys, and belting it to a line shaft which furnished power to a washing machine in the same room. On March 29th Fuchs requested appellant to send a man to put on a larger pulley, in order to increase the speed, and this necessitated also splicing the belt to make it longer. Complying with this request, appellant sent out one of its machinists, Hayton, who proceeded to do the work required. When the work had been completed, Hayton requested Brady to assist him in adjusting the belt on the pulley to start the machinery. As soon as the belt was adjusted the wringer was pulled from its fastenings on the floor, the belt flew off, and in some manner wrapped itself about Brady, and he was whirled around the shaft, his body striking the joist and pulley with such force that he died from his injuries in a short time. The negligence charged in the declaration is that the defendant did not use reasonable skill and diligence in setting up the machinery, etc., and so unskillfully set it up, and constructed and fastened it to the floor, that it was insecure and unsafe, whereby it gave way, and caused the injury complained of, while he was working for appellant, and at its request. An additional count was in substance the same, except that it charged negligence in defendant not having a sufficient number of skilled men in setting up such machinery to be used for laundry purposes. Wilson & Fuchs were joined as codefendants in

the case, but the suit was not pressed as to them. On the trial a number of special findings were submitted to the jury by appellant, answers to which were returned by them, finding that the wringer was not properly set up and fastened to the floor, with reference to the purpose for which it was intended and adapted; that the death of deceased was caused by insecure fastening; that he was not a mere volunteer, assisting appellant's agent, when injured; and that he could not have avoided the injury by the exercise of ordinary care and prudence. At the close of plaintiff's evidence, a motion was made by defendant to instruct the jury to find for it, but was refused by the court. The jury returned a verdict for plaintiff of \$5,000. A motion for a new trial was overruled, and judgment entered on the verdict. On appeal to the appellate court of the First district, this judgment was affirmed, and appeal was prosecuted by the appellant to this court.

G. L. Shorey and J. A. & H. R. Baldwin, for appellant. Kavanagh & O'Donnell, for appellee.

PHILIPS, J. (after stating the facts). A number of reasons are urged by appellant for the reversal of this judgment, which, to the extent it is consistent or proper for this court to consider, will be noted. The question as to whether the decedent was guilty of contributory negligence, resulting in the injuries received by him, is a question of fact which has been settled adversely to appellant by the special finding of the jury, its verdict, and by the judgment of the appellate court. There was, without doubt, evidence tending to show that he was exercising due care and caution at the time of the injury. There is an absence of evidence that his attention was in any way called to the unsafe condition of the fastenings of this wringer. He was the salesman and superintendent, and was absent from the building much of the time taking orders. The eighth special finding submitted to the jury was as follows: "Could the deceased, Stafford N. Brady, have avoided the accident complained of, which resulted in his death, by the exercise of ordinary care and prudence?" And to which the jury answered, "No." No objection was made before the trial court that this finding was unsupported by the evidence, nor was it urged in the motion for a new trial, and it cannot therefore be urged now. *Avery v. Moore*, 133 Ill. 74, 24 N. E. 606; *City of Aurora v. Rockabrand*, 149 Ill. 399, 36 N. E. 1004; *Coal Co. v. Kelly*, 156 Ill. 9, 40 N. E. 938. The same consideration as above is also applicable to appellant's suggestion and argument that Brady, the decedent, was at the time of the injury a mere volunteer in assisting Hayton, the agent of appellant, and was under no obligation to do this work. This fact was also submitted to the jury by the seventh special finding, and found adversely to appellant. The question cannot now be raised here, for the reason above stated.

It is urged by appellant that, even if it was guilty of negligence in not sufficiently bolting the wringer to the floor, yet the acceptance of the machine by Wilson & Fuchs, its purchasers, and the employers of decedent, would relieve appellant from any liability. If decedent had been injured while in the act of operating the wringer for his employers, an entirely different question would have been presented for our consideration; but such a case is not before us. At the time of the injury, resulting in the death of decedent, he was not engaged in any line of employment for Wilson & Fuchs, but, as the jury in the trial court have found, he was, at the request of appellant's machinist, assisting him in a line of work which was to be performed by appellant. We are referred to a line of authorities indicating that a liability does not exist against a manufacturer who has sold his machine, and which has been accepted by the purchaser, and an employé of whom has been injured by some defect in the machinery. The case of *First Presbyterian Congregation v. Smith* (Pa. Sup.) 26 Lawy. Rep. Ann. 504 (30 Atl. 279), together with the cases there annotated, is particularly relied upon by appellant as supporting this proposition. The majority of the cases referred to are those holding that no liability exists against a contractor of work in favor of one injured by a defect therein after the work has been turned over to and accepted by the owner. This general rule is well established. *Curtin v. Somerset*, 140 Pa. St. 70, 21 Atl. 244; *Fitzmaurice v. Fabian*, 147 Pa. St. 199, 23 Atl. 444. An exception to this rule is in cases where a structure or the subject-matter of the contract is to be used for a particular purpose requiring security for the protection of human life. The particular question, however, as to whether a manufacturer who has sold and delivered his article is liable for a defect to a third person injured, and with whom there is no privity, we do not have before us in this case. If it be conceded that the delivery of the wringer had been made by appellant to Wilson & Fuchs, and accepted by them, still, at the time of the injury, the machinery was again under the control of appellant for the purpose of making additional repairs. The deceased was not injured while the machinery was being operated by Wilson & Fuchs. Where machinery is originally defective and delivered and accepted by the owner; and after such acceptance the contractor or manufacturer again, either by himself or agent, is in charge of the machinery for the purpose of repairs or improvements, he must be held liable for an injury to a third person for such a defect, or from his negligence. In *Schubert v. J. R. Clark Co.* (Minn.) 51 N. W. 1103, it is held, in substance, that where a manufacturer of goods not ordinarily dangerous so negligently constructs an article which is to be placed on the market for sale, and, knowing its defects, permits it to go out in the course of trade, he

will be liable to a person injured thereby who was not aware of the defective condition from the fact of its being concealed. In the present case appellant had knowledge of the insecure and unsafe fastenings of the wringer, and had knowledge, also, of the fact that its method of operation was being changed from hand to steam power, which would cause an additional strain to be put on this machine. Appellant was there for the especial purpose of making this change. The machine, for the time being, was under its control, and the deceased, at its request, and without knowledge of the dangerous condition of the fastenings, was assisting the agent of appellant, and thus received the fatal injuries. These are all facts which are established by the trial and appellate courts, and by which we are bound. They were sufficient on which to base the verdict returned, and the judgment of affirmance in the appellate court.

It is also assigned as error that the court modified the ninth instruction asked by appellant, and improperly refused to give to the jury certain other instructions asked by it. It would extend to an undue length this opinion to fully note these instructions, with their objections. For the reasons set forth in this opinion, there was no error in the action of the trial court in giving or refusing instructions. Our conclusion, therefore, is that there is no reversible error in the record, and the judgment of the appellate court is affirmed. Affirmed.

(164 Ill. 88)

UNION PAC. RY. CO. v. CHICAGO, R. I. & P. RY. CO.

(Supreme Court of Illinois. Nov. 9, 1896.)

RES JUDICATA—APPEAL—HARMLESS ERROR—REVIEW—LANDLORD AND TENANT—ACTION TO RECOVER RENT.

1. In a suit brought in a state court in Nebraska by the R. Co. against the U. Co., a contract annexed to the petition declared, in one section, that defendant leased to plaintiff the right of trackage over a part of defendant's railroad, and, in other sections, that plaintiff leased to defendant the joint use of plaintiff's tracks between certain points. The petition, after setting out in substance the granting parts of the agreement, alleged that defendant refused to respect "said contract, or * * * any of the terms or stipulations thereof," and prayed that it be compelled to specifically perform "all" the stipulations; plaintiff offering to perform "all the stipulations in said contract" to be performed by it. Defendant admitted that it had entered into possession of that part of plaintiff's line which it had leased, but averred a surrender of the same, and that it had no authority to "execute the supposed contract attached to" the petition, and was not bound to recognize the validity "of said contract, or any of the terms and conditions thereof." The federal court, to which the cause was transferred, after reforming a part of the contract in reference to one of the lines of which defendant was lessee, as asked by amendment to the petition, decreed that "said contract, as so reformed, is the valid obligation of the parties thereto," and that defendant perform "the several covenants, promises, and agreements in said contract," etc. *Held*, that the decree established the validity of the entire contract, and that defendant, in a subsequent action against it by plaintiff in the state court of

Illinois, to recover rents due under those sections of the agreement wherein defendant was the lessee, could not plead want of power on its part to make such lease. 57 Ill. App. 430, affirmed.

2. Error in sustaining replications to certain pleas is harmless where defendant, in other pleas, has the full benefit of the defenses alleged in those to which replications were sustained.

3. Error in refusing defendant leave to withdraw a demurrer to certain replications, and file rejoinders, cannot be considered where no exception to such ruling was preserved by a bill of exceptions.

4. Covenant may be maintained on an agreement which is absolute to pay rent, though the lessee has not taken possession of or used the premises, provided there is a demise, and the lessor is not at fault in preventing actual enjoyment.

Appeal from appellate court, First district.

Action of covenant by the Chicago, Rock Island & Pacific Railway Company against the Union Pacific Railway Company. A judgment for plaintiff was affirmed by the appellate court (see 57 Ill. App. 430), and defendant appeals. Affirmed.

W. E. Mason, for appellant. Robert Math-er, for appellee.

BAKER, J. This is an action of covenant, brought in the circuit court of Cook county by the Chicago, Rock Island & Pacific Railway Company, appellee, against the Union Pacific Railway Company, appellant, and wherein appellee recovered verdict and judgment against appellant for \$85,481.86 damages, which judgment was afterwards affirmed in the appellate court of the First district. The action is for the recovery of certain rentals accruing under certain articles of agreement under seal, bearing date May 1, 1890, and executed by the appellant railway company, the appellee railway company, the Omaha & Republican Valley Railway Company, the Salina & Southwestern Railway Company, and the Chicago, Kansas & Nebraska Railway Company. The contract is quite voluminous, and but comparatively few of its provisions need be set out, or even specially referred to. It may be well to first make reference to the preamble, for, though it is not the province of the recitals therein to be used primarily for the purpose of construing the operative parts of the contract itself, yet the matters of fact set forth therein may properly be regarded, for the explanations they afford of the reasons upon which the transaction is founded. It is recited that appellant owns and operates two designated and described lines of railroad, and also operates, as lessee, several designated auxiliary and branch lines; that the Omaha & Republican Valley Railway Company owns one of the mentioned railroads operated by appellant; that the Salina & Southwestern Railway Company owns another of the roads designated as being operated by appellant; that appellee owns and operates a railroad which extends from Chicago to Council Bluffs, and also to St. Joseph; and that it operates, as lessee, the railroad of the Chicago, Kansas & Nebraska Railway Company, and designated portions of the Hannibal & St. Joseph

Railway, and of the railway of the Pacific Company; and that the Chicago, Kansas & Nebraska Railway Company owns a certain described railroad, and is lessee of certain other mentioned railroads, and parts of railroads, "all of which lines are operated by the Rock Island Company, under a lease of all the railways and railway property owned by or leased to the Kansas Company, for the term of nine hundred and ninety-nine years, commencing on the fifteenth day of May, 1886"; and the various connections made by these several lines of railroad are also recited in the preamble. The preamble then recites: "The Rock Island Company proposes to extend its railway from the present terminus thereof, at the city of Council Bluffs, to a connection with the railway of the Kansas Company, at the city of Beatrice, in the state of Nebraska. The parties hereto believe that the interests of all will be promoted by incorporating in the proposed extension a portion of the main tracks of the Pacific Company, in the cities of Council Bluffs and Omaha, the bridge over which said tracks pass across the said Missouri river between said cities, and a portion of the railway of the Republican Valley Company, between a point at or near the north boundary of the city of Lincoln, to a point at which it connects with the tracks of the railway of the Kansas Company, at the city of Beatrice, by a lease by the Rock Island Company to the Pacific Company of the joint use and possession of the railway owned by the Kansas Company, extending from the city of McPherson, in the county of McPherson, and state of Kansas, to the point where the Hutchinson, Oklahoma & Gulf Railroad connects with the railway of the Kansas Company, west of the Arkansas river, in the city of South Hutchinson, and a lease by the Rock Island Company to the Pacific Company of the right to operate trains over the railway which the Rock Island Company proposes to construct and operate between the cities of South Omaha and Lincoln. Therefore, in consideration of the premises, and of the mutual covenants and agreements hereinafter set out and contained, the parties above named have severally entered into covenants, promises, and agreements with each other as follows."

Section 1 of article 1 of the contract made provision for the letting by the Pacific Company to the Rock Island Company, for the term of 999 years, of trackage, etc., between Council Bluffs and South Omaha, including use of the bridge across the Missouri river, and for compensation to be paid therefor. Section 2 made provision for the letting by the Pacific Company to the Rock Island Company, for a like term of years, of trackage, etc., on the Republican Valley Railway, from Lincoln to Beatrice. Paragraph 1 of section 3, paragraph 1 of section 4, and paragraph 1 of section 5, of said article 1, contain the provisions of the contract upon which the declaration in this suit counts.

Said provisions are as follows: Section 3: "(1) The Rock Island Company hereby lets the Pacific Company into the full, joint, and equal possession and use of all its tracks, buildings, stations, sidings, and switches, forming a part of the line of railway owned by the Kansas Company between the points at which said railway is intersected, at or near the city of McPherson, in the county of McPherson, in the state of Kansas, to the point where it is intersected by the tracks of the Hutchinson, Oklahoma and Gulf Railroad Company, west of the Arkansas river, in the city of South Hutchinson, in the county of Reno and state of Kansas, including all and every part of the railway leased and demised, with the appurtenant property between the points aforesaid, and all the improvements and betterments thereon and additions thereto, which may be jointly used by the parties, excluding the yards and depots of the lessor at the cities of McPherson and Hutchinson, but including main and passing tracks in the last-named city, for the term of nine hundred and ninety-nine years, commencing on the first day of May, 1890, for which possession and use the Pacific Company covenants, promises, and agrees to pay, to the order of the Rock Island Company, rental, to be computed in the manner hereinafter provided." Section 4: "(1) The Rock Island Company hereby lets, leases, and demises to the Pacific Company, for the term of nine hundred and ninety-nine (999) years, commencing on the first day of October, 1890, the right and privilege to move and operate, over the tracks of the railway it proposes to construct between the cities of South Omaha and Lincoln, in the state of Nebraska, from the point where the tracks of the parties shall intersect in South Omaha to that at which they shall intersect near to the boundary line of the city of Lincoln, its passenger and freight trains, including engines and cars of all classes in the transaction of its business as a common carrier, and to use in such movement the necessary side and passing tracks and structures between the points above named. And it promises and agrees to furnish and supply the cars and engines of said Pacific Company, when moved on said railway, with water, and to deliver on the requisition of said company, coal for use on such engines and cars of said company while on its tracks; to keep and maintain said tracks and appurtenances thereto in good repair and condition during the continuance of said term; and to accept, as full compensation for such use of its tracks, and for all water and coal which it shall furnish to said Pacific Company, the sum of twenty-five (25) cents per mile for each and every mile over which any passenger train of said last-named company may be moved, and thirty (30) cents per mile for each and every mile over which any freight train of said company may be moved on said track, the actual cost of the coal delivered on such requisition on

the tenders and cars of such Pacific Company, and fifty (50) cents per tank for each and every tank of water taken by said company, which compensation the Pacific Company promises and agrees to pay on statements of account, to be made monthly; and, when the compensation in any year for mileage shall be less than would be produced by the operation of two passenger and two freight trains per day each way over the entire length of the main track of the Rock Island Company between the cities of South Omaha and Lincoln, it (the Pacific Company) will pay to the order of the Rock Island Company, in addition to the compensation for actual mileage, the difference between such compensation and that which would be produced by the operation of two freight and two passenger trains each way daily during the entire year." Section 5: "(1) The parties to the leases set out and contained in sections 2 and 3 of this article will pay to each other rental for the possession and use of the leased and demised property, as follows: The Rock Island Company will pay to the Pacific Company, monthly, for the possession and use of its railway and appurtenant property at and between Lincoln and Beatrice, in the state of Nebraska, the sum of the following amounts: First. An amount equal to one-twelfth of two and one-half per centum of the value of the main track leased and demised, which value, it is agreed, is fifteen thousand (15,000) dollars per mile. Second. An amount equal to the proportion of the cost and expense actually, necessarily, and reasonably incurred and paid for maintaining, renewing, repairing, and supplying with water the railway leased and demised, salaries of officers and employees whose duties pertain to the joint use thereof, and for the payment of taxes and assessments legally laid or levied on such property during the month for which such rental is paid, which proportion shall be to the aggregate of the sums so paid as the number of wheels per mile run during such month by the Rock Island Company over said leased and demised railway bears to the whole number of wheels operated over said leased property per mile during the same period. The Pacific Company shall pay to the Rock Island Company, for the possession and use of the railway of the Kansas Company, between and at McPherson and South Hutchinson, a rental which shall be computed in the manner prescribed by this paragraph. Each of said parties will accept the rental thus computed, when paid, as full compensation for the possession and use of the railway by it leased and demised."

The declaration consists of three special counts. The contract of May 1, 1890, is set out in full in the first count; and, by reference to said first count, it is also set out in the second and third counts. Two breaches are assigned in the first count. The first breach is the failure of defendant to pay to plaintiff rental up to July 31, 1893, amounting to \$19,-

048.86, for use of plaintiff's railway between McPherson and South Hutchinson. The second breach is the failure of defendant to pay to plaintiff \$69,670.96 for privilege of running its cars, etc., over plaintiff's road from South Omaha to Lincoln, up to July 31, 1892. The second and third counts, taken together, substantially duplicate the first count. Twenty-five pleas to the declaration were interposed, and subsequently, by leave of court, two additional pleas were filed. The first plea was non est factum, not sworn to, upon which issue was taken. The second plea was that the contract was executed without authority of defendant. Pleas 3, 4, and 5 were pleas of ultra vires of defendant, setting out the corporate organization of the Union Pacific Railway Company under certain acts of congress, and the specific purposes of that organization, the limitation of its power to the construction and operation of specific lines of railroad and telegraph, and the want of authority on the part of the company to enter upon and operate other lines of railroad than those thus specified, and averring that the new line of road proposed to be constructed by the Rock Island Company between South Omaha in Nebraska, and the line of the Kansas Company between McPherson and South Hutchinson in Kansas, were no part of the lines of road it was authorized to construct or operate. To these pleas, averring the invalidity of the contract, plaintiff filed its replication of res adjudicata, setting up the record of an action in equity to compel specific performance of the contract brought by plaintiff against defendant in the district court of Nebraska, and thence removed to the circuit court of the United States, where a decree was rendered in plaintiff's favor, as prayed, specifically finding that the contract was the valid obligation of the parties thereto. Pleas 6, 7, 8, 9, 10, 11, 13, 14, 15, 16, 17, 18, 22, and 23, each, either set up, by way of defense, ultra vires either of plaintiff or of defendant, or else alleged the invalidity of the contract for other stated cause; and to each of said pleas a like replication of res adjudicata was filed. To all the replications of res adjudicata, demurrers were overruled, and defendant abided by its demurrers. Demurrers were sustained to the twelfth and twenty-first pleas, and defendant stood by said pleas. The nineteenth and twentieth pleas set up the failure of the plaintiff to complete its railway between South Omaha and Lincoln on or before the 1st day of December, 1890, etc. The replications to these pleas alleged an extension of time, etc., and demurrers to said replications were overruled, and defendant abided by its demurrers. The twenty-fourth plea was that the plaintiff did not, on or before October 1, 1890, construct and put in condition, for the operation of passenger and freight trains upon and over the same, its proposed railroad between South Omaha and Lincoln. The replications to the plea were—

First, the execution of a new agreement, extending the time for completion of the road; and, second, *res adjudicata*. To the first of these replications, the rejoinders were—First, *non est factum*; second, that the railroad was not completed by January 1, 1891; and issue was taken on these rejoinders. To the second replication, the rejoinders were—First, *nul tiel record*; and, second, that the covenants mentioned in the pleas were not the same covenants mentioned in the replication; and issues were taken on these rejoinders. Plea 25 was that plaintiff did not, on or before December 1, 1890, construct and put in condition, for the operation of passenger and freight trains upon and over the same, the proposed line of railroad between South Omaha and Lincoln. Similar replications and rejoinders were interposed, and similar issues formed, as in respect to plea 24. The additional plea was a plea of *ultra vires* of defendant, and the demurrer to a replication of *res adjudicata* was overruled, and defendant stood by the demurrer.

It is urged that the circuit court erred in overruling the demurrer of the appellant to the several replications of *res adjudicata* filed by appellee to sundry pleas of appellant; that the record set out in said several replications is insufficient in law to estop the appellant from pleading and insisting upon the defense of *ultra vires* as to those provisions of the agreement of May 1, 1890, relied upon by appellee as the basis of this action, and the validity of which is put in issue by the pleas of *ultra vires*. The contention is that the purpose of the proceedings of the Nebraska courts, as set out in the replications, was to obtain an injunction by the Rock Island Company against the Pacific and Republican Valley Companies to prevent the defendant companies from interfering with the right of the Rock Island Company, as lessee under the agreement of May 1, 1890, to restore and maintain its railroad connections with the Union Pacific and Republican Valley lines of railroad; that the only parts of the contract of May 1, 1890, involved in that proceeding, rest entirely and exclusively upon the covenants or grants of the Pacific Company as a lessor, and in no wise involve its duties and obligations under other separate, distinct, and independent parts of the same agreement which relate to its duties and obligations as a lessee; and that the scope and effect of the proceedings and adjudication in that case did not involve the legal capacity of the Union Pacific Railway Company to lease and operate lines of railroad outside of its own, but simply the power of that company to grant, by way of lease or agreement, a right or privilege to the Rock Island Company to use the surplus capacity of its tracks and depot facilities, and whether the lease, agreement, or license was authoritatively executed in the exercise of a power actually conferred.

In order to ascertain what was the object

of the proceeding instituted by the Rock Island Company against the Union Pacific Company and the Republican Valley Company in the state court of Nebraska, and afterwards transferred to the United States court for the district of Nebraska, and the scope and effect of the decree therein entered by Mr. Justice Brewer,¹ it will be necessary to examine the record set out in the replications. In this suit, for the purpose of seeing what matters were by the petition and answers in that case submitted to the decision of the equity court in Nebraska, and what the decree of that court was in respect to such matters. A copy of the agreement of May 1, 1890, was annexed to and expressly made a part of the petition. The petition then made averments of the substance of the granting parts of that agreement; and these averments were as full and complete with reference to those sections of the contract granting to the Union Pacific Company the right to use the tracks of the Rock Island Company as with reference to the sections in which the Union Pacific is lessor and the Rock Island lessee. The entry of the Union Pacific upon and its use of the line of the Rock Island from McPherson to Hutchinson was alleged. It averred "that, after the execution of said contract as aforesaid, plaintiff, relying upon the performance of said contract upon the part of defendants, and each of them, in good faith constructed its proposed railway from South Omaha to Lincoln, aforesaid, and acquired a large amount of land in Omaha and South Omaha adjacent to the railway of the Union Pacific Railway Company; and in constructing said railway, and in acquiring said land, this plaintiff expended more than one million dollars." Then followed averments as to the preparation of joint schedules for the operation of trains; the destruction by defendant, on January 4, 1891, of the connections between the tracks of the plaintiff and the defendant at Council Bluffs, South Omaha, Lincoln, and Beatrice; the refusal of the Union Pacific to permit the connections to be restored; the refusal to permit the Rock Island to use any of the railways the right to use which it had acquired by the agreement; and that "the defendants, and each of them, have at all times since the 4th day of January, 1891, wrongfully refused to respect said contract, or to observe any of the terms or stipulations thereof." The petition alleged that "plaintiff has kept and performed all the conditions of said contract on its part," and it concluded with the prayer: "Wherefore said plaintiff prays judgment and decree of this court that said contract be carried into execution, and that the defendants, and each of them, specifically perform the stipulations therein contained by them, and each of them, to be kept and performed, this plaintiff hereby offering to perform all the stipulations in said contract contained on its part to be kept

¹ See 47 Fed. 15.

and performed," etc.; "and that plaintiff may have all such other and further relief in the premises as it may in equity and good conscience be entitled to."

Among other things set up in the answer, it was said that "defendants deny that said supposed contract was ever authorized, entered into, or executed by either of the defendants in its corporate capacity, or in such a manner as to bind them, or either of them, to a performance of the terms and conditions thereof." In paragraph 9 of the answer, the possession and use by the Pacific Company of the line between McPherson and Hutchinson is admitted; but it is further stated that it has since surrendered and turned over all of the premises, properties, rights, and privileges which it had assumed to possess, use, and enjoy under the terms and conditions of the supposed contract. It is also stated in said paragraph that on January 12, 1891, the Pacific Company notified the Rock Island Company of its purpose to make such surrender; and it is therein said: "A copy of the notice served upon the said complainant with respect thereto is hereto attached, and referred to for greater certainty." The notice so referred to is as follows: "To the Chicago, Rock Island & Pacific Railway Company: You are hereby notified that the Union Pacific Railway Company is advised by counsel that those certain articles of agreement made and entered into on the first day of May, in the year of our Lord one thousand eight hundred and ninety, by and between the Union Pacific Railway Company, the Omaha & Republican Valley Railway Company, the Salina & Southwestern Railway Company, the Chicago, Rock Island & Pacific Railway Company, and the Chicago, Kansas & Nebraska Railway Company, were and are in excess of the powers and statutory authority of the Union Pacific Railway Company, and of the Omaha & Republican Valley Railway Company, to enter into, execute, and perform. You are therefore notified that the Union Pacific Railway Company has decided to, and hereby does, disaffirm the said agreement, and all of the terms and conditions therein contained; that it refuses to perform and execute the same; and it hereby surrenders to you all the road, property, rights, privileges, uses, and appurtenances pretended to be conveyed to it thereunder; and it hereby further notifies you that it has abandoned, and hereby surrenders to you, all that certain, full, joint, and equal possession and use of all tracks, buildings, stations, sidings, and switches described in paragraphs 1 and 2, section 3, article 1, of said articles of agreement; and it hereby tenders and restores to you, as complete and perfect restoration, ownership and operation of all said premises as you were possessed of prior to the execution of said contract. It hereby further notifies you that it does not now, and will not hereafter, claim any right, title, interest, use, or connection with, or operation of, any property pretended to be leased, demised, or transferred to it by

you, or by any other parties to said contract. The Union Pacific Railway Company, by W. H. Holcomb, Asst. Genl. Manager." In paragraph 14, defendants "deny that the refusal of the defendants to comply with the terms and conditions of the said supposed contract are contrary to equity and good conscience, or that they have done any irreparable injury to the complainant; and they allege the fact to be that, for any injury sustained by the complainant by reason of the refusal of the respondents, or either of them, to submit to the execution of said supposed contract, and to enter upon the performance of the terms and conditions thereof, the complainant has an adequate remedy at law." In paragraph 18 it is said that "the question as to whether or not said supposed contract was a valid and subsisting agreement between the parties, and as to whether or not it was properly executed, and as to whether or not the parties thereto had a legal right to enter into the terms and conditions of the same, was and is a question of statutory construction, and of the application of the principles of the law of the land, and was and is as well known to the officers, agents, and attorneys of the complainant as to those of the defendant; and it alleges that both parties to this action, in entering upon the supposed execution of said supposed contract, were bound to know the full extent and meaning of all of said several acts of congress, and of the law of the land applicable to the terms and conditions contained in said supposed contract. And defendant says that neither of said parties can complain by reason of any act or thing which has been done in the way of a partial performance of the terms and conditions of said supposed contract, or by reason of the refusal of either party to further continue the performance thereof, in case it shall be determined that the said contract, as far as the defendant is concerned, was and is ultra vires, and its supposed execution was entered into without authority of law." Paragraph 16 of the answer alleges the fact to be that the Pacific Company has not and did not have any right, power, or authority under or by virtue of the several acts of congress creating it to enter into or execute the supposed contract attached to the complainant's bill of complaint. In paragraph 20 it is said: "No power is conferred upon this defendant to enter into any such supposed contract as the one attached to the complaint;" and further said: "The alleged execution of the said supposed contract by the officers of this defendant was in direct violation of the requirements of the said several acts of congress." In the last paragraph (22) of the answer it is said: "Defendants are not bound to recognize the validity of said contract, or any of the terms and conditions thereof." And numerous other denials and statements similar to those we have specially referred to are to be found in the answer. Besides this there was in the federal court an amendment of the petition, the object of which amendment was to

reform the contract of May 1, 1890, with reference to the covenants relating to the line from South Omaha to Lincoln. That line was one of the lines of which, under the contract, the Pacific Company was lessee, and one of the lines for the rental of which the present action is prosecuted. In the answer of the defendants to said amendment, they stated their belief that the allegations in said amendment were true; and they joined in asking that the court would make such finding and decree in the premises "as will make the contract read according to the original intention and agreement of the parties."

It appears from the allegations of the replications herein that the findings and decree of the circuit court of the United States for the district of Nebraska in the matter of said petition in equity were, in part, as follows: "(1) That the contract entered into by and between the Union Pacific Railway Company, the Omaha & Republican Valley Railway Company, the Salina & Southwestern Railway Company, the Chicago, Rock Island & Pacific Company, and the Chicago, Kansas & Nebraska Railway Company, bearing date May 1, A. D. 1890, a copy of which is attached to the petition or bill of complaint in this cause, should be reformed by substituting in the place of the word 'provisions,' in the last sentence of section 7 of article 3 thereof, the word 'provisos,' which was written in the contract as settled by and between the parties, and changed by inadvertence in printing the same. (2) That said contract, as so reformed, is the valid obligation of the parties thereto, and should be performed in good faith by each of them. * * * (3) That the defendants the Union Pacific Railway Company and the Omaha & Republican Valley Railway Company are commanded severally to specifically perform, keep, and observe the several covenants, promises, and agreements in said contract set out, to be by them, either jointly or severally, observed, kept, or performed. * * * (5) That nothing in this decree contained shall operate to estop any party hereto from recovering against another party or parties, by appropriate proceedings in law or equity, the compensation to which it is now or may be hereafter entitled, for the use of any of the railway and appurtenant property, between and at Council Bluffs and South Omaha, between and at South Omaha and Lincoln, between and at Lincoln and Beatrice, and between McPherson and South Hutchinson, or from recovering in such proceedings damages which it has sustained or may sustain because of any breach or violation of said contract."

The legal effect of the averments of the petition in the Nebraska cause with reference to those parts of the agreement of May 1, 1890, which are in issue in this case under the pleas of ultra vires and other pleas averring the invalidity of the contract, was to allege the existence, validity, and binding force of those parts of the agreement. The effect of the

averments of the answer with reference to those parts of the agreement was to admit their formal or technical execution, and to seek to avoid their effect, upon the ground of a surrender by the Union Pacific Company to the Rock Island Company of the rights secured by those portions of the agreement to the former, for the reason that the Union Pacific Company had no power or authority to enter into or perform those portions of the agreement. This formed an issue between the parties as to the validity and binding effect of the parts of the contract here in question, as well as in regard to the validity of the covenants and grants of the Pacific Company as a lessor. The contention on one side was the existence and binding force of the agreement as an entirety; and the contention on the other side was a denial of "the validity of said contract, or any of the terms or conditions thereof." The petition prayed that "said contract be carried into execution, and that the defendants, and each of them, specifically perform the stipulations therein contained by them, and each of them, to be kept and performed"; and the answer denied the right to such specific performance. It was decreed by the federal court that the contract of May 1, 1890, is the valid obligation of the parties thereto, and should be performed in good faith by each of them; and the Union Pacific Railway Company was commanded to specifically perform, keep, and observe the several covenants, promises, and agreements, in said contract set out, to be by it observed, kept, or performed. Certain of the pleas in the suit at bar, to which there were replications of res adjudicata, are based upon constitutional or statutory provisions of the states of Nebraska and Kansas, respectively. It is just as impossible that the federal court could have rendered the decree that it did without necessarily finding that the Rock Island Company was authorized by the laws of Nebraska or Kansas, as the case may be, to do the things which the decree gave it the right to do, as it is for that court to have rendered the decree commanding the Pacific Company specifically to perform the contract without necessarily finding that the latter company had the power, under the laws of the United States and of the states where the several covenants of the contract were, respectively, to be performed, to perform them. It follows from what we have said that all the issues tendered in the pleas to which replications of res adjudicata have been sustained were included within the issues raised and decided in the suit determined in the federal court in Nebraska. The question there litigated and determined was the validity of the contract of May 1, 1890; and the adjudication established its validity, —not the validity of merely some parts of that agreement, but the validity of the entire contract. This conclusion is supported by the decisions of this court in *Hanna v. Read*, 102 Ill. 596; *Kelly v. Donlin*, 70 Ill. 378; *Ruegger v. Railroad Co.*, 103 Ill. 449; *Riverside Co. v.*

Townshend, 120 Ill. 18, 9 N. E. 65; Harmon v. Auditor, 123 Ill. 122, 13 N. E. 161; Stickney v. Goudy, 132 Ill. 213, 23 N. E. 1034; and numerous other cases. The rule deducible from the cases in this state is that a question which is involved within the issues of a former controversy is conclusively settled, as between the parties, by the decision in that controversy, whether the court, in its judgment, passed specifically on that particular question or not.

From the decree of the circuit court of the United States for the district of Nebraska in the case of the Rock Island Company against the Union Pacific Company et al., an appeal was taken to the circuit court of appeals, where the decree was affirmed. 2 C. C. A. 174, 51 Fed. 309. A further appeal was then taken to the supreme court of the United States. Since the submission of this case to this court, the federal supreme court has rendered a decision affirming the decree. Union Pac. Ry. Co. v. Chicago, R. I. & P. Ry. Co., 16 Sup. Ct. 1173, 1184. In the opinion of the supreme court, *its*, among other things, said: "But it is earnestly contended that the Pacific Company had no power under its charter, as a federal corporation, to operate any other line of road than those lines which it was specifically authorized by congress to construct, and that it was prohibited by the constitution and laws of Nebraska from doing so, and, therefore, that it could not obligate itself to use, and to pay to the Rock Island Company compensation for the use of, the road between South Omaha and Lincoln. * * * The eighth section of the eleventh article of the constitution of that state provided that no railroad corporation of any other state, or of the United States, doing business in Nebraska, should be entitled to exercise the right of eminent domain, or have power to acquire the right of way or real estate for depot or other uses, until it should have become a corporation of the state pursuant to the constitution; but we do not see what that provision has to do with this question. The stipulation of the contract relating to the use of the Rock Island tracks between South Omaha and Lincoln by the Pacific Company did not embrace the acquisition of right of way or real estate, or the exercise of the power of eminent domain by the latter. By the contract, the Rock Island Company gave the Pacific Company 'the right and privilege to move and operate its trains over the tracks,' and nothing more; and it was provided that the Pacific Company should do no business at intermediate points. The Pacific Company was to run its trains over the Rock Island tracks forty-five miles, and it agreed to pay a fair compensation for doing so. It was perfectly competent for the Pacific Company to contract to deliver at Lincoln freight and passengers taken up at Omaha; and, in carrying out such contract, it could make delivery in car-loads, as well as in small parcels. It follows that its cars

might be run through, and the fact that, under this contract, the Pacific Company would haul its cars with its own engines, amounts to no more than a mere method of doing the business. And as, when it contracts for deliveries beyond its own line, it must pay the connecting company for its services, that compensation might be fixed by the parties upon any basis they agreed to. Here it agreed to pay a certain sum per mile for the mileage over which its trains run, and the difference between that and any other mode of payment did not go to the powers of the company. Where a corporate contract is forbidden by a statute, or is obviously hostile to the public advantage or convenience, the courts disapprove of it; but where there is no positive prohibition, and it is obvious that the contract is one of advantage to the public, the rule is otherwise. As remarked in *Navigation Co. v. Hooper*, 160 U. S. 514, 16 Sup. Ct. 383: 'Although the contract power of railroad companies is to be restricted to the general purposes for which they are designed, yet there are many transactions which are incidental or auxiliary to its main business, or which may be useful in the care and management of the property which it is authorized to hold, and in the safety and comfort of the passengers which it is its duty to transport. Courts may be permitted, where there is no legislative prohibition shown, to put a favorable construction upon such exercise of power by railroad companies as is necessary to promote the success of the company within the powers of its charter, and to contribute to the comfort of those who travel thereon.' And that principle is applicable to the transportation of through freight and passengers over connecting lines. Under the laws of Nebraska, railroad companies are clothed with ample power to make leases or any agreements, for their common benefit, consistent with, and calculated to promote, the objects for which they are created. Comp. St. Neb. 1887, p. 248, c. 16, § 94. There is nothing in the charter of the Pacific Company that prohibits such an arrangement as this in controversy, unless by implication; and as by it the public interest was subserved, that company reached its own lines by a shorter route, and accommodated its own through freight and travel, we are not prepared to hold that it was invalid. These observations also apply to the clause of the contract in respect to the road between McPherson and Hutchinson, but it should be added that that reach of road was held and operated by the Kansas Company, which was a Kansas corporation. The Union Pacific Railway Company was formed by the consolidation of the Union Pacific Railway Company, a federal corporation, the Denver Company, a Colorado corporation, and a corporation originally named the Leavenworth, Pawnee & Western Railway, afterwards called the Union Pacific Railway, Eastern Division, and lastly the Kansas Pacific Railway. The latter company, by its

first name, was incorporated under the laws of the territory of Kansas, and, upon the admission of Kansas into the Union, became a corporation of the state. The acts of congress of 1862 and 1864 clothed it with new franchises, but did not deprive it of its powers as a state corporation, which could be exercised by the consolidated company in Kansas so far as not in derogation of its federal powers. The Kansas corporations were duly empowered to enter into leases and the like by the state laws. 1 Gen. St. Kan. p. 443, c. 23, § 112."

Our conclusion is that there was no error in overruling the demurrer to the several replications of *res adjudicata*.

It is urged there was error in the order of the Cook circuit court overruling the demurrer of appellant to the replication of appellee to pleas 19 and 20, because the pretended agreements set out in said replications are not, nor is either of them, under seal, and therefore cannot be availed of as modifications of the original agreement of May 1, 1890. If we assume that it was technical error to overrule said demurrer, yet it worked no injury to the rights or interests of appellant. Substantially the same defenses set up in pleas 19 and 20 were also pleaded in the amended pleas 24 and 25,—the first of these latter pleas setting up that appellee did not on or before October 1, 1890, and the other that it did not on or before December 1, 1890, construct and put in condition for operation the contemplated railroad from South Omaha to Lincoln; and, as we have already seen, upon the issues based, by means of appropriate replications and rejoinders, on said amended pleas 24 and 25, appellant had the full benefit of the defenses alleged in pleas 19 and 20. And so the overruling of the demurrer, even if erroneous, was not material and reversible error.

The alleged error of the court in refusing to allow the motion of appellant for leave to withdraw its demurrer to the replication to the eighth and ninth amended pleas and the first additional plea, and to file rejoinders to said replications, is not properly before this court for decision, because no exception to the ruling of the court on the motion was preserved by a bill of exceptions. *Snell v. Trustees*, 58 Ill. 290; *Earl v. People*, 73 Ill. 329; *Burns v. People*, 126 Ill. 282, 18 N. E. 550.

It is claimed that the trial court erred in refusing to admit certain proffered testimony in mitigation of damages. The excluded evidence was that of experts, tending to show that, the less the traffic over a railroad line, the less will be the cost of keeping the property in good repair and condition. The contention is that the entire burden and expense of keeping the road in repair was, by the terms of the agreement, cast upon appellee, and that, since appellant did not use the road at all, there was a saving in expense of repairs. It may well be that testimony

of the character indicated would in some cases be admissible in evidence. But here the damages are liquidated and fixed by the agreement of the parties themselves. The provision of the contract in regard to compensation for the use of the line between South Omaha and Lincoln is: "When the compensation in any year for mileage shall be less than would be produced by the operation of two passenger and two freight trains per day, each way, over the entire length of the main track of the Rock Island Company, between the cities of South Omaha and Lincoln, it (the Pacific Company) will pay to the order of the Rock Island Company, in addition to the compensation for actual mileage, the difference between such compensation and that which would be produced by the operation of two freight and two passenger trains each way, daily, during the entire year." The rule is that covenant can be maintained on an agreement which is absolute to pay rent, where there is a demise, and the lessor is not in fault in preventing actual enjoyment, although the tenant has not taken possession of or used the demised premises.

The rulings of the trial court upon the instructions were in conformity with the views we have expressed.

There is no error in the record for which the judgment should be reversed. The judgment of the appellate court is affirmed. Affirmed.

(144 Ill. 196)

WHITE et al. v. TOWN OF WEST CHICAGO.

(Supreme Court of Illinois. Nov. 23, 1896.)

PUBLIC IMPROVEMENTS — SPECIAL ASSESSMENT — DIVISION INTO INSTALLMENTS.

In proceedings under Act May 2, 1873 (2 Starr & C. Ann. St. p. 1708), for the improvement of a boulevard, an ordinance providing that the special assessment for the cost of the work be divided into installments, bearing annual interest, is invalid; and a judgment of confirmation in accordance with such ordinance is unauthorized. *Culver v. People*, 43 N. E. 812, 161 Ill. 89, followed.

Error to Cook county court; Frank Scales, Judge.

Application by the town of West Chicago for the appointment of commissioners to make and levy a special assessment for the cost of improving a boulevard. Commissioners were appointed, and, from a judgment confirming the assessment roll made by them, Mary White and others bring error. Reversed.

Geo. W. Wilbur, for plaintiffs in error. H. S. McCartney, for defendant in error.

PER CURIAM. The same record presented in this case has been before us on three occasions. *Culver v. People*, 161 Ill. 89, 43 N. E. 812; *Farrell v. Town of West Chicago*, 162 Ill. 280, 44 N. E. 527; *Connor v. Town of West Chicago*, 162 Ill. 287, 44 N. E. 1118.

In the Culver Case it was decided that the ordinance upon the validity of which the judgment depended was without authority of law, and void, by reason of a provision for dividing the special assessment into installments, with interest. That decision was adopted in the other cases, and is equally conclusive in this. The judgment is reversed, and the cause remanded. Reversed and remanded.

(164 Ill. 255)

JOHN A. TOLMAN CO. v. RICE.

(Supreme Court of Illinois. Nov. 23, 1896.)

GUARANTY—CONSTRUCTION—LIABILITY OF GUARANTORS.

Defendant, in writing, guarantied the payment to plaintiff of any money collected by one O. as employé of plaintiff, or advanced to him, or indebtedness due plaintiff in excess of the amount due O. under the agreement of employment. The agreement provided that O. should sell goods on commission, paying his own expenses, and bear a proportion of the losses by bad debts. Held that, as the agreement provided that O. should pay his own expenses, defendant was not liable, under his guaranty, for the repayment of money advanced to O. for the payment of expenses. 60 Ill. App. 516, affirmed.

Appeal from appellate court, First district.

Action by the John A. Tolman Company against R. B. Rice upon a contract of guaranty. A judgment for plaintiff having been reversed by the appellate court (60 Ill. App. 516), the plaintiff appeals. Affirmed.

F. J. Smith and E. M. Ashcraft, for appellant. A. Tyrrell, H. M. Bacon, and Henry Schofield, for appellee.

CARTER, J. The appellant company sued appellee upon the guaranty following, to recover for certain moneys advanced to Otsott, who is mentioned therein: "Chicago, January 10th, 1894. In consideration of the sum of one dollar, and other valuable consideration, received from John A. Tolman Co., the receipt of which is hereby acknowledged, we hereby guaranty the payment to John A. Tolman Co. of any and all moneys collected by Edward W. Otsott for account of John A. Tolman Co., and for all moneys which they may, from time to time, advance to said Edward W. Otsott, and any and all indebtedness now due, or which may hereafter become due, John A. Tolman Co., in excess of the amount due said Edward W. Otsott, as per the present or any future agreement between said John A. Tolman Co. and said Edward W. Otsott; and we hereby waive notice of acceptance of this guaranty by John A. Tolman Co., and accept a verified statement of the account, as kept in the regular books of said John A. Tolman Co., as correct and final between the said company and the said Edward W. Otsott, and without requiring any demand or notice of default; and we agree that any extension may be granted him, or any security taken, or security taken surrendered, and any security hereto released, at

any time, without notice, or affecting any liability. My liability, however, is limited hereby by two thousand (\$2,000.00) dollars, together with interest at seven per cent. per annum until paid, and all costs, attorney's fees, and expenses that shall arise from enforcing collection; and for such amounts this is intended as a continuing guaranty, until revoked by notice in writing to me. Any amount which shall become due from me upon this contract of guaranty, we agree to pay at the office of John A. Tolman Co., in Chicago, Illinois. Witness my hand and seal, this 13th day of January, 1894, in the village of Oxford, and state of Ohio. R. M. L. Huston, Oxford, Ohio. R. B. Rice, Chicago Lawn, Ill." Appellee Rice gave in evidence the following, which was the only agreement in evidence between appellant and said Otsott: "John A. Tolman Co., Importers and Wholesale Grocers, 4, 6, and 8 Lake Street, and 61, 63, 65, 67, 69, and 71 Michigan Ave. John A. Tolman, Pres't. S. A. Tolman, V. Pres't. F. A. Brayner, Jr., Treas. A. S. Deleware, Sec'y. Chicago, January 25, '94. This memorandum certifies: Engaged E. W. Otsott as salesman to solicit orders for goods for us (John A. Tolman Co.), he expending his entire time and energy in faithfully and intelligently rendering such service, for one year from date, or longer, as agreed (or at our option as to time, if less time). We are to pay him forty (40) per cent. of the profits he makes on the route, selling goods for us; he to pay his own expenses and furnish his own sample cases. We to be the final judge of all credit given customers. No order is to be counted as a sale, except order is acceptable to us. On the further condition that he stays the full year's time out, and also stands fifty (50) per cent. of any losses that may be incurred from bad debts, or any expenses for collecting difficult accounts, on the territory for the time. Then, when the sales of the year are collected for, we are then to pay an additional ten (10) per cent. of the profits (but until that time this ten (10) per cent. of the profits is to be held as a guaranty fund for the purpose specified. At the end of the time when the sales of the year shall be collected for, and, collections for the sales of the year are all made, and no losses for bad debts have occurred, we are to pay over the ten (10) per cent.; but, if any losses have occurred, we are to deduct half of the amount of the same from this ten (10) per cent. guaranty fund, and pay over the balance. But, if half of the amount of the losses exceed the amount of the guaranty fund, we are to stand the balance. Agreed to. E. W. Otsott." Appellant showed, by a verified statement from its books, in the manner contemplated by the instrument of guaranty, that it had made the advances to Otsott sued for; and verdict and judgment were recovered for \$516.81, which judgment was, on appeal of Rice, reversed by the appellate court, without remanding. The company obtained a cer-

ificate of importance, and brings the case here by appeal.

The only question to be considered is, was the guarantor, Rice, liable, by virtue of his guaranty, to make good to the company the moneys so advanced to Otsott? So far as this case goes, the second instrument must, under the evidence, be regarded as the agreement, and the only one, referred to in the contract of guaranty by the clause, "as per the present or any future agreement between said John A. Tolman Co. and said Edward W. Otsott." And this clause in the guaranty must be regarded as a limitation upon the liability of the guarantor; that is to say, by it his guaranty of payment to the company "of any and all moneys collected by Edward W. Otsott for account of John A. Tolman Co., and for all moneys which they may, from time to time, advance to said Edward W. Otsott, and any and all indebtedness now due, or which may hereafter become due, John A. Tolman Co., in excess of the amount due said Edward W. Otsott," is restricted to such liabilities of said Otsott in respect to the matters mentioned in the said three clauses as accrued under or by virtue of the agreement between appellant and Otsott. Construing the two arguments together, appellee's liability was limited to (1) "moneys collected" by Otsott for the company under the agreement of employment, (2) "moneys advanced" to Otsott by the company under the agreement of employment, and (3) "any and all indebtedness" of Otsott to the company accruing under the agreement of employment, and was limited also to the excess over the amount due from the company to Otsott. The liability sued for did not, however, accrue or arise under or by virtue of the agreement of employment, but aside from it. By that agreement, Otsott was to pay his own expenses, and the company, if it advanced him any money, did so as a loan to him outside of the agreement; and the only liability Otsott incurred, so far as the record discloses, was an implied one to repay the moneys so loaned to him. Such an implied liability was not contemplated by the contract of guaranty, for it did not arise "as per," or under, or by virtue of the agreement of employment. It is a settled rule of law "that the undertaking of a surety is to be construed strictly, and that he is bound to the extent, and in the manner, and under the circumstances pointed out in his obligation, and no further." His liability is not to be extended by implication. *Cooper v. People*, 85 Ill. 417; *Shreffler v. Nadelhoffer*, 133 Ill. 536, 25 N. E. 630. The liability of guarantors is governed by this principle. *Kingsbury v. Westfall*, 61 N. Y. 356; *Ryan v. Trustees*, 14 Ill. 20; *Thomas v. Olney*, 16 Ill. 53; *Bank v. Dieffendorf*, 90 Ill. 396. The following cases have been cited to us as showing the construction placed upon similar contracts by the courts of last resort in other states: *John A. Tolman Co. v. McClure* (Ind. App.) 37 N. E. 289; *Same v. Clements*, 98 Mich. 6, 56 N. W.

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1038; *Same v. Bowerman* (S. D.) 58 N. W. 568. In some respects they agree with, and in others they differ from, the view here taken; but giving the contract a strict construction in favor of the guarantor, as the law requires, we are satisfied that the appellate court decided the case correctly, and its judgment will be affirmed. Judgment affirmed.

(164 Ill. 259)

RYAN v. SUN SING CHOW POY.

(Supreme Court of Illinois. Nov. 23, 1896.)

TRESPASS—POSSESSION—EVIDENCE.

The mere fact that a person claiming under an invalid lease has changed the locks upon the leased building does not show such an actual possession as will render the owner of the paramount title guilty of trespass in taking possession.

Appeal from circuit court, Cook county; R. W. Clifford, Judge.

Action by Sun Sing Chow Poy against William M. Ryan. There was a judgment for plaintiff, and defendant appeals. Reversed.

Young, Makeel & Bradley, for appellant.

PHILLIPS, J. Appellee sued, in trespass *quare clausum fregit*, December 22, 1892, William M. Ryan and Mrs. William M. Ryan, for breaking and entering, with force and arms, a certain close of the plaintiff. Appellant pleaded the general issue and *liberum tenementum*, alleging the close was the close and freehold of Mrs. William M. Ryan, and appellant, as her agent, peaceably and without force took possession thereof, as he lawfully might for that reason. Suit was dismissed against Mrs. Ryan, and prosecuted against appellant as the sole defendant. Replication was filed to the general issue, and *de injuria* to the plea of *liberum tenementum*. Upon the trial it was admitted that Mrs. William M. Ryan was the owner of the premises, and appellant's agency was not in controversy. Appellee claimed to have procured a lease from one Cadwallader, as agent of appellant, to the *locus in quo*. There is no evidence in this record showing any authority on the part of Cadwallader to execute a lease for appellant or appellant's principal, Mrs. William M. Ryan, who was the owner of the premises; and there is an entire absence of evidence showing either authority to execute or approval of the execution of the lease. Appellee testifies he procured the lease from Cadwallader, and paid rent in advance, and received the keys, and placed another lock on the door, and locked the same. The locks on the door were changed by appellant. The material question is whether appellee was in possession of the premises as an actual occupant at the time the locks were so changed. This fact depends, on the part of the appellee, on his own testimony. He states that, after changing the locks, he sent certain goods in the express wagon, and delivered the goods to the expressman, to be placed in the room, and subse-

quently found the goods so forwarded by the expressman on the sidewalk. On further examination, it was claimed by appellee that he had actual possession, and saw some of his goods in the basement, which he claimed to have leased, and which he insisted had been taken from that basement and placed on the sidewalk. There is no evidence of the expressman that the goods were ever placed in the basement, nor is there evidence of the execution of the lease, or of the authority to execute on the part of Cadwallader. Controverting this is the testimony of the appellant that he found certain locks on the doors of the basement which, under advice of counsel, he removed, and placed others thereon. At the time of doing so the basement was vacant, and no authority had ever been given by him as agent of the owner, or by the owner, to Cadwallader, to execute any lease. This evidence is supported by other testimony. While this testimony appears in the form of an affidavit for continuance, which was by appellee (plaintiff below) admitted as evidence, we are constrained, from all the facts appearing in the record, to believe that, at the time appellant changed the locks, appellee had no property therein, and had placed locks thereon without authority. The entry of appellant as agent for Mrs. William M. Ryan, so far as concerns the importance of changing the locks, was by one having paramount title and the right to immediate possession; and that possession, acquired in a peaceable and orderly manner, without violence or intimidation, was no offense, and operated to transfer the seisin and possession to the rightful owner from the lessee, who claimed under the lease, which was made without authority or right. There was no invasion of the rights of appellee for which he has a cause of action. *Lodge v. Klein*, 115 Ill. 177, 3 N. E. 272. The judgment for plaintiff for \$200, of which a remittitur of \$100 was rendered, cannot be sustained. The judgment is reversed, and the cause remanded.

(164 Ill. 245)

GRIMMER et al. v. FRIEDERICH et al.

(Supreme Court of Illinois. Nov. 11, 1896.)

WILLS—CONSTRUCTION—AMBIGUITIES—APPEAL—REVIEW—OBJECTIONS WAIVED.

1. Testator gave his wife a life estate, and directed that the remainder should be divided equally among his surviving children "and their heirs," share and share alike. *Held*, that the words of survivorship related to the death of testator, and not to the time of the widow's death.

2. In partition, defendants did not waive the right to claim on appeal that the bill was wholly insufficient to support the decree, by answering after a demurrer to the bill had been overruled.

3. Where plaintiffs' interest depends on the construction of a will, and the will is capable of construction without the aid of extrinsic evidence, defendants are entitled to a review on the merits on appeal, though there is no certificate of evidence in the record.

Error to circuit court, St. Clair county; A. S. Wilderman, Judge.

Bill by John Grimmer and others against Charles Friederich and others for partition. There was a decree for plaintiffs, and an order of distribution, and defendants bring error. Affirmed.

One John Grimmer died testate April 25, 1873, leaving at the time of his death a widow, five sons, and four daughters. By his last will and testament, made about three weeks before his death, and afterwards duly probated, he devised his property as follows: "First, I give and bequeath to my beloved wife, Magdalena Grimmer, the use and control of my personal property, and the renting and profits of my real estate, during her natural life, and she to pay all my just debts and taxes on my land after my death. Second. After the death of my said wife, Magdalena Grimmer, all the remainder of my estate, both personal and real, shall be equally divided among my surviving children and their heirs, share and share alike." One of the said daughters, Margaret Friederich, died in 1886, intestate, leaving a husband and 11 children surviving, as her heirs at law. Two of the said sons, Isadore and George, died about 1893, intestate, unmarried, and leaving no lineal descendants. Another of said sons, Nicholas, died in 1894, also intestate, leaving a widow, but no lineal descendants. Afterwards, in December, 1894, the widow of the testator also died. The testator, John Grimmer, died seised of certain real estate described in the bill. Upon the death of his widow, the appellees, who are the heirs at law of said Margaret Friederich, deceased, and the widow of Nicholas Grimmer, deceased, filed a bill for partition. The case was heard below on bill, answer, replication, and proofs, and the circuit court found that the complainants were entitled to a share of the estate, and decreed partition as prayed. The commissioners appointed reported the land not susceptible of division, and a decree of sale was accordingly entered. The sale having been made by the master in chancery, and approved by the court, the proceeds were ordered to be distributed according to the rights of the parties as shown by the decree of partition. The case is brought up to this court on a writ of error, and the errors assigned question the rights of the complainants in the bill, the defendants in error here, to share in the said real estate.

J. F. Hughes and E. C. Rhoads, for plaintiffs in error. R. D. W. Holder, for defendants in error.

WILKIN, J. (after stating the facts). The defendants in error take the position that this case is not so presented as to call for a review upon its merits, because, the plaintiffs in error having answered the bill after demurring to the same, and not standing by the demurrer when it was overruled, they thereby waived the right to question its sufficiency here, and also because, there being

no certificate of evidence in the record, it must be presumed that the court below decided correctly upon the facts before it. We do not consider these positions well taken. The general rule is that a party not standing by his demurrer, but answering over, is considered as waiving all defects in the pleading demurred to which might have been reached by demurrer. But the authorities on common-law pleading recognize the qualification of the rule, that "if a declaration is so totally defective as not to support the judgment, that may be availed of by motion in arrest, even after demurrer thereto has been overruled and the defendant has pleaded over." *Stearns v. Cope*, 109 Ill. 340, 346. A similar qualification or exception is recognized as applicable to pleadings in equity. *Gordon v. Reynolds*, 114 Ill. 118, 123, 28 N. E. 455, 456; 1 Beach, Mod. Eq. Prac. § 276. We think the case at bar would come properly within that qualification, if the law, upon the merits, was, as claimed, with the plaintiffs in error. The will, upon its face, considered in the light of the rules of law, is capable of construction without the aid of extrinsic evidence. In fact, it is difficult to see how extrinsic evidence could aid in its construction. We therefore think it immaterial to the correct decision of this case what evidence was heard by the court below.

The right of the defendants in error to share in the estate of John Grimmer, deceased, depends upon the construction to be placed upon the second clause of the will, above quoted. In the first clause he gives to his widow a life estate. In the second he says: "After the death of my said wife, all the remainder of my estate, both real and personal, shall be divided equally among my surviving children and their heirs, share and share alike." If the construction of this clause be that the children living at the death of the testator shall take the estate in remainder, the court below decided correctly. The plaintiffs in error, however, contend that the words of survivorship relate to the time of the death of the widow, in which case the appellees would take nothing, the persons through whom they claim having died before the widow. The question is one not altogether free from difficulty, but the application of well-settled principles leads to the conclusion that the circuit court decided it correctly. "It has long been the settled rule of construction in the courts of England and America that estates, legal and equitable, given by will, should always be regarded as vesting immediately, unless the testator has, by very clear words, manifested an intention that they should be contingent on a future event." *Scofield v. Olcott*, 120 Ill. 362, 374, 11 N. E. 351, 354. "The law always gives preference to vested over contingent remainders. It does not favor the abeyance of estates. Estates in remainder vest at the earliest period possible, unless a contrary in-

tention on the part of the testator is clearly manifested. * * * Where it is a remainder after a life estate, it is regarded as a vested remainder, and the possession only is postponed." *Kellett v. Shepard*, 139 Ill. 433, 443, 28 N. E. 751, 754, and 34 N. E. 254. The ascertainment of any class which is described in a will should be referred to the earliest possible period consistent with a fair interpretation of the will. *Schouler, Wills* (2d Ed.) § 563. If the distribution is postponed for the convenience of the estate, the legacy becomes vested at once, and is not postponed to the day of payment; but if, on the other hand, it be postponed for reasons personal to the legatee or devisee, the remainder is contingent. *Carper v. Crowl*, 149 Ill. 465, 484, 36 N. E. 1040, 1045. Applying these rules to this case, we find nothing in the will indicating an intention that the devise to the remainder-men was contingent upon their surviving the life tenant. The words "after the death of my said wife" are rather to be taken as qualifying the words "all the remainder of my estate." There is no devise to a trustee to hold the legal title, nor any direction to sell the estate and distribute the proceeds. The law favors the immediate vesting of estates, especially in the case of real estate.

Aside from these rules of construction, there is an expression in the will which indicates that the testator intended the estate in remainder should vest in interest at his death, for he devises it to his surviving children "and their heirs." If it was his intention that only such children should take as survived his widow, why should he say that his estate is to be divided "among my surviving children and their heirs"? This expression indicates that the testator had in mind that, in case any of his children should die after his death, before coming into the beneficial enjoyment of the estate, the heirs of such child should not be cut off. This construction conforms more nearly to the rules of descent and natural justice. The cases of *Ridgeway v. Underwood*, 67 Ill. 425, and *Blatchford v. Newberry*, 99 Ill. 11, are unlike the case at bar. In each of them it was apparent, from the language of the will and the circumstances of the case, that the survivorship referred to a later time than the death of the testator. This case is governed by the principles determined in other decisions of this court. In addition to those above quoted, we cite *Hempstead v. Dickson*, 20 Ill. 194; *Ducker v. Burnham*, 146 Ill. 9, 34 N. E. 558.

The finding of the circuit court was that all the children living at the testator's death took a vested interest in the remainder, and that the complainants in the bill were therefore entitled to share in the estate sought to be partitioned; and it decreed accordingly, and in this we think it committed no error. Affirmed.

(164 Ill. 267)

BECKER v. PEOPLE.

(Supreme Court of Illinois. Nov. 11, 1896.)

**BOND—PLEA OF NIL DEBET—RELEASE—EVIDENCE
—HARMLESS ERROR—ADDITIONAL BOND
—RELEASE OF SURETY.**

1. In scire facias against the surety on a supersedeas bond, issue having been joined on a plea of nil debet, the defendant moved to file an additional plea of release, which was refused. *Held* that, as the matters included in such plea could be shown under the plea of nil debet, the refusal of the court to allow the additional plea was not error.

2. In scire facias against the surety on a supersedeas bond, where the bond itself was in evidence, as well as the record of the action in which the bond was given, the admission of parol evidence as to the amount due on the bond was not prejudicial to defendant.

3. In scire facias against the surety on a supersedeas bond, certified copies of certain portions of the record of the action in which the bond was given were put in evidence by the plaintiff, and not withdrawn. On motion, it was ordered that such copies should also be considered as if received in evidence on the offer of the defendant. *Held*, that it was not prejudicial error to exclude other copies of the same portions of the record from the evidence.

4. In quo warranto against an officer, judgment of ouster was rendered, with a fine. A writ of error was taken to the appellate court, and a supersedeas bond filed, with surety. The judgment being affirmed, the cause was appealed to the supreme court, the appeal bond having a different surety. *Held*, that the giving of the appeal bond did not release from liability the surety on the supersedeas bond. 63 Ill. App. 333, affirmed.

5. A party cannot be heard to object, on appeal, that judgment was rendered against him for too small an amount.

Appeal from appellate court, First district.

Scire facias at the suit of the people against Barbara Becker as surety on a supersedeas bond. A judgment for plaintiff having been affirmed by the appellate court (63 Ill. App. 333), the defendant appeals. **Affirmed.**

Wm. S. Young and J. R. McFee, for appellant. J. J. Kern, for the People.

BAKER, J. By a judgment of the circuit court of Cook county in a quo warranto proceeding, Frank Becker was ousted from the office of justice of the peace, and fined \$1,000. To reverse that judgment the defendant sued out from the appellate court a writ of error to the circuit court, which was made a supersedeas upon his filing a bond in the appellate court. Barbara Becker, the appellant here, was the surety on the bond. The appellate court affirmed the judgment. From said judgment of affirmance, the defendant appealed to the supreme court, and gave an appeal bond, with one P. P. Kern as surety. The supreme court affirmed the judgment of the appellate court. 40 N. E. 944. Thereafter, the people, appellees here, sued Frank Becker in the superior court of said county, in an action of debt, upon the covenant contained in the supersedeas bond, in which he was principal and Barbara Becker surety. Judgment was rendered against him by default. By a scire facias proceeding, Barbara

Becker was made a party to that judgment, and judgment rendered against her for \$1,000. She thereupon appealed to the appellate court for the First district, where said judgment was affirmed, and now prosecutes this further appeal.

It appears that, to the scire facias, the pleas of nil debet, non est factum, and nul tiel record were filed, and that there was a joinder of issues on these three pleas. Afterwards appellant moved the court for leave to file an additional plea of release, and filed an affidavit in support of her motion. The court, however, overruled the motion, and refused to allow the plea of release to be filed. This ruling is assigned for error. It was a matter in the sound discretion of the court to permit this plea to be filed after issues joined in the cause, and it is manifest that there was here no abuse of that discretion. Under the plea of nil debet, in which appellees joined issue instead of demurring, any matter might have been given in evidence which showed that nothing was due at the time of the pleading, and a release or any other matter in discharge of the debt might have been proven. Chit. Pl. § 481; Gould, Pl. c. 6, § 12. Consequently, the rights of appellant were in no way prejudiced by the ruling of the court denying her motion. At the trial one E. S. Bottum, a witness in behalf of appellee, was permitted, over the objection of appellant, to testify as to the amount due upon the bond sued on, and it is claimed that the court erred in admitting this testimony. The bond was itself in evidence, as also were the orders of affirmance of the appellate and supreme courts in the suit in which the bond was given. So this testimony, while no doubt improper, was merely superfluous, and worked no injury whatever to appellant.

It is urged that the trial court erred in excluding certain evidence proffered by appellant, to wit, certified copies of the order of the appellate court granting an appeal to the supreme court in the quo warranto proceeding, of the order approving the bond filed on appeal to the latter court, and of the appeal bond filed on such appeal. Certified copies of said orders and bond are in the record, having been given in evidence by the appellees and not withdrawn. Therefore, and for the further reason that the record shows that, upon motion of appellant that the court should consider and dispose of said evidence "just as if the same, when offered by the defendant Barbara Becker, had been received in evidence," the court concurred in such contention, and did so consider said evidence, it is immaterial whether the ruling of the court here complained of was technical error or not. This question is of no importance in this case for still another reason, which will appear in the discussion of the question next presented.

It is contended that the copies of said orders and bond, introduced in evidence by ap-

pellees, showed upon their face that appellant was discharged from all liability upon the bond sued on. In other words, the claim is that the appeal bond filed and approved on the appeal from the appellate court to the supreme court in the quo warranto proceeding operated as a release of appellant as surety on the supersedeas bond. The supersedeas bond and the appeal bond were in the same penalty, and were both conditioned for the payment of the judgment of the trial court, and the costs rendered and to be rendered,—the one in case the judgment of the trial court should be affirmed, and the other in case the judgment of the appellate court should be affirmed. The position assumed by counsel for appellant in this behalf is not in consonance with the decisions of this court. In *People v. Curry*, 59 Ill. 35, where it was held that a new or additional bond, given by an administrator, under section 78 of the statute of wills (St. 1866, p. 1196), cannot operate to discharge his sureties in the original bond, it was said: "There is not a word, not an intimation [in the statute], that this additional bond shall operate as a discharge of the original bond. In the absence of the express enactment of the legislature to that effect, so to hold would be unwise and odious judicial legislation." In *McCall v. Moss*, 100 Ill. 461, a decree had been rendered in the trial court for \$36,000, and on an appeal to the appellate court an appeal bond had been given in the sum of \$40,000. The decree was affirmed on that appeal; and on a further appeal to this court an appeal bond in the sum of \$300 was given. On the question whether the latter bond was for a sufficient amount, it was held that, in case of an affirmance by this court of the judgment of the appellate court, the appeal bond given on the appeal from the trial court would stand as security for the decree rendered in that court, and that, as the appeal bond given on the second appeal was sufficient in amount to cover the costs in this court, that was all that was required. In *Ennor v. Railroad Co.*, 104 Ill. 103, the question presented was the same as that before the court in the *McCall* Case, and the decision was to the same effect. In *Chester v. Broderick*, 131 N. Y. 549, 30 N. E. 507, the rule that an appeal bond executed on an appeal from the judgment of affirmance of an appellate court does not operate to discharge the bond given on the original appeal, is recognized.

The cases of *Sharp v. Bedell*, 5 Gilman, 88; *People v. Lott*, 27 Ill. 215, and *Bank v. Poppers*, 105 Ill. 491, cited by counsel, do not sustain appellant's contention. They are not in point. In the first of these cases, an appeal had been taken from a judgment of a justice of the peace to the circuit court of Hancock county, and the appeal bond was conditioned for the payment of "whatever judgment might be rendered by the circuit court of Hancock county," etc. After the appeal had been taken, the venue was changed

to the circuit court of McDonough county, where the judgment appealed from was affirmed. In a suit upon the bond, it was held that, if the condition of the bond had been as prescribed by the statute, viz. for the payment of whatever judgment might be rendered by "the court" upon dismissal or trial of the appeal, the sureties would have been liable; but that, having, instead, bound themselves for the payment of such judgment only as should be rendered by "the circuit court of Hancock county," their liability was limited to such judgment as should be rendered in that court, and could not be extended by implication beyond the terms of the contract. In *People v. Lott*, the bonds involved were administrators' bonds, and the second of them was given under the seventy-ninth and eightieth sections of the statute of wills, and the decision was as to the proper construction of those sections of the statute. In *Bank v. Poppers*, the court was called upon to construe the nineteenth section of the forcible entry and detainer act (Rev. St. 1845, p. 256), and it was held that "the language of the statute" showed that it was intended the execution of the new bond should release the sureties on the prior bond. It is true that in *Winston v. Rives*, 4 Stew. & P. 269, the supreme court of Alabama holds the law to be as here contended for by appellant; but the reasoning by which the court reached its conclusion does not seem to us to be sound, and we adhere to the doctrine to which this court has already committed itself.

It is said that, because of the appeal to the supreme court, appellant was deprived of the right to at once pay the judgment against her principal, and to have immediate execution against him in order to reimburse her; and it is argued that she was injured by such postponement, and that, the appeal having been taken without her consent, the second bond should be held to release her from liability. In so far as appellees are concerned, the securities were cumulative, and they had their election to sue on either bond. Appellees are in no way responsible for the injury of which appellant complains. Indeed, the appeal from the judgment of the appellate court was manifestly against their interests. The surety on the second bond, through whose instrumentality the judgment debtor was enabled to prosecute the appeal, is the party to whom appellant must charge the injury, and, if she has any remedy, it is against him. The question, however, of the respective rights of the two sureties, as between themselves, in no way affects the appellees, and we are not here called upon to decide it. Our conclusion is that the evidence in question did not show that appellant was discharged from liability.

The last assignment of error is that the trial court erred in entering judgment for only \$1,000, when it should have given judgment for a larger amount. This claim does

not merit serious consideration. Appellant cannot be heard to object because the judgment entered against her was for too small a sum. The fact that there was no formal remittitur filed in no way injured her. We find no substantial error in the record, and the judgment of the appellate court will be affirmed. Affirmed.

(157 Ill. 19)

FELTENSTEIN et al. v. STEIN.¹

(Supreme Court of Illinois. April 1, 1895.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—DELIVERY OF POSSESSION TO ASSIGNEE—SYMBOLICAL DELIVERY—RECORDING DEED—PRIOR TRANSFERS BY ASSIGNOR.

1. The right of an assignee for the benefit of creditors to merchandise covered by the assignment is superior to that of a judgment creditor of the assignor who caused an execution to be delivered to the sheriff between the time when the executed deed of assignment and the key to the store, which was locked, were delivered to the assignee, and his taking actual possession, which followed within an hour thereafter; he being in possession when the sheriff arrived to levy the execution.

2. Where an assignee for the benefit of creditors took actual possession of the assigned property in the night, immediately on his acceptance of the trust, and before any levy thereon by creditors, such possession was effective, as against them, though the deed of assignment was not recorded until the following morning.

3. A transfer of property by a debtor immediately prior to the making of a general assignment for the benefit of creditors does not invalidate the assignment; the transfer itself, if fraudulent, being avoided by the assignment, and the property transferred recoverable by the assignee.

Appeal from appellate court, First district.

Petition of Aaron Feltenstein and others to declare a lien of certain executions on the property of Charles A. Weissenbach, in the hands of Sydney Stein as assignee for the benefit of creditors. An order of the county court of Cook county dismissing the petition was affirmed by the appellate court, and the petitioners appeal. Affirmed.

Moses, Pam & Kennedy, for appellants. G. W. Northrup, Jr., and S. O. Levinson, for appellee.

MAGRUDER, J. This is a contest between appellants, claiming to be judgment creditors of one Weissenbach, an insolvent debtor, and appellee, as assignee under a general assignment for the benefit of creditors made by said debtor. The question is whether the judgments are entitled to liens upon the debtor's property superior to the rights of the assignee, or whether the latter took the property free of any liens created by said judgments. The facts in relation to the entry of the judgments are as follows: During Saturday, June 3, 1893, and until late in the afternoon of that day, appellants and Weissenbach had been in conference in relation to the indebtedness of the latter to

the former, and he had executed to them judgment notes. One of these notes, for \$5,000, was without valid consideration, and was finally withdrawn without the entry of judgment thereon. On Sunday, June 4, 1893, and in the early part of Sunday evening, Weissenbach was in consultation with some of his friends and creditors, with a view of raising money so that he could continue his business, which was conducted at two stores,—one on Milwaukee avenue and one on Halsted street, in Chicago, at each of which places he had a stock of goods and merchandise. The negotiations fell through. One of the attorneys of appellants, and one or more of his clerks, and one or more of the appellants were in the office of said attorneys before and after midnight on Sunday, June 4, 1893. There the declarations and cognovits were prepared for entering judgments on the judgment notes. Stevens, a deputy sheriff, had been found at 11 o'clock in the evening, and at 12:30 a. m. on June 5, 1893, he and said attorney, and a brother of the attorney, went to the Brevoort House, in Chicago; and there the attorney awakened from his sleep a judge of the circuit court of Cook county, who had retired to his bed. The narrs. and cognovits in six cases were then and there presented to said judge, and he signed his name to an indorsement upon the papers in each case in the words and figures following: "Enter judgment herein for ——— dollars." In the meantime, one of appellants and a clerk of said attorney had taken a carriage, and gone after one of the deputies of the clerk of the circuit court. The deputy clerk arrived at the courthouse at about 8 or 10 minutes before 2 o'clock on the morning of Monday, June 5, 1893, and lighted the gas, and placed some of the books within reach. About 2, or a few minutes thereafter, the attorney came in with the papers containing the judge's indorsement, and with executions already prepared, except the signatures and numbers. The deputy clerk marked the papers filed as of June 5, 1893; wrote the general numbers of the cases in the execution docket, but nothing else,—not the title of the cases, nor the amounts of the judgments; put the general, execution, and fee-book numbers on the executions, and signed and sealed them; and then went with said attorney to the waiting place of the deputy sheriff, in the neighborhood of the courthouse, and there delivered the executions to him. The judgments were not written up upon the judgment record at that time, nor until after 8 o'clock in the forenoon of that day. The deputy sheriff returned to the sheriff's office in the courthouse, and stamped the first of the executions as having been received at 2:30 a. m. on June 5, 1893, and each of the others as received one moment later than the preceding one.

The facts in regard to the execution of the assignment are as follows: Weissenbach, feeling uneasy about the judgment notes he

¹ Rehearing denied October 11, 1895.

had signed, and fearing that some advantage had been taken of him, particularly as one of the notes, for \$5,000, represented no actual indebtedness, consulted an attorney on Sunday evening, and went a second time to the house of the latter, between 12 and 1 o'clock on the morning of June 5, 1893, in company with a friend named Herman. The three came down to the attorney's office, and on the way down, Weissenbach told the attorney that he had on that evening executed a bill of sale of the Halsted street stock to a creditor named Rosenberg, to whom he owed \$9,000. After they reached the attorney's office, about 1 o'clock, or shortly thereafter, the attorney advised Weissenbach to make a general assignment for the benefit of his creditors, and he reluctantly consented to do so. A deed of assignment was then drawn, and signed by Weissenbach, and the attorney placed his seal upon the blank certificate of acknowledgment. He and Weissenbach and Herman then went to a drug store, distant less than a block from the courthouse, where John S. McConnell was in charge. The matter was explained to McConnell, and he consented to act as assignee. His name was inserted in the deed of assignment, and he signed a written acceptance of the trust, indorsed upon the deed. The deed and acceptance were acknowledged before the attorney, as notary, who filled out the certificate to that effect. The deed was then and there formally delivered by Weissenbach, the assignor, to McConnell, the assignee, at the hour of 2 o'clock and 16 or 17 minutes on the morning of June 5, 1893. The evidence is clear and undisputed that it was not later than 2:18 a. m. At the same time the attorney said to Weissenbach, "Deliver the keys and possession of the store to Mr. McConnell" (meaning the store on Milwaukee avenue). Thereupon Weissenbach delivered the keys of said store to McConnell, with the remark, "You now have possession of the store." Weissenbach had locked the store on Saturday evening, and taken the keys with him, and it does not appear that the store was open on Sunday. Weissenbach and his attorney and Herman and McConnell then went to the courthouse; and the attorney, seeing a light in the sheriff's office, went in, and found Stevens placing his stamp upon the last one of the executions, and asked him if he had executions against Weissenbach, and was told by the deputy sheriff that the executions had been delivered to him at 2:30 o'clock, and replied to that statement that the delivery was 12 minutes too late, as an assignee had been appointed 12 minutes before 2:30 o'clock. The attorney and McConnell and Weissenbach and Herman then jumped into a carriage in front of the courthouse, and drove to the store on Milwaukee avenue, and there McConnell took possession at once, and posted the following sign on the door: "This Store is in Possession of John S. McConnell, As-

signee." The deed of assignment was filed in the recorder's office of Cook county at 6:45 o'clock on the morning of June 5, 1893, and with the clerk of the county court at 8:30 o'clock on that morning. When the deputy sheriff was told that an assignment had been made before the delivery of the executions to him, he at once communicated the fact to the attorney of appellants, and told the latter that he could not make a levy, if an assignee had been appointed, as he had received no indemnifying bond. But the deputy sheriff and said attorney and one of appellants went at once to the Halsted street store to make a levy, and found it in the possession of Rosenberg, and then to the store on Milwaukee avenue, and found McConnell in possession there.

Upon these facts, it is strenuously insisted by counsel for appellee that the judgments and executions were void, and subject to collateral attack, upon the ground that no judgment or order or entry was made upon any record of the court until long after the executions were in fact issued, and that the mere indorsement by the judge upon the *cognovit* of a direction to the clerk to enter judgment, made out of court, and away from the courthouse, in the dead of night, could not support an execution. Without passing any opinion upon this point, we deem its consideration unnecessary to a disposition of this case. If it be conceded that the judgment and executions are valid, the rights of the assignee are superior to those of the judgment creditors, in view of the circumstances already detailed. It is proven beyond dispute, by the testimony introduced by the appellants themselves, that, before the executions came to the hands of the sheriff, the assignment was executed and delivered to the assignee, and the trust therein reposed was accepted by him, and the keys of the store in which the goods were contained were handed to him, accompanied by the declaration of the assignor that the possession thereof was thereby given to him; and these acts were followed almost immediately by the actual possession of the assignee, and in a few hours by the recording of the assignment. The fact that the delivery of the executions to the sheriff took place during the brief space between the execution, delivery, and acceptance of the assignment, and the symbolical delivery of the goods, on the one hand, and the taking of actual possession of the goods, and filing the instrument for record, on the other, is not sufficient to postpone the rights of the assignee to the liens of the judgments.

1. There was here a symbolical delivery of the possession of the goods by the assignor to the assignee, when the former handed to the latter the keys of the store in which the goods were stored. In *Logsdon v. Spivey*, 54 Ill. 104, in speaking of sales of personal property, we said: "To render the sale valid and effectual as to creditors and subsequent purchasers, there must be an actual delivery to

the purchaser, if capable of delivery; and, if not, then a symbolical delivery." Such a symbolical delivery of personal property is allowed in many cases where an actual delivery is physically impracticable. Among the acts most clearly expressive of such a delivery is that, of delivering the keys of the store or premises containing the goods assigned. *Burrill, Assignm.* (6th Ed.) §§ 252, 340; 21 Am. & Eng. Enc. Law, 550, 551. In *Packard v. Dunsmore*, 11 Cush. 282, the debtor sold his bakehouse, and the stock, material, and implements of his bakery, to the plaintiff, and made the latter a deed and bill of sale, and took a lease from him, and remained in possession more than a month. He then went to the office of plaintiff's attorney, distant a quarter of a mile from the bakehouse, and there, between 12 and 1 o'clock on a certain day, surrendered the lease and the key of the bakehouse to said attorney; the bakehouse being locked at the time, and the same and the personalty therein having been unused for several weeks. About two hours thereafter, at half after 2 of the clock on the same day, the defendant, as deputy sheriff, levied attachment writs upon the personal property. Two days thereafter, plaintiff demanded the possession of the property from the sheriff; but the latter refused to surrender it, and sold it at public auction, under the writs. It was there held that the delivery of the key of the building, under the circumstances of the case, was a sufficient delivery of the personal property within it, as against the subsequent attaching creditors. As, there, the property was a quarter of a mile distant when the lease was surrendered, and the key handed over, so that an actual delivery was impracticable, so, in the case at bar, the stock on Milwaukee avenue was distant about a mile when the assignment was executed, delivered, and surrendered, and when the key of the store, which had been previously locked, and unused since Saturday night, was put into the hands of the assignee, thus rendering it impracticable to make an actual delivery at that time. In *Wilkes v. Ferris*, 5 Johns. 335, there was an assignment for the benefit of creditors, containing goods in three stores, and, at the time of executing the assignment, the assignor delivered to the assignee the keys of the stores; and it was held that there was a sufficient delivery of the goods by the delivery of the keys, as against a subsequent creditor. To the same effect are the following authorities: *Vining v. Gilbreth*, 39 Me. 496; *Sharp v. Carroll*, 66 Wis. 62, 27 N. W. 832; *Marsh v. Fuller*, 18 N. H. 360; *Sullivan v. Smith*, 15 Neb. 476, 19 N. W. 620. Symbolical delivery of goods, as by the delivery of the keys to the warehouse where they are stored, will be accepted, instead of actual delivery, where the thing does not admit of actual delivery, thus necessitating such a delivery as the nature of the case admits, or where it is not possible to make an immediate and complete delivery of the thing sold or given. 2 Kent,

Comm. (12th Ed.) marg. p. 500; 1 Schouler, *Pers. Prop.* § 87.

2. The symbolical delivery of the stock of goods on Milwaukee avenue was followed by an actual possession of the same, taken by the assignee almost immediately, and certainly within a very reasonable time. Within an hour or less after the assignee accepted the executed deed of assignment, and the keys of the store, he proceeded to the store, and took actual possession, and was in such actual possession before the sheriff arrived with the executions to make a levy. Consequently, the facts of the case at bar bring it within the terms of those authorities which hold that a symbolical delivery can only be effective when followed immediately by an actual delivery. *Stevens v. Stewart*, 3 Cal. 140; 1 Schouler, *Pers. Prop.* § 87; 21 Am. & Eng. Enc. Law, p. 551, and notes.

3. Counsel for appellants insist that the property should be held to be subject to the liens of the executions, because the deed of assignment had not been recorded when the executions were delivered to the sheriff; and the case of *Lowe v. Matson* (*Lowe v. Kean*, Ill. Sup.) 29 N. E. 1036, is relied upon as authority for this position. We do not think that that case will properly bear the construction sought to be placed upon it. It was there said that the publicity of certain sales or transfers was a circumstance which would sometimes relieve them of the charge that they were fraudulent per se by reason of the retention of the property by the vendor or owner, and the recording of the assignment was mentioned as showing an intention to give publicity to the transaction. But it was not decided in that case that the recording of the assignment was necessary to vest the assignee with title, as against creditors, where the assignee had taken possession of the property before executions or attachments were levied; otherwise the following language would not have been used: "Suppose the assignee had taken manual possession of the property, but the sheriff had levied upon it prior to the filing of the deed with the county clerk; would there have been any doubt as to the power of the county court to remove the levies, and subject the property to distribution among the general creditors? Certainly not." A majority of this court held in *Farwell v. Cohen*, 138 Ill. 216; 28 N. E. 35, and 32 N. E. 893, that the failure of the assignee to record a deed of assignment of personal property when possession is given to the assignee will not invalidate or defeat the assignment, or deprive the county court of jurisdiction to compel the execution of the trust. The publicity of the transaction is a circumstance in favor of its good faith, because it operates as notice thereof to parties interested. In the present case the proof shows that the deputy sheriff, holding the executions of the appellants, and the attorney of appellants, were given actual notice of the execution of the assignment within a few moments after it was made, and after

the delivery of the keys of the store had taken place. This notice was more effectual as showing an intention to give publicity to the transaction than the constructive notice arising from the recording of the deed, although such recording was effected at the very earliest moment, to wit, at 6:45 a. m. of June 5, 1893.

4. Complaint is made by the appellants that they were not allowed to introduce proof as to the bill of sale of the stock on Halsted street made by the assignor to a creditor named Rosenberg, in payment of the latter's debt, for the alleged purpose of showing that the assignment was fraudulent and void as to them. We do not think that the offered testimony was material, under the circumstances of this case, and we are inclined to hold that there was no error in refusing to receive it. The facts, so far as developed by the testimony, are that the assignor made the bill of sale to Rosenberg before he had any idea of making the assignment; that the assignment is general in its terms; that, as soon as the assignee took possession of the store on Milwaukee avenue, his attorney at once went to Halsted street, and made demand on Rosenberg for the possession of the stock there; and that such demand on him was the first information which Rosenberg had of the making of the assignment. The assignment law of this state vests the title to all the debtor's property in the assignee. Where the assignment is general in its character, and fair on its face, as placing all the debtor's property in the hands of the assignee for equal, pro rata distribution among the creditors, the mere fact that it delays particular creditors in the enforcement of their claims by the ordinary process of law does not make it fraudulent and void. Such delay is a necessary incident in the discharge by the assignor of his duty to his creditors. *Burrill, Assignm. (6th Ed.)* § 299; *Reed v. McIntyre*, 98 U. S. 507; *Hoffman v. Mackall*, 5 Ohio St. 124; *Gardner v. Bank*, 95 Ill. 298. Where the assignor has transferred property to third persons before making the assignment, if it is sought to recover back such property, either at law or in equity, resort can be had to the courts having jurisdiction of the proper remedy, and competent to afford adequate relief. *Davis v. Dock Co.*, 129 Ill. 180, 21 N. E. 830. The bona fides of the previous transfer can there be determined. It does not necessarily affect the validity of the assignment. "Where an assignment of the debtor's whole property has been made in good faith for the benefit of all the creditors, its validity will not be impaired by the assignor's withholding a portion of the property actually conveyed; for it has become the property of the assignee, and he can recover it by action." *Burrill, Assignm. (6th Ed.)* § 254; *Pike v. Bacon*, 21 Me. 280; *Parsell v. Patterson*, 47 Mich. 505, 11 N. W. 291. If fraudulent transfers of property are made by a debtor just previous to a general assignment, they do not avoid such assignment, but

are themselves avoidable under it. *Batten v. Smith*, 62 Wis. 92, 22 N. W. 342. A fraudulent conveyance or concealment of any of his property by an assignor prior to the assignment will not impair the validity of a general assignment subsequently made. If such property may not be recovered by the assignee for the benefit of the creditors, any creditor may pursue it as though no assignment had been made. *Wilson v. Berg*, 88 Pa. St. 167. The judgment of the appellate court is affirmed. Judgment affirmed.

(157 Ill. 160)

CITY OF CHICAGO v. GREGSTEN et al.¹
(Supreme Court of Illinois. May 15, 1895.)

APPEAL—EFFECT OF REVERSAL—PROCEEDINGS ON MANDATE.

Decree for defendant having been entered on the hearing of a bill for injunction, and affirmed by the appellate court, the complainants appealed to the supreme court. The decree was by this court reversed, and the cause remanded "to the circuit court, for further proceedings not inconsistent with" the opinion of the supreme court. *Held*, that an order denying a motion of the defendant for leave to file a supplemental answer, and entering final decree for complainants, was properly granted. *Bailey and Baker, JJ.*, dissenting. 57 Ill. App. 94, affirmed.

Appeal from appellate court, First district.

Bill for injunction filed by Samuel Gregsten and another against the city of Chicago. An order entering a decree for complainants having been affirmed by the appellate court (57 Ill. App. 94), defendant appeals. Affirmed.

September 29, 1890, the appellees Samuel Gregsten and Andrew Cummings filed a bill of complaint in this cause, praying that the city of Chicago and the commissioner of public works be restrained from ejecting them from the vault or space underneath the alley in the rear of the premises occupied by said appellees, fronting on Dearborn street, Chicago. The bill of complaint was afterwards amended by leave of court. Preliminary injunction was granted, as prayed in said bill. On October 21, 1890, the city of Chicago filed its answer to the bill of complaint, and on January 9, 1891, moved the court for dissolution of the injunction theretofore granted. The certificate of evidence signed and sealed by the court, and incorporated into the record, shows the following proceedings in the cause after the motion was entered to dissolve the injunction: "Be it remembered and certified that, the above-entitled cause coming on to be heard on motion of defendant to dissolve injunction, it was agreed and stipulated between parties that said cause should immediately be set down for hearing upon the bill, and the answer thereto, and the amendment to said bill, and the answer to stand as an answer to said amendment, and the replication to said answer, and also as well as the affidavits of Samuel Gregsten." In addition to the foregoing, the certificate of evidence

¹ Rehearing denied October 16, 1895.

shows that affidavits on the part of complainants were introduced in evidence, and also a certain bond executed by them to the city of Chicago; and, on the behalf of the defendant, affidavits of William R. Purdy and Adolph M. Hirsch were read in evidence. The record of the court also shows that the cause came on to be heard on the pleadings. On the hearing, the court found the issues for the defendant, and entered a decree dissolving the injunction, and dismissing the bill for want of equity, at the costs of the complainants. Upon appeal to the appellate court, the decree of the circuit court was affirmed. Thereupon an appeal was taken to this court; and, on a consideration of the cause, the decree of the circuit court was reversed, and the cause remanded "to the circuit court, for further proceedings not inconsistent" with the opinion of the supreme court. 34 N. E. 426. A remanding order having been filed in the circuit court, appellees entered a motion for a final decree in their favor, in conformity to the opinion of this court, and the appellant entered a cross motion for leave to file a supplemental answer. The court allowed the motion of appellees, and denied the motion of appellant. A final decree having been entered, the appellant appealed to the appellate court, where the decree of the circuit court was affirmed, and this further appeal has been prosecuted.

Condee & Rose, for appellant. Knight & Brown, for appellees.

CRAIG, J. (after stating the facts). Under the facts as they appear from the foregoing statement, the only question presented by the record is whether the appellant, after the cause was remanded to the circuit court, was entitled to put in a new answer, and thus open up the cause for another hearing; or, was the court justified in entering a final decree in harmony with the opinion of this court? It will be observed that, when the cause was first submitted to the circuit court, the question determined was not merely that the injunction should be dissolved; but there was a hearing on the pleadings and affidavits, which were treated by the party as evidence, on the merits, and a decree entered dismissing the bill. When the case reached this court on appeal, it was here considered and decided on the merits, and every question involved was fully considered and decided, as shown by the opinion of the court. The order, therefore, reversing the decree of the circuit court and judgment of the appellate court, and remanding "for further proceedings not inconsistent with the opinion," in connection with the opinion, in our judgment, was a clear direction to the circuit court to enter a decree for the complainants upon the filing of the remanding order in that court;

and the course pursued by the circuit court in refusing defendant's application to reopen the cause, and rendering final decree, is sustained by the following authorities: *Hollowbush v. McConnel*, 12 Ill. 203; *Wadhams v. Gay*, 83 Ill. 250; *Newberry v. Blatchford*, 106 Ill. 584; *Hook v. Richeson*, 115 Ill. 431, 5 N. E. 98; *Gage v. Bailey*, 119 N. Y. 539, 9 N. E. 199; *Sanders v. Peck*, 131 Ill. 407, 25 N. E. 508; *Buck v. Buck*, 119 Ill. 613, 8 N. E. 837; *Leiter v. Field*, 24 Ill. App. 123. In *Wadhams v. Gay*, where a decree was reversed, and the cause remanded for further proceedings in conformity with the opinion, it was held to be error to allow the bill to be dismissed, without prejudice. The court, among other things, said (page 252): "Here is a peremptory order for such proceedings, and such only, as shall be in conformity with the opinion filed. On the receipt of this mandate, it was the duty of the superior court to examine the opinion, and conform its action to it. An examination of the opinion would have informed the court that the merits of the controversy had been fully considered; that there had been a decision upon the merits, and the conclusion reached that the complainants (the appellees here) had no equities, and their claim to relief wholly groundless. The court would have seen that every question raised and argued by the parties to the bill had been fully met and decided by this court against the complainants. The whole merits were tried, discussed, and decided." In *Newberry v. Blatchford*, supra, it is said (page 593): "The rule governing the practice in such cases seems to be as well settled in *Wadhams v. Gay* as any rule can be. It is, as stated in that case: Where a cause in chancery has been determined by a court of last resort upon its merits, the court finding there is no equity in the bill, and the cause is remanded for further proceedings in conformity with its opinion, it is the duty of the court, on receiving the mandate of the supreme court, to dismiss the bill for want of equity, that there may be an end to the matter in litigation." In *Sanders v. Peck*, supra, it was held that where the court decides the rights of the several parties upon the merits, and reverses the decree, and remands the cause for proceedings in conformity to the opinion rendered, there is nothing for the trial court to do but to carry into complete effect the decision of this court. The same doctrine is laid down in the other cases cited, but we do not regard it necessary to quote from them. Under the remanding order, it was the plain duty of the circuit court to enter a decree for the complainants, as indicated in the opinion of the court. That was done by the circuit court, and the decree will be affirmed. Decree affirmed.

BAILEY and BAKER, JJ., dissenting.

(160 Ill. 22)

DOANE v. CHICAGO CITY RY. CO.¹

(Supreme Court of Illinois. Oct. 11, 1895.)

STREET RAILROADS—CONSENT OF ABUTTING OWNERS—PURCHASE OF CONSENT—PUBLIC POLICY—LIMITATION OF DUTY.

1. Under the city and village act of 1872 (1 Starr & C. Ann. St. art. 5, par. 63, subd. 90), providing that the consent of the owners of more than one-half of the abutting property is a condition precedent to the laying of street-railway tracks in any street, a street-railway company, in consideration of the consent of an owner to the laying of a single track along the street, executed a bond conditioned that it would not thereafter build any other track along said street without the consent of the obligee first obtained. *Held*, that the bond was void as against public policy. 51 Ill. App. 353, affirmed.

2. In view of the fact that the consent of the owners of only more than half of the abutting property is required, the bond cannot be justified as compensation for damages.

3. The agreement by the company not to lay a second track without the consent of the obligee was invalid as a limitation upon its duty to the public under the provision of its charter. 51 Ill. App. 353, affirmed.

Appeal from appellate court, First district.

Action by John W. Doane against the Chicago City Railway Company to recover the penalty on a bond executed by the defendant. A judgment for defendant having been affirmed by the appellate court (51 Ill. App. 353), plaintiff appeals. Affirmed.

This is an action of debt begun by appellant against appellee. A demurrer was filed to the declaration. The circuit court sustained the demurrer. The plaintiff elected to stand by his demurrer, and judgment was rendered against him for the costs. Upon appeal to the appellate court, the judgment of the circuit court was affirmed; and the present appeal is prosecuted from such judgment of affirmance rendered by the appellate court. The action is brought upon the following instrument: "Know all men by these presents, that the Chicago City Railway Company, a corporation created by and existing under the laws of the state of Illinois, is held and firmly bound unto John W. Doane, of the city of Chicago, state of Illinois, his heirs, executors, administrators, and assigns, in the penal sum of one hundred thousand dollars (\$100,000), for the payment of which sum, well and truly to be made, in lawful money of the United States, the said the Chicago City Railway Company binds itself, its successors and assigns. In witness whereof, the said the Chicago City Railway Company, by the authority and direction of its board of directors, has caused these presents to be signed by its president, and attested by its secretary, and its corporate seal affixed hereto, this 10th day of May, A. D. 1881. The conditions of this obligation are such that, whereas, the said railway company is desirous of obtaining from the city council of the city of Chicago authority and consent to lay its street-railway tracks on Wabash ave-

nue in said city, from Lake street to Madison street; and whereas, it is necessary for said railway company to obtain the consent in writing therefor, of certain property owners along the line of said proposed tracks, before applying to said council for such authority and consent to construct said proposed tracks; and whereas, the said John W. Doane is the owner of certain property along the line of said proposed tracks, from whom it is necessary to obtain such consent to construct said proposed tracks; and whereas, said John W. Doane, upon the conditions hereinafter named, and to be kept and performed by said railway company, its successors and assigns, has given his written consent, as such property owner, to the laying and construction of said proposed tracks on Wabash avenue, between said Lake street and Madison street, by said railway company: Now, therefore, in consideration of the consent of said Doane given as aforesaid, and further consideration of one dollar, in hand paid to said railway company by said Doane, the receipt whereof is hereby acknowledged, the said the Chicago City Railway Company hereby agrees that it will not hereafter build, construct, or lay any other or more than a single-track railway, without switch or switches, turnout or turnouts, along any part of said Wabash avenue, between said Lake street and the north line of said Madison street (except the necessary curves to connect the said proposed track on Wabash avenue with the tracks of the Chicago West Division Railway Company on Randolph street, and also on Lake street, and to connect said proposed track with the tracks of the Chicago City Railway Company on Madison street), nor upon any part of Lake street between Wabash avenue and State street (except the necessary curves to connect the tracks on said Lake street with the tracks of said City Railway Company on State street, and with the proposed tracks on Wabash avenue), without first having obtained the consent therefor, in writing, from the said John W. Doane, his heirs, executors, administrators, or assigns. And in the event that the said railway company, its successors or assigns, shall violate the conditions, or any of the conditions, of this obligation, then the said sum of one hundred thousand dollars (\$100,000) shall thereupon become due and payable to the said Doane, his heirs, executors, administrators, or assigns, as liquidated damages herein; otherwise, this obligation to be null and void. The Chicago City Railway Company, by S. B. Cobb, Prest. Attest: W. N. Evans, Secretary." In his declaration, the plaintiff avers that, at the time of the execution of the said writing obligatory, he was, and ever since has been, and still is, the owner, and in the occupancy, possession, and control, of certain lots and premises fronting upon and adjoining said Wabash avenue, in the said city of Chicago, between said Lake street and Madison street,

¹ Rehearing denied March 13, 1896.

in said city, to wit, the east part of block nine, in Ft. Dearborn Addition to Chicago, fronting east on said Wabash avenue for a distance of several hundred feet, to wit, four hundred feet, and bounded on the north by said Lake street, and on the south by Randolph street, and having a frontage on each of said last-named streets of, to wit, one hundred and fifty feet, all of which said frontage upon Wabash avenue was and is between the said Lake street, on the north, and the north line of Madison street, on the south, and in respect to which the said plaintiff consented in writing, at or about the date of said writing obligatory, to the construction and operation of a single-track street railroad by the said defendant in Wabash avenue, between said Lake and Madison streets. The declaration further avers that, after the execution and delivery of the bond, to wit, during the year 1881, the defendant, having obtained the consent of the city council therefor, laid down and constructed a single-track railway in and along the whole of that part of Wabash avenue lying between Lake and Madison streets, together with the necessary curves to connect the same with the tracks of the Chicago West Division Railway Company on Randolph and Lake streets, and with its own tracks on Madison street, along and in front of the property of the plaintiff, in pursuance of his consent thereto given, as recited in the bond, and had ever since maintained and operated said single-track railway, with the curves aforesaid, so consented to by the plaintiff; and "that afterwards, to wit, on the 1st day of January, A. D. 1892, and before the commencement of this suit, the said defendant, contrary to its agreement in the said last-mentioned writing obligatory contained, and in violation thereof, laid down and constructed, and has since maintained and operated, and still maintains and operates, a second and other railway track in, along, and upon a portion of said Wabash avenue, between said Lake street and said Madison street, to wit, that part thereof lying between Randolph street and Washington street, without the consent in writing of said plaintiff to the construction of said last-mentioned track, by reason whereof, and in accordance with the terms and provisions of said last-mentioned writing obligatory, the said defendant became liable and obligated to pay to the said plaintiff, as and for his damages, fixed and liquidated, the said sum of one hundred thousand dollars, lawful money of the United States, parcel of the said sum of one hundred thousand dollars as above demanded."

B. F. Ayer and J. N. Jewett, for appellant.
J. S. Grinnell, for appellee.

MAGRUDER, J. (after stating the facts). The allegations of the declaration are admitted by the demurrer to be true. The recitals in the instrument to be sued upon by the

plaintiff must be assumed to be true as against him. The defendant, the Chicago City Railway Company, wanted to obtain from the city council of Chicago the authority to lay its street-railway tracks on Wabash avenue, in that city, from Lake street to Madison street. By an act of the legislature approved February 14, 1859, entitled "An act to promote the construction of horse railways in the city of Chicago," under which the said railway company was incorporated for a term of 25 years (which term was subsequently extended by "An act concerning horse railways in the city of Chicago," in force February 6, 1865), said company was authorized to construct, maintain, and operate a single or double track railway along such streets in said city, within the South or West divisions thereof, as the common council of said city should authorize it to do, in such manner and upon such terms and conditions as said council might prescribe. Priv. Laws 1859, p. 530; Priv. Laws 1865, p. 597. Before applying to the common council for authority to lay its tracks upon that portion of Wabash avenue above designated, the company was obliged to obtain the consent in writing therefor of certain property owners along the line of the proposed tracks. The procurement of the consent of the property owners was made necessary by subdivision 90, par. 63, art. 5, of the city and village act of 1872, which paragraph, as then in force, and before the subsequent amendments were made, is as follows: "The city council or board of trustees shall have no power to grant the use of or the right to lay down any railroad tracks in any street of the city, to any steam or horse railroad company, except upon a petition of the owners of the land representing more than one-half of the frontage of the street, or so much thereof as is sought to be used for railroad purposes." 1 Starr & C. Ann. St. p. 472. The appellant, Doane, owned an east frontage of 400 feet on Wabash avenue, between Lake street, on the north, and Randolph street, on the south, together with a frontage of 150 feet on each of said two last-named streets. In order to get the consent of the owners of the land representing more than one-half of the required frontage of the street, it was necessary to have the consent of the appellant as the owner of said 400 feet. The appellant gave his written consent to the laying down and construction of the proposed track; but the consideration for the giving of such written consent was an agreement by the company that it would not thereafter build any other or more than a single-track railway, without switch or switches, etc., along any part of Wabash avenue between Lake street and the north line of Madison street, except the necessary curves, etc., nor upon any part of Lake street between Wabash avenue and State streets, except the necessary curves, etc., without first having obtained the consent therefor in writing of the appellant or his

heirs, executors, administrators, or assigns, with a provision that, in case of a violation of the agreement, the sum of \$100,000 should become due to appellant, his heirs, etc., as liquidated damages. Substantially and in effect, the written consent of appellant to the laying down of a single track was procured by an agreement on the part of the company that it would never in the future lay a double track without plaintiff's consent, or, if it did so, would forfeit \$100,000. As was said by the learned circuit judge, in giving his reasons for sustaining the demurrer to the declaration: "Plaintiff's consent was the consideration for the defendant's agreement, and the defendant's agreement was the consideration for the plaintiff's consent."

The question then arises whether the consent of a property owner to the laying down of a street railway in the street upon which his property abuts can be purchased for money, or for a consideration inuring to the exclusive benefit of such owner. We do not think that it was the intention of the legislature, in the adoption of paragraph 90 as above quoted, to make the consent of the abutting owner in such cases a purchasable article. An agreement based upon the purchase of the abutting owner's consent to the laying of the proposed tracks in a public street is illegal, as being against public policy, and will not be enforced by the courts. There are some very obvious considerations which justify this conclusion. Such consent of the owner is manifested by his signature to a petition addressed to the common council of the city. Upon this petition the common council bases its legislative action. The provision of the statute embodied in paragraph 90 is a limitation upon the power of the council to grant the use of the streets to a street-railway company. Unless there is a petition of those owning more than one-half of the frontage to be used, the council is without power to grant the license. *McCartney v. Railroad Co.*, 112 Ill. 611; *Hunt v. Railway Co.*, 121 Ill. 638, 13 N. E. 176. The city holds the fee of the streets in trust for the use of the public, including the owners of property abutting thereon; and, consequently, the power to grant the use of the streets must be exercised for the benefit and in the interest of the public, including such owners. *Hunt v. Railway Co.*, supra. The city council would not be faithful to its trust if it granted the use of a public street to a street-railway company without being satisfied that such use of the street would be a public benefit, by facilitating public travel, and promoting the public convenience. The law makes the petition of the abutting property owners evidence to some extent that the public will be benefited by the proposed laying of the tracks. Such evidence, lying at the foundation of legislative action, must be fairly and honestly given, and not purchased by considerations moving to the signers of the petition. An agreement on the part of

a corporation to grant to individuals certain privileges, in consideration that they will withdraw their opposition to the passage of a legislative act touching the interests of the corporation, is against sound public policy, prejudicial to correct and just legislation, and void. *Pingry v. Washburn*, 1 Alken, 264; *Greenh. Pub. Pol. rules* 316, 320. "Legislators should act from high considerations of public duty. Public policy and sound morality * * * require that courts should not put the stamp of their disapprobation on every act, and pronounce void every contract, the ultimate or probable tendency of which would be to sully the purity or mislead the judgments of those to whom the high trust of legislation is confided." *Marshall v. Railroad Co.*, 16 How. 314.

Contracts for the purchase of the influence of private persons upon the action of public officials, either executive or legislative, are against public policy, and void. It is sufficient that their tendency is bad. *Liness v. Hesing*, 44 Ill. 113; *Trist v. Child*, 21 Wall. 441; 3 Am. & Eng. Enc. Law, pp. 877, 878, and notes; *Brown v. Brown*, 34 Barb. 533. Personal influence to be exercised over a legislative body is not vendible in our system of laws and morals. *Oscanyan v. Arms Co.*, 103 U. S. 261. If the appellee had made an agreement with appellant to pay him for using his influence with the common council of Chicago to induce that body to pass an ordinance permitting appellee to lay down its tracks in Wabash avenue, such contract would be conceded at once to be illegal, and no court would enforce it. We see no difference between it and the agreement made in the present case. The signing of the petition by the abutting property owner has a direct influence upon the action of the common council. An agreement to sign such a petition is an agreement to influence the common council, and, when made for a consideration moving to the property owner, is unlawful. Where, by the statutes of a state and the ordinances of a city therein, the owners of a majority of feet fronting on a street, or the part of it proposed to be graded and paved, were required to unite in an application to the city commissioner to have the work done before any action could be taken by the city authorities, it was held as follows: "Any arrangement or combination among the parties applying whereby a few individuals, desirous of causing the grading and paving to be done, procure the signatures of others to the application by paying them a consideration therefor, either directly or indirectly, is a fraud on the law, and contrary to public policy." *Howard v. First Independent Church*, 18 Md. 451. In *Maguire v. Smock*, 42 Ind. 1, the action was upon an agreement to pay a consideration to procure the signatures of property owners to a petition for the improvement of a street under a law which authorized the common council of the city to cause the improvement to be made on the petition of the resident owners of

two-thirds of the whole line of lots bordering on the street, or part of street, sought to be improved, etc.; and it was held that the contract was one which the courts would not aid either party to enforce. The doctrine of the Howard Case, as stated above, was quoted and approved, and it was said: "Their names were to be added to the petition to affect the action of the council. The council would be controlled to a considerable extent by the wishes of the property owners. * * * They [the council] would have a right to believe that every property owner petitioning for it * * * signed the petition in good faith, and not under a contract by which he was to be relieved of the whole or any part of his share of the cost of the improvement, whilst he was seeking to have others taxed for the whole amount of their share under the law." In *Railway Co. v. Shea*, 67 Iowa, 728, 25 N. W. 901, it was proposed that a township should aid in the construction of a railroad; and, one of the members of the committee appointed by the town to work up the tax having entered into a contract with the railroad company, it was held that the tax voted was void, by reason of a promise made by him to voters that, if such aid was voted, they would be paid 50 cents on the dollar on their certificates when they paid such tax. In *Kean v. City of Elizabeth*, 35 N. J. Law, 351, under a statute providing that where the common council determined to pave a street by the use of a patented process, and the owners of one-half of the property, in running feet along the line of the intended improvement, petitioned for the use of any special patent, the contract must be awarded in accordance with the request of such proportion of owners, it appeared that some of the owners signed the petition for a consideration, and the court said: "Such purchased consent is against the policy of the law, and unjust to the other property owners. The fair judgment of the owners, and not their cupidity, must determine the question whether they and others shall be assessed." A promissory note given by the applicants for a public road to a caveator against the road to buy off his opposition, and secure his assent to it, is void. *Smith v. Applegate*, 23 N. J. Law, 352. Contracts between the officers of a railroad company and private parties to locate a railroad at a particular point, or to locate passenger and freight depots at a particular point, and at no other point, in a town, are void, as being against public policy. *Bestor v. Wathen*, 60 Ill. 138; *Marsh v. Railroad Co.*, 64 Ill. 414. So, also, are contracts by which the directors of a railroad company agree to prohibit the establishment of depots or stations at certain points, or within specified distances of particular points, on the road. *Railroad Co. v. Mathers*, 71 Ill. 592, 104 Ill. 257. Authorities holding that the purchase of signatures to petitions for the construction of public improvements, like the paving of streets, is against public policy, are said to be inapplica-

ble in the case at bar, upon the alleged ground that there the property owner selling his signature is relieved of his share of a burden which falls upon others not signing the petition or receiving any consideration, while here, as it is insisted, the property owners not signing the petition are not subjected to any burden.

While it may be true that the property owners not signing the petition are subjected to no tax or expenditure by reason of the laying down of the tracks in front of their property, it does not follow that they are not wronged when those signing the petition sell their consent. Counsel for appellant claim that appellant's property would be damaged by the laying of the tracks, and that he had a right to demand compensation for such damage as a consideration for giving his consent to the laying of the tracks. On the other hand, counsel for appellee contends that a street-surface passenger railway, constructed at grade in the usual manner, is not a nuisance, or a new servitude imposed upon the street, for which the abutting owners suffer damage, and that, as they suffer no damage, they are entitled to no compensation. We do not deem it necessary to pass upon these contentions. It is certainly true that the owner of property abutting upon a street, the fee of which is in the city, has the right of ingress and egress to and from his premises by means of the street. This right is an interest in the street appurtenant to his property, which is distinct from the interest of the general public in the street. But if the property owners signing the petition have any interest whatever, either by reason of damage suffered or because of their right of ingress and egress, for which they are entitled to demand a price in consideration of giving their consent to the laying of the tracks, it is an injustice to the property owners not signing the petition to be deprived of an opportunity also of receiving such price. They are deprived of such opportunity if appellant's claim that the consent may be purchased is well founded. The law only requires a petition from the owners of the land representing more than one-half of the frontage; and, if the corporation can buy the consent of those embraced in this proportion, it will have no interest in buying the consent of those not embraced in it. It results that the latter are deprived of what their neighbors are fortunate enough to receive. We cannot believe that it was the intention of the law to thus discriminate between the abutting property owners. If the consent of one is purchasable, the consent of all is purchasable; and, if the consent of all is purchasable, a system under which some are necessarily deprived of any opportunity to sell is wrong and unjust. The only legitimate conclusion is that the consent of none should be made a matter of barter.

But, aside from any question of damage, it is true that not only the abutting property owners signing the petition, but those not

signing it, and also the general public, are interested in the improvement. In *McCartney v. Railroad Co.*, supra, we said in reference to paragraph 90: "It is not the city alone or abutting property owners that are concerned about the unlawful obstruction of a street of a city. All the people of the state are entitled to the use of such street as being a public highway." Consequently, the abutting property owners, who sign the petition, and thus put in motion the legislative action of the common council, are to a certain extent charged with a duty to the public. As the rights of third persons and of the general public are thus affected by the action of the property owners who sign the petition, they have no right to sell their signatures thereto. Public policy requires the unbiased and uninfluenced judgment of such signers. *Smith v. Applegate*, 23 N. J. Law, 352; *Dean v. Clark* (Sup.) 30 N. Y. Supp. 45; 19 Am. & Eng. Enc. Law, 565; 9 Am. & Eng. Enc. Law, 880. This doctrine is admirably illustrated in the case of *Jacobs v. Tobiason*, 65 Iowa, 245, 21 N. W. 590, where an agreement to abandon the prosecution of the proceeding for the establishment of a public highway, in consideration of money to be paid for such abandonment, was held to be against public policy, and void in law, and not enforceable, and where the supreme court of Iowa said: "Proceedings for the establishment of public highways are essentially public in their character. * * * The proceeding can be instituted, it is true, only on the petition of some member of the public who is interested in the question. * * * In instituting and carrying on the proceeding, he acts, in a sense, in a public capacity. He invokes the power of the state, and it is exercised for the benefit of the common public; and he, in a sense, represents that public, and stands for it in the proceeding. It is true, he cannot be compelled to institute the proceeding, and it may be true, also, that, having voluntarily begun it, he cannot be compelled to continue it to a final result. * * * But when he has assumed a position of trust towards the public, and instituted a proceeding of public concern, he cannot be permitted to make the question whether he will remain in the position, or continue the proceeding, a matter of private bargain for his own emolument."

We cannot make an extended review of the cases referred to by counsel for appellant. Those most relied upon are *Low v. Railroad Co.*, 46 N. H. 284; *White v. Railway Co.*, 139 N. Y. 19, 34 N. E. 887, and *Weeks v. Lippencott*, 42 Pa. St. 474. The New Hampshire case seems to be based mainly upon English decisions, whose authority upon this subject is generally repudiated in this country. 1 Whart. Cont. § 402, note 1; *Green's Brice*, *Ultra Vires*, p. 504, note. The New York case is essentially different in its facts from the case at bar, and the main question there involved was whether an abutting owner, who had consented to the erection of an ele-

vated railroad in front of his property, was thereby estopped from subsequently suing for damages. The Pennsylvania case is more directly in line with appellant's contention, but it is opposed to the current of authority, and we regard the authorities already noticed as announcing the sounder doctrine.

But it is urged on behalf of appellant that the consideration of the bond or agreement sued upon was not only the laying of a single track in front of appellant's property at the date of the execution of the instrument, but it was also in part that, in case another track should be laid, a definite sum was agreed to be paid. Only a single track was laid down in 1881, between Madison and Lake streets, and in front of appellant's property, which property was between Randolph street, on the south, and Lake street, on the north. In 1892 another track was laid, but not in front of appellant's property. The second track, though between Madison and Lake streets, was not between Randolph and Lake streets, but between Randolph and Washington streets. It was therefore south of appellant's property. It is the laying of this second track which is assigned as a breach of the bond. The agreement of the company that it would not thereafter lay a second track without appellant's consent was clearly invalid. The company had no right to bind itself that it would not do in the future what might be required of it by its duty to the public under the provisions of its charter. It is averred in the declaration that a second track was laid in 1892, south of Randolph street; and the presumption is that it was laid by authority of the common council, based upon a petition signed by the owners representing more than one-half of the required frontage of the street. If, under the agreement, the company could not lay a second track without appellant's consent, then the petition therefor of the requisite proportion of owners, and an ordinance of the common council authorizing it, would be of no avail to secure the laying of such second track. In such case appellant's veto would be more powerful than the public demand, as made known by the petition and ordinance provided for in the law. An agreement by a corporation, which thus hampers its power to perform a public duty imposed upon it by its charter, is against public policy, and void. A contract whereby a corporation abandons a public duty will not be enforced. Where a railroad company or a street-railway company has, under its charter, a franchise, which was intended, in large measure, to be exercised for the public good, any contract with an individual or private corporation which disables it from the exercise of such franchise, or limits it in the exercise thereof, to the injury of the public, is void as against public policy. *Chicago Gaslight & Coke Co. v. People's Gaslight & Coke Co.*, 121 Ill. 530, 13 N. E. 169, and cases there referred to; *Marsh v. Railroad Co.*, supra; *Railroad Co. v. Mathers*, supra; *State v. Hartford & N. H.*

R. Co., 29 Conn. 538; Hartford & N. H. R. Co. v. New York & N. H. R. Co., 3 Rob. (N. Y.) 411; Railroad Co. v. Taylor, 6 Colo. 1.

A further contention by appellant is that the amount named in the bond was agreed upon by the parties as liquidated damages, while appellee claims that the amount was a mere penalty. It is unnecessary to determine whether the bond provides for a penalty or for liquidated damages, as the views already expressed dispose of the material question involved, and justify the action of the trial court in sustaining the demurrer to the declaration. The judgments of the appellate and circuit courts are affirmed. Affirmed.

(164 Ill. 197)

BIEGLER v. MERCHANTS' LOAN & TRUST CO.

(Supreme Court of Illinois. Nov. 23, 1896.)

EQUITY — BILL AND CROSS BILL — DISMISSAL OF BILL — JURISDICTION OF CROSS BILL — NEGOTIABLE INSTRUMENTS — CONSIDERATION — INDORSEMENTS AFFECTING NEGOTIABILITY — NOTICE TO PURCHASER.

1. Plaintiff's bill for dissolution of his partnership with defendants in race horses alleged that for his interest he had paid part cash and part notes, on condition that in case of dissolution he was to forfeit the cash and interest in the horses, and receive back the notes, and asked for an accounting. A loan company, transferee of the notes, having sued thereon pending the bill, plaintiff joined it as a defendant with the original defendants to a supplemental bill, alleging defenses to the notes of which the transferee had notice, and asking for their surrender, and for an injunction against the actions at law. The transferee filed its cross bill, alleging that it was a bona fide holder for value, and asked judgment for the amount due on the notes. *Held* that, jurisdiction of the cross bill having been obtained as germane to the original and supplemental bills, the dismissal by plaintiff of his bills as to the original defendants, after a master's report finding the transferee a bona fide holder without notice, and entitled to recover the amount found due by him on the notes, did not deprive the court of its jurisdiction to render a decree for the transferee upon the report of the master on its cross bill, though the relief asked was legal. 62 Ill. App. 560, affirmed.

2. Where a statute prohibits the racing of horses for money, but not the breeding and owning of race horses, notes given for an interest in race horses, under an agreement that they shall constitute partnership property of the parties to the notes in a partnership to be formed by them for the racing of horses for money, are not void, as being given for an illegal consideration. 62 Ill. App. 560, affirmed.

3. An indorsement on notes, negotiable on their face, that they are secured by a lien on the maker's interest in certain horses described in an agreement of even date with the payees, will not charge a purchaser of the notes with notice of the terms of the agreement by which payment of the notes is made conditional. 62 Ill. App. 560, affirmed.

4. An indorsement on a note, negotiable on its face, merely reciting that it is secured by lien on the maker's interest in certain horses, described in an agreement, of even date, with the payees, does not affect the negotiability of the note, though the agreement makes its payment conditional. 62 Ill. App. 560, affirmed.

Appeal from appellate court, First district.
Bill by P. L. Biegler against G. W. Lelhy

and another for a dissolution of a partnership and an accounting, to which he joined as a defendant, in a supplemental bill, the Merchants' Loan & Trust Company (transferee of notes given by him, for his interest in the partnership, to the original defendants), to enjoin an action at law thereon against him by the loan company, and for an accounting on the notes. The loan company filed a cross bill. From an affirmance by the court of appeals (62 Ill. App. 560) of a decree of the circuit court for the loan company on its cross bill, for the amount found due on the notes by the master's report, after dismissing the original and supplemental bills as to the original defendants, plaintiff appeals. Affirmed.

The original decree herein was entered in the circuit court of Cook county. It was afterwards affirmed, on appeal by the appellate court of the First district, and this further appeal then taken. On the rendition of the judgment of affirmance in the appellate court, the following opinion was filed (Shepard, J.):

"Pursuant to previous negotiations, the appellant purchased of George W. Lelhy & Son a one-third interest in nine certain race horses and certain racing equipments, and agreed to pay therefor the sum of \$13,500, of which six thousand dollars was paid in cash, and the remaining \$7,500 was evidenced by two promissory notes made by the appellant. Those notes, with indorsements thereon, were as follows:

"\$3,750. Chicago, Jan. 15, 1894. Five months after date, for value received, I promise to pay to the order of G. W. Lelhy & Son the sum of thirty-seven hundred and fifty dollars, at my office in Chicago, with interest at the rate of six per cent. per annum after date. P. Louis Biegler, 379 No. Clark St.'

"Indorsed: 'This note is secured by a lien upon my interest in certain horses named in agreement this day made between said G. W. Lelhy & Son and myself. Dated January 15, 1894. P. Louis Biegler.'

"\$3,750.00. Chicago, Jan. 15, 1894. Six months after date, for value received, I promise to pay to the order of G. W. Lelhy & Son the sum of thirty-seven hundred and fifty dollars, at my office, in Chicago, with interest at the rate of six per cent. per annum after date. P. Louis Biegler, 379 No. Clark St.'

"Indorsed: 'This note is secured by a lien upon my interest in certain horses described in agreement this day made, between G. W. Lelhy and myself, dated January 15th, 1894. P. Louis Biegler.'

"A partnership agreement in writing, bearing the same date of the notes, was entered into between appellant and the Lelhys; and it is contended that a verbal agreement was made between them at the same time, whereby, if the appellant should desire at any time thereafter to withdraw from the partnership, he should lose the \$6,000 cash paid by him, give up his interest in the

horses, and receive back the said two notes; and that the indorsement on the notes had reference to such verbal agreement, and was, as well, notice of what the partnership agreement contained, and put any person dealing with the notes upon inquiry as to what the agreement was. On January 30, 1894, the six-months note was deposited by Lelhy & Son with the Merchants' Loan & Trust Company, the appellee, as collateral security to an indebtedness of \$3,000, then owing by them to said bank; and on May 7, 1894, the said bank discounted for Lelhy & Son, in its regular course of business, the other note, due at five months. The notes were not paid at maturity, and on December 1, 1894, the appellee sued the appellant on them at law. In the meantime the appellant had filed a bill in equity against the Lelhys, which was pending; and, about the time the suits on the notes were about to be reached for trial, the appellant filed a supplemental bill in the equity case, and made appellee a party defendant with the Lelhys, and set up various equitable defenses to the notes, and prayed for an accounting, that said notes be surrendered and given up to him, and for an injunction against the further prosecution of the suits on the notes, and obtained an injunction restraining appellee from further prosecuting said suits. Appellee answered said supplemental bill, and filed its cross bill, denying that any equitable defenses existed against the notes as between appellant and the Lelhys, the payees thereof, and insisting that, if any such equitable defenses did exist as between the maker and payees thereof, such defenses were unavailing against cross complainant (the appellee), under the circumstances of acquiring them, as set forth in the said cross bill, and praying that appellant be decreed to pay the amount due on the notes. In his answer to said cross bill, the appellant admitted as follows: "That his counsel and the counsel for said cross complainant agreed in open court, at the time that the said injunction was granted as aforesaid, that all questions in contention and controversy arising between this defendant and said cross complainant and said Lelhy & Son upon the said notes of this defendant, as in the said cross bill of complaint set forth, should be submitted and determined upon a hearing of the original bill and supplemental bill in this cause, and that, if it was found that this defendant was indebted to said cross complainant, it should be decreed in this cause that he pay to said cross complainant whatever sum should appear upon an accounting to be justly due from this defendant to said cross complainant upon said two notes, or either of them." The cause was referred to a master, who found and reported, among other things, that the appellee received the notes without notice of any of the equitable defenses against them claimed by the appellant, and that there was due to appellee the sum of \$4,045 on the note that it

discounted, and \$2,068.83 on the indebtedness that the other note was pledged as collateral to. The cause coming on to be heard upon exceptions filed by the appellant to the master's report, it was ordered, on motion of appellant's solicitor, that the original bill and supplemental bill of appellant be dismissed as to the Lelhys, and thereupon, on the court's own motion, the cross bill of appellee and the supplemental bill as to it were also dismissed. Subsequently, on motion of appellee, the court set aside its order dismissing the original and supplemental bill as to appellee, and also appellee's cross bill, and entered a decree confirming the master's report in respect to the allegations of the cross bill, and that appellee (said cross complainant) have and recover from appellant the sum so found due by the master, together with lawful interest from the date of the report, and ordered execution therefor. It is from such decree that this appeal is prosecuted.

"It is contended by the appellant that, he having dismissed his original and supplemental bill as against the Lelhys, the court properly dismissed the same as to the appellee, and also appellee's cross bill, and that it was error to vacate such order of dismissal. The allegations and theory of the original and supplemental bills were that, upon an accounting, there would be found to be nothing due from appellant on said notes, as between himself and the Lelhys, and that, owing to existing equities between himself and the Lelhys, who were the payees of the notes, of which the appellee had notice, and advantage of which appellant could not have in the suits at law brought by appellee against him upon the notes, he was entitled to an injunction against the prosecution of said suits at law, and it was upon such allegations that he obtained his injunction. The cross bill that was filed by appellee was clearly germane to the issues raised by the original and supplemental bills; and, while appellant had the right to dismiss his original and supplemental bills as against the Lelhys, jurisdiction by the court to retain the same as to appellee was not thereby lost, and it was error for the court to dismiss them and appellee's cross bill, as was done. It being error to dismiss them, it was proper for the court to vacate its order of dismissal, and reinstate them, and to proceed to a decree upon the merits of the cause, as between appellant and appellee. We say this without reference to the stipulation entered into by the parties, as admitted by appellant, for it need not be argued that consent cannot confer jurisdiction. Jurisdiction was acquired under the original and supplemental bills filed by appellant, and, under the provisions of our statute, they could not be dismissed as against the appellee, who had filed its cross bill without its consent; and, jurisdiction having been thus acquired, it was proper that it should be retained for the determination and settlement of all the equities between the parties in relation

to the subject-matter of the suit. Parties resorting to equity, and inviting its administration, are not permitted, after the filing of a cross bill which prays for relief germane to the original suit, and after being defeated in equity, or anticipating defeat there, to retrace their steps, and compel the defendant, who has filed his cross bill, to again return to the court of law, from proceeding in which he had been enjoined. True, the appellant, by dismissing his bills as to the Leihys, who were the only defendants thereto except the appellee, was left with the appellee as his only adversary as to matters which, doubtless, might have been tried at law; but the appellant had brought the appellee into a court of equity, under his bills, setting up facts that gave a court of equity jurisdiction; and the equity court, having thereby acquired jurisdiction for all equitable purposes, retained it to give full relief, whether legal or equitable, as to all purposes relating to the subject-matter of the bills, although it so happened that at last it gave relief only as to matters which would not have been proper subjects of equitable interposition if they alone were the original subjects of relief. *Stickney v. Goudy*, 132 Ill. 213, 23 N. E. 1034. The master found that the appellee took the notes in due course of business, for a valuable consideration, and without notice of any equities against them, and the decree followed the report of the master. An examination of the evidence satisfies us of the correctness of such finding. The recital, by indorsement on the notes, that they were secured by a lien upon the maker's interest in certain horses described in a specified agreement had no effect to put the appellee upon inquiry as to the terms of that agreement. The fact, if true, that the notes were secured as recited, did not affect their negotiability. *Byles, Bills*, 101. A recital upon a promissory note, to destroy its negotiability, must be of a kind that in some respect qualifies or makes uncertain or conditional the promise. *Siegel v. Bank*, 131 Ill. 569, 23 N. E. 417.

"The further contention is urged that the notes were given for a gaming consideration, and therefore, by force of the statute, were void in the hands even of an innocent holder for value. The notes were given for an interest in race horses, it is true; but that a race horse may be the subject of a valid contract of purchase and sale, as much so as a mule or an ox, is, we think, not open to dispute, in the absence of statutory prohibition. The statute nowhere prohibits the breeding or dealing in or running of race horses. And we do not think, although it was contemplated between the parties when the notes were made that they should, as they did, enter into a partnership agreement for, among other things, racing for money the very same horses for an interest in which the notes were given, that the consideration of the notes was thereby tainted to the extent of making them void in the hands of an innocent holder. The partnership articles make no mention what-

ever of the notes, but open with a recital that the two Leihys and appellant are each owners of a one-third interest in the horses, naming them, and then proceeds with stipulations as to the racing of them, and the buying and selling of other horses, etc., and the management of the outfit. The notes did not pay for or represent in any way an interest in any moneys won or staked on racing, or on any other uncertain and gambling event or circumstance, but were given only for horses and their equipment. In a sense, they were given for something—horses—to be used in racing for money; but so might it be said of the purchase of boots for a jockey, of the hiring of men to construct a race track, or of carpenters to erect a judge's stand, and therefore in aid of gaming. But we do not feel strongly constrained to declare such contracts to be void. It would be going beyond anything that the legislature has ever done with reference to contracts and negotiable paper to hold these notes void, and, except by statutory enactment, there could be no pretense of the invalidity of such instruments as the notes in question.

"We do not consider it necessary to discuss other points argued in behalf of appellant. The main questions—that the notes were negotiable, and were acquired by appellee in the regular course of its banking business, for value, and without notice of any of the alleged equities against them; the jurisdiction of the court of equity to give judgment upon the notes; and that the notes are not tainted with a prohibited consideration, so as to render them void in the hands of appellee—being determined adversely to the appellant, it remains only necessary to say that we discover no substantial error in the record, and to affirm the decree of the circuit court, which is accordingly done."

Loesch Bros. & Howell, for appellant. Rich & Stone, for appellee.

BAKER, J. (after stating the facts). The appellate court properly disposed of the cause, and we concur in and adopt the views expressed in its opinion. We have carefully examined the elaborate briefs filed in this court by counsel for appellant, and it seems to us that there is but one point upon which there is occasion for adding anything to what has already been said in the case.

Appellant says that the original bill prayed an accounting, injunction, receiver, and dissolution between partners who had formed a partnership for the purpose of racing horses for money, purses, and prizes on different race tracks in this and other states; that the contract and partnerships entered into were for the purpose of gaming, and an illegal contract or partnership, and, under our statutes, void, and not enforceable; that, therefore, the court had no jurisdiction to entertain the original and supplemental bills; that the cross bill was auxiliary to and dependent

on the original and supplemental bills; and that, the court having no jurisdiction over the original and supplemental bills, the cross bill must fail. And he complains that the appellate court passed no opinion as to the legality of the partnership agreement, or the partnership subsisting under that agreement. The original bill was for an injunction, and the appointment of a receiver, and for the dissolution of an alleged partnership, and the settlement of the partnership accounts. These are all matters that are within the general jurisdiction of a court of chancery. The supplemental bill was in line with the original bill, and was filed for the purpose of subjecting certain legal rights claimed by appellee to the supposed equities of appellant. Appellant came into the chancery court, claiming in both his bills that he had equitable rights; and these rights, so claimed, were of such character as that, if they had any valid existence, they were properly cognizable in that court, and in that court only. He had a right to be heard in that court in support of his claim, and had a right to contend that the partnership agreement was a valid agreement, and the partnership entered into a lawful partnership, and that he was entitled to all the benefits resulting therefrom. The court, without doubt, had jurisdiction to give judgment upon the case that he exhibited. Suppose a demurrer had been interposed to the bills for want of equity; would he not have had a right to insist upon the validity of the contract and partnership? And would not the court have had jurisdiction to adjudicate upon such contentions? If A. should sue B. in an action at law to recover \$100 won on a horse race, would not the court have jurisdiction to adjudicate in the suit? In *Tatman v. Strader*, 23 Ill. 493, cited by appellant, it was an open question whether winning money on a horse race was gaming, this court reversing the decision of the court below.

When a complainant files a bill that properly falls under one or another of the heads of ordinary chancery jurisdiction, the right of the defendant to maintain a cross bill that is germane to the original bill is not dependent upon the validity of the claim made in the original bill. If answer is interposed, instead of a demurrer to the original bill, the court may, at the hearing, dismiss the bill for want of equity; and it is immaterial whether this be done for want of proof, or because the bill does not on its face show a case for equitable relief. Here appellant himself set up the contract and the partnership, and claimed their validity, and invoked the equitable jurisdiction of the court. He enjoined appellee from the prosecution of its suit at law, and forced it into chancery. He answered the cross bill, and not only did not claim appellee had an adequate remedy at law, or challenge the jurisdiction of the court of equity to entertain the cross bill, but expressly canceled and agreed to the exercise

of such jurisdiction; and neither he nor any of the other parties to the litigation made any claim or suggestion in the circuit court that the partnership agreement was illegal, or the partnership not a valid partnership. The matters alleged in appellant's bills related to matters of contract, and were not wholly foreign to the jurisdiction of a court of chancery. *Richards v. Railway Co.*, 124 Ill. 516, 16 N. E. 909; *Stickney v. Goudy*, 132 Ill. 213, 23 N. E. 1034. It would be inequitable to allow appellant to deny for the first time after appeal taken the equitable jurisdiction which he himself invoked, and forced appellee to submit to. *Clemmer v. Bank*, 157 Ill. 206, 41 N. E. 728, and authorities there cited.

After the issues had been joined in the cause, and the evidence reported by the master, appellant dismissed his original and supplemental bills, as to George W. Leihy and Morgan P. Leihy, and this eliminated from the cause the matter of the partnership agreement between appellant and said Leihys. Consequently, the matters of said partnership and said partnership agreement were not submitted to the decision of the circuit court, and, in fact, said court made no adjudication and rendered no decree in regard thereto; and so there is no occasion for expressing an opinion on the question that was first raised upon appeal as to the legality of the partnership and partnership agreement. The judgment of the appellate court is affirmed. Affirmed.

(146 Ind. 379)

STOUT v. RAYL et al.

(Supreme Court of Indiana. Dec. 4, 1896.)

DEEDS—DELIVERY—VALIDITY—APPEAL AND ERROR
—REVIEW—OBJECTIONS NOT MADE
BELOW—REVERSAL.

1. Where deeds are delivered by the grantor to a third person, to be delivered on his death to the grantees, and the grantor parts with all dominion over them, and reserves no right to recall the deeds or alter their provisions, the title passes at the time of the delivery of the deeds to such third person.

2. S. delivered to his wife deeds executed by him and her, with directions to keep them until his death, and then deliver them to W. The deeds were placed in an envelope, and indorsed, "Deeds to be delivered by W. after my death;" and on each deed were the words, "After my death, this deed to be delivered by W." After S.'s death, W. delivered the deeds to the grantees named therein. *Held*, that the deeds were not invalid, as an attempt by the grantor to make a testamentary disposition of the land, without the legal formalities of a will.

3. Objections to evidence not stated at the time it is objected to cannot be urged on appeal.

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Action by Andrew P. Stout against Mary A. Rayl and others to set aside deeds to defendant Rayl executed by Robert Stout and wife, and to quiet plaintiff's title in an undivided part of the land described in the deeds, as one of the children and heirs of Robert Stout,

deceased. From a judgment in favor of defendants, plaintiff appeals.

S. D. Stuart and J. F. Neal, for appellant. Christian & Christian and Jesse Hodgins, for appellees.

McCABE, J. The errors assigned on this appeal call in question the conclusions of law stated on the special finding of facts by the circuit court, and the action of that court in overruling the plaintiff's motion for a new trial. The substance of the special finding is as follows: (1) That Robert Stout died, intestate, on June 18, 1896, leaving, surviving him, as his only heirs at law, the defendant Jemima Stout, his widow, Lucius Stout, Mary Ann Allen, and Andrew P. Stout, his children. (2) That on the 22d day of October, 1881, Robert Stout, by warranty deed, his wife, Jemima, joining therein, conveyed to the defendant Mary Rayl certain described real estate situate in Hamilton county, Ind., containing 60 acres. Said deed was duly acknowledged on said day, before a justice of the peace. That thereafter, on said day, said deed was handed to the defendant Jemima Stout by said Robert Stout, he saying to her: "Take it, and keep it in a safe place until my death; then deliver it to B. F. Wells." That said Jemima Stout took said deed, and put it in a drawer, which was a safe place, and kept possession of it there, under lock and key, until the death of said Robert Stout, whereupon she delivered said deed to said B. F. Wells. That said deed, on the day of its execution, was put into an envelope by said Robert Stout, and sealed up, and there were indorsed on said envelope the words, "Deeds to be delivered by B. F. Wells after my death;" and there were indorsed on said deed the words, "After my death, this deed to be delivered by B. F. Wells." That said B. F. Wells, pursuant to the instruction given him by Robert Stout in his lifetime, called for and received said deed after the death of said Robert Stout from the defendant Jemima Stout, and caused the same to be recorded in the deed records of the county; and, after said deed had been so recorded, he delivered it to the defendant Mary Rayl, who accepted the same, and went into possession of said real estate. (3) That on February 9, 1884, said Robert Stout, by warranty deed, his wife, Jemima Stout, joining therein, conveyed to the defendant Mary Rayl certain other described real estate situate in the county of Hamilton and state of Indiana, containing 20 acres, more or less. That said deed was duly acknowledged before a justice. That on said day, after said deed had been duly signed and acknowledged, said Robert Stout handed said deed to the said defendant Jemima Stout, saying to her: "Take it, and keep it in a safe place until after my death; then deliver it to B. F. Wells." That said Jemima Stout took said deed, and put it in a drawer, which was a safe place, and kept possession

of it there, under lock and key, until the death of said Robert Stout. That thereupon she delivered said deed to B. F. Wells. That said deed, on the day of its execution, was put into an envelope, and sealed up, and there was indorsed on said envelope this language, "Deeds to be delivered by B. F. Wells after my death;" and there was indorsed on said deed this language, "To be delivered by B. F. Wells;" and that said B. F. Wells, pursuant to the instructions given him by Robert Stout in his lifetime, called for and received said deed after the death of said Robert Stout, from the defendant Jemima Stout, and had the same recorded in the deed records of the county, and thereafter delivered it to said defendant, Mary Rayl, who accepted the same, and went into possession of said real estate. (4) That said Robert Stout, deceased, at no time after the execution of either of said deeds, and placing them in the hands of said Jemima Stout, ever exercised any control or authority over them, or ever called for them. (5) That said Robert Stout, during his lifetime, exercised full control over said real estate, and received the rents and profits therefrom, and paid the taxes thereon, and that his personal property left by him is sufficient to pay his debts. (5½) That, at the time of signing each of said deeds before said justice, said Robert Stout directed his wife to take charge of them, and not let his body get cold in death before delivering them to B. F. Wells. That she accordingly took sole charge of said deeds, and put them under lock and key in a drawer, where she and said Robert kept their private papers. While he had access to said drawer by obtaining the key from her, he never had or resumed control of said deeds, or the other deeds to his children, but left them in the possession of his said wife. Frequently, prior to his death, and after making said deeds, he had conversations with said B. F. Wells, in which he directed him to deliver the deeds after his death to the grantees; and said Wells did so deliver them, but he never saw or had possession of them until they were delivered to him by Mrs. Stout. (6) That said defendant Mary Rayl, since the death of said Robert Stout, has had possession of said real estate, and paid the taxes thereon, and received the rents and profits therefrom, of the value of \$——. (7) That at the same time said first deed was signed and acknowledged by said Robert Stout and Jemima Stout, his wife, to Mary Rayl, said Robert and wife conveyed to plaintiff, Andrew P. Stout, a certain tract of real estate situate in said county and state, and also conveyed to each of the defendants, by separate deeds, a certain tract of real estate situate in said county and state, each of which said deeds was placed in the envelope in which said first deed to Mary Rayl, herein mentioned, was placed, and each of said deeds was handed to said defendant Jemima Stout by said Robert Stout, saying to her, "Take it,

and keep it in a safe place until my death, and then deliver it to B. F. Wells;" that said Jemima Stout took each of said deeds, and put them in a drawer, which was a safe place, and kept possession of each of them there, under lock and key, until the death of said Robert. That, on the death of said Robert Stout, she delivered each of said deeds to said B. F. Wells. That there was indorsed on each of said deeds this language, "To be delivered by B. F. Wells," and there was indorsed upon said envelope this language, "Deeds to be delivered by B. F. Wells." That said B. F. Wells, after the death of Robert Stout, called for and received each of said deeds from the defendant Jemima Stout, and had each of them recorded in the deed records in Hamilton county, and afterwards delivered them, respectively, to Andrew P. Stout, Jemima Stout, and L. R. Stout, each of whom accepted the deed so delivered, and took possession of the real estate described therein, and are now and ever since have been in possession thereof. That said Mary Rayl had lived in said Stout's family 28 years prior to his death, and he adopted the plan of dividing his real estate by deed, as above found, instead of by will or otherwise, which plan was, after his death, ratified, adopted, and acted upon by his heirs, as well as said Mary. The conclusions of law were that, upon the foregoing facts, the court concludes the law to be with the defendants, and that the plaintiff take nothing by his complaint, and pay the costs, to each of which conclusions of law the plaintiff excepted. The complaint sought to set aside said deeds to Mary Rayl, and to quiet plaintiff's alleged title in and to the undivided one-third of two-thirds of said real estate, as one of the children and heirs of Robert Stout, deceased.

It is contended that the conclusion of law stated by the circuit court is wrong, because, as is claimed—First, that the facts found show that there never was a legal delivery of the deeds; and, second, that the transaction was an attempt on the part of the grantor to make a testamentary disposition of his property by deed, and without the legal formalities of a will. The cases of *Stewart v. Weed*, 11 Ind. 92, and *Squires v. Summers*, 85 Ind. 252, are very similar in their facts to the case at bar, and the conclusion there reached fully supports the conclusion of law stated in the present case. In the latter case it was said on pages 253 and 254: "The deed was executed and duly acknowledged by Richard (Summers), Sr., and Paulina, his wife, in the presence of Thomas Sutton, the justice who took the acknowledgment, and Aaron Summers, husband of the grantee, Mary Summers. The other grantees were Richard Summers, Jr., and Thomas Summers. After the deed was signed and acknowledged, the justice handed it to Richard Summers, Sr., who handed it to Aaron, the husband of one of the grantees, saying: 'Take it, and give it to some one to keep while I live; then to be recorded.' Aaron

took the deed, saying to Richard, Sr.: 'I will give it to Paulina.' Richard, Sr., then said to her: 'Take it, and put it away in the drawer, and take care of it until I die; then it is to be recorded.' After the execution of the deed, Richard, Sr., expressed dissatisfaction with the deed, and asked Paulina where it was. When told that it was in the drawer, he said that 'they had forfeited it; that it had never been delivered, and that, if it had been, the children could have it set aside; and that, as soon as he got able, he would go to town, and have a deed made to suit him.' This he said in the presence of Thomas Summers, one of the grantees. Upon these facts, there was no error in the conclusion of the court that the title to the land therein conveyed was vested in the grantees. * * * "When a deed is delivered to a third person, for the use of the grantee, the deed will take effect from the instant of such delivery, if the grantor parts with all control over the instrument. *Stewart v. Weed*, 11 Ind. 92." To the same effect are *Wilson v. Carrico*, 140 Ind. 533, 40 N. E. 50; *Dinwiddle v. Smith*, 141 Ind. 318, 40 N. E. 748; *Smiley v. Smiley*, 114 Ind. 258, 16 N. E. 585. Mr. Washburn, in his work on Real Property (5th Ed., vol. 3, at pages 319, 320), states the law thus: "Whether putting a deed into a third person's hands is a present delivery, or an escrow, depends upon the intent of the parties. If the delivery depends upon the performance of a condition, it is an escrow; otherwise, it is a present grant, though it be to wait the lapse of time or happening of an event. If it is to be delivered at the grantor's death, it is a present deed; and a quitclaim by the grantee, intermediate, would pass his estate." An eminent author correctly and clearly states the law thus: "Where a grantor executes a deed, and delivers it to a third person, to hold until the death of the grantor, the latter parting with all dominion over it, and reserving no right to recall the deed or alter its provisions, it seems to be settled by the weight of authority that the delivery is effectual, and the grantee, on the death of the grantor, succeeds to the title. A delivery of this kind may be considered, in effect, an escrow, but differs from that in the fact that a delivery in escrow is dependent upon the performance of some event, and not upon the lapse of time." 1 *Devl. Deeds*, § 280. It is equally clear that the transaction did not constitute an attempt to make a testamentary disposition of the land by the grantor in the deeds in question. *Owen v. Williams*, 114 Ind. 179, 15 N. E. 678.

Objection is urged to the admission of the testimony of Jemima Stout as to the directions given by her husband as to what she should do with the deeds. The objection now urged to that testimony is that it does not appear therefrom that these directions were given at the time the deeds were deposited with her. But no such objection was stated at the time the admission of the testimony was objected to. It has often been decided by this court that objections to the admission of evidence

not stated at the time it is objected to cannot be urged here on appeal. The objection that such testimony was not part of the *res gestae* was made, but the court, in admitting the evidence, expressly stated that it was admitted as a part of the act of delivery. If these directions were, in fact, given at a different time than that of the delivery of the deeds, and thereby rendered incompetent, it was in the power of appellant to have so shown by a proper question to the witness; and then he might have moved to strike out the testimony. He fails to make the error alleged appear by the record, and hence he cannot secure a reversal therefor. Errors which the complaining party fails to make appear affirmatively by the record are not errors so far as such record is concerned. There is no foundation for appellant's claim that the special finding is not supported by the evidence. The circuit court did not err in its conclusions of law, and in overruling appellant's motion for a new trial. The judgment is affirmed.

(146 Ind. 361)

SUTTON v. BALDWIN.

(Supreme Court of Indiana. Dec. 3, 1896.)

EXECUTION SALE—PAYMENT BY CHECK—ESTOPPEL —SUMMARY REMEDY.

1. A check given and received, by agreement of the parties, as a payment of a debt, extinguishes the debt; and, if not paid, the right of action is on the check, and not on the original debt.

2. A sheriff received a check in payment for a deed issued under sale in execution, and delivered the same to plaintiff in execution, who had knowledge of the agreement under which the check was received. *Held* that, under the circumstances, such plaintiff in execution was estopped to urge that the sheriff had no authority to receive the check in payment.

3. Where a creditor in execution receives a check given by a purchaser at an execution sale for a deed thereunder, and makes no offer to rescind the contract or tender back the check when payment thereof was refused, he is not entitled to the summary remedy provided by Rev. St. 1894, § 772 (Rev. St. 1881, § 760), for recovering judgment for the amount at which real estate is sold by the sheriff on execution.

4. Where, pending the trial, defendant deposits certain money in court, to be returned to him unless plaintiff surrenders a certain check to be held by the clerk subject to the order of the court, and the check is not surrendered, an order of court to return the money to the defendant is proper.

Appeal from circuit court, Cass county; M. B. Lairy, Judge.

Action by John P. Sutton against Daniel P. Baldwin. Judgment for defendant and plaintiff appeals. Affirmed.

McConnell & McConnell, Geo. W. Walters, and Geo. C. Taber, for appellant. D. P. Baldwin and McConnell & Jenkins, for appellee.

MONKS, J. This was a proceeding brought by appellant April 8, 1895, under section 772, Rev. St. 1894 (section 760, Rev. St. 1881; section 760, 1 Horner's Rev. St. 1896), to recover judgment against appellee for the amount at which certain real estate was sold to him by

the sheriff on execution, with interest and 10 per cent. damages and cost, on the grounds that he had failed and refused to pay the same. At appellant's request the court made a special finding of facts, and stated its conclusions of law thereon: "That appellee had paid the amount of his bid before the commencement of this action, and that he is entitled to a judgment against appellant for costs,"—to which conclusions of law appellant excepted. Over appellant's motion for a new trial, judgment was rendered in favor of appellee.

It appears from the special findings: "That appellant, as a redemptioner from a former sale of the real estate in question, caused a venditioni exponas to be issued by the clerk of the Cass circuit court, and be placed in the hands of the sheriff of said county, and the sheriff thereupon advertised the land to be sold on said writ on the 25th day of February, 1895. On the day of sale, the land was struck off and declared sold to appellee for \$3,741, he being the highest bidder. The sheriff tendered a deed for said real estate to appellee, which he accepted, and still retains. That at the time said deed was delivered, appellee made out and delivered to said sheriff, in payment for his bid for said real estate, a check on the State National Bank of Logansport, Indiana, for \$3,741, payable to Charles W. Homburg, or order, which check the sheriff then and there accepted from appellee in payment of his bid for said real estate. Appellee had that sum of money on deposit in said bank subject to check on said February 25 and 26, 1895. That immediately before the delivery of the sheriff's deed and the check, said appellee stated to said sheriff and his deputy that at that hour of the night it would be impossible for him to pay the amount of his bid in cash, and inquired of said sheriff if he was willing to accept his check in lieu of the cash; and said sheriff then and there stated and agreed that he would accept said check in lieu of so much cash. That said appellee further stated to said sheriff, before the delivery of either the deed or the check, that he claimed \$900 of the said \$3,741 as junior incumbrance of said land, and informed said sheriff that he was about to commence a suit against him to enjoin the payment of said \$900 to appellant, and refused to deliver to him said check of \$3,741 unless said sheriff would agree to hold said check until 10:30 a. m. the next day, so that he (appellee) might restrain the payment of said \$900, to which the sheriff assented and agreed; and thereupon appellee delivered to said sheriff his check in the usual form on the State National Bank of Logansport, to the order of Charles W. Homburg, and signed by said appellee, for the sum of \$3,741, and received a sheriff's deed for said lands. That on February 25, 1895, between 10 and 11 o'clock p. m. of said day, the sheriff indorsed and transferred said check of \$3,741 to the attorney for appellant, first in-

forming him of said agreement made with appellee at 8:30 p. m. of said day, which check said attorney received for his client in payment of the judgment above set forth, both principal and costs. That said attorney, after receiving said check, paid to the sheriff, with his personal check, \$414.28, that being the costs upon the above-described judgment and execution. The next day, February 26, 1895, at 9 o'clock a. m., appellee, after learning that the sheriff had violated his agreement made the night before, notified the cashier of the State National Bank of Logansport not to pay said check, which order has never been withdrawn by the appellee. That the check has never been returned or tendered to appellee, but is still outstanding, and retained by the appellant or his attorney."

The general rule is that a check delivered by a debtor to his creditor does not extinguish the debt for which it is given. If such check is paid, it extinguishes the debt; otherwise not. *Boyd v. Olvey*, 82 Ind. 294, 301; 2 Daniel, Neg. Inst. 577; 2 Pars. Cont. 622. It is settled by the decisions of this court that the giving of a promissory note governed by the law merchant, for a pre-existing indebtedness of the maker to the payee, will discharge such debt, unless it is shown that the parties did not intend it to have that effect; and the giving of a promissory note not governed by the law merchant, for such a debt, does not operate as a payment thereof unless it is so agreed between the parties. *Smith v. Bettger*, 68 Ind. 254, and cases cited; 18 Am. & Eng. Enc. Law, 178. We think a check may be given and received by agreement of parties as a payment of a debt, and the debt for which it is so given is thereby extinguished. *Blair v. Wilson*, 28 Grat. 165; *Cromwell v. Lovett*, 1 Hall, 56, 68, 69; *Monument Corp. v. Magoon*, 73 Wis. 627, 633, 42 N. W. 17; *Turner v. Bank*, *42 N. Y. 425, 426. In such a case, if the check is not paid for any reason, the right of action is on the check, and not on the obligation or indebtedness for which it was given. *Monument Corp. v. Magoon*, supra; *Blair v. Wilson*, supra.

It is insisted by appellant that the sheriff had no authority to receive anything but money in payment of the amount bid by appellee, and that he had no authority to accept the check as payment, or make any agreement or promise in regard to said check. Under the facts stated in the special finding, appellant is not in a position to urge that the sheriff had no authority to receive the check in payment. The special finding shows that the sheriff received the check in payment of the amount of appellee's bid. Appellant was not compelled to receive the check from the sheriff. He had the right to refuse it, and demand the cash. He did not take this course, however, but elected to receive the check, with a full knowledge of all the facts in regard to the agreement under which it was delivered to the sheriff. Moreover, the court finds that the attorney for appellant received

the check for his client in payment of the judgment, and paid the costs, amounting to \$414.28, and that the check has not been returned to appellee. The facts found by the court show that appellant, besides receiving the check as a payment, had by his conduct ratified the acts and agreement of the sheriff in receiving said check in payment. The contract to receive the check in payment was not rescinded or set aside by the act of appellee in notifying the bank not to pay said check. If appellant had offered to rescind the contract, and tendered back the check, when payment thereof was refused, a different question would be presented; but no such steps were taken. On the contrary, retaining a check which he received as a payment of the judgment, and without any offer to rescind the agreement under which it was received, he seeks to avail himself of the summary remedy provided by section 772 (section 760), supra. Appellant is not entitled to the remedy provided by said section, for the reason that appellee had not, under the facts found, failed or neglected to pay the purchase money. As between appellant and appellee, the check is an obligation to pay money, and a suit may be brought upon it. *Harrison v. Wright*, 100 Ind. 515, 544; *Offutt v. Rucker*, 2 Ind. App. 350, 27 N. E. 589.

The record shows that, during the progress of the trial, "appellee paid into court" the amount of his bid, with interest, for the use of appellant, in lieu of the check of appellee, upon appellant surrendering said check to the clerk of the court,—the money and check to be held by the clerk subject to the further order of the court; the money to be returned to said appellee by the clerk under the order of the court if the check was not surrendered to the clerk within a reasonable time to be fixed by the court. The check was not surrendered to the clerk, and afterwards, on order of court, the amount paid by appellee into court was repaid to him. There was no error in this order of the court. The check not having been surrendered to the clerk, it was proper for the court to order the money repaid to appellee. The payment of the money into court was only a conditional tender. Appellant was only entitled to demand that the money remain subject to the order of the court, on complying with the conditions named by appellee. This he failed to do. Judgment affirmed.

(148 Ind. 136)

THOMPSON et al. v. BOARD OF COM'RS
OF JASPER COUNTY et al.¹

(Supreme Court of Indiana. Dec. 2, 1896.)

DRAINAGE—DISMISSAL OF PETITION—APPEAL.

1. Under Act March 7, 1891, p. 455 (Rev. St. 1894, §§ 5690-5717), providing for petition to the board of county commissioners for a ditch, who shall appoint viewers to report on its necessity, and shall dismiss it if the viewers report against the improvement, and shall, if the viewers report favorably, direct them to return a schedule of

¹ Rehearing denied.

benefits and damages, and shall then, after notice to landowners affected, examine the report and apportionment, and, if the apportionment is fair and just according to benefits, shall approve and confirm it, otherwise shall amend it on the evidence, so as to make it fair and just according to benefits, and determine the said apportionment and spread it on the record; and providing that no assessment shall be made of benefits to any land upon any principle other than that of such benefits derived,—even if the board is authorized to find in favor of the improvement on the preliminary report of the viewers, they may, after the second report, if the evidence shows that the costs exceed the benefits, dismiss the petition.

2. Under Act March 7, 1891, p. 455, § 6 (Rev. St. 1894, § 5695), providing that any person aggrieved by the decision of the board of county commissioners on petition for a drain may appeal from their order, and on such appeal have determined “any of the following matters,” only the matters therein specified can be tried on the appeal.

3. The overruling by the circuit court of motion to dismiss appeal from order of county commissioners on petition for a drain does not prevent its thereafter sustaining the motion before final determination of the proceedings.

Appeal from circuit court, Jasper county; J. H. Gillett, Special Judge.

Petition by Simon P. Thompson and others to the board of commissioners of Jasper county for a ditch. From a judgment of the circuit court dismissing an appeal from the order of the commissioners dismissing the petition, petitioners appeal. Affirmed.

Simon P. Thompson and Frank Foltz, for appellants. Stuart Bros. & Hammond, Sellers & Uhl, and R. W. Marshall, for appellees.

McCABE, J. This is an appeal to this court from the judgment of the Jasper circuit court dismissing an appeal from a decision of the board of commissioners of Jasper county, made March 23, 1895, dismissing certain proceedings therein pending for the construction of a public ditch. Those proceedings were commenced by petition of the appellants on October 7, 1892, under the act approved March 7, 1891. Acts 1891, p. 455 (Rev. St. 1894, §§ 5690-5717). In addition to the appeal by the present appellants (being a part of the petitioners for the ditch), certain remonstrators and exceptors to apportionments of benefits and costs of construction also appealed from the action of the board on their exceptions. The circuit court at first overruled motions to dismiss both appeals, but afterwards set aside its action in overruling such motions to dismiss appeals, and permitted an amended motion by the appellees here to dismiss the petitioners' appeal, and sustained that motion; and the exceptors and remonstrators dismissed their appeal from the board to the circuit court by the consent of said court. The errors assigned here call in question the action of the circuit court in rescinding its first order as to dismissal of appeals, in sustaining the motion to dismiss the appeal of the petitioners from the board to the circuit court, in overruling appellants' motion to modify the judgment of dismissal so as to relieve petitioners of the costs, and hold-

ing that there was no right of appeal from the board to the circuit court.

The act under which these proceedings took place is very peculiar. The ditch must be not less than five miles in length. The application or petition must be to the board of commissioners of the county, signed by at least ten owners of lots or lands drained or benefited thereby. They must give bond conditioned for the payment of all costs “if the prayer of the petitioners be not granted or be dismissed for any cause by the board of commissioners.” Sections 5690, 5692. At the next regular or special session of the board after the filing of such petition, the board is required to appoint three viewers, one of whom must be a competent surveyor or engineer, who are required to proceed to view the line of the proposed improvement, and report whether such improvement is necessary or conducive to public health, convenience, or welfare, and report the best route, and their finding, in writing, to the board of commissioners at a time to be fixed by them, when they shall order the auditor to enter the same upon their record. If the board find against the improvement, they are required to dismiss the petition and proceedings at the costs of the petitioners. If they find in favor of making the improvement, they are required to direct said viewers, with the surveyor or engineer, to go upon the line of the route, and, among other things, to make and return a schedule of all lots, lands, and public or corporate roads that will be benefited or damaged by the improvement, and apportion costs in proportion to benefits or damages which will result to each lot or parcel of land. Upon the filing of this report the auditor is required to issue notice to the landowners affected by the improvement. If the board find that the notices have been served on the landowners affected, they are required to “examine the report of the viewers and appointment [apportionment?] by them made, and if it is fair and just according to benefits, they shall approve and confirm the same. If, however, the board of commissioners find that the apportionment reported by the viewers is unfair and unjust and ought not to be confirmed, they shall so order and amend it upon the evidence, so as to make it fair and just in proportion to benefits—if necessary, in their opinion they may adjourn the further hearing not exceeding twenty days, to a day to be fixed by them, and go upon the premises and by actual view apportion the benefits, damages, cost of location and construction, or any part thereof, as to them may seem just and proper under the evidence, and on the day so fixed by them they shall again meet at the auditor's office, or usual place of meeting, and determine the said apportionment and spread the same on the record.” Section 5694. The eighteenth section of the act provides that “no assessments shall be made of benefits to any lands upon any other principle other than that of such benefits derived.” Rev. St. 1894,

§ 5707. It is thus made clear that assessments against lands for the cost of such an improvement under said act cannot exceed benefits. The record shows that the board, on the preliminary or first report of the viewers, and before notice could be or was given to the landowners affected, found in favor of making the improvement. It also shows that on the coming in of the second report of the viewers making the assessment of benefits, and apportioning costs of construction to the various lands affected, and after service of notice on the owners of lands affected, there was a hearing on the same, as required by the section above quoted, and also that a hearing of exceptions to apportionments by some of the landowners affected, as required by the next section, at the same time, had resulted in overruling all of such exceptions. Thereupon the board made the following order: "The board, after hearing further evidence upon the benefits and damages, finds that the estimated cost of construction will exceed the benefits, and the board orders that the proceedings and petition be dismissed at the costs of the petitioners," etc. From this order the appeal to the circuit court was prosecuted.

It is contended by the learned counsel for appellants that the order of the board dismissing the petition and proceedings was void, because, as it is claimed, the board had already found on the incoming of the first or preliminary report of the viewers in favor of making the improvement, and their subsequent order amounted to a revocation of their first order and all other previous orders; and counsel cite, to the point that the board had no power to so revoke previous orders, *Doctor v. Hartman*, 74 Ind. 221; *Weir v. State*, 98 Ind. 311; *Board of Com'rs of Cass Co. v. Logansport & R. C. Gravel Road Co.*, 88 Ind. 199. That is a correct statement of the law where the proceedings containing the order or act attempted to be revoked have ended before the attempt to revoke was made. But it has been held by this court that previous orders of the board may be revoked by them, or set aside, while the proceeding in which it occurs is still pending and undetermined. *Scott v. Board*, 101 Ind. 42. But it is not clear from this statute that the board was authorized even to make a finding in favor of making the improvement on the preliminary report of the viewers, and before the adverse parties could be served with notice or get into court. Indeed, one of the grounds on which appellees insist that the action of the board in dismissing the petition and proceedings are justified is that the whole act is so vague and meager in its provisions that it is inoperative. It is insisted with some show of reason that the act nowhere provides for making a final order establishing or directing that the improvement be made. It makes no provision for any one to oversee or superintend the construction of the work. No one is authorized to determine whether the work is done according to contract, or to accept the same.

Though money to construct the work is to be raised by the sale of bonds by the county treasurer, no authority is granted or manner provided for paying out the money. We shall not find it necessary to decide, and we do not decide, what effect these omissions have on the operation of the act. One thing is certain, and that is that the fifth section of the act authorizes a hearing on the second report of the viewers, and if they find that the apportionment reported by the viewers is unfair and unjust, and ought not to be confirmed, they are required to so order; and they are required to amend it upon the evidence, so as to make it fair and just according to benefits, and determine the said apportionment and spread the same on record. This authorizes them to hear and determine the report of the apportionment according to the evidence. If that evidence shows, as the board said by their decision, that the costs exceeded the benefits, they were not bound to confirm the apportionment. On the contrary, they were required to dismiss the petition and proceedings at the petitioner's costs, as they did. The appellants do not claim that the determination of the question by the board was contrary to or not justified by the evidence, and by their appeal do not seek to correct any error of fact by a trial of the case *de novo*, but simply affirm that the board erred in deciding the question of excess of costs over benefits at that time.

But even if the board erred in dismissing the proceedings and petition, the circuit court was justified in dismissing the appeal to it from said order. The sixth section of the act, among other things, provides that "any person or corporation aggrieved by the decision may appeal from the order of the board of commissioners and on such appeal may determine either of the following matters: First. Whether said ditch will be conducive to public health, convenience, or welfare. Second. Whether the route is practicable. Third. Whether the compensation has been allowed for property appropriated. Fourth. Whether proper damages have been allowed for property affected by the improvement. The appellant shall pray an appeal and file a motion in writing, specifying therein the matters appealed from which motion shall be filed and recorded." The appeal was attempted to be taken under these provisions of the act. Accordingly, the petitioners appellants prayed an appeal from the board to the circuit court from the order in question, and filed their motion therefor in writing, specifying the matters appealed from. Said motion, after stating the history of the case up to that point, specified the matters appealed from as follows: "Whereupon the petitioners appeal, and assign for error: (1) That the board, after directing the improvement to be made, erred in taking up for decision the question as to whether the ditch was of public utility, touching the relation of the total benefits to the total costs; (2) the court erred

in taking up of its own motion, on May 10, 1894, the questions as to the practicability of any portion or the whole route; (3) the board erred in deciding to dismiss the petition and proceeding without an issue thereon, and after a large amount of costs had accrued, since the same question came up before the board on April 12, 1893, and was by the board decided the other way; (4) the board's judgment for costs was without jurisdiction, and is appealed from on these grounds." It will be seen that none of these specifications hint at any one of the matters authorized by the statute to be determined on appeal, unless it be the second, and that simply charges the commissioners with erring in taking up on its own motion on May 10, 1894, the questions as to the practicability of any portion or the whole route. That is far from a specification to try the question "whether the route is practicable," as authorized by the statute. But the record shows that the board did not decide the practicability of the route against the petitioners, the appellants, but in their favor; and it further shows that the only question the board decided against the petitioners was whether the costs of construction of the work would exceed the benefits therefrom derived to the lands affected, and whether, under such circumstances, the proceedings and petition ought to be dismissed at the petitioners' costs. These decisions are the only ones complained of as affording ground for an appeal from the board to the circuit court on behalf of the petitioners appellants in their briefs in this court. It will be readily seen from the statute quoted that no such matters or questions are authorized by the act to be tried on appeal. It was said by this court in *Denton v. Thompson*, 136 Ind. 446, 35 N. E. 264, of similar provisions in the ditch law of 1881, that only the questions therein specified could be tried on appeal under that law. This rule is analogous to that prevailing in highway cases. In such cases it has been held that, if the report of the first viewers is against the public utility of the road, their decision of that question is made final by the statute. *McKee v. Gould*, 108 Ind. 107, 8 N. E. 724. And so, too, it has been held that the report of reviewers, on remonstrance that the proposed highway is not of public utility, cannot be appealed from for the same reason. *Jones v. Duffy*, 119 Ind. 440, 21 N. E. 348. And so the statute here involved, providing, as it does, for an appeal, naming certain matters which may be determined on such appeal, and requiring the appeal to be taken by written motion specifying therein the matters appealed from, clearly indicates that it was the purpose and intent of the act to make the action of the board final on all matters or questions not embraced in the specifications of the statute above quoted. The decision that the estimated cost of the contemplated improvement exceeds the benefits resulting to the lands, and the dismissal of the petition and proceedings at the costs

of the petitioners in consequence thereof, are not embraced in the specifications of the statute in matters that might be determined on such appeal, and hence the action of the board thereon was final, and could not be appealed from.

The act of awarding the costs against the petitioners on the dismissal of the petition and proceedings by the board does not serve to bring the appeal within the matters specified in the statute, even if the board erred in taxing the costs against the petitioners. But there was no error in so taxing the costs against the petitioners by the board on the dismissal of the petition and proceedings, because the statute expressly requires that such dismissal should be at the costs of the petitioners.

The only thing the circuit court could correctly do was to dismiss the appeal. The fact that it at one time erroneously overruled the motion to dismiss such appeal did not irrevocably commit the court to such error. It had a right to rectify the error at any time before the final determination of the proceeding, which it did. The judgment is affirmed.

PEOPLE'S BUILDING, LOAN & SAV. ASS'N v. REYNOLDS.¹

(Appellate Court of Indiana. Nov. 24, 1896.)

BUILDING AND LOAN ASSOCIATION — CONTRACT —
CONVERSION — ALLEGED DEMAND.

1. Where a building association agrees to keep an agency in the city in which members lived, to receive dues and installments from them, such members are not required, when such agency is discontinued, to tender their dues and installments at any other place.

2. A complaint by a member of a building association to recover the dues and installments paid to the association, alleging that the association "failed, neglected, and refused" to return the sums paid by her, sufficiently alleges a demand.

Appeal from superior court, Marion county; P. W. Bartholomew, Judge.

Action by Maria S. Reynolds against the People's Building, Loan & Savings Association. There was a judgment for plaintiff, and defendant appeals. Reversed.

Fishback & Kappes, for appellant. Hes Dalley, for appellee.

ROSS, J. The appellee, who was a shareholder in the appellant company, sued to recover moneys alleged to have been paid by her to said association, as dues and installments on her stock. The complaint was in two paragraphs. The first contained a specific statement of the facts relied on to recover, while the second was simply a common count for money had and received. A demurrer was overruled to the first paragraph, and that ruling is the basis for the second specification of error assigned.

The facts as alleged in the first paragraph of the complaint are substantially as follows: That the defendant is a corporation organized

¹ Rehearing denied. Superseded by opinion, 46 N. E. 1006.

and operating under the laws of the state of New York, with its principal office at Geneva, in said state; that on the 2d day of February, 1891, the defendant had an agent and agency in the city of Indianapolis, in the state of Indiana, for the purpose of procuring shareholders, and receiving dues and installments upon certificates of stock issued at such agency; that on said day the plaintiff purchased, through such agency, 10 shares of stock in the defendant company, for which she was to pay in monthly and quarterly installments, at such agency, at Indianapolis, Ind., and nowhere else, and for that purpose the defendant undertook and promised to keep an agent and an agency in said city of Indianapolis; that after the plaintiff had paid the installments falling due in the months of February, March, April, May, June, and July, 1891, to the amount of \$75, the defendant wrongfully withdrew its said agency from Indianapolis, and although she made search and inquiry, she was unable to find either an agency or an agent to whom to pay her dues thereafter. It is further alleged that by the terms and conditions of the certificate of stock issued to her, if she failed to pay her dues and the installments on such shares of stock for three consecutive months, said certificate became forfeited; that the defendant did not at any time have an agency or agent in Indianapolis to whom or where she could pay her dues and installments after she made her payment, in July, 1891, until after her certificate, under the terms and conditions thereof, had become forfeited; that by the forfeiture resulting from said nonpayment of dues, etc., said certificate became and was wholly worthless, and of no value whatever, and for that reason she did not surrender, or offer to surrender, it to the defendant, before the bringing of this action; that she was at all times ready and willing to keep and perform her part of said contract; but that she was prevented from doing so by the defendant; that the defendant had failed, refused, and neglected to return to her the dues and installments paid by her, and it has wrongfully appropriated and converted the same to its own use, to her damage, etc.

The contention of the appellant that the complaint is insufficient, because it is not alleged that she "ever offered or made any effort to pay to the defendant at any other place at said agency," is untenable. The facts alleged show that the defendant undertook to maintain an agency and an agent at the city of Indianapolis, to accept the dues and installments from the plaintiff as they fell due; that, after doing so for a number of months, it discontinued the agency, and the plaintiff was unable to find any person to whom to make the payments as they became due; that she was ready and willing to perform her part of said contract, but was prevented from doing so by the acts of the defendant. These facts are all well pleaded, and are admitted by the demurrer, as being true. They are sufficient.

The further contention that the complaint is

insufficient, because no demand was made before the bringing of the action is also untenable. It is averred that the defendant failed, refused, and neglected to return to her the sums she had paid, etc. Where property is rightfully in the possession of one party, a demand is ordinarily necessary by one claiming the right to possession, and no action will lie in his favor until such demand has been made, and delivery refused. But an allegation that a party has failed, refused, and neglected to turn over property is equivalent to an allegation that a demand had been made, and possession refused. There could be no refusal unless a demand had been made. *Snyder v. Baber*, 74 Ind. 47; *Manufacturing Co. v. Porter*, 75 Ind. 428; *Ferguson v. Hull*, 136 Ind. 339, 36 N. E. 254. "But, when an actual conversion is alleged, no demand is necessary before the institution of suit, for a demand and refusal are merely evidence of a conversion." *Sloan v. Gravel Road Co.*, 6 Ind. App. 584, 33 N. E. 997; *Koehring v. Aultman*, 7 Ind. App. 475, 34 N. E. 80. The contract entered into between the appellant and the appellee was of such a character that the appellee might have had great difficulty in compelling its fulfillment by appellant; hence, when the appellant violated its part of the contract, and put it beyond the power of appellee to perform her part, she had a right to assume that the appellant did not intend to comply with its part of the contract. When the facts pleaded show that the defendant has repudiated the contract, or affirmatively refused to perform, or denies liability under it, the plaintiff need not allege a performance or readiness to perform on his part. *Riley v. Walker*, 6 Ind. App. 622, 34 N. E. 100, and cases cited. The fact that the certificate of stock became worthless, and of no value whatever, is admitted to be true by the demurrer; hence it was unnecessary to allege an offer to return it. Admitting, without deciding, that this paragraph of the complaint states facts sufficient to withstand a demurrer, we pass to the next specification of error.

The third specification of error assigned is that "the court erred in overruling the appellant's motion for a new trial." One of the causes for which a new trial was asked was that the decision of the court was not sustained by sufficient evidence. A careful reading of the evidence convinces us that there is no evidence to establish some of the material allegations of the complaint. It is alleged in the complaint that the defendant undertook to keep an agency and an agent at Indianapolis, where and to whom plaintiff was to pay her dues. The evidence fails to show any such undertaking, but, on the contrary, if there is any proof at all as to where payments of dues were to be made, it was that they should be paid at the office of the company, in Geneva, N. Y. The judgment is reversed, with instructions to sustain the appellant's motion for a new trial, with leave to appellee to amend her complaint if so desired.

17 Ind. App. 315)

FITZMAURICE v. PUTERBAUGH.¹

(Appellate Court of Indiana. Nov. 24, 1896.)

APPEAL—RECORD—IMPLIED WARRANTY—GENERAL AND SPECIAL VERDICT.

1. Under the express provisions of Rev. St. 1894, § 344 (Horner's Rev. St. 1896, § 341), reversal for any error in overruling a demurrer for misjoinder of causes is forbidden.

2. A complaint alleging that plaintiffs informed defendant of the purpose for which they wanted a boiler; that he informed them that he had just what they wanted, a secondhand boiler, which was better than a new one; and that they, relying on his statements, paid him the price therefor, sufficiently alleges an implied warranty that the boiler was fit for the purpose for which it was bought.

3. The general verdict will not be set aside unless the answers to special interrogatories are such that both cannot be true under any supposable condition of the evidence within the issues.

4. It must appear from the record that the stenographer's manuscript copy of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions, or it cannot be received when transposed by the clerk into the transcript.

5. Where there is nothing in the record to show that instructions were filed, and they are not signed by the judge, and there is no order making them a part of the record, they are not properly a portion thereof.

Appeal from circuit court, Jay county.

Action by Joshua Puterbaugh against William Fitzmaurice. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Thompson & Canaday, for appellant. Bell & Ross, for appellee.

GAVIN, J. Appellee sued to recover damages resulting from the explosion of a steam boiler sold to him and his brother by appellant, the inherent defects in the boiler having been the cause of the explosion. The first paragraph of the complaint proceeds upon the theory of a warranty, while the second counts upon fraudulent representations. Appellant filed a motion to separate, and a demurrer for misjoinder of causes of action. Both were overruled. The statute (section 344, Rev. St. 1894; section 341, Horner's Rev. St. 1896) expressly forbids a reversal for any error committed in sustaining or overruling a demurrer for misjoinder of causes of action. The courts give effect to the statute. *File v. Springel*, 132 Ind. 312, 31 N. E. 1054; *Crum v. Yundt*, 12 Ind. App. 308, 40 N. E. 79.

In the first paragraph it appears that appellee and his brother were engaged in operating a sawmill and tile factory, which were run by a steam boiler which was too small and insufficient for the purpose; that they knew nothing of the kind or quality of materials used in constructing such boilers, but consulted with appellant, who was a manufacturer of steam boilers, told him the size and capacity of their old boiler, and that they desired a new one, and informed him of the purpose for which they desired it: that he told them he had just what they wanted, a secondhand iron boiler which had been tried and tested, and was better than a new

steel boiler, and for which he would charge them \$375, the full price of a new one; that, relying upon his statements, they purchased it, set it up, and operated it; that appellee afterwards purchased his brother's interests in said mill; that the boiler was old, patched, and worn-out, entirely worthless and unfit for the purpose for which it was bought, and without any fault upon the part of appellee or any one in charge of the same, but solely by reason of the inherent weakness of the material therein, it exploded, causing great damage to the mill, etc. It is objected that there is here no direct averment of warranty, and that the statements made by appellant were mere matters of opinion—"dealers' chaff,"—upon which appellee had no right to rely, and which could not constitute a warranty. If we assume (without deciding) this to be true, still the facts set forth abundantly establish an implied warranty that the boiler was reasonably fit for the purpose intended, and a breach thereof. *Zimmerman v. Druecker* (Ind. App.) 44 N. E. 557; *Bank v. Frazee*, 9 Ind. App. 165, 36 N. E. 878; *McClamrock v. Flint*, 101 Ind. 278.

The second paragraph sets up substantially the same state of facts as the first, but goes still further, averring more particularly the purchasers' ignorance of steam boilers, and their inability to distinguish between good and bad materials therefor; appellant's knowledge and skill therein. That he personally inspected their plant; told them he knew just what they wanted; that he had a steam boiler which was better than a new one, one constructed of iron plate, which had been used "just enough to be thoroughly tested, and was better and tougher than a new one," the plates of which were not so strong and durable as those constructed of iron; that he had no new boiler of the proper size and capacity, and it would require a long time to make it, but that his secondhand boiler was nearly new, none the worse for use, and in just as good shape as it ever was. That these representations were falsely, knowingly, and fraudulently made, and were relied on by the purchasers, who, believing them to be true, bought the boiler, which was in fact an old one remodeled, was old, patched, and worn-out, many of the flues in it having been tepped and become worthless. That the sheets of metal in said boiler had been burned and rusted until entirely worthless and unsafe for any purpose. There is here much more than mere matters of opinion,—“dealers' talk,”—even by the most liberal interpretation of the terms. There are representations of existing facts, falsely and fraudulently made, and believed and relied upon by the purchasers. Under such circumstances the vendor must answer for the damages. *Bloomer v. Gray*, 10 Ind. App. 326, 37 N. E. 819; *Armstrong v. White*, 9 Ind. App. 588, 37 N. E. 28.

The jury returned a general verdict in appellee's favor, with answers to numerous in-

¹ Rehearing denied.

interrogatories. By some of these it is expressly found that appellee did not, before the explosion, know that the boiler was unsafe. By others, appellant's counsel claim it is established that he did have notice of such unsafe condition. Because of these latter answers it is urged that appellee was guilty of contributory negligence in using the boiler with such notice. It is well settled that the general verdict must stand, unless the answers are such as that both cannot be true under any supposable condition of the evidence within the issues. It is also settled that, if the answers to interrogatories contradict one another, then they nullify each other, and those which might alone control the general verdict cannot overthrow it. *Manufacturing Co. v. Fields*, 138 Ind. 53, 36 N. E. 529; *Gates v. Scott*, 123 Ind. 459, 24 N. E. 257.

Numerous questions are argued relating to the sufficiency of, and rulings upon, the evidence. Appellee, however, contends that, under the law established by recent decisions of the supreme court, the evidence is not properly in the record. This position must be sustained. Under this rule, it must appear from the record that the stenographer's manuscript copy of the evidence was filed in the clerk's office before it was incorporated in the bill of exceptions, or it cannot be received by us when transposed by the clerk into the transcript, under section 1476, Rev. St. 1894 (section 1410, *Horner's Rev. St. 1896*). *Railroad Co. v. Wagner* (Ind. App.) 45 N. E. 76, and cases there cited. The bill of exceptions in this case was presented to the judge and signed upon January 18, 1895. The file marks show that the evidence and bill were filed upon that day. The certificate of the clerk is that "on the 18th day of January, A. D. 1895, the official shorthand reporter who took down the evidence in said cause filed in my office his longhand transcript and manuscript thereof, and the defendant at the same time filed his bill of exceptions, which longhand manuscript was made a part thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions, and made a part of the foregoing transcript." This showing as to the priority of the filing of the evidence is identical with that appearing in *Thrash v. Starbuck* (Ind. Sup.) 44 N. E. 543, and it was there adjudged to be insufficient, the court saying: "It is manifest that the longhand manuscript of the evidence was not filed in the clerk's office before the bill of exceptions was filed, or before it was incorporated in the bill." This decision leaves us no room to distinguish, or hold otherwise than that the evidence is not properly in the record.

It is further asserted by appellee's counsel that no question whatever is available upon the instructions, for the additional reason that they are not in the record. In this contention, also, counsel are right. Immediately after the order-book entry showing that the

jury was charged and retired to the jury room, comes the following, "Charge to Jury," when there is copied into the transcript a series of charges, including those asked by both parties. There is nothing, however, to show that these instructions were filed, nor are they signed by the judge, nor is there any order making them a part of the record. They are not, therefore, properly in the record by the statutory mode without a bill. *Railroad Co. v. Cox*, 8 Ind. App. 29, 35 N. E. 183; *Killion v. Hulen*, 8 Ind. App. 404, 36 N. E. 49; *Stephenson v. Elliott*, 11 Ind. App. 694, 39 N. E. 890. There is an effort to bring some of the instructions in by a bill which does not purport to set out all the charges given, but, on the contrary, affirmatively discloses that it does not so do. In the absence of the evidence, and of all the instructions given, it is impossible for this court to know whether there was any available error in giving those which are before us, or in refusing those rejected. The absent instructions may have cured any apparent error in those given, and covered all points to which those refused were applicable. *Railroad Co. v. Cox*, supra; *Hawley v. Zigerly*, 135 Ind. 248, 34 N. E. 219. Judgment affirmed.

(16 Ind. App. 688)

MILLS et al. v. BYRAM.

(Appellate Court of Indiana. Dec. 2, 1896.)

RECORD ON APPEAL—BILL OF EXCEPTIONS—NECESSITY FOR CLERK'S CERTIFICATE.

A bill of exceptions, though signed by the presiding judge, cannot be considered on appeal, in the absence of any certificate of the clerk showing that the bill was filed in the court below or was a part of the proceedings there.

Appeal from superior court, Marion county; L. M. Harvey, Judge.

Action between Thomas P. Mills and others and Norman S. Byram. From a judgment for the latter, Mills and others appeal. Affirmed.

B. F. Nyeswander, for appellants. Charles E. Averill, for appellee.

LOTZ, C. J. The only question arising on this appeal is presented by a bill of exceptions. There is a bill of exceptions in the record, signed by the presiding judge, but there is no certificate of the clerk showing that the bill was ever filed in the court below or that the bill was a part of the proceedings in the court below. The clerk of the trial court should duly certify to the transcript, and to all documents and papers which were a part of the proceedings in the court below, and which he transmits to this court. Without such certificate, under the seal of that court, this court has no means of knowing whether or not the record presented is the one upon which the court below rendered the judgment. *Dodge v. Morrow* (Ind. App.) 43 N. E. 153. Judgment affirmed.

(16 Ind. App. 417)

SHEPHERD v. MARVEL.(Appellate Court of Indiana. Dec. 3, 1896.)
DEFAULT JUDGMENT—SETTING ASIDE—SUMMONS—RETURN NOT CONCLUSIVE—DEMURRER—APPEAL.

1. In an action under Rev. St. 1894, § 399 (Horner's Rev. St. 1896, § 396), to have a default set aside, and to be permitted to answer and defend, the defaulted party may show, as an excuse for not appearing and defending, that the summons was not in fact served on him, and hence he had no knowledge of the action. *Nietert v. Trentman*, 4 N. E. 306, 104 Ind. 390, followed.

2. The mere fact that the judgment had been satisfied by a sale of the defaulted party's property would not deprive him of relief, where it did not appear that any one was misled by a failure to prevent the sale.

3. Where a demurrer is sustained to a bad answer, defendant cannot urge on appeal that the demurrer itself was insufficient to properly test the answer.

4. Where proper parties are not in court, the objection should be made to appear by answer, under Rev. St. 1894, § 346 (Horner's Rev. St. 1896, § 343).

Appeal from circuit court, Sullivan county; W. W. Moffitt, Judge.

Action by Amanda Marvel against David Shepherd to have a default judgment set aside. From a judgment in favor of plaintiff, defendant appeals. **Affirmed.**

John T. Hays and J. H. Drake, for appellant. John S. Bays and Silver Chaney, for appellee.

GAVIN, J. Appellee filed her complaint to have a default set aside, and to be permitted to answer and defend against the complaint of appellant, under section 399, Rev. St. 1894 (section 396, Horner's Rev. St. 1896). She showed a good defense to his complaint, and that, while summons had been regularly issued for her, and returned duly served by copy at her residence, yet the sheriff had in fact left the copy at her son's residence, instead of her own, the son being a co-defendant, and the officer acting under the belief that it was the son's wife who was named therein. Appellee's ignorance of the pendency of the proceedings, and her prompt action upon learning thereof, are properly averred. Appellant contends that appellee is estopped by the sheriff's return from asserting that she was not in fact served, even as a basis for relief for excusable neglect. *Nichols v. Nichols*, 96 Ind. 433, and cases cited therein are urged in support of this position. In so far, however, as they do sustain the contention, they are overruled by the later case of *Nietert v. Trentman*, 104 Ind. 390, 4 N. E. 306, where, after full consideration, it was held that, while the sheriff's return is conclusive to establish the fact of service so far as to confer jurisdiction of the person of the defendant, yet that "under the statute, for the purpose of rendering an excuse for not appearing and defending the action, the defaulted party may show that the summons was not in fact served upon him, and that hence he had no knowledge of the action." There is no room for distinction in any material

feature between that case and this. Counsel press *Cully v. Shirk*, 131 Ind. 76, 30 N. E. 882, as establishing a different doctrine, and being similar to the case in hand. We do not so read it. There no relief was sought for excusable neglect with a showing of good defense and a request for opportunity to make it, as we have here, but it was simply demanded that the judgment be declared null and void for want of jurisdiction of the person of the defendant. The *Nietert* Case is referred to with tacit approval in *Thompson v. McCorkle*, 136 Ind. 484, 34 N. E. 813, and 36 N. E. 211, and has not been, so far as we are advised, in any manner limited or disapproved.

Appellant set up by way of answer that at the time of the institution of this suit execution upon the judgment had duly issued, upon which, before the filing of the paragraph of complaint here relied on, real estate of appellee was duly sold, and the execution returned satisfied. It is urged that because the judgment was thus satisfied of record this proceeding cannot be maintained. In the absence of any averment to the contrary, we might presume that appellant was himself the purchaser at this sale. There is nothing to show that he or the purchaser, whoever he may have been, was ignorant of the true state of the facts relative to the service of the summons. The mere fact that a sale had been made under the judgment would not deprive her of relief. *Dickerson v. Davis*, 111 Ind. 433, 12 N. E. 145; *Nash v. Cars*, 92 Ind. 216,—where relief was granted after sale. If the proper parties were not in court, that should have been made to appear by the answer. Rev. St. 1894, § 346 (Horner's Rev. St. 1896, § 343).

It cannot be said that appellee was negligent in not taking steps to prevent the sale, and should, therefore, be denied her day in court, in the absence of any showing that appellant or any one else was in any way misled by her conduct. The first and second paragraphs of the complaint to which demurrers were sustained, and which were filed before the third, upon which judgment was rendered, were abundantly sufficient to apprise appellant of appellee's rights. The demurrer to the answer having been sustained, and the answer being bad, it cannot avail appellant, even though the demurrer was itself insufficient to properly test the answer. *Blue v. Bank* (Ind. Sup.) 43 N. E. 655; *Bell v. Hiner* (Ind. App.) 44 N. E. 576, and cases there cited. Judgment affirmed.

(16 Ind. App. 408)

BALTIMORE & O. S. W. R. CO. v. MANNING.

(Appellate Court of Indiana. Dec. 2, 1896.)

ESTOPPEL IN PAID.

An employé who consents that his employer shall pay into court the amount of a claim and costs for which his wages in the employer's hands

have been garnished, and agrees to accept the balance due him, cannot thereafter maintain suit against the employer to recover the full amount of his wages, on the ground that the garnishment proceedings were irregular, and that the employer was not legally bound to pay the money into court.

Appeal from circuit court, Knox county; George W. Shaw, Judge.

Action by Arthur Manning against the Baltimore & Ohio Southwestern Railroad Company. From a judgment for plaintiff, defendant appeals. Reversed.

A. H. De Wolf, for appellant. H. Burns and J. S. Pritchett, for appellee.

ROSS, J. This was an action to recover an amount alleged to be due appellee from the appellant, for services rendered, and for a penalty for its nonpayment, as provided by sections 1596 and 1597, Elliott's Supp. (sections 7056 and 7057, Burns' Rev. St. 1894). Under the specifications of error assigned, several questions are urged for our consideration, which we deem it unnecessary to examine or decide, in the view we take of the case as presented by the record. Whether or not the judgment rendered in the Kentucky court against the appellant, as garnishee defendant, was regular, we need not determine, for it is apparent the appellee has no standing in court. It appears from the uncontradicted evidence that the appellee consented that the appellant should pay into the Kentucky court the amount of the claim and costs for which his wages in appellant's hands had been garnisheed, and he agreed that, upon such payment, he would accept from appellant the balance due him. The balance was tendered him, and he refused, and brought this action. We think, under these circumstances, he is estopped to question either the regularity of the proceedings of the Kentucky court, or whether appellant was legally bound to pay the money into court. The money was paid into court with his knowledge and consent, and upon an agreement that, when so paid in, he would accept the balance due him from the appellant. The appellant has apparently acted in good faith, and it would be inequitable to permit the appellee to recover anything except the balance in appellant's hands after the payment into the Kentucky court of the claim and costs. The judgment of the court below is reversed, with instructions to sustain the appellant's motion for a new trial.

(55 Ohio St. 274)

SHURTZ v. COLVIN et al.

(Supreme Court of Ohio. Dec. 1, 1896.)

DELIVERY OF DEED—MORTGAGE—WAIVER OF VENDOR'S LIEN—DEED IN HANDS OF THIRD PARTY—CONDITIONAL DELIVERY—ESTOPPEL AS AGAINST INNOCENT MORTGAGEE.

1. A vendor who takes a mortgage on the premises, including other lands of the vendee, thereby waives his lien for the purchase money.

2. Where an owner of land, under a verbal agreement for the sale of it, places the purchaser

in possession, and executes a deed, and places it in the hands of a third person, with direction to deliver it on the purchase money being paid or secured by mortgage, and the grantee induces the holder of the deed to deliver it to him that he may exhibit it as evidence of title, and the grantee does so to one ignorant of the facts, and who in good faith makes him a loan secured by mortgage on the property, the grantor in such case is estopped from setting up his claim to the land or a lien on it for purchase money, against such innocent mortgagee. *Ogden v. Ogden*, 4 Ohio St. 182, distinguished.

3. The rule that one who would avail himself of an estoppel must plead it, is fairly complied with where, upon the whole case made by the pleadings, it appears that the party intends to rely on it, if certain facts averred by the other party, and denied by him for want of knowledge, are made to appear; and in any case the rule only applies where the party has had an opportunity to plead it.

(Syllabus by the Court.)

Error to circuit court, Muskingum county.

The original suit was commenced by Oliver C. Shurtz, as administrator of Lewis Schultz, deceased, against James Colvin, for the foreclosure of a mortgage given by the latter to the decedent to secure a loan of \$6,500. James E. Colvin, who had a subsequent mortgage on the same land, was made a party. James Colvin made no defense. James E. Colvin filed an answer and cross petition. He claimed priority over the mortgage of the plaintiff on two grounds: (1) That at the time the Shurtz mortgage was made he was the legal owner of an undivided one-third interest in the fourth, fifth, and sixth tracts included in the Shurtz mortgage; that he, with his co-tenant, Silas H. Colvin, had by a verbal agreement sold the land to James Colvin, but the purchase money had not been paid, and on April 8, 1887, they made a deed, and placed it in the hands of one Howard Colvin, to be delivered when the money had been paid or secured to be paid; that, contrary to instructions, Howard delivered it on August 3, 1887, the money not having been paid,—the Shurtz mortgage having been made prior thereto on July 23, 1887. (2) That the decedent, when he took his mortgage, had knowledge of the facts, and that the purchase money had not been paid, and that he has therefore a vendor's lien on the land. These facts are all denied by the plaintiff, and he further says that the defendant subsequently took a mortgage on the land and other lands of the vendee to secure the purchase money, and thereby waived any vendor's lien he might have had. The defendant likewise set up this mortgage, and asked that it should be held to be a lien on the fourth, fifth, and sixth tracts prior to that of the plaintiff. The case was appealed to the circuit court, and there tried on the issues; and the court, on request, made a separate finding of its conclusions of fact and of law. The finding of facts and conclusions of law are as follows: "Silas H. and James E. Colvin owned the fourth, fifth, and sixth parcels of real estate described in the petition in the following proportions,—Silas H. two-thirds, and James E. one-third.

That in 1884 they sold the land by verbal contract to James Colvin, and put him in possession, which possession he retained until the land was sold in this case under plaintiff's mortgage in 1892. Shurtz and Johnson knew James was in possession of the land at the time plaintiff's mortgage was given, and had been for some time. The deed to him was executed by James E. Colvin for himself, and by him as attorney in fact for Silas H. James E. was duly and legally authorized, by power of attorney, duly recorded in the records of Muskingum county, from Silas H., to execute and convey by deed Silas' share. This was all done prior to the plaintiff's loan of the money. This deed was put in Howard Colvin's hands by James E. Colvin, to be delivered by him to James Colvin upon payment of the purchase money, or upon the same being secured by mortgage. James Colvin intended to borrow money, and got this deed from Howard, and delivered it to N. S. Chandler, the attorney of the person that was to make the loan, so that a description might be obtained, and to exhibit the same as a part of his title papers, but without authority from Howard to deliver the same. Chandler preferred a deed should be executed by Silas H. and James E. Colvin personally, and another deed was prepared by him, but the loan was not made. Subsequently a loan was negotiated through W. H. Johnson, an attorney. The plaintiff and his intestate were to furnish the money. The first deed was handed to Mr. Johnson without authority from Howard, with other deeds, either by Mr. Chandler or James Colvin, as a part of the title papers of James Colvin, before the title was examined. Johnson examined the title for Shurtz, including the power of attorney and this deed as to its sufficiency, and was satisfied there was a perfect title in James Colvin. After the examination of the title the notes and mortgage to Shurtz were executed, and the money, \$6,500, paid by Shurtz to James Colvin on July 23, 1887. Johnson instructed James Colvin to record the deed, but was told by James, the grantee, that Chandler had objected to it because it was executed by an attorney in fact, and that he (James Colvin) had had another deed prepared, and it would be back from Missouri, where James E. lived, in a few days, and he would record that one, and thus save the expense of recording two deeds. James E. and Silas H. lived in the West. Subsequently, on August 2d, James Colvin got the second deed, which was dated April 7, 1887, from Howard. James informed Howard he had procured a loan. Howard was busy at harvest, and did not want to go to Zanesville, and told James he was instructed not to deliver the deed until the money due James E. was paid or secured, and these were the instructions of James E. to Howard. James told him he could transact the business. Howard delivered the second deed to James, knowing James was going to have it recorded, after the money due James E. was paid

or secured to be paid, and it was put on record by James on August 3, 1887, without the payment as directed by Howard. The Shurtz mortgage was recorded on July 23, 1887. The purchase money for Silas H. Colvin's share of the property was paid, but James E. Colvin's purchase money was not paid, except that from the proceeds of the Shurtz loan James paid James E. \$100. Neither of the Shurtzes nor Johnson knew of any unpaid purchase money, and none of them knew either deed was or ever had been in Howard Colvin's hand; and the Shurtzes took their notes and mortgage and loaned their money in good faith, without any information or knowledge that James E. had or claimed any interest in or lien on the land. On September 17, 1888, James E. Colvin was in Muskingum county, Ohio, and learned of the delivery of the deed by Howard to James Colvin, and that Shurtz had loaned this money, and taken a mortgage on the land conveyed by that deed, as well as upon the other land described in the petition. With this knowledge, on September 17, 1888, James E. took a mortgage on the land described in his and Silas' deed, and upon other lands of James Colvin for his claim, the lands being the same as those covered by the Shurtz mortgage. The plaintiff and his intestate were the mortgagees in the mortgage of July 23, 1887. Before the maturity of the notes, and before James E. took his mortgage, Oliver C. Shurtz transferred his interest in the note and mortgage to Lewis Shurtz, who afterwards died intestate and the owner of the same; and the amount found due this administrator was and is due him. The plaintiff is the duly and legally appointed and qualified administrator of Lewis Shurtz. That the proceeds of the sale of the real estate are not sufficient to pay both plaintiff and James E. in full. From the facts stated, the court found as matters of law: First, that James E. Colvin had waived his vendor's lien for purchase money; second, that James E. Colvin's mortgage was superior in equity to the Shurtz mortgage, and that one-third of the proceeds arising from the sale of the fourth, fifth, and sixth parcels of land should be paid to James E. Colvin, subject to its proper proportion of the costs of sale." Judgment accordingly. The plaintiff at the time excepted to the court's second conclusion of law and the judgment of the court thereon, and this proceeding is prosecuted to obtain a reversal of the same. Reversed.

W. H. Johnson and Frank A. Durban, for plaintiff in error. Fred. S. Gates, for defendants in error.

MINSHELL, J. (after stating the facts). There can be no question but that James E. Colvin waived his lien as a vendor by taking a mortgage on the granted premises, and other lands of the grantee, to secure the purchase money. Such is the settled law of this state.

The court's conclusion of law as to this is correct, and not now questioned by the defendant in error. So that the only question here presented is as to whether it erred in its second conclusion, that, upon the facts found, the mortgage of James E. Colvin, being subsequent in point of time, is superior in equity to the Shurtz mortgage. Priority is claimed on the ground that, at the time the Shurtz mortgage was taken, James E. Colvin held the legal title to his interest in the premises, subject, however, to a legal obligation to convey to James Colvin, as purchaser, on his paying the purchase money, or securing it to be paid. If the facts found will bear this simple construction, then there can be no question as to the correctness of the court's conclusion of law thereon. In such case the legal title of James E. Colvin would have been notice to the world of his rights in the property, and no one could have acquired an interest in it superior to his by mortgage or otherwise. The question, however, is whether the facts as found will bear this construction as between James E. Colvin and the Shurtzes. James E. Colvin had, by a verbal agreement made in 1884, sold his interest in the premises to James Colvin, who went into possession under the agreement, and was in possession at the time the Shurtz loan was made. Some time before the making of the Shurtz mortgage, James E. Colvin, with his co-tenant Silas H. Colvin, executed a deed for the land to James Colvin, the purchaser, and placed it in the hands of a third person, Howard Colvin, to be delivered when the purchase money was paid or secured by mortgage. Afterwards, for the purpose of enabling James Colvin to obtain a loan of money on the land, Howard delivered the deed to him, that he might obtain a description of the premises, and exhibit it as evidence of his title. The facts found bear this construction, and none other. It is true that, from the facts found, it was not to be regarded as delivered. But the law has always attached much importance to an overt act. It contravenes its spirit to allow that an act may be done with an intention contrary to the act itself. And while, as between parties, the intention may be shown, it seldom permits this to be done where to do so would work a fraud on innocent third persons. Here, while James Colvin was in possession of the land and of a deed to it by James E. Colvin, of whom he had purchased, the Shurtzes, on the faith of these appearances, loaned him \$6,500, and took a mortgage on the land to secure its payment, and, as the court expressly finds, without any knowledge that the deed had ever been held as an escrow by any one, and that it was taken in good faith, without any knowledge that James E. Colvin had or claimed any interest in or lien on the land. It would seem, on the plainest principles of justice, that under these circumstances James E. Colvin, as against the owner of the Shurtz mortgage, should not be heard to say that the deed had not in fact been delivered at the time the mort-

gage was made, and that his equity is superior to it. He trusted Howard with the deed, to be delivered when the conditions had been performed. Howard violated his trust. He delivered it to the grantee, that the latter might obtain a loan on the land by exhibiting it as evidence of his title. The loan was so obtained of persons who had no knowledge of the facts, and were entirely innocent of any fraud in the matter. Who, then, should suffer the loss? It may be regarded as one of the settled maxims of the law that where one of two innocent persons must suffer from the wrongful act of another, he must bear the loss who placed it in the power of the person as his agent to commit the wrong. Or, more tersely, he who trusts most ought to suffer most. And it would seem that the rights of the parties in this case should be governed by this principle, unless there is some rigid exception, established by the decession, which forbids its application where a deed is delivered in escrow.

Before considering this question, it may be well to note that no importance can be attached to the fact that the deed on the faith of which the loan was made had not yet been recorded. A deed on delivery passes title to the land, whether recorded or not. It takes effect on delivery. The object of recording a deed is to give notice to third persons, not to perfect it as a muniment of title. Where not recorded, it will be treated as a fraud against third persons dealing with the land without notice of its existence. Hence the first deed, if delivered, having been duly executed, passed the title to James Colvin. Recording it would have added nothing to its effect as a deed, and the failure to record it in no way influenced the conduct of any of the parties to the suit. There are some cases which seem to hold that, where a deed is delivered as an escrow to a third person, to be delivered on the performance of certain conditions, no title passes if delivered without the conditions being performed, and that this is so as against an innocent purchaser from the vendee. *Everts v. Agnes*, 6 Wis. 453, is such a case. The argument there is that no title passes by deed without delivery; that where a deed is delivered by one who holds it as an escrow, contrary to the vendor's instructions, there is no delivery, and consequently an innocent purchaser acquires no title. To the objection that, if this be true, there is no safety for purchasers, the court said that, if it be not true, there is none for vendors. This seems to be a misconception of the real situation of the parties. A vendor may protect himself. He may either retain the deed until the vendee pays the money, or select a faithful person to hold and deliver it according to his instructions. If he selects an unfaithful person, he should suffer the loss from a wrongful delivery, rather than an innocent purchaser without knowledge of the facts. In purchasing land, no one, in the absence of anything that might awaken sus-

picion, is required, by any rule of diligence, to inquire of a person with whom he deals whether his deed had been duly delivered. Where a deed is found in the grantee's hands, a delivery and acceptance is always presumed. 3 Washb. Real Prop. (5th Ed.) p. 312, pl. 31. The fact that, under any other rule, "no purchaser is safe," had a controlling influence with the court in *Blight v. Schenck*, 10 Pa. St. 285, 292. In this case the question was whether a deed had been delivered, the defendant being an innocent purchaser from the vendee of the plaintiff. In discussing the case the court used this language: "Here Curtis, who, it is alleged, delivered the deed contrary to his instructions, was the agent of the grantor. If a man employs an incompetent or unfaithful agent, he is the cause of the loss so far as an innocent purchaser is concerned, and he ought to bear it, except as against the party who may be equally negligent in omitting to inform himself of the extent of the authority, or may commit a wrong by acting knowingly contrary thereto." And the case was disposed of according to this principle.

The case on which most reliance is placed by the defendant in error is that of *Ogden v. Ogden*, 4 Ohio St. 182. The facts are somewhat complicated. It seems to have grown out of an agreement for an exchange of lots between two of the parties, each being the equitable owner of his lot. The deed for the lot of one of them, David Ogden, was to be delivered by the legal owner to the other on his performing certain conditions, and was delivered to a third person, to be delivered on the performance of these conditions. It was delivered without the conditions being performed, and the lot was then mortgaged by the grantee to the defendants Watson and Stroh, who claimed to be innocent purchasers for value. But it was charged in the bill that they took their mortgages with notice, and to cheat and defraud the complainant; and it does not distinctly appear whether this was true or not. From the reasoning of the court it would seem that the deed had been obtained from the party holding it in some surreptitious manner. It is first conceded "that if David reposed confidence in Gilbert, and he violated that confidence, and delivered the deed, and loss is to fall on either David or the mortgagees, that David should sustain that loss, and not the innocent mortgagees." Instances are then given in which the rule would be otherwise,—an innocent purchaser from the bailee of a horse, or of stolen property, or from one who had either stolen or surreptitiously obtained his deed. There is no room for doubt in either of these cases. But the court then observes that, "if the owner of land makes a deed purporting to convey his land to any one, and such person by fraud or otherwise procures the owner to deliver the deed to him, a bona fide purchaser from such fraudulent grantee, without notice of the fraud, might acquire title to the

land." This, we think, is equally clear; but, unless the deed in the case had been stolen or surreptitiously obtained, or the mortgagees were guilty of the fraud charged, then, on the reasoning of the court, the decree should have been in their favor. If the case is to be understood as holding differently, then it is not in accord with the later decision in *Resor v. Railroad Co.*, 17 Ohio St. 139. Here the owner of a tract of land contracted to sell it to the company, but refused to deliver the deed until paid. An agreement was then made by which the deed was placed in the hands of the president, but it was not to be considered delivered until payment had been complied with, and the company went into possession. The president wrongfully placed the deed on record, and the company then mortgaged its entire property to secure an issue of bonds. The court held the bondholders to be innocent purchasers, and that the plaintiff was estopped from setting up his claim as against them. It might be claimed that the delivery by Resor was to the purchaser, the company, and that a deed cannot be delivered as an escrow to the vendee. The latter statement is true. But, as a matter of fact, it was delivered to the president of the company, and not to the company itself. There is no reason why the president could not have held it as an escrow, and, under the agreement, must be regarded as having so held it. *Railroad Co. v. Hill*, 13 Ohio St. 235; *Watkins v. Nash*, L. R. 20 Eq. 262; *Insurance Co. v. Cole*, 4 Fla. 359. The plaintiff trusted the president to hold the deed, and it was his wrongful act that disappointed him. The supreme court of Indiana, in a well considered case (*Quick v. Milligan*, 108 Ind. 419, 9 N. E. 392), the facts of which are very similar to the case before us, held, where a deed is delivered to a third person, to be delivered the grantee, who is already in possession of the land, on payment of the purchase money, and is delivered without the condition being performed, that the vendor is estopped, as against an innocent purchaser, to set up his title. See, also, and to the same effect, the following cases: *Balley v. Crim*, 9 Biss. 95, Fed. Cas. No. 734; *Haven v. Kramer*, 41 Iowa, 382; *Blight v. Schenck* 10 Pa. St. 285.

It is the general, if not universal, rule of the courts to protect the innocent purchaser of property for value against such vices in the title of their vendors as result from fraud practiced by them in acquiring the property, for in all such cases the party complaining is found to have been guilty of some negligence in his dealings, or to have trusted some agent, who has disappointed his confidence, and is more to blame for the consequences than the innocent purchaser, so that his equity is inferior to that of such purchaser. Hence it is that the innocent purchaser for value from a fraudulent grantee is always protected in his title as against the equity of the wronged grantor. In *Hoffman v. Strohecker*, 7 Watts, 86,

where a sale had been made under execution upon a satisfied judgment, the satisfaction not appearing of record, an innocent purchaser of the person who purchased at the sale was protected in his title, although the purchaser at the sale had knowledge of the facts and acquired no title. A similar holding had been made by the same court in *Price v. Junkin*, 4 Watts, 85, and in *Fetterman v. Murphy*, Id. 424. In the case of *Price v. Junkin*, it is said: "An innocent purchaser of the legal title, without notice of trust or fraud, is peculiarly protected in equity; and chancery never lends its aid to enforce a claim for the land against him."

Most of the cases cited and relied on by the defendant are not in point. Where the grantee wrongfully procures the holder of a deed as an escrow to deliver it to him, he acquires no title, or at least a voidable one; but this is a very different case from where a third person without notice, afterwards and while the grantee is in possession, deals with him in good faith as owner. Again, it may be conceded that the delivery of a deed by one who simply holds it as a depository transfers no title; but, if he holds it as an escrow, with power to deliver it on certain conditions, a delivery, though wrongful, is not in excess of his authority, for, in such case, the act is within his authority, and binds the principal as against an innocent party. And so a deed held in escrow, delivered after the death of the principal, passes no title. It will readily appear, from reasons already given, that such cases are without application to the case under review. Here it will be conceded that, as between the grantor and the grantee, the latter took no title, because delivered by Howard contrary to his instructions. But the plaintiff relies on the fact that, as found, he had no knowledge that the deed had ever been held as an escrow, and in good faith loaned his money and took a mortgage on the land to secure it, and that the defendant is thereupon estopped from setting up his legal title as against him.

But it is claimed that, as the plaintiff relies on an estoppel, he should have pleaded it. This rule, however, only applies where the party has had an opportunity to do so. In this case he had none until the evidence had been introduced. The defendant, in his answer and cross petition, set up that the deed from him had been placed in escrow, and wrongfully delivered to the grantee, and that the plaintiff had knowledge of the facts. The plaintiff then averred his want of any knowledge or belief as to the facts stated by the defendant, and denied them. The court, however, found that the deed had been delivered to Howard Colvin to be held as an escrow, and was by him wrongfully delivered to the grantee, but also found that the plaintiff was ignorant of the facts, and an innocent purchaser for value without notice. The object of pleading is to inform the opposite party of the facts on

which the pleader relies as the ground of his claim or defense, and here, when the plaintiff denied knowledge of the facts as pleaded by the defendant, he fairly advised the defendant that he relied on an estoppel, on the ground of want of notice, should the facts as pleaded be made to appear in the evidence, except as to the matter of notice; for that he was a purchaser for value appeared from his petition, which was taken as true, as it was not controverted. Hence the claim of the plaintiff could in no way surprise the defendant unless he was ignorant of the law. The first opportunity the plaintiff had to plead an estoppel, as against James E. Colvin, was when the facts were fully made to appear in evidence; and he is not, therefore, precluded from doing so on the facts as found by the court.

Judgment reversed, and judgment on the facts for the plaintiff in error.

(55 Ohio St. 306)

CLEVELAND, C., C. & ST. L. RY. CO. v.
KERNOCHAN.

(Supreme Court of Ohio. Dec. 1, 1896.)

HAZARDOUS EMPLOYMENT—CONTRIBUTORY NEGLIGENCE—FELLOW SERVANTS—BILL OF EXCEPTIONS—ENTRY—DISMISSAL.

1. One who engages in a hazardous employment assumes all risks incidental thereto, but is not bound to anticipate such dangers connected therewith as arise solely from the negligence of others, not in law his fellow servants; and therefore his failure to foresee and guard against dangers of the latter class does not raise against him, nor his personal representatives, a presumption of contributory negligence.

2. An entry in the following terms: "This day came the defendant, and filed its bill of exceptions, duly allowed, signed, and sealed, and the same, at its request, is ordered to be made a part of the record in this case, all of which is done within the fifty days allowed,"—made on the journal of a court of common pleas, shows with sufficient certainty that the bill of exceptions therein referred to was presented to, and signed, sealed, and allowed by, the trial judge.

3. Should a circuit court erroneously dismiss, or erroneously decline to consider, a bill of exceptions on the ground that it had not been legally allowed, and thereupon affirm the judgment below, such judgment of affirmance will be reversed by this court, without passing on any question arising out of the bill of exceptions, and the cause remanded to the circuit court, with instructions that it consider and decide all questions that may arise out of the same.

(Syllabus by the Court.)

Error to circuit court, Crawford county.

Action by Maggie Kernochan, administratrix, against the Cleveland, Cincinnati, Chicago & St. Louis Railway Company.

This action was commenced in the court of common pleas of Crawford county by the defendant in error, to recover of plaintiff in error damages for the death of the intestate, her husband, caused, as she alleged, by the negligence of the plaintiff in error. She prevailed in the court of common pleas. The judgment there rendered in her favor was affirmed by the circuit court, whereupon the present proceedings were brought in this court to reverse both judgments. The facts

will be stated in the opinion of the court. Reversed.

D. Dirlam, Goulder & Holding, and John T. Dye, for plaintiff in error. P. W. Poole and Finley, Beer & Bennett, for defendant in error.

BRADBURY, J. Two questions, only, arise on the record: (1) Did the petition, as amended, state a cause of action? (2) Did the circuit court err in holding that the bill of exceptions taken in the court of common pleas by the plaintiff "was not duly allowed and signed. * * *"? The amended petition is in the following words: "The plaintiff says: On the 9th day of February, A. D. 1892, she was duly appointed and qualified, and letters of administration on the estate of James Kernochan, deceased, were issued to her by the probate court of Crawford county, Ohio, and she is now the duly-qualified and acting administratrix of said estate. The defendant now is, and at the time hereinafter mentioned was, a corporation duly incorporated under the laws of the state of Ohio, and owned and operated a railroad located in and passing through the village of Crestline, in this county, from the northeastern portion of said village to the southwestern portion thereof, with the cars and locomotives thereon. At the time of the commission of the grievances and wrongs hereinafter complained of, and for more than 20 years prior thereto, a large building, known as the 'Continental Hotel' was used by the defendant and by the Pittsburgh, Ft. Wayne & Chicago Railway Company, as a passenger station, and the same was also at the same time used for hotel purposes. During all the same time three of the tracks of defendant's railroad have been located immediately west of said Continental Hotel. A hotel known as the 'Gibson' was during all said time located a few feet west of said last-named tracks, and west of said Continental Hotel. During all said time two of the tracks of the Pittsburgh, Ft. Wayne & Chicago Railway have been located immediately south of said Gibson House and said Continental Hotel. At and during all of said time, immediately south of the last-named tracks and east of the three tracks of defendant's railway, there was and had been located a building used by both of said companies as a telegraph office, and immediately south of the building last named two or more tracks of the Pittsburgh, Ft. Wayne & Chicago Railway were located, and which crossed the three tracks of the defendant's railroad. About four rods south of the last-named crossing, and east of the said three tracks of defendant's railroad, during all said time were located the freight houses of said railroad companies, with other tracks of said defendant in front thereof, used daily by said defendant in shifting cars from its railroad to the Pittsburgh, Ft. Wayne & Chicago Railway, and for loading and unloading freight.

At and during said time one of the principal streets of said village running north and south crossed the three tracks of the defendant's railroad a few feet south of the crossing last above described. A considerable portion of said village of Crestline lay south of said crossings, and said street was in daily use, and much traveled and frequented by the inhabitants of said village and by country people coming into and going out of said village. All of said tracks and crossings are, and always have been, much used by said companies; and the employes of said companies and the public generally have been in the habit of passing over said tracks and crossings at all the points above described at all hours of the day and night, with great frequency, so that the same became, and on the 8th day of January, A. D. 1892, was, a public highway. The plaintiff, in further amendment of her petition, says that said James Kernochan was on said Thoman street, at the east line thereof, when he was struck by said train and killed. The said James Kernochan was employed by the Pennsylvania Company, lessee of the Pittsburgh, Ft. Wayne & Chicago Railroad, as a car inspector, and on the night of January 8, 1892, he was engaged in the discharge of his duties as such car inspector on the tracks of said Pittsburgh, Ft. Wayne & Chicago Railroad, west of the tracks of defendant's railroad. Between the hours of 7 and 8 o'clock p. m. it became his duty, as such car inspector, to pass over the tracks of defendant's railroad at a point between said telegraph office and said freight house. At about 7 o'clock of said evening the local freight train of defendant was pulled into Crestline from the north, and stopped on the west track above described in front of the Gibson House, and north of said railroad crossings. Said train was then cut, and the locomotive, with some of the cars attached thereto, passed over said crossings to said defendant's freight house, and was there kept for some time loading and unloading freight and shifting cars. After doing said work, said cars, pushed by a locomotive, were negligently backed to couple onto the rear portion of said train left standing as aforesaid on the defendant's track in front of the Gibson House. Said locomotive and cars so backed were by said defendant negligently put, and then were, in the hands and under the sole control of inexperienced and unskillful servants. No light or lights were displayed at the rear end of the portion of the train being so backed, and no servant of said company was stationed on the rear car thereof, to prevent danger or accidents, and neither the conductor nor the engineer of said train was upon said portion thereof so being backed, but said conductor and engineer had left said train, and were out of sight and hearing of the same; and no signal of any kind was given to warn persons who might be upon or about to cross defendant's said tracks upon or near said crossings that said

locomotive and cars were being backed, but the same was by said defendant negligently and unlawfully omitted. While said locomotive and cars were being so unlawfully and negligently backed, the said James Kernochan was compelled, as aforesaid, in the discharge of his duties, as aforesaid, to cross the tracks of said defendant's railroad at or near the south crossing above described, at which time a passenger train was being run on the east track of defendant's railroad in southerly direction, immediately in front of said James Kernochan, with steam escaping, and the bell of the engine being rung, so that the noise made thereby prevented said James Kernochan from hearing the locomotive and the cars so as aforesaid approaching from the south, and so as to obscure the light from said west track, rendering the same entirely dark, so as to prevent said James Kernochan from seeing the rear or any other portion of the cars and locomotive so as aforesaid being backed towards the rear portion of said train so as aforesaid left standing in front of said Gibson House. The said James Kernochan had no knowledge or means of knowledge that said cars and locomotive were being so backed from the south, and the said train passing in front of him compelled him, upon peril of his life, to stop on said track for a moment; and while he so stopped he was, without any fault or negligence on his part, and wholly by the negligence of the defendant, run over by said cars and locomotive so as aforesaid being negligently backed, and instantly killed. At the time of his death said James Kernochan was 23 years old; was an active, strong, healthy man, temperate, of good habits, standing well with his employer, and capable of earning good wages. He left surviving him this plaintiff, as his widow, who was, at the time of his death, dependent upon him for support. She has been injured by his death to the amount of \$10,000. Wherefore plaintiff, as administratrix of said estate, asks judgment in the sum of \$10,000."

Plaintiff in error contends that the averments of the petition raise a presumption against the decedent of contributory negligence. We do not think this is true. The decedent was engaged in discharging the duties of his occupation,—that of car inspector for the Pennsylvania Company,—which company and plaintiff in error used the yard where the accident occurred in common, as the exigencies of the business of each required. Of course, the deceased assumed such risks as grew out of the nature of his occupation, and therefore, if his death was due to an accident that was incidental thereto, or was caused by the negligence of another, for whose fault he is chargeable, his administratrix could have no remedy. But one who is engaged in a hazardous occupation, no more assumes the risks that may arise from the negligence of others than does the person who engages in occupations comparatively safe.

The duties of the decedent as car inspector must, of necessity, have been performed in the yards of these railroad companies. The cars must be inspected while standing upon some of the tracks therein,—side or main tracks. He must pass along or across these tracks, or near them, of necessity. It was possible that moving cars might at any time pass along them. If they did so without any one being in fault, and injured him, no recovery could be had. But he was not bound to anticipate that a locomotive and cars would be placed in the hands of inexperienced or unskillful servants, and then backed through the yards without a light displayed, or a person stationed on the rear end of the moving train to give warning of its approach, especially at a moment when another train, with its bell ringing and steam escaping, so as to drown the noise made by the backing train, was also passing; and these are the negligent acts that are alleged to have caused the decedent's death. Not being bound to foresee and guard against this course of conduct on the part of the plaintiff in error and its servants, his failure to do so, though it may have directly contributed to his death, was not negligence, and should not defeat a recovery.

During the trial of the cause in the court of common pleas, after the plaintiff in that court had closed her testimony, the railroad company moved the court to direct the jury to return a verdict in its favor, because the evidence introduced by her raised a presumption of contributory negligence. This motion being overruled, the plaintiff in error introduced its evidence. The trial resulted in a verdict for the plaintiff below. The railroad company moved for new trial, assigning as reasons therefor a number of distinct grounds of error; among them, the action of the court in overruling its motion to direct a verdict; that the court erred in admitting, and also in rejecting, evidence; that the court erred in the instructions it gave to the jury, and in refusing to charge as requested; that the verdict was excessive, and that it was contrary to the weight of the evidence. This motion was overruled, and thereupon the railroad company prepared a bill of exceptions embodying all the evidence, the charge of the court, and its several rulings in admitting and rejecting evidence. This was signed by the trial judge in due time, and the following entry in respect thereof placed upon the journal of the court: "This day came the defendant, and filed its bill of exceptions, duly allowed, signed, and sealed, and the same, at its request, is ordered to be made a part of the record in this case, all of which is done within the fifty days allowed." The cause was taken to the circuit court on error. That court declined to consider the errors assigned in the bill of exceptions, because it found that the bill of exceptions was not duly allowed and signed, and "for that reason find no error in the record of the court below." This action of the circuit court is assigned as error.

In this court. The plaintiff in error was, of right, entitled to the judgment of the circuit court upon the assignment of error, if such bill of exceptions, being legally perfected, was before that court. Suggestion was made in argument that there might have been more than one bill of exceptions taken in the trial court, and that the one the circuit court declined to consider may not be the one that is disclosed in the record brought to this court. The bill of exceptions appears to have been signed by the trial judge, March 3, 1894. It was filed in the court of common pleas, as the file mark shows, on the 5th of March, 1894; and the entry on the journals of that court of its allowance was on March 12, 1894, seven days later. This difference of dates is, of course, compatible with the suggestion that more than one bill of exceptions might have been taken. On the other hand, it might occur in the case of a single bill of exceptions. An examination of the whole record does not give the slightest corroboration to this suggestion. The journal of the circuit court, setting forth its refusal to consider the bill of exceptions, shows that its action was based upon the identical record and papers now on file in this court, which, as we have seen, afford no ground to suppose that more than one bill of exceptions was ever taken in the action. That court, having before it nothing except this record, necessarily acted solely thereon. That record, we have seen, affords no ground to believe that more than one bill of exceptions was ever taken in the action. It is therefore idle to suppose the action of the circuit court was influenced by that theory, and the suggestion should be dismissed as totally unfounded.

In *Hill v. Bassett*, 27 Ohio St. 597, it was held that: "Before a paper purporting to be bill of exceptions can be regarded by a reviewing court upon error as a part of the record, it must appear from the record, outside of such paper, that a bill of exceptions was in due time tendered to, allowed, signed, and sealed by, the court, and made part of the record; and the paper in question must be identified with reasonable certainty as the bill of exceptions which was thus made part of the record." This bill of exceptions was identified with reasonable certainty. It was signed by the trial judge, and bears the file marks of the trial court. The journal of the court of common pleas made in the case recites that the "defendant came and filed its bill of exceptions, duly allowed, signed, and sealed; and the same, at its request, was ordered to be made a part of the record in this case." No ambiguity arises out of this language. It necessarily implies that the bill of exceptions had been presented to, allowed, signed, and sealed by, the trial judge, or some judge authorized to act in his stead. It could not have been signed by such judge unless presented to him, and it could not have been duly allowed, signed, and sealed by any other than a judge having authority to do so.

We think the journal entry shows that every act required by the statute to give validity to the bill of exceptions was performed. The bill of exceptions, having been duly allowed, was before the circuit court, and the plaintiff in error was, of right, entitled to the judgment of the circuit court upon the questions it presented. The declination of that court to consider them violated this right, and was for that reason prejudicial to the plaintiff in error. It is no answer to this view of the case to say that the circuit court might, or even should, have affirmed the judgment below, because the rulings of the trial court, as disclosed in the bill of exceptions, were correct. Whether this court should reverse a judgment of the circuit court for striking a bill of exceptions from its files, or for refusing to consider it, where it was made to appear that the questions it presented were frivolous, need not now be considered. No claim is made that the question arising on the bill of exceptions under consideration is one of this character. Judgment reversed, and remanded to the circuit court for further proceedings.

(164 Ill. 323)

CHICAGO EDISON CO. v. FAY.

(Supreme Court of Illinois. Nov. 23, 1896.)

CORPORATION—STOCK—FORGED ASSIGNMENT—RATIFICATION—PARTIES.

1. A corporation canceling a certificate of stock, and reissuing another certificate to the assignee under a forged assignment, will be required to reissue to the original owner a certificate in lieu of the one canceled. 62 Ill. App. 55, affirmed.

2. An agent forged an assignment by his principal to a certificate of stock, and deposited the check received therefor to the credit of his principal, and afterwards withdrew the moneys under a power of attorney from his principal to draw checks. *Held*, that an implied ratification of the forged assignment was not shown. 62 Ill. App. 55, affirmed.

3. Where a corporation cancels a certificate of stock, and reissues another to an assignee, under a forged assignment, the assignee is not a necessary party to an action by the owner of the certificate canceled to compel the reissue of another certificate, where it does not appear that such owner is insolvent, or that the issuance of a new certificate would cause an overissue of stock. 62 Ill. App. 55, affirmed.

Appeal from appellate court, First district.

Action by Charles Norman Fay against the Chicago Edison Company. There was a judgment for plaintiff, which was affirmed in the appellate court (62 Ill. App. 55), and defendant appeals. Affirmed.

Uhlmann & Hacker, for appellant. Williams, Holt & Wheeler, for appellee.

CARTER, J. This was a bill in equity, filed by appellee, Fay, against the appellant corporation, to compel it to issue to him 200 shares of its capital stock, in lieu of two certificates of such stock, of 100 shares each, belonging to him, which, upon forged assignments, and without his authority, had been surrendered up to the company, and canceled,

and new certificates in lieu thereof issued to the assignees, who were innocent purchasers or pledgees. In the latter part of June, 1894, appellee, being about to go to the seashore for the summer, left his office and some of his business affairs in Chicago in the hands of one Anderson, his private secretary and man of affairs, and gave Anderson a power of attorney to draw checks, bills of exchange, and drafts, and make orders and overdrafts upon the Northern Trust Company of Chicago, and to indorse checks, drafts, bills of exchange, notes, and orders for deposit in said trust company, for appellee and in his name. In pursuance of arrangements made by appellee before his departure (he not having theretofore received the stock from appellant), Anderson afterwards, on behalf of appellee, paid the last installment due appellant for the stock, and appellant thereupon issued the 200 shares to Fay, and delivered the same to Anderson for him. Fay had had previous dealings with Slaughter & Co., who were brokers and bankers, and who, in the course of such dealings, became acquainted with Anderson, as Fay's private secretary and man of affairs. On September 12th, and during Fay's absence, Anderson called up Slaughter & Co. by telephone, saying, in substance, that Fay wished to sell 100 shares of the Edison stock, and had placed the limit at \$125 per share. Slaughter & Co. answered that it could not be sold at that figure. Anderson replied that he would wire Fay, and, on reply, would let them know. The next day, Anderson telephoned Slaughter & Co. to sell the stock at the market, whereupon they sold 50 shares, at \$123, and gave Anderson a check payable to Fay for \$6,137.50, the amount of the sales less their commission; Anderson having in the meantime forged Fay's name to the assignment of one certificate of 100 shares of the stock, and sent such certificate, so assigned over, to Slaughter & Co., who took it to appellant, and received for it two certificates, of 50 shares each, properly transferred on the books of the corporation, one in the name of the purchaser, and one in their own name. Slaughter & Co. not being able to sell said last-named 50 shares at the same figure, Anderson obtained a loan thereon from them, ostensibly for Fay, of \$6,000, and received the same in a check payable to Fay's order, which he indorsed, and deposited as before. About two weeks later, Anderson again inquired by telephone whether or not the 50 shares had been sold, and was informed they had not been; that the price had fallen to \$120. Anderson replied that he did not think Fay wanted to sell at that price, but said Fay needed more money; and it was arranged that he should send over to them the other certificate of 100 shares, and they would make a loan of \$8,000 upon it. Anderson forged Fay's signature to the assignment of this certificate, as to the first, and sent it over, and received from Slaughter & Co. a check to Fay for \$8,000, upon which he indorsed Fay's name, and deposited it to

Fay's credit, as before. October 4th, Anderson obtained a further loan in the same manner from Slaughter & Co., informing them at the time that Fay would not need any more. Four days later, upon directions by telephone from Anderson, Slaughter & Co. sold 25 shares, at \$120, and credited the amount upon the loans. Statements of these transactions—one the usual monthly statement on October 1st, and the other on the sale of the 25 shares—were mailed to Fay, at his office, but he received only the last one. Slaughter & Co. surrendered the second certificate to appellant. It was canceled, and two certificates—one for 25 shares, to the purchaser, and the other for 75 shares, to themselves—were issued, and the transfer made upon the books of the corporation, as in the first instance. Slaughter & Co. did not know of the power of attorney given by Fay to Anderson. Fay returned to Chicago about October 7th, and, on receiving the notice from Slaughter & Co. of the sale of the 25 shares, called on them October 10th for an explanation, and was informed of Anderson's transactions, and he informed them he had no stock for sale. Fay, on the same day, checked up his account at the bank, and, having ascertained Anderson's defalcations, revoked his power of attorney. Fay had drawn some checks on his account for expenses during the summer, but Anderson had from time to time checked out nearly all the deposits, taking in all, for his own benefit, \$950 more than the total amount of the money received from Slaughter & Co. Before any of the money was received from Slaughter & Co. and deposited by Anderson, he had withdrawn and stolen a large sum from Fay's balance in bank, and the first check from Slaughter & Co. went in to make it up; and it is claimed by appellant that it thus appears that the money of Slaughter & Co. went to make up Fay's balance, and was in part checked out and used to pay Fay's bills, and that Fay had knowledge thereof before the filing of his bill, and that, as he did not refund it to Slaughter & Co., he must be held to have ratified Anderson's transfers of the stock, and so lost his right to have such stock restored or other certificates of stock issued to him by appellant. Fay obtained his first knowledge of Anderson's criminal acts on October 10th, when he had the interview with Slaughter & Co., and checked up his account at the bank. This account then showed a balance in his favor of \$134.84. It showed deposits corresponding in amounts and dates with the checks received from Slaughter & Co., but did not show whence they came. Other facts not important to a decision of the case were shown, to the effect that Anderson was fully trusted by Fay, and was therefore relied upon as trustworthy by Slaughter & Co., and that Fay did need to borrow money in his absence, and had left securities in a private box at the bank, accessible to Anderson, to be used by him as collateral security for such loans. But it is not pretended that

Anderson had any authority to sell or pledge the shares of stock in question, or to sign Fay's name to a written assignment thereof.

The bill was filed October 19th, and it is alleged, among other things, that the complainant had never authorized nor ratified the assignments or transfers of the two certificates of stock; that he had demanded that his name be restored to the books of the company as a stockholder, and that certificates of stock to the amount of 200 shares be issued to him in lieu of those which the company had canceled. The appellant company answered, setting up the facts, and alleged that Slaughter & Co. paid the proceeds of the transfers of the stock to Anderson, as the secretary and agent of Fay, and that such proceeds were deposited in bank to Fay's credit, and were drawn out either by Fay or by some one authorized by him to draw the same, and that Fay had thereby ratified the acts of Anderson in disposing of the stock, and had kept the proceeds with full knowledge of the facts, and was estopped from denying Anderson's authority. Appellant also filed a cross bill, setting up the same facts, and alleging also a ratification by Fay, and that Fay well knew at the time of the filing of the bill that Slaughter & Co. claimed to be the rightful holders of said stock, but had failed to make them parties to his bill, so that their rights and equities could be adjudicated in the cause; that an accounting should be had between Fay and Slaughter & Co., and their equities in said stock, and the amount Fay had received from them, definitely ascertained, before appellant should be required to issue any stock to him; and that appellant should be protected and indemnified by Slaughter & Co. in the event it should be required to issue such stock. Slaughter & Co. were made parties to this cross bill, and they filed their answer thereto, and also filed their cross bill, in which their version of the facts was set forth, and in which they insisted that Fay was not entitled to the relief he asked until he refunded to them the moneys received from them by Anderson, his secretary; that they were interested in the suit, and were necessary parties; that they were entitled to the stock held by them; and that Fay should be enjoined from prosecuting his bill further until their rights and equities were determined or their money refunded. Fay filed a replication to appellant's answer, but demurred to its cross bill, and moved to strike the cross bill of Slaughter & Co. from the files. The demurrer and motion were both sustained by the court, and, on a hearing before the chancellor in open court, a decree was rendered, as prayed in Fay's bill. The appellate court, on appeal by the appellant company, affirmed this decree.

The decree below was right, and was properly affirmed by the appellate court. Appellant acted at its peril in cancelling Fay's certificates of stock, and in issuing to others other certificates therefor on the forged assignments. Forgery can confer no rights or

authority upon anybody. 1 Cook, Stock, Stockh. & Corp. Law, § 365; *Telegraph Co. v. Davenport*, 97 U. S. 309.

As to appellant's cross bill, the demurrer was properly sustained to it. The alleged ratification was fully set up in the answer, and that issue was fully tried and considered under the bill and answer. The cross bill was unnecessary. Appellant endeavored on the trial to prove that Fay had ratified Anderson's disposals of the two certificates of stock, by the fact that the checks given were payable to Fay's order, and, when received by Anderson, were by him placed in bank to Fay's credit; that Fay enjoyed the benefit thereof; that Anderson, in withdrawing the moneys, acted under power of attorney from Fay; and that Fay, before filing his bill, had knowledge that he had had the benefit of Slaughter & Co.'s money, and had made no restitution to them. But the finding was, and we think properly so under the evidence, that there was not sufficient evidence to show that Fay knowingly took or retained any of Slaughter & Co.'s money derived from the transfers of stock; and it was necessary to show knowledge on the part of Fay before an implied ratification could be established on the grounds attempted. Ratification, especially in such a case, should not be presumed from a doubtful state of facts. 1 Am. & Eng. Enc. Law (2d Ed.) 1195. While this court has held that a forged note may be ratified by the principal, so as to bind him (*Living v. Wiler*, 32 Ill. 387; *Hefner v. Vandolah*, 62 Ill. 483; *Hefner v. Dawson*, 63 Ill. 403), it has not to our knowledge been held in any case that a ratification of a forged instrument can be implied from a doubtful state of facts. It would be a question of some nicety to determine from the evidence in the record whether Fay had received any such benefit from the deposits of Slaughter & Co.'s money as to impose liability on him; but that is a question which may or may not arise between that firm and Fay, and which is not necessary to be, and is not, determined in this case.

A clear liability of appellant to restore appellee to his rights as a stockholder, of which appellant had wrongfully deprived him by cancelling his certificates, and issuing new ones therefor to other parties on the forged assignment, being apparent, it was not necessary upon the case as made by the pleadings for appellee to wait for an accounting between himself and Slaughter & Co., and for the investigation of the question as to whether or not he should account to them for one or more or all of the four several amounts which they, by their checks to him, had put into the hands of Anderson. Questions might well arise in such a case which would not be germane to the question between appellant and appellee. Appellant could not maintain its bill as a bill of interpleader from the standpoint of a stakeholder, as supposed by counsel. It was not then the holder of shares of stock in which it had no interest, claimed by several different persons, so that it

could call on them to interplead and settle the question of title between themselves; but it had already canceled the certificates, and issued new ones to other parties, and stricken appellee's name as a stockholder from its books, wrongfully, and without any authority whatever. Its duty was to repair the injury it had done, and then seek redress from those, if any, liable to it. There was no allegation in either of the cross bills that appellee was insolvent, or that, if the certificates of stock should be issued to him as prayed, there would be an overissue of stock, so as to raise the question insisted upon by appellant, that, in order to do complete justice, all the parties to these several transactions should be before the court in the same case. There was no error in sustaining appellee's demurrer to appellant's cross bill, nor in striking the cross bill of Slaughter & Co. from the files. *Pratt v. Railroad Co.*, 126 Mass. 443; *Telegraph Co. v. Day*, 52 N. Y. Super. Ct. 128; *Telegraph Co. v. Davenport*, 97 U. S. 369; *Bank v. Field*, 126 Mass. 345; *Mayor, etc., v. Ketcham*, 57 Md. 23; *Dalton v. Railway Co.*, 12 C. B. 458.

It seems to have been held in *Blaisdell v. Bohr*, 68 Ga. 56, that in such a case the transferees of the stock were proper parties; but in that case, as suggested by counsel for appellee, they were made parties to the original bill, and alternative relief was prayed against them.

Finding no error in the record, the judgment of the appellate court is affirmed. Judgment affirmed.

(164 Ill. 37)

DICKEY v. CITY OF CHICAGO et al.

(Supreme Court of Illinois. Nov. 23, 1896.)

PUBLIC IMPROVEMENTS — SPECIAL ASSESSMENTS — ENFORCEMENT.

1. In proceedings for the confirmation of a special assessment, a copy of the approval by the mayor of the ordinance authorizing the improvement need not be annexed to the petition.

2. Under Rev. St. c. 24, art. 9, § 19, requiring a special assessment ordinance to specify the nature, character, locality, and description of the work, an ordinance for paving a street, failing to specify the width of the street, is sufficient, unless some uncertainty as to the width of the street is shown. *Gage v. City of Chicago*, 32 N. E. 264, 143 Ill. 157, distinguished.

3. Where, in proceedings for the confirmation of a special assessment, a party raises specific objections as to one tract of his land, and fails to raise any objection as to other tracts, he cannot, on error to the supreme court, raise new objections as to such other tracts. *Baker, J.*, dissenting.

Error to Cook county court; Frank Scales, Judge.

Proceedings to confirm a special assessment in the city of Chicago. The assessment was confirmed over the objections of Charles D. Dickey, Jr., and he brings error. Affirmed.

Mason Bros., for plaintiff in error. J. D. Adair, for defendants in error.

CARTWRIGHT, J. Plaintiff in error, as trustee under the will of Hugh T. Dickey, deceased, seeks the reversal of a judgment of

confirmation entered by the county court of Cook county at the February term, 1892, in special assessment proceedings to which said Hugh T. Dickey was a party.

The first complaint made is that the petition did not recite the ordinance for the improvement, which was for the paving of a street. The ordinance was recited in the manner which was held sufficient by this court in the following cases: *Wadlow v. City of Chicago*, 159 Ill. 176, 42 N. E. 806; *Adcock v. City of Chicago*, 160 Ill. 611, 43 N. E. 589; *Doremus v. People*, 161 Ill. 26, 43 N. E. 701.

Secondly, plaintiff in error says that the copy of the ordinance annexed to the petition was not the same as the ordinance described therein, because the petition avers that the ordinance was approved by the mayor, while the copy does not show the indorsement of such approval. The essential fact to be averred is that the ordinance became a law, and that fact is a matter for proof on the hearing. The petition makes the averment, whether necessarily or not, that the ordinance was approved by the mayor; and it was not necessary that there should be a copy of the approval annexed to the petition.

In the third place, it is contended that the ordinance was insufficient, because indefinite. It provided for curbing with curbstones and paving with wooden-block pavement a street in Chicago, but it did not state the width of the street. An ordinance of this kind must specify the nature, character, locality, and description of the improvement; and it is insisted that this was not done, because it was not shown where the curbing was to be set, or what the width of the paving would be. So far as the curbstones are concerned, the term, by common understanding, shows where they were to be set. As to the paving, it may be said that a street has a fixed and certain width, which cannot be varied, and which is as permanent and well known as the existence of the street itself. The sidewalks are not to be paved, and an ordinance to pave a street generally will not be construed to embrace them, but will include the space between them. In the absence of any showing that there is any uncertainty about the width of the street, it will be presumed to be like other streets in cities, with sidewalks and a roadway between. This ordinance provided for paving the street generally, and it was not necessary that the width ordinarily paved, about which neither the commissioners nor any party could make any mistake, should be stated in the ordinance. *Adams Co. v. City of Quincy*, 130 Ill. 566, 22 N. E. 624; *Woods v. City of Chicago*, 135 Ill. 582, 26 N. E. 608. The case of *Gage v. City of Chicago*, 143 Ill. 157, 32 N. E. 264, was where there was a trial by the court without a jury, by consent, and, both by objection to the evidence and by propositions of law asked to be held, the question of the uncertain character of the improvement was raised. It was proved in that case that the paving was to be done upon a prairie,

where there were no houses on the line of the street, and no sidewalk, and where the city contended that the roadway was to be 30 feet wide, and the evidence showed that the commissioners had estimated upon a basis of 40 feet in width. It was proved that the width directed to be paved was uncertain, but in this case there is nothing to indicate that the estimate was upon an improper basis as to width.

Fourthly, plaintiff in error contends that the judgment should be reversed because the oath of the commissioners appears to be dated two days prior to the order of their appointment. Hugh T. Dickey entered his appearance in the proceeding in the county court for the confirmation of the assessment, and filed 23 objections as to one parcel of land owned by him, but made no objection as to his other land, now in question. There had been a rule entered requiring all parties desiring to object to the confirmation of the assessment roll to file their objections thereto by a specific time, and, no objections having been filed by said Dickey as to this part of his land, the assessment was confirmed as to it. There was a hearing of his objections, which were all overruled, and the assessment was confirmed as to the tract mentioned in such objections. Most of those objections were general, and went to the validity of the entire assessment. Some of them covered the questions above considered, but there was no objection which covered this question, and it was not raised in the county court in any manner. In *Karnes v. People*, 73 Ill. 274, and *Neff v. Smyth*, 111 Ill. 100, it was held that, where a taxpayer makes specific objections as to certain taxes on application for judgment against his land, he will be estopped by the judgment from afterwards urging any other objection to other taxes included in the judgment. In *Neff v. Smyth* it is said: "The idea that appellee appeared and defended only as to the part of the taxes to which he filed objections, and that, as to the rest of the taxes, he is to be considered as not having made appearance and defense, and is at liberty now to question their being due, is not to be admitted." In a special assessment proceeding the judgment is several against the land, and there may be separate trials of objections made by different owners; but we think that, when Hugh T. Dickey appeared, and filed objections, he was bound to make all objections which he intended to raise to the assessment against his lands. Plaintiff in error would now be barred from raising this objection as to the tract for which Hugh T. Dickey saw fit to object, and we think that the same rule should apply to their several tracts. It would be equally unjust to permit an owner to appear and raise objections as to one tract of his land, tacitly admitting that he has no objections as to other tracts included in the roll, and then raise a new objection as to some other tract by writ of error in this court. The objection under consideration, not having been made under

the appearance in the county court, will not be considered here, and the judgment will be affirmed. Affirmed.

BAKER, J. I dissent from that part of the opinion of the court which holds that, because Hugh T. Dickey appeared in the county court, and filed objections as to one parcel of land owned by him, therefore the plaintiff in error is now barred from raising any objection not included in the objections then filed by his testate. The appearance and defense at the time of the rendition of judgment of confirmation were expressly limited to the one parcel of land. The present writ of error does not question the judgment as to said parcel of land, but brings up for review the judgments as to other and wholly different and distinct parcels of land. The statute (Rev. St. c. 24, art. 9, § 34) provides in express terms that the judgment of the court shall have the effect of a several judgment as to each tract or parcel of land assessed. The proceeding is in rem, and the judgment is against the property only. Appearance and defense does not make the proceeding in personam. *People v. Dragstran*, 100 Ill. 286. In *Karnes v. People*, 73 Ill. 274, and *Neff v. Smyth*, 111 Ill. 100, the different taxes were all assessed against the same tracts or lots in respect to which the owners appeared and made contests; and, in my opinion, the principle that controlled those decisions is not applicable here.

(164 Ill. 340)

GRAND LODGE A. O. U. W. v. BAGLEY.

(Supreme Court of Illinois. Nov. 23, 1896.)

MUTUAL BENEFIT INSURANCE—ASSESSMENT—FORFEITURE OF MEMBERSHIP—ACTION OF DEBT—JUDGMENT.

1. The constitution and by-laws of a mutual benefit society providing that, on the death of a member, the grand recorder shall be notified by the lodge to which he belonged, and shall in turn notify each subordinate lodge, and that "each subordinate lodge shall then make an assessment of one dollar upon each member holding a certificate," which assessment must be paid by a certain time under penalty of forfeiture of his rights by the delinquent member, are not complied with by simply reading in the subordinate lodge the notice from the grand recorder and entering it upon the lodge "minute book," with the statement, "Assessment No. 102 and 103 on death 458 and 466 was called March 1," without any further action, by vote or otherwise, by way of making the assessment; and a member failing to pay such assessment does not forfeit his rights under his certificate.

2. Where, in an action of debt, the declaration contains no count for interest, and judgment is rendered for the principal and damages allowed as interest, exceeding the damages laid in the declaration, such judgment is at most irregular, and cannot be questioned for the first time on appeal. 60 Ill. App. 589, affirmed.

Appeal from appellate court, First district.

Action of debt by Margaret Bagley against the Grand Lodge of Ancient Order of United Workmen of Illinois. Judgment for plaintiff was affirmed in appellate court (60 Ill. App. 589), and defendant appeals. Affirmed.

J. P. Ahrens, for appellant. F. W. Becker, for appellee.

WILKIN, J. This is an action of debt, by appellee against appellant, upon a beneficiary certificate issued by appellant to John H. Bagley, the son of appellee, for her benefit. The defense is that the certificate became forfeited, prior to the death of the holder, by his failure to comply with its condition in making payment of two assessments for the beneficiary fund of the order. On the first trial in the superior court of Cook county, the judgment was for the defendant, which was affirmed in the appellate court of the First district but reversed in this court, and the cause remanded to the superior court. 131 Ill. 498, 22 N. E. 487. On the second trial the defendant again recovered judgment for costs, which the appellate court reversed, remanding the cause. 46 Ill. App. 411. The third trial was by the court, a jury being waived, which resulted in a judgment for the plaintiff for \$2,000 debt, and \$1,217 damages. The appellate court has affirmed that judgment, and hence this appeal.

It is first insisted that the superior court erred in allowing the \$1,217 damages, which was for interest on the certificate, because the declaration contained no count for interest, and because the debt and damages recovered exceeds the ad damnum, which is only \$3,000. If plaintiff had a right of action on the certificate at all, she was entitled to recover the amount named therein, \$2,000, with 6 per cent. interest, from the date of the notice of the death of the holder to the date of her judgment. *United Workmen v. Zuhlke*, 129 Ill. 298, 21 N. E. 789. Under the declaration it would have been error to enter judgment for the aggregate amount of the principal and interest, but it was perfectly proper to give judgment for the amount named in the certificate as the debt, and for the amount of interest due thereon as damages. It was expressly so held in *March v. Wright*, 14 Ill. 248. Even if the judgment had been for an aggregate amount, the error could have been corrected, in the appellate court or here, by entering just such judgment as was entered by the superior court. *Williams v. Bank of Illinois*, 1 Gil. 667; *Bowman v. Bartley*, 21 Ill. 30. If it be admitted the damages laid in the declaration should have been large enough to cover both the debt and damages allowed, advantage could only have been taken of such an irregularity by urging it at the time of entering judgment, and thus giving the plaintiff an opportunity to amend. Such an amendment would have been one of form, rather than substance. *Tomlinson v. Earnshaw*, 112 Ill. 311. The statute of amendments was intended to cover all such cases. As said in *Bowden v. Bowden*, 75 Ill. 112, "if a party will be silent on the occurrence of such a mistake, one that would be corrected on the instant should the attention of the court be called to it, one that in no wise affects the merits of the contro-

versy, he ought to be foreclosed of his right to assign it for error on an appeal to this court."

This brings us to the consideration of the case upon its merits. The assessments which defendant insisted the certificate holder failed to pay are numbers 102 and 103. Plaintiff did not claim that they were paid during his lifetime, but she did contend that, by payments thereof after his death, and the subsequent action of the subordinate lodge to which he belonged, any right which the defendant would otherwise have had to declare a forfeiture was waived. Her principal contention, however, is that no forfeiture of the certificate resulted from the failure to pay these assessments, because they were never legally made. The proceeding prescribed by the constitution and by-laws of the order for assessments is in substance as follows: Upon the death of a member it is the duty of the subordinate lodge to which he belonged to notify the grand recorder, and he must on the 1st day of the following month notify each subordinate lodge in his jurisdiction. "Each subordinate lodge shall then make an assessment of one dollar upon each member holding a certificate," etc. When the assessment has been made, the financier, not later than the 8th of the month, shall notify each member of the assessment, and not later than the 28th of the same month the assessment must be paid; the penalty for a failure to do so being a forfeiture of all rights of the member under his certificate. In the present case all that was done in the subordinate lodge was the reading of the notice from the grand recorder to make the assessment, and entering it upon the lodge record,—the "minute book,"—with the statement: "Assessment No. 102 and 103 on death 458 and 466 was called March 1." No action whatever was taken by the lodge, by vote or otherwise, by way of making the assessment. The question, therefore, is, was the language of the constitution, "Each subordinate lodge shall then make an assessment," complied with? It seems too clear for argument that it was not. All that was done, as appears from the record of the proceedings of the subordinate lodge, was the action of the recorder, and not of the lodge. It is not, as we understand, claimed that the language of the constitution and by-laws was complied with, but it is insisted that the intent and meaning of the language was complied with, because, it is said, no discretion as to whether the assessment should or should not be made is vested in the subordinate lodge, and that its voting upon the question would, therefore, amount to nothing. The question here is one of forfeiture, and no liberal construction or intendment will be indulged in favor thereof. We have carefully considered the argument of counsel in support of their contention against the view of the appellate court, and are of the opinion that the decision of that court is a correct one. In that view the propositions of law submitted

to the trial court as to the validity of these assessments were properly refused, and those relating to the question of waiver or ratification of the payment after the death of John Bagley became unimportant. Concurring, as we do, in the views of the appellate court, as expressed in its opinion, its judgment will be affirmed. Affirmed.

(184 Ill. 275)

FIREMEN'S INS. CO. v. KUESSNER.

(Supreme Court of Illinois. Nov. 23, 1896.)

INSURANCE—FIRE—PAROL CONTRACT—EVIDENCE.

1. Where a written application for insurance against fire, stating the property to be insured, the rate, amount of insurance wanted, and amount of the premium, is presented to and accepted by the company, which promises to issue the policy, the oral contract for insurance is complete, and the liability of the company for loss may be enforced in an action declaring on the oral contract, though the policy was never in fact issued.

2. A fire insurance company, authorized by its charter to make insurance and issue policies, can make a valid parol contract of insurance.

3. In an action for loss by fire, a declaration upon an oral contract for insurance is sustained by evidence that on the morning of the day of the fire an insurance broker took plaintiff's written application for insurance, promising to bring him the policy and receipt next day, filed the application with defendant company, which kept it, and informed plaintiff, when he called at the office next day, that the insurance had been placed the day before, and that plaintiff then paid the premium and took a receipt therefor from a clerk, not disclosing to the company that the loss had already occurred.

4. Where an oral contract for fire insurance is made, and loss occurs before the policy is delivered and the premium paid, the fact that insured, immediately after the fire, pays the premium without disclosing the fact of loss, does not invalidate the contract nor affect his right to recover.

5. Where an oral contract for fire insurance is made without demand for payment of the premium before acceptance of the risk, its nonpayment by insured in advance does not invalidate the contract.

Appeal from appellate court, First District.

Action by Ferdinand Kuessner against the Firemen's Insurance Company. Judgment for plaintiff, which was modified by the appellate court (59 Ill. App. 432), and defendant appeals. Affirmed.

U. P. Smith, for appellant. Nelson Monroe, for appellee.

PHILLIPS, J. Appellee brought an action on a policy of insurance for \$300, of date October 6, 1891, and upon an alleged oral contract for \$1,000 insurance on the same property, alleged to have been made March 1, 1892, by the appellant. The property on which insurance was claimed was destroyed by fire about 5 p. m., March 1, 1892; the application for insurance on which the oral contract is alleged having been presented at an earlier hour of that day. A recovery was had in the trial court on the policy and also on the oral contract.

Ferdinand Kuessner was carrying on the business of upholsterer in a small way on

Twenty-Second street, in Chicago, and his stock consisted largely of upholstered goods. For several years prior to the 1st day of March, 1892, one Edward Burbank, who had his office with appellant company, had been soliciting the insurance of appellee, and had previous to the 1st day of March, 1892, solicited and placed insurance on appellee's property of \$1,000 in the Commercial Insurance Company and \$300 in appellant company. On the morning of March 1, 1892, said Burbank called at the store and stated to appellee that his policy of \$1,000 in the Commercial Insurance Company had expired, and asked appellee if he did not want to renew the same. Appellee replied he did. Then Burbank asked appellee if he would not like to have the \$1,000 placed in the Firemen's Insurance Company, who had at the time a policy of \$300, then existing and in force, on the same property. Appellee asked of Burbank if the Firemen's Insurance Company was as good a company as the Commercial. Burbank replied that it was, and a much better company. Appellee then stated to Burbank that he should place the \$1,000 with the Firemen's Insurance Company; Burbank stating, at the time, he would bring around the policy and receipt the following morning. This occurrence took place on the morning of March 1, 1892. Burbank proceeded on his way to the office of the Firemen's Insurance Company, and filed an application for said insurance of \$1,000, and which was then and there accepted by the company, as claimed by appellee. At about 5 o'clock on the evening of the same day, Kuessner had been in the rear part of his store cleansing the cloth of a lounge there with gasoline, and, when he had got it so cleansed, he and the boy assisting him started to carry the lounge to the forward part of the store, and in passing by a heated stove the same ignited, an explosion occurred, and a fire ensued, which entirely destroyed his property then contained in the store. Early the following morning he went to the office of appellant, and inquired if Burbank had placed the \$1,000 of insurance with appellant's company, and was informed that it had been so placed the day before. Appellee then returned to his store, and there met Burbank, who was again on his way to his office at the Firemen's Insurance Company. Kuessner asked Burbank if he had brought with him the policy. Burbank replied that he had not. Kuessner stated to Burbank that he desired the policy of \$1,000. Kuessner then went to the office of the company, and asked a clerk to make him out a receipt for the premium, and that he would pay the same. The clerk in charge turned to his books, and made out a receipt for \$23, which Kuessner paid; took the receipt, and proceeded again to his store. For a number of days after that time Kuessner made ineffectual efforts with A. O. Harding, the vice president and adjuster of the company, to adjust and determine the amount of loss and

damage. After the expiration of several weeks, appellee and appellant each appointed an appraiser, who found and reported that there was a total loss of the entire stock of goods, and the proof of said loss, amounting to \$1,813.94, was made and returned to the company on the 28th day of April, 1892, and accepted. These are the material facts with reference to the application for the policy for \$1,000 on March 1, 1892, and on which the judgment of the trial court was entered as to the count declaring on the oral contract. On appeal to the appellate court of the First district, the judgment of the trial court was reversed as to the policy for \$300, and a remittitur was entered, whereupon there was a judgment of affirmance for the sum of \$1,072.22.

The contention of appellant on the trial was that no oral contract of insurance had ever been made, and that no application for insurance had been accepted. By the judgment of the superior court, and the affirmance by the appellate court of the First district, these facts are conclusively determined: That there was a valid oral contract for insurance entered into; that the loss accrued in such manner that a liability was created; and the damage sustained was the sum of \$1,072.22. In this court it is urged that appellee should have declared on a refusal to issue a written policy, or treated the policy as issued, and sued thereon, and could not declare upon the oral contract as a binding contract of insurance. The application made is as follows:

"Firemen's Insurance Company, of Chicago: Insurance is wanted by F. Kuessner for one year, from Feb. 28, 1892, to Feb. 28, 1893, as follows:

Company.	Amount.	Rate.	Premium.	Renewal No.	Policy No.
Firemen's	1000	2.50	25.00	62468	

"\$950.00 on stock, consisting chiefly of furniture and upholstering materials. \$50.00 on store and shop, tools, fixtures, and implements contained in frame building, 139 22d St. E. A. Burbank, Applicant."

It is clear, from the evidence, that this application was made out and delivered to the company before the loss was incurred. There is conflict in the evidence as to whether it was accepted by the company on the day of its presentation. That it was on file, having been presented by Burbank, in the forenoon, is beyond doubt. The adjudication of the trial and the appellate court is conclusive that it was accepted.

In a suit to enforce the liability of an insurance company, it may be brought on the contract for insurance as well as upon the policy. The real course of action is the same in both the contract and policy. The measure of damages recoverable is the same, and the policy must be based on the contract of insurance, and can contain no element dif-

ferent therefrom. Where an application for insurance is presented to a company, stating what is wanted and the terms, and its officer or any agent having authority to issue a policy says one will be issued on that application, the minds of the parties have met in the execution of a contract, and a contract for insurance has been consummated. It is an oral contract. Though proposed in writing, the acceptance by parol and a promise to issue a policy thereon constitutes an oral contract. Corporations authorized by their charters to make insurance and issue policies are not precluded from entering into parol contracts to effect the same object. Whatever doubts might have heretofore existed as to the validity of parol contracts of insurance, it is now settled such contracts are valid. *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Commercial Mut. Marine Ins. Co. v. Union Mut. Ins. Co.*, 19 How. 321; *Ellis v. Insurance Co.*, 50 N. Y. 402; *Taylor v. Insurance Co.*, 9 How. 390; *Insurance Co. v. Farrish*, 73 Ill. 166; *Fire Ass'n v. Smith*, 59 Ill. App. 655. The evidence was sufficient to sustain the averments of that count of the declaration declaring on an oral contract. *Insurance Co. v. Hallock*, 27 N. J. Law, 645.

It is urged that there is no right of recovery because the premium was not paid before the loss occurred. The evidence shows that appellee, the morning after the fire, paid the amount owing for insurance, and took a receipt therefor. It is insisted that he gave no notice of the loss before paying the premium, and thereby perpetrated a fraud on the insurance company. He owed no duty to disclose the loss before making the payment. His silence neither was to his benefit nor disadvantage. The observation and experience of business men is that, where applications for insurance are made, and by an agreement officers or agents with authority to issue policies have promised to issue the same, then collections of the premium are not, in their business methods, always a condition precedent. Collections are often left to be made at the close of the month. Unless payment of the premium when an application is made is then made a condition precedent to acceptance, a promise to issue the policy is a consummation of the contract. The mere failure to pay the premium in advance, where an application and a promise to issue a policy is made, will not defeat the right to recover on the contract of insurance, in the absence of a demand for the payment of the premium, made as a condition precedent. Any other rule would allow a method of business to be used as a cloak for fraud. There was no demand for the payment of the premium before the acceptance of the risk. We therefore hold the contract was not rendered invalid by reason of the nonpayment of the premium. Our observation of methods of business causes us to hold the nonpayment of the premium, under the cir-

cumstances under which the application was made and accepted, did not defeat a recovery on the contract.

Without entering into a discussion of the question on the instructions given and refused, we recognize there are certain errors in the instructions given, but they are not such as should cause a reversal of the judgment. Upon this record the judgment should be affirmed, and it is so ordered. Affirmed.

(168 Ill. 131)

STODDARD v. GILBERT, Sheriff, et al.¹

(Supreme Court of Illinois. June 13, 1896.)

ASSIGNMENT FOR CREDITORS—DISCONTINUANCE—TITLE TO PROPERTY—APPEAL—ERROR WAIVED—REVIEW.

1. Errors waived in the appellate court will not be considered by the supreme court.

2. Rev. St. 1893, c. 10a, § 15, provides that on discontinuance of assignment proceedings all parties shall be remitted to their respective rights as they existed at the time of the assignment, except so far as the estate shall have been administered and disposed of. *Held*, that where insolvents, while their property is in the hands of an assignee, compromise with a majority of their creditors, and by agreement convey all their property in trust for the composition creditors, such conveyance is ineffectual to prevent title to the property from vesting in the insolvents on dismissal of the insolvency proceedings. 62 Ill. App. 70, affirmed.

Error to appellate court, First district.

Replevin by Horace H. Stoddard against James H. Gilbert, sheriff, and others. From a judgment for defendants, plaintiff brings error. Affirmed in appellate court (62 Ill. App. 70), and plaintiff brings error. Affirmed.

L. H. Bisbee and W. N. Gemmill, for plaintiff in error. Sleeper & Barbour, for defendants in error.

CARTWRIGHT, J. This is an action of replevin, brought by plaintiff in error in the circuit court of Cook county. Plaintiff filed the common declaration in replevin, to which the defendant interposed seven pleas. The question in the case turns upon the replication to the fifth plea and the demurrers to this replication. The fifth plea set forth a voluntary assignment by David A. Titcomb and E. S. Pratt, partners under the firm name of Titcomb & Pratt, for the benefit of their creditors; the recovery by the defendant the Commercial National Bank of a judgment against Titcomb & Pratt, and a discontinuance of the assignment proceeding in the circuit court while an execution upon the said judgment was in the hands of the defendant Gilbert as sheriff, and the levy on the property as the property of Titcomb & Pratt. To this plea a replication was filed, to which a demurrer was interposed, and the plaintiff, by leave of the court, then filed a further replication to the plea. To the further replication the defendants demurred, and by leave of court also filed an additional demurrer. The demurrers

were sustained. There were subsequent proceedings had, all of which were afterwards vacated, and there was judgment on the demurrers for the defendants. This judgment has been affirmed by the appellate court.

Numerous reasons, based upon the rules of pleading, are urged in this court why judgment should not have been rendered for the defendants; but it is shown by the brief and argument on behalf of plaintiff in error in the appellate court that none of the questions were presented to that court in any manner. That brief contained a statement of facts upon which it was alleged that the questions in the case arose, which were substantially adopted by the appellate court. Upon the facts as so stated alleged in the replications questions were presented to that court, and its judgment was invoked upon such statement without any reference to the rules of pleading now presented to this court. The questions then stated were as follows: "First. What is the effect of the dismissal of the voluntary assignment proceedings out of the county court upon the property theretofore held by the assignee? In whom does the title to that property vest? And what becomes of the trust imposed upon the property by the deed of assignment? Second. If it is held that upon the dismissal of the assignment proceedings out of the county court all parties, including creditors, are immediately remitted to the same rights and duties existing at the date of the assignment, then what were the rights of the defendants in this case at the moment before the insolvency proceedings herein were dismissed?" A third proposition, as to the right to levy upon property purchased by the plaintiff, as trustee, since the assignment proceedings had been begun, was stated; but in a subsequent part of the argument it is said that "the questions arising upon the pleadings as to the rights of the defendants to levy upon the property purchased by the assignee and Stoddard, as trustee, which was purchased after the assignment, partly by the individual money of Stoddard, as trustee, have all been withdrawn, and no issue, therefore, is raised by the record upon them." These were the only questions presented to the appellate court upon which its judgment was asked; and all other supposed errors, having been waived or abandoned in that court, cannot be considered here. *Strodtmann v. Menard Co.*, 158 Ill. 155, 41 N. E. 778. The facts alleged and necessary to be stated are substantially as follows: On April 15, 1893, David A. Titcomb and Eldridge S. Pratt, partners under the name of Titcomb & Pratt, were engaged in the furniture business in Chicago, and executed a deed of assignment to Robert W. Walker as assignee. Walker took possession of the goods, and proceeded to administer the estate under the directions of the county court. The Commercial National Bank, one of the defendants, held a judgment note against the firm for the sum of \$7,949, upon which judgment was entered the same day that the assignment was

¹ Rehearing denied November 6, 1896.

executed, but at a later hour. An execution on this judgment was placed in the hands of the defendant Gilbert, which was returned unsatisfied, because all the estate was in the hands of the assignee, being administered in the county court. On April 28, 1893, a meeting of creditors of the insolvent firm was held, and a committee was appointed to act and represent the creditors. A majority of the creditors accepted a proposition of David A. Titcomb of 50 cents on the dollar of their claims, payable in installments, and as a part of the plan Titcomb & Pratt executed an instrument purporting to transfer to the plaintiff Stoddard, as trustee, the property in the hands of the assignee, to be reduced to money, to pay said percentages; and after said payments were made the balance of the property was to be paid over to Julia A. Titcomb, to apply on an indebtedness held by her against Titcomb & Pratt. Stoddard accepted the trust on June 30, 1893, although the assignment proceeding had not yet been dismissed. On the 6th of July following, Walker resigned as assignee, and the plaintiff was appointed as his successor, and took possession of the estate. On July 24, 1893, an alias execution upon said judgment was issued, and placed in the hands of the sheriff, the defendant Gilbert. Plaintiff retained possession down to the 26th of July, when the proceedings were dismissed in pursuance of a petition of a majority in number and amount of the creditors of Titcomb & Pratt. The execution was levied upon the property August 23d after such discontinuance. An execution was also issued on a judgment in favor of the Chicago Daily News Company against Titcomb & Pratt. On the day following the levy this suit was brought.

It is claimed on the part of plaintiff that when the assignment proceedings were dismissed, and he ceased to hold possession of the property as assignee, it immediately passed from him as assignee to him as trustee under the agreement, and that there was no intervening title or interest in Titcomb & Pratt upon which the execution would be a lien. The statute¹ provides that upon a discontinuance of an assignment proceeding all parties shall be remitted to the same rights and duties existing at the date of the assignment, except so far as the estate shall have already been administered and disposed of. In construing this section in *Howe v. Warren*, 154 Ill. 227, 40 N. E. 472, it was said: "Upon such discontinuance the debtor again has his estate, except so far as administered, liable to be taken in satisfaction of his indebtedness, precisely as if no assignment had been made; and each creditor stands on the same footing of right to proceed against such estate as such right existed when the assignment was made." And again, in *Terhune v. Kean*, 155 Ill. 506, 40 N. E. 481, it was held: "Upon such discontinuance, the assigned estate, or so

much of it as remained unadministered, would revert to the assignor, and remain liable for the payment of his debts; and each creditor would have the right to proceed against it as it existed when the assignment was executed." When the attempted transfer to plaintiff was made, the title to the property was in Walker as assignee, and that agreement could only become operative upon a discontinuance of the proceedings. It was doubtless the purpose of the creditors to prevent the property from vesting in Titcomb & Pratt upon the dismissal as provided by the statute by creating another trust, and appointing the plaintiff as trustee to take the property and administer it. But there could be no disposition of the property by such an agreement which would defeat the plain meaning of the statute, and the scheme was ineffectual for that purpose. Creditors cannot be placed upon a different footing than that provided by the statute by the adoption of any scheme or device to that end. The judgment will be affirmed. Judgment affirmed.

(164 Ill. 314)

VOIGT v. KERSTEN.

(Supreme Court of Illinois. Nov. 23, 1896.)

MUTUAL BENEFIT INSURANCE — BENEFICIARIES — CHANGE BY WILL — VESTED RIGHTS — COSTS.

1. A benefit society organized under 3 Starr & C. Ann. St. c. 73, § 122, providing that such societies may furnish pecuniary benefits, upon the death of a member, to certain of his kin or representatives, "or to the designated beneficiary of such deceased member," issued a certificate payable to a beneficiary, designated therein, in no way related to the member. The by-laws of the society until after the death of the member provided that endowments should be paid to the person designated by the will of the member or in the endowment certificate. After the issuance of the certificate the member requested the society to change the beneficiary to one also no relative of his, which the society refused to do, and he made a will designating this other person as his beneficiary. Subsequent to the issuance of the certificate, and prior to the attempted change of the beneficiary therein named, *Sess. Laws 1893, p. 130, § 1*, took effect, providing that payment of death benefits by such societies should only be made to "the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon the member; and such benefits shall not be willed, assigned or otherwise transferred to any other person." Held, that this act did not take away the right of the member to designate, as beneficiary of a certificate issued prior to its enactment, a person not within the classes mentioned in the act. 61 Ill. App. 42, affirmed.

2. The beneficiary designated in an endowment certificate issued by a fraternal insurance society acquires no vested right to the fund named in the certificate till after the death of the member to whom the certificate is issued.

3. The amount involved in the trial court determines the jurisdiction of the supreme court, which is not defeated by the fact that the fund in controversy, which was paid into the trial court, has been reduced below the jurisdictional amount by an order of the appellate court that the costs of the suit be paid out of it.

¹ Rev. St. 1893, c. 10a, § 15.

4. Where adverse claimants to the fund due upon an endowment certificate issued by a beneficiary society are brought into court by a bill of interpleader filed by the society for the purpose of determining their rights, which are prosecuted in good faith, costs may be awarded to be paid out of the fund.

Error to appellate court, First district.

Bill of interpleader filed in the superior court by the High Court of the Independent Order of Foresters of the State of Illinois, making Adolph Voigt and Anna Rosina Kersten defendants, for the purpose of determining which is entitled to the amount due on an endowment certificate issued by complainant to one Paul Anton Fischer. Decree for defendant Voigt. Appealed to appellate court by defendant Kersten, where decree was reversed (61 Ill. App. 42), and fund awarded to Kersten, whereupon defendant Voigt sued out error from supreme court, where judgment of appellate court is affirmed.

Sess. Laws 1893, p. 130, § 1, being part of an act for organization and management of fraternal beneficiary societies, approved and in force June 22, 1893, provides "that a fraternal beneficiary society is hereby declared to be a corporation or association, formed or organized and carried on for the sole benefit of its members and their beneficiaries, and not for profit. Each society shall have a lodge system, with ritualistic form of work and representative form of government, and shall make provision for the payment of death benefits and may, in addition thereto, provide for the payment by local lodges of benefits in case of sickness, disability, or old age of its members, subject to their compliance with its constitution and laws. The fund from which the payment of such benefits shall be made, and the fund from which the expenses of such association shall be defrayed, shall be derived from assessments or dues collected from its members. Payment of death benefits shall only be made to the families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon the member; and such benefits shall not be willed, assigned or otherwise transferred to any other person. All such societies shall be governed by this act, and shall be exempt from the provisions of all insurance laws of this state, and no law hereafter passed shall apply to them unless they be expressly designated therein." The by-laws of the High Court of the Independent Order of Foresters of the State of Illinois, in force at the time the certificate in question in this action was issued, provided that "on the death of a member of this order in good standing the endowment shall be paid (1) to such person or persons as he may designate in his last will and testament or endowment certificate; (2) to his widow; (3) to his orphans; (4) to his heirs. In the absence of said will or endowment certificate, and in case such member shall leave no widow, orphans, or heirs, then such amount shall revert to the endow-

ment fund of this High Court, and if no one entitled to take shall appear and make claim within one year from the date of said brother's decease, then such endowment shall be absolutely forfeited to the High Court, and revert into its treasury, and be applied in the payment of the next endowment, without assessment."

A. N. Tagert, for plaintiff in error. Olson & Bantle, for defendant in error.

PER CURIAM. We have carefully examined the record in this case, together with all briefs and arguments, and authorities cited by counsel for both plaintiff and defendant in error. The opinion by Shepard, J., in the appellate court, in the statement of facts, in the discussion of the legal questions involved, and in the conclusion arrived at, is all in accordance with the views of this court. The opinion of the appellate court is as follows:

"This is a bill of interpleader, filed in the superior court by the High Court of the Independent Order of Foresters of the State of Illinois, a fraternal and benevolent organization, organized and incorporated under the laws of the state of Illinois. The bill was filed for the purpose of having the court determine as to who is entitled to the fund or endowment due on certificate No. 36,302, issued by the complainant, the High Court of the Independent Order of Foresters of the State of Illinois, to Paul Anton Fischer, by the name of Tony Fischer. This certificate is dated January 14, 1893, in and by which the complainant agrees to pay to Adolph Voigt \$1,000 on satisfactory evidence of the death of Paul Anton Fischer. The facts in the case are principally admitted by the parties, and are, in substance, that Paul Anton Fischer, commonly known as Tony Fischer, was an unmarried man; that he was a member in good standing in complainant society; that he died on October 30, 1894; and that at the time of his death he continued to be a member of said society in good standing. It is also admitted that the defendant Adolph Voigt is now alive, and is godfather of said Fischer. It is also admitted by the parties that neither the defendant Adolph Voigt nor Mrs. Anna Rosina Kersten is now or ever was a member of the family of said Fischer, or heir, blood relative, or affianced husband or wife of, or dependent on, said Fischer during his lifetime. It appears from the evidence that, after the deceased had taken out the certificate set out in the bill in this case, he desired to change the beneficiary named therein, and for that purpose applied to the subordinate lodge of the complainant order, asking that the payee or beneficiary named in the certificate be changed from Adolph Voigt to Anna Rosina Kersten, the written request to said society being dated October 19, 1894, and that, when said written request was presented to the proper officers of the complainant society, it

was refused. It further appears that the deceased, on or about the 17th day of October, 1894, attempted to execute a will, in and by which he named said Anna Rosina Kersten, as beneficiary of said certificate No. 36,302, and directed that said benefit fund or endowment should at his death be paid to her. It thus appears, from the evidence, the admissions of the parties, and the allegations of the bill, that one or the other of the two defendants to the bill, the appellant or the appellee, is entitled to the fund named in the certificate held by the deceased, unless there is some provision of the statute of the state to the contrary. The appellee, Voigt, claims that by the statute of the state which was approved and went into effect June 22, 1893, the right of the deceased to name another beneficiary than himself, Voigt, who is named in the certificate, is restricted to one who is included within its terms, viz. families, heirs, blood relations, affianced husband or affianced wife of, or to persons dependent upon, the member. The appellant, Kersten, contends that the contract between the deceased and the complainant order was such that the deceased had the right to change the beneficiary at any time he saw fit, so long as he complied with the terms of the contract on his part to be performed, and that such right was not, and could not be, affected by a change in the statute made subsequent to the contract, and further contends that the deceased did all in his power, and all that he was required to do, to change the beneficiary to herself, and that therefore she is entitled to receive the fund the same as though she had been named in the certificate in the place of Voigt.

"The statute in force July 1, 1887, under which the complainant body was organized and operating at the time of the issuance of the certificate to the deceased, reads in part as follows: 'That corporations, associations or societies for the purpose of furnishing life indemnity or pecuniary benefits upon the death of a member, to the widows, heirs, relatives, legal representatives or the designated beneficiaries, of such deceased member, * * * may be organized.' 3 Starr & C. Ann. St. c. 73, § 122. And the by-laws of the complainant, in force when said certificate was issued to the deceased, provide in part as follows: 'This endowment law shall go into full force and effect on January 1, 1895. * * * The old endowment law as now in force shall be law and guide for the payment and collection of assessments and payment of death claims until December 31, 1894, inclusive, in all subordinate courts, such accounts to be continued in the old account books of subordinate courts, and high court; but on and after January 1, 1895, new and separate accounts shall be opened with the members in such subordinate courts, in such books as may be adopted by the high board of directors, and new and separate accounts be opened for such courts in the high court.' Thus there was nothing, either in the statute or in the

laws of the complainant order, that prevented the appellee, Voigt, from being named as beneficiary in the certificate at the time deceased became a member of the order, and of the issuance of the certificate. And as the law then stood the member had not only the right to name Voigt as beneficiary, but he had also the right to subsequently appoint another beneficiary in the place of Voigt. Until after the death of the member, the beneficiary acquired no vested right to the fund named in the certificate, and the right to appoint another remained in the member during his lifetime, without limit or restriction except such as was imposed by the statute or laws of the order. *Martin v. Stubbings*, 126 Ill. 387, 18 N. E. 657. Neither appellee nor appellant would be eligible as beneficiary under the statute of June, 1893. Both or either of them were eligible under the provisions of the act in force at the time the certificate in question was issued, in January, 1893. The evidence does not show that the deceased had (and it was conceded upon argument that he had not) any relatives or connections or persons dependent upon him who would be eligible to take under the provisions of the act of June, 1893. Therefore, by the passage of the act of June, 1893, if the right to name a new beneficiary outside of the class mentioned in that act was taken away from the deceased, then the benefit fund must be paid to the party therein named, the appellee, Adolph Voigt, or the fund must revert to the complainant order. At the time the contract was made between the deceased and the complainant order, this right to appoint the beneficiary or change the name existed, and, we think, was an important part of the contract entered into. It would seem that the construction of the act passed in June, 1893, giving it the effect to destroy that right of appointing a beneficiary or naming another beneficiary, which existed in favor of the deceased under his contract prior to the passage of the act, would be to give the act a retrospective effect, and destroy the obligation of the contract entered into between the deceased and the complainant. It is a recognized rule in the construction of statutes, that they should be so construed as to give them a prospective operation only, and they should be allowed to operate retrospectively only where the legislative intention to give them such operation is clear and undoubted. *Benton v. Brotherhood of Railroad Brake-men*, 146 Ill. 570, 34 N. E. 939.

"It is evident, by the acts of the deceased before his death, that he no longer wished the fund to be paid to the appellee; that his desire and wish was, at the time of his death and prior thereto, that the appellant should receive the fund derived from the certificate in question. He applied to the complainant for the change to be made in the certificate, making her the beneficiary instead of Voigt, and, not content with such application to the society, he also made an attempted will,

clearly designating her as the person whom he desired to receive the money derived from said payment of the certificate. In other words, he did all that was in his power to do to make the change and to secure to appellant the money in question; and the fact that the complainant society refused to make the change could have no weight to deprive the appellant of the funds if the right existed in deceased to make such change. We think that the right to make this change was one of the considerations entering into the contract at the time the deceased obtained his certificate from the complainant, and that it was a material right, and one that could not be taken away by the legislature; and we do not think that the legislature intended, by the act of June, 1893, to affect certificates issued prior thereto. Our conclusion is that the decree of the superior court, in awarding the fund to Volgt, was erroneous; and, it appearing that the said fund was paid into the said superior court by the said complainant, the said decree is therefore reversed, with directions to the superior court to enter a decree in favor of the appellant for the said fund remaining in the said superior court; and, the controversy appearing to have been conducted in a good-faith effort to determine to whom the fund should be paid, we think the costs in both this court and in the superior court should be paid out of the fund, and it is therefore ordered that the appellant be required to pay the cost in both courts as a condition precedent to her right to have the fund paid to her. Reversed, with directions."

The defendant in error enters a motion in this court to dismiss this writ of error on the ground that the amount involved in the decree from which this writ of error is sued out, so far as it affects the plaintiff in error, involves less than \$1,000. This motion is based on the fact that, though the sum of \$1,000 was paid into the court by Independent Order of Foresters, \$60 was ordered to be paid on costs of defendant in error and \$40 was ordered to be paid as master's fees. We have held the rule to be that the amount involved in the trial court determines the jurisdiction of this court, and the sum of \$1,000 paid in by the interpleader gives this court jurisdiction. *Gilmore v. Courtney*, 158 Ill. 432, 41 N. E. 1023; *Railroad Co. v. Davis*, 159 Ill. 53, 42 N. E. 382.

We fully concur with the reasoning and conclusion of the appellate court in this case, and the judgment of the appellate court is affirmed, and the case is remanded to the superior court of Cook county, with directions to enter a decree in favor of the plaintiff in error, Anna Rosina Kersten, in conformity with the report of the master in chancery therein and the judgment of the appellate court; the costs to be paid out of the fund, by appellee, for reasons stated in opinion of the appellate court. The judgment of the appellate court is affirmed.

(151 N. Y. 266)

COLTON et al. v. NEW YORK EL. R. CO.
et al.

(Court of Appeals of New York. Dec. 24,
1896.)

APPEAL—MOTION FOR PREFERENCE—SOLE PARTY.

Under Code, Civ. Proc. § 791, which establishes the order in which "civil causes are entitled to preference among themselves, in the trial or hearing thereof," and provides: "(4) In the court of appeals, an action, a party to which has died, pending the action, where the pendency of the action prevents a final settlement of the estate of a deceased party. (5) In any court, an action * * * in which an executor or administrator * * * is the sole plaintiff or sole defendant," etc.,—a party is not entitled to a preference under subdivision 4 or 5, unless a sole plaintiff or defendant.

Appeal from supreme court, appellate division, First department.

Action by Charles H. Colton and others against the New York Elevated Railroad Company and another. Judgment for plaintiffs was affirmed by the appellate division (39 N. Y. Supp. 1122), and defendants appeal.

This is a motion for an order designating this action as a preferred cause, and placing it upon the calendar as such. Teresa A. Colton was one of the plaintiffs at the commencement of this action. It was commenced in October, 1888. Subsequently, and on April 6, 1891, while it was still pending, she died, leaving a last will and testament, wherein Charles H. Colton was named as executor. The will was duly admitted to probate in 1891, and letters testamentary issued to him as sole executor. The action was to recover damages caused by the maintenance and operation of an elevated railroad in front of certain property situate in the city of New York. The estate of the decedent is entitled to a portion of the damages recovered herein, and the executor will be unable to finally settle it until the determination of the action. Denied.

Davies & Rapallo, for appellants. J. Aspinwall Hodge, Jr., for respondents.

MARTIN, J. The question involved in this motion is whether, where one of several plaintiffs in an action dies during its pendency, and a personal representative is substituted, he may have the case placed upon the calendar as a preferred cause, under the provisions of subdivision 4, § 791, Code Civ. Proc., where the pendency of the action prevents a final settlement of the estate of such decedent. The preference upon the calendar of the court of appeals in cases like this is regulated by the provisions of section 791 of the Code of Civil Procedure. So far as material to the question under consideration, that section provides: "Civil causes are entitled to preference among themselves, in the trial or hearing thereof; * * * (4) In the court of appeals, an action, a party to which has died, pending the action, where the pendency of the action prevents a final settlement of the estate of the deceased party. * * * (5) In any court, an action,

* * * in which an executor or an administrator, * * * is the sole plaintiff or sole defendant. * * * It maybe, if read literally, and without regard to the other provisions of the section, that subdivision is sufficient to justify the conclusion that upon the death of any party during the pendency of an action his representative is entitled to have the cause preferred. Still that subdivision falls to plainly and definitely convey that idea. The language is, "a party," and not "any party," so that the words may, perhaps, be fairly regarded as designating a party plaintiff or a party defendant, or an appellant or respondent, as distinguished from an individual, who may be a joint-party plaintiff or defendant. We are unable to discover any good reason for believing that the legislature intended to provide that upon the death of one of numerous plaintiffs or defendants during the pendency of an action it should be entitled to a preference, especially when this provision is read in connection with the other provisions of section 791. It will be perceived that the only provisions of that section which relate to preferences on the ground that a personal representative of a decedent is a party are contained in the subdivisions quoted. Subdivision 4 provides that when a party dies during the pendency of an action in this court, a preference may be had. This relates only to cases pending here. Subdivision 5 relates to all courts, and expressly provides that a party is entitled to a preference upon the ground that the pendency of the action prevents a settlement of the estate only when the executor or administrator is sole plaintiff or defendant. Under that provision, no such preference can be had in behalf of a joint plaintiff or joint defendant. It is, we think, not to be supposed that the legislature intended to prevent such preferences in behalf of a joint plaintiff or joint defendant in other courts, and permit it in cases pending here. We find no reason for any such distinction. We think the provisions of this section of the Code should be construed together, and, when so considered, they indicate that a party is not entitled to a preference under either of those provisions unless a sole plaintiff or defendant in the action. The motion for a preference in this case should, therefore, be denied, without costs. All concur, except BARTLETT, J., not voting, and O'BRIEN, J., absent. Motion denied.

(151 N. Y. 283)

BRADY v. NALLY.

(Court of Appeals of New York. Dec. 22, 1896.)

APPEAL—REVIEW—OBJECTIONS NOT RAISED BELOW
— PAROL EVIDENCE — FAILURE TO
OBJECT—EFFECT.

1. A judgment on a counterclaim will not be disturbed on appeal because the findings do not sustain the allegations of the answer in respect to the counterclaim, where the evidence, which goes beyond the allegations of the answer, supports the judgment, and was received without objection. 28 N. Y. Supp. 64, reversed.

2. One party to a written contract may show by parol that the person purporting to be the other party thereto was merely an agent, and that another was the real party.

3. In an action for work and materials defendant set up a counterclaim for work and material furnished plaintiff in part performance of a contract to do the plumbing in a school building erected by plaintiff as contractor. Defendant put in parol evidence, without objection, that the work was to be paid for in installments; as plaintiff received money from the school board. Afterwards the written contract was read in evidence, which stated simply that defendant was to receive a specified sum for the entire work; but plaintiff did not ask that the parol evidence be excluded. *Held*, that the parol agreement as to the time of payments, proved without objection, should be given force after the written agreement was in evidence.

4. Where a contract is in writing, the presumption that it embraces the entire contract between the parties is overcome by parol evidence, admitted without objection, of additional prior or contemporaneous stipulations between the parties.

Appeal from superior court of New York City, general term.

Action by James H. Brady against Christopher Nally. From a judgment of the general term of the superior court of the city of New York (28 N. Y. Supp. 64) reversing a judgment in favor of defendant entered on the report of a referee, defendant appeals. Reversed.

J. Newton Fiero, for appellant. C. N. Bovee, Jr., for respondent.

VANN, J. The referee before whom this action was tried found in favor of the plaintiff upon the claim set forth in the complaint for labor performed and materials furnished, and allowed him the sum of \$3,125 therefor. He found in favor of the defendant upon the third counterclaim set forth in the answer, for labor and materials, and allowed him therefor the sum of \$5,139.68, including interest. He directed judgment in favor of the defendant for the difference between these sums, with costs. The plaintiff alone appealed, and the general term reversed the judgment, upon the ground that "the findings of fact do not sustain the allegations of the answer in respect of the counterclaim." While it is true that the evidence went far beyond the allegations of the answer, as it was received without any objection based upon that ground, and no motion was made to strike it out as not within the issues, the case comes under the rule that defects which, if pointed out during the trial, might have been obviated or avoided, are not available on appeal. *Hofheimer v. Campbell*, 59 N. Y. 269-272; *Knapp v. Simon*, 96 N. Y. 284-291; *Fallon v. Lawler*, 102 N. Y. 228-233, 6 N. E. 392; *Wells v. Association*, 120 N. Y. 630, 24 N. E. 276; *Gillies v. Improvement Co.*, 147 N. Y. 420, 42 N. E. 196. If the proper objection had been made upon the trial, an amendment of the answer might have been allowed so as to enlarge the issues by embracing the items which the general term held were not covered by the pleadings.

Under the circumstances it was the duty of that learned court to consider the facts as proved, rather than as alleged, and to regard the answer as amended by implied consent, so as to justify the admission of the evidence objected to upon appeal for the first time. It is, however, insisted that the judgment entered on the report of the referee was properly reversed, because there was no competent evidence tending to show that anything was due to the defendant upon the contract established by him. Upon the trial the defendant testified, without objection, that on the 14th of May, 1888, James Brady, the father of the plaintiff, brought him a paper to sign, saying: "Here is a paper that my boy Jim and I drew up last night, and he wants you to look it over, and see what you think about it. Just read it over, and see if it suits you;" that, after examining the paper, he said that it did not specify the time when he was to get his pay, and that James Brady then replied: "That will be all right. James will give you money, or I will give you money whenever you want it, and I will pay you in accordance to your work, and he will pay you in accordance to the work you have done, and as he gets it from the school board." A day or two later the defendant and James Brady signed the paper, which is as follows: "This agreement, made and entered into this 16th day of May, 1888, by and between James Brady, builder, of the city of New York, of the first part, and Christopher Nally, plumber, of the second part. Whereas, the party of the first part is about to erect a public school building on the southeast corner of Lexington avenue and Ninety-Sixth street for the city of New York; and whereas, the party of the second part enters into this agreement to do all the plumbing, gas piping, gas fixtures, sewers, and excavating for the same, furnish and put in all manner of piping, both iron and lead, that may be required to complete the said school building, including labor, to make a complete finish as laid down by plans and called for by the specifications, and to the satisfaction of the superintendent of school buildings in every respect; and for such work, labor, and materials the party of the first part agrees to pay the price or sum of eleven thousand dollars (\$11,000.00). The party of the second part to pay for all permits and connections, etc., and to proceed with the work whenever it is ready." After this agreement had been read in evidence, without objection, the defendant offered to show that James Brady was not, in fact, the party of the first part to the contract, but that James H. Brady, the plaintiff, was the real party, and that James Brady was simply his agent. The plaintiff's counsel objected "to any testimony showing a different agreement than that produced in writing," but the referee overruled the objection, and the plaintiff excepted. The defendant then showed that James Brady was merely an

agent for his son, the plaintiff, and that, although he executed the contract in his own name as principal, he was really acting only as agent. The plaintiff insists that this was an error that required a reversal, but it is well settled, as was said by Judge Andrews in *Briggs v. Partridge*, 64 N. Y. 357-362, "that a principal may be charged upon a written parol executory contract entered into by an agent in his own name, within his authority, although the name of the principal does not appear in the instrument, and was not disclosed, and the party dealing with the agent supposed that he was acting for himself; and this doctrine obtains as well in respect to contracts which are required to be in writing as those where a writing is not essential to their validity." See, also, *Coleman v. Bank*, 53 N. Y. 393; *Nicoll v. Burke*, 78 N. Y. 530; *Ludwig v. Gillespie*, 105 N. Y. 653, 11 N. E. 835.

In order to fully establish his counterclaim, it was necessary for the defendant to show that something was due upon said contract for the partial performance thereof, as he had not fully performed it when this action was brought. As the instrument appeared, upon inspection, to be a complete contract, embracing all the particulars necessary to make a perfect agreement, and designed to express the whole arrangement between the parties, it was presumed to embrace the entire contract, which, on its face, was indivisible as to the time of payment. *Thomas v. Scutt*, 127 N. Y. 133, 138, 27 N. E. 961. Still the defendant had been permitted to show, without objection, that before this agreement was signed James Brady promised, both for himself and the plaintiff, to pay the defendant according to the amount of work done, and as payments were received from the school board. When this evidence was received, it had not appeared that there was a written contract, yet no motion was made to strike it out after that contract had been read in evidence. When, however, the defendant attempted to go a step further, and prove the value of the work done and materials furnished by him in partial performance of the contract, objection was made, but only as mentioned hereafter. The following question was asked by his counsel: "What was the fair and reasonable charge for the labor and material which you had furnished up to that time?" This was objected to on the ground "that there is a specific contract for \$11,000," but the objection was overruled, the plaintiff excepted, and the defendant answered, "The amount I had done was worth four thousand four hundred and ninety-six dollars on the school." Unless the written agreement is to be regarded as modified by the parol agreement previously made as to partial payments, this evidence was improperly received. The question is whether the parol agreement, although proved without objection, can be given any force after the written agreement was put in evidence. No

motion was made to strike out the verbal testimony. No challenge was made to the parol evidence except as stated, unless it was after the close of the trial, and the decision of the issues by the referee, by an exception to the finding of fact that "the plaintiff agreed to pay the defendant the sum of \$11,000 in installments or sums proportionate to the work done and materials furnished as aforesaid at the time payments were received from the comptroller of the city." When the plaintiff objected to any testimony showing "a different agreement than that produced in writing," it was to a question that was clearly competent, as we have held, to show that the person who executed the written agreement in his own name was an agent, and not a principal. That objection should be limited in its effect to the question in respect to which it was interposed, and not extended so as to change the position of the plaintiff with reference to other testimony received without objection, and allowed to remain unchallenged by a motion to strike out; for, obviously, it was neither designed nor adapted to that end. The same is true of the objection made to the offer to show the value of the labor performed and material furnished in part performance of the contract, for no reference was made to the parol evidence that tended to vary the effect of the written agreement, nor was any claim made that such evidence could not properly be considered by the referee in deciding the case. The exception to the finding of fact that payment was to be made in installments was too late to be effective as notice, either to the defendant or the referee, that the plaintiff was unwilling that the parol evidence under consideration should remain in the case, or that it should be regarded or treated as ineffectual for any purpose. We think that the plaintiff waived his right to object to the consideration of that testimony by failing to make objection when it was received, and by neither moving to strike it out, nor directly challenging its effect in any way. If he desired the referee to disregard it, it was his duty to say so before the close of the trial. If he wished to have it out of the case, he should have made a motion to that effect. He could not expect the court, of its own motion, to refuse to consider testimony which he did not see fit to object to when it was received, and which he allowed to remain as evidence, without protest or question. By failing to take the position during the trial that it was not legal evidence, and hence that it should be disregarded, he impliedly consented that it should be considered and acted upon by the referee, who, indeed, had no right to refuse consideration to anything that the parties had spread before him as evidence to guide him in passing upon their rights.

It is, however, insisted that, in view of the conclusive nature of the presumption that the written agreement embraced the entire con-

tract between the parties, the parol evidence, although received by consent, cannot overcome that presumption. The answer to this position is that the parties may, by agreement, express or implied, accept oral testimony instead of the presumption ordinarily arising from written evidence. They have the right to make a rule of evidence for their own case, and they are presumed to have done so when testimony, otherwise incompetent, is received without objection, and without any effort to have it stricken from the minutes, or disregarded by the trial court. They may waive the rules established by the courts to govern the admission of evidence, the same as they may waive the rule established by the legislature that certain contracts must be in writing; and a waiver may be inferred from the failure of the party, for whose benefit the rule was made, to object in due season, or in some way to insist upon compliance with the law. *Sherman v. McKeon*, 38 N. Y. 266-274; *Vose v. Cockcroft*, 44 N. Y. 415; *Hilton v. Fonda*, 86 N. Y. 339. The general rule upon the subject was so clearly and comprehensively stated by Judge Earl in a recent case that his remarks, although often quoted in our reports, may properly be repeated here: "Parties by their stipulations may in many ways make the law for any legal proceeding to which they are parties, which not only binds them, but which the courts are bound to enforce. They may stipulate away statutory, and even constitutional, rights. They may stipulate for shorter limitations of time for bringing actions for the breach of contracts than are prescribed by the statutes, such limitations being frequently found in insurance policies. They may stipulate that the decision of a court shall be final, and thus waive the right of appeal; and all such stipulations not unreasonable, not against good morals or sound public policy, have been and will be enforced; and, generally, all stipulations made by parties for the government of their conduct or the control of their rights in the trial of a cause or the conduct of a litigation are enforced by the courts." In *re New York, L. & W. R. Co.*, 98 N. Y. 447, 453. The plaintiff was entitled to the benefit of the rule that evidence of what was said between the parties to a valid instrument in writing, either prior to or at the time of its execution, cannot be received to contradict or vary its terms. *Thomas v. Scutt*, *supra*. It was not unreasonable or against good morals or sound public policy that he should waive that rule, if he saw fit to do so. We think that by the course pursued upon the trial he is conclusively presumed to have waived it, and that, after the trial had closed and the case had been decided against him, he could not invoke the rule in order to secure a reversal of the judgment. *Sterrett v. Bank*, 122 N. Y. 659, 662, 25 N. E. 913. We find no error in the record before us that justifies the action of the general term, and

its order should therefore be reversed, and the judgment entered upon the report of the referee affirmed, with costs. All concur, except BARTLETT, J., not voting. Judgment reversed.

(151 N. Y. 249)

MONTGOMERY et al. v. MAYOR, ETC., OF CITY OF NEW YORK.

(Court of Appeals of New York. Dec. 22, 1896.)

CONTRACTS — PERFORMANCE — RIGHT OF INSPECTION — ESTOPPEL.

1. Under a contract for the construction of a sewer, providing that the certificate of the inspector of materials and work to be appointed by the city should be a condition precedent to the contractor's right of payment, an action by the contractor will not lie to recover damages based upon the increased cost of the work alleged to be due to delay caused by conduct of the inspector in rejecting material which was in fact in accordance with the plans and specifications. 29 N. Y. Supp. 687, affirmed.

2. The tacit consent of the contractors to the action of the inspector, as manifested by the procurement of other material and continuance of the work, estops them from now complaining of such action.

Appeal from superior court of New York City, general term.

Action by John J. Montgomery and Samuel F. Pease against the mayor, aldermen, and commonalty of the city of New York. A judgment dismissing plaintiffs' second cause of action having been affirmed by the general term (29 N. Y. Supp. 687), plaintiffs appeal. Affirmed.

L. Laffin Kellogg, for appellants. Francis M. Scott, for respondent.

PER CURIAM. By the terms of the contract made between the plaintiffs and the city, which provided for the construction of a sewer, the commissioners of the park department were authorized to appoint an inspector of the materials furnished and the work done, "and to see that the same corresponded with said specifications and plans." The plaintiffs further agreed in the contract that the certificate of the inspector that the work had been faithfully performed, in accordance with the requirements of the contract, approved by the engineer of the commissioners, should be a condition precedent to their right of payment. The effect of these provisions was to vest in the inspector a right or capacity to pass upon the performance of the work, which came very near to constituting him, as between the parties, the judge as to that matter. The plaintiffs' cause of action for damages is based upon an increased cost of the work, alleged to be due to the action of the inspector in delaying the work, through his rejection of materials which were in accordance with the plans and specifications. The plaintiffs' evidence shows that the inspector frequently did reject the pipe and cement intended to be used, and, possibly enough, that he was

very arbitrary in doing so. The plaintiffs were not otherwise prevented from going on with the work than by the objections which were made by the inspector to the suitability of the materials. It may be true that his objections were not sound, and perhaps his superior officers should have listened more indulgently to the plaintiffs' complaint concerning the inspector's action. But, assuming the truth of all this, we fail to see how any cause of action has arisen against the city for these damages. It would be very extraordinary, and we think it would constitute an unsafe precedent in future cases, if contractors with the city under these contracts could maintain actions against it for damages, where the execution of the work contracted for was delayed, upon the ground that the delay was caused by the officers who, by the force of the contract, were invested with the power of supervision. This is not at all like the Mulholland Case, 113 N. Y. 631, 20 N. E. 856, where, through the action of the city's engineers, more work was required of the plaintiff than was called for by the contract, by reason of a deviation from the original plan, which caused additional and useless labor. If the inspector had the power under this contract to reject materials which he thought unfit to be used, the plaintiffs certainly cannot complain; for such was the agreement of the parties. For all that the case discloses, there was nothing to prevent the plaintiffs going on with the work, and relying upon their ability to prove, if upon completion the city should refuse to make payment, that the work and materials were up to the requirements of their contract. But the plaintiffs, in effect, acquiesced in the inspector's rejection of materials; for they went on with the work after procuring other materials, or, at least, they must be assumed to have done so. We do not think they can be heard to complain that the city has been made liable to them in damages, upon the theory that a delay occurred in the completion of the work, whereby the cost was increased to them, when the delay was occasioned in the exercise of a power of supervision which the contract warranted, and which the plaintiffs seem to have recognized. We therefore think that the complaint was properly dismissed as to this cause of action, and that the judgment appealed from should be affirmed, with costs. All concur. Judgment affirmed.

(151 N. Y. 237)

BARKER v. CENTRAL PARK, N. & E. R. R. CO.

(Court of Appeals of New York. Dec. 22, 1896.)

STREET RAILROADS — REASONABLENESS OF RULES — TENDER OF FARE — QUESTION FOR COURT.

In an action for an assault, it appeared that plaintiff tendered a five-dollar bill to defendant's street-car conductor in payment of a

five-cent fare, stating that it was the only money he had with him, and that the conductor refused to change it, and ejected him. It was stipulated that defendant had a rule (not brought to plaintiff's notice) requiring conductors to furnish change to the amount of two dollars, but that there was no rule forbidding conductors to make change for a larger amount. There was no evidence of a custom on the part of plaintiff or the public of tendering to defendant five dollars in payment of a five-cent fare, and receiving the change, but plaintiff testified that on a former occasion, and on another line, he had offered a five-dollar bill for his fare, and that it had been changed for him. *Held*, that the tender was unreasonable, as a matter of law.

Appeal from common pleas of New York city and county, general term.

Action by Benjamin Barker, Jr., against the Central Park, North & East River Railroad Company. From a judgment of the general term of the court of common pleas for the city and county of New York (22 N. Y. Supp. 1132, *mem.*), affirming a judgment dismissing the complaint, at the close of plaintiff's case, plaintiff appeals. Affirmed.

Samuel H. Ordway, for appellant. Henry Thompson, for respondent.

BARTLETT, J. This appeal presents a novel question, which has not been considered by this court in any case to which our attention has been called. No opinion was written in the court below. The defendant corporation operates a horse railroad in the city of New York as a common carrier of passengers. On the 12th of January, 1889, the plaintiff entered one of the defendant's cars as a passenger, and, when called upon for his fare of five cents, found that the smallest amount of money in his possession was a five-dollar bill. The plaintiff offered the bill to the conductor, who stated: "I am not supposed to change it. You must get off." To this the plaintiff replied: "I won't get off. You must put me off." The conductor thereupon put the plaintiff off the car. It is not claimed that he used any more violence than was necessary, or that the plaintiff was actually injured in person or property.

The transaction was undoubtedly a technical assault and battery, and the plaintiff seeks in this action to recover his damages therefor. It may be conceded, as was urged by plaintiff's counsel in his very able argument, that, if plaintiff was unlawfully ejected from the car, this is a case for substantial damages. A number of points were discussed at the bar, but, in the view we take of this case, there is but one question to be considered. The plaintiff's counsel asked to go to the jury on several questions, and, among others, the following: "Whether the five dollars was in this case, and under the circumstances testified to, a reasonable amount for the plaintiff to tender the conductor in payment of his fare?" The complaint was dismissed at the close of the plaintiff's case, and the point is made whether the reasonableness of the tender of five dollars to the conductor is a question of law or a question of fact on the evidence. It was stipulated at

the trial that the defendant had a rule requiring its conductors to be prepared to furnish change to the amount of two dollars, and that such rule was not brought to the attention of plaintiff. It was further stipulated that there was no regulation forbidding the conductors to make change to a greater extent than two dollars. On cross-examination of the plaintiff he testified as follows: "Q. Why did you say to the conductor, before making any tender, 'I have only got a five-dollar bill'? A. Well, because I felt rather apologetic about offering that large amount, because I didn't know whether it might inconvenience him with using up a great deal of his change or not, and, of course, I wouldn't have offered five dollars if I had anything else, and I wanted to explain it." It thus appears that the plaintiff regarded his offer of the five-dollar bill as unusual and requiring explanation. There is no evidence of a custom on the part of the plaintiff or the public of tendering to defendant five dollars in payment of a five-cent fare, and receiving the change, nor of any rule of the defendant imposing upon their conductors the duty of furnishing passengers with change in so large an amount. The plaintiff swore to one occasion when he had offered a five-dollar bill for his fare, and had it changed, but it was on the car of another line. There is no evidence which would have warranted the trial judge in submitting to the jury the question whether the plaintiff's tender of the five-dollar bill, under the circumstances, was unreasonable. On the evidence as it stands, the plaintiff's tender of the five-dollar bill was unreasonable as a matter of law, and the undisputed facts are not of such a nature that reasonable men might differ in regard to the inferences proper to be drawn from them. In this state of the record it is well settled that there is no question for the jury. *Vedder v. Fellows*, 20 N. Y. 126; *Hibbard v. Railroad Co.*, 15 N. Y. 455, 459, 460; *Avery v. Railroad Co.*, 121 N. Y. 31, 44, 24 N. E. 20. It is quite apparent that a carrier of passengers must make and enforce such reasonable rules as will enable it to discharge its duties to the general public in a proper manner, and if the facts are undisputed, and not susceptible of different inferences, the question of their reasonableness ought not to be submitted to a jury, who might not readily understand the reasons upon which the rule is sought to be founded. If the question is treated as one of law, uniformity is secured,—a matter in which the public are interested quite as much as the corporations who are carriers of passengers. In the case at bar the reasonableness of the rule established by the defendant is obvious. In a large city like New York, the round trip of a car of any street line means a very considerable number of fares paid in, and the necessity for the conductor to carry and pay out a large amount of small change. When the defendant enacted the rule requiring its conductors to furnish change to a passenger to the amount of two dollars, it did all that could reasonably be expected of it in consulting the con-

venience of the general public, and it would be unreasonable and burdensome to extend the amount to five dollars. It would require conductors to carry a large amount of bills and small change on their persons, and greatly impede the rapid collection of fares. It is not necessary that a common carrier should bring home to each passenger a personal knowledge of any reasonable and just rule which it is seeking to enforce. To so hold would render the enforcement of the rule impracticable. We have been cited to but one case holding with the plaintiff in this action. *Barrett v. Railway Co.*, 81 Cal. 296, 22 Pac. 859. We agree with the learned supreme court of California that a passenger upon a street railroad is not bound to tender the exact fare, but must tender a reasonable sum, and the carrier must accept such tender and furnish change to a reasonable amount; but we cannot assent to the conclusion that a tender of five dollars is a reasonable sum. It is quite possible that there existed local reasons for the decision in California, as the judge writing the opinion suggested that the five-dollar gold piece was practically the lowest gold coin in use in that section of the country. The plaintiff urges that there are several other questions than the one of reasonableness of amount tendered that should have been submitted to the jury. We have considered these questions in the light of the record as it stands, and are of opinion that the dismissal of the complaint was proper. The judgment appealed from should be affirmed, with costs. All concur. Judgment affirmed.

(151 N. Y. 230)

YEOMANS v. BELL.

(Court of Appeals of New York. Dec. 22, 1896.)

FRAUD IN SALE OF LAND—ELECTION OF REMEDIES BY VENDOR—RESCISSION—MEASURE OF DAMAGES.

1. A vendor of land may elect to rescind the contract for fraud by restoring or tendering the consideration to the vendee, or may proceed in affirmance of the sale or contract, and recover damages for the deceit, but cannot pursue both remedies.

2. A complaint by a vendor setting up that the vendee induced him by fraud to accept, in part payment, depreciated shares of stock at their par value, which does not state that plaintiff is able or willing to restore what he had received for the land, and which does not ask for any judgment rescinding the contract or restoring the land, but seeks a judgment declaring the amount of the par value of the shares to be a lien on the land, shows that the action is one in affirmance of the contract, and for damages, rather than for a rescission of the contract in equity.

3. Where a complaint by a vendor setting up that he was fraudulently induced by the vendee to accept, at its par value, certain stock, as part of the price, shows that the action is brought in affirmance of the contract, and for damages for the deceit, a judgment that plaintiff recover the amount of the par value of the stock, with interest, is erroneous, in the absence of a finding that the stock was worthless. 29 N. Y. Supp. 502, reversed.

4. The measure of damages for fraudulent inducing plaintiff to accept, as part of the

consideration of a deed, depreciated shares of stock at their par value, is the difference between the actual value of the stock and its par value at the date of the sale.

5. Where a vendor elects to proceed in affirmance of the contract for the recovery of damages, on the ground of fraud, he cannot compel defendant to receive back any part of the property forming the consideration for the deed.

6. The court of appeals may look into the evidence in order to see whether a finding of fact essential to the support of the judgment should have been made by the trial court on the evidence before it.

Appeal from supreme court, general term, Fifth department.

Action by James N. Yeomans against George H. Bell. From a judgment of the general term (29 N. Y. Supp. 502) affirming a judgment for plaintiff, defendant appeals. Reversed.

Tracy C. Becker, for appellant. Adelbert Moot, for respondent.

O'BRIEN, J. It is important at the outset to ascertain the real nature and true character of this action. It is alleged in the complaint that on or about the 1st day of November, 1887, the plaintiff sold and conveyed his farm to the defendant for the consideration of \$20,000, and it appears that the consideration was paid by the defendant in property or obligations. He assumed two mortgages then upon the farm. He gave his notes for a part of the price, and transferred 50 shares of stock in a manufacturing corporation to the plaintiff at par, in lieu of \$5,000 of the purchase money, and the balance was paid by a mortgage which the defendant, as vendee, gave to the plaintiff on the farm. All these terms and conditions were settled by a preliminary contract between the parties. It is then stated, in substance, that the plaintiff was induced by fraud to accept the 50 shares of stock in lieu of \$5,000 of the purchase price; that the fraud consisted in false and fraudulent representations on the part of the plaintiff as to the value of the stock, the income derived from it, and the pecuniary condition of the corporation. The defendant went into possession of the farm under the conveyance from plaintiff; and it is alleged that the plaintiff did not ascertain the facts or become aware of the fraud that had been practiced upon him until three or four years afterwards, when this action was commenced; that before bringing the suit the plaintiff offered to repay to the defendant all that he had paid, and retransfer the stock upon condition that the defendant would reconvey to him the farm, but the offer was rejected; that \$5,000 of the purchase money of the farm has never been paid, but still remains a lien upon the land. The prayer of the complaint is that the plaintiff have judgment that the sum of \$5,000 and the interest thereon be adjudged a lien upon the farm, and that a sale thereof be decreed in accordance with

the practice in foreclosure cases, for the payment of said sum, with the expenses of the sale and costs of the action. The material allegations of the complaint, except the offer to restore upon condition of a reconveyance, were put in issue by the answer. The court found the facts in favor of the plaintiff, including the charge of fraud, and found, as a conclusion of law, that the plaintiff was entitled to judgment for the relief prayed for, with costs, and that the stock should be transferred by the plaintiff to the defendant, and declared to be his property. The judgment contained a direction for the sale of the farm for the payment to the plaintiff of the sum of \$6,637.50, being the whole sum of \$5,000 and the interest thereon from the date of the conveyance, and also for the satisfaction of the costs of the action; but it contains no provision for a retransfer of the stock by the plaintiff to the defendant.

When fraud has been practiced in the sale and conveyance of real estate by the vendee upon the vendor, as found in this case, the vendor has two remedies. He may proceed in equity to rescind the contract by restoring or tendering to the vendee what he has paid, and, in case the fraud and other facts are established, he will be entitled to a decree that the defendant reconvey the land, or the defrauded party may proceed in affirmance of the sale or contract, and recover his damages at law for the deceit. The remedy in equity proceeds in disaffirmance, that at law in affirmance, of the contract. The party claiming to have suffered from the fraud may elect which form of action or remedy he will pursue, but he cannot have both. *Bradley v. Bosley*, 1 Barb. Ch. 125; *Mills v. Bliss*, 55 N. Y. 139; *Vail v. Reynolds*, 118 N. Y. 297, 23 N. E. 301; *Whitney v. Allaire*, 4 Denio, 558; *Krumm v. Beach*, 96 N. Y. 398; *Gould v. Bank*, 86 N. Y. 75; *Id.*, 99 N. Y. 333, 2 N. E. 16. Nor can he blend the two remedies together, and affirm in part and rescind in part. If he elects to rescind he must do so in toto. It was not open to the plaintiff in this case to retain what he had received for the farm except the stock, and insist upon rescinding as to that. Whatever exceptions to this rule may exist, they are based upon circumstances and conditions that are not present in this case. *Nichols v. Pinner*, 18 N. Y. 312; *Wheaton v. Baker*, 14 Barb. 594; *Masson v. Bovet*, 1 Denio, 74; *Bowen v. Mandeville*, 95 N. Y. 237; *Jewett v. Petit*, 4 Mich. 508.

It is now pertinent to inquire which of these remedies the plaintiff has sought in this case. He demands judgment for the \$5,000, and interest thereon from the time of the conveyance of the farm, upon the theory that it has never been paid. It is true that he avers that, before the action was commenced, he offered to restore to the defendant what he had received, on condition that the farm should be conveyed back to him; but this has no bearing on the question now

under consideration, which is whether the plaintiff sought to recover damages in affirmance of the contract, or to rescind. Such an offer may be made in any case before suit, but the true character of the action must be determined by the facts stated in the complaint, and the relief demanded. The plaintiff did not ask for any judgment rescinding the contract, or restoring to him the farm. He did not state in his complaint that he was able or willing to restore to the defendant what he had received. He asked that \$5,000 of the purchase money, which he alleged had never been paid, be declared a lien upon the land, and that this lien be enforced by foreclosure and sale. Hence the action was upon the contract, and in affirmance of it. The facts pleaded and the relief demanded fix the character of the action as one at law for damages. The plaintiff simply sought to obtain indemnity for the injury caused by the defendant through the fraud practiced, and not to restore the parties to their original position, which is the principle upon which an action in equity to rescind always proceeds. The action would probably be triable by jury but for the incidental relief demanded, that the damages be declared a lien upon the land, and that this lien be foreclosed. We do not assert now that the circumstances could be sufficient to deprive the parties, or any of them, of the right to have the question of fraud tried as an issue in an action at law; but simply that the right to a lien for the damages, and the enforcement of that lien, was the only feature of the case that could draw the action into equity.

It was a material question in the case to determine whether the vendor's lien existed, or had been waived, under the circumstances of the case; and we are of the opinion that this question was properly disposed of in the courts below. But, assuming that the action was to recover damages, we think the conclusion of the learned trial judge is not sustained by his findings of fact. His legal conclusion was that the plaintiff was entitled to the relief prayed for; that is, for the recovery of the \$5,000 and interest thereon from the date of the sale and conveyance. Since the plaintiff elected to proceed upon an affirmance of the contract, he could not recover this sum, unless it appeared that the stock was worthless; and no such fact is alleged, proved, or found. While most of the questions discussed by the learned counsel for the defendant in the argument and on his brief were not raised at the trial by any motion, request, or exception, there is an exception to the conclusion of law which raises the question whether it is sustained by the facts found. The plaintiff was entitled to recover as damages only the difference between the actual value of the stock on November 1, 1887, and its par value, which was what the plaintiff allowed for it upon the purchase price of the farm, upon the belief that the defendant's representations as to its condition

and value were true. In other words, the plaintiff was entitled to indemnity for his loss, and nothing more. There is no finding that the stock was worthless at the time of the transfer of the farm, nor as to its value then or at any other time; and, without such a finding, there was no basis upon which to determine plaintiff's loss, or the injury which he sustained from the fraud. It does not appear that the corporation has failed, and from a statement filed in January, 1892, the assets appear to have been \$387,000, and the debts \$142,000. The whole capital stock was \$250,000, and this statement, while showing that it was impaired, is far from showing that it was of no value. So, the statement to November, 1887, while showing an impairment, leaves a large margin of property to represent the stock. This court may look into the evidence in order to see whether a finding of fact essential to the support of the judgment should not have been made by the trial court upon the evidence before it. We have examined the evidence in this record for that purpose, and we are of the opinion that it would not justify, much less require, a finding that the stock was worthless, or even that it was not worth at least half its par value.

This court cannot supply a finding to support a judgment unless the evidence is conclusive, or, at all events, so free from conflict that the trial court was bound to make it had such a request been made. It cannot be contended that the evidence in the record bearing on the value of the stock is of such a character. On the contrary, it calls for a finding that it possessed some, and perhaps considerable, value. This difficulty is not obviated by the direction in the decision of the court that the stock be transferred to the defendant, and treated as his property,—a measure of relief not demanded in the complaint, or carried out in the judgment. Moreover, since the plaintiff elected to proceed in affirmance of the contract to recover damages, he could not compel the defendant to receive back any part of the property which constituted the consideration for the conveyance of the farm. That would be giving to the plaintiff the right to affirm the contract in part, and rescind it in part, in an action at law,—a proposition that has no support in reason or authority. The judgment must be reversed, and a new trial granted; costs to abide the event. All concur, except HAIGHT, J., not sitting. Judgment reversed.

(151 N. Y. 243)

In re ALLEN.

In re HOWARD'S ESTATE.

(Court of Appeals of New York. Dec. 22, 1896.)

WILL—BEQUEST TO CLASS—LIMITATION—LAPSED LEGACY.

1. Testator, after giving his wife a life estate, bequeathed the remainder "to my sisters

and their heirs and assigns, and to the children of my deceased brother and their heirs and assigns. The children of any of my sisters or my brother are only to receive the same share that my brother or sisters would receive if they were living at the decease of my wife." Held that, as the bequest was to the sisters as a class, it included only those living at the termination of the life estate. 30 N. Y. Supp. 683, affirmed.

2. In a bequest "to my sisters and their heirs," the words "and their heirs" are words of limitation and not of purchase.

3. Where testator bequeathed to his widow the use and income of all his real estate, but provided that in case of her remarriage she should be entitled to only one-half of such use or income, the income from the other half of the estate, upon the remarriage of the widow, fell into the residue of the estate; and not to the next of kin.

Appeal from supreme court, general term, Third department.

Settlement of the accounts of Norman M. Allen, executor of the estate of Norman Howard, deceased. A decree of the surrogate including Henry Milks among the beneficiaries of the residuary clause having been reversed by the general term (30 N. Y. Supp. 683), the said Milks appeals. A decree of the surrogate including a portion of a lapsed legacy in the residuary estate having been affirmed by the general term (30 N. Y. Supp. 683), Charlotte Kavanaugh appeals. Affirmed.

For former reports, see 23 N. Y. Supp. 836; 30 N. Y. Supp. 683.

Norman Howard died at the town of Dayton, Cattaraugus county, on or about the 12th day of March, 1866, leaving no children or lineal descendants, and leaving a will dated March 10, 1866, which was admitted to probate by the surrogate of Cattaraugus county April 3, 1866. Testator left him surviving, his widow, Betsey Howard, his father, Harry Howard, and mother, Dillah Howard. At the time of the execution of the said will and the death of the testator, he had three sisters living, Charlotte Kavanaugh, Emeline Parsell, and Harriet Parsell. Another sister, Amanda Milks, died several years prior to the death of the testator, leaving a son, Henry Milks, who still survives, and who is the only heir of the said Amanda Milks, deceased. Alexander Howard, a brother of the testator, also died before the testator's death, leaving three children, William Howard, James E. Howard, and Amanda D. Countryman, all of whom are now living, and are the only heirs of the said Alexander Howard, deceased. Testator's two sisters, Charlotte Kavanaugh and Emeline Parsell, still survive. The other sister, Harriet Parsell, died April 15, 1869, leaving her surviving her husband, who is now deceased, and two sons, George Parsell, who is now deceased without issue, and Frank Parsell, who still survives, and is the only heir of the said Harriet Parsell, deceased. Harry Howard, the father of the testator, died May 12, 1881; Dillah Howard, the mother of the testator, died in the month of August, 1888; and Betsey Howard, his widow, died on the 21st day of July, 1890. By the

terms of his said will the testator bequeathed all his personal property to his widow absolutely, and also gave and bequeathed to her the use and income of all his real estate, and the income accruing from the investment of the proceeds of sale of such real estate, in case a sale should be made during her lifetime, but provided that, in case of her remarriage, she should be entitled to only one-half of such use, avails, and income after such remarriage. Testator designated and appointed Norman M. Allen as the executor, and the said widow, Betsey Howard, as the executrix, of said will, and authorized and empowered them to sell and convey said real estate when they should deem it for the best interest of the said estate so to do. Testator bequeathed to his cousin, Daniel Howard, a claim or demand which testator held against him of about \$175. He also bequeathed, at the death of his said wife, Betsey, the sum of \$500 to his nephew, Arthur Hull; the same amount to Frederick Milks, the son of said Henry Milks; and the sum of \$1,000 to the children of his deceased brother, Alexander Howard. After such bequests, the said will further provides as follows: "Seventh. At the decease of my said wife, all the rest, residue, and remainder of my said estate, after paying the bequests before made, shall descend to my father, Harry Howard, if he shall then be living; and if he shall not be living at the time of the decease of my said wife, then the same shall descend to my mother, Delloh Howard, if she shall then be living; and if she shall not then be living, then the same shall descend to my sisters and their heirs and assigns, and to the children of my deceased brother and their heirs and assigns. The children of any of my sisters or of my brother are only to receive the same share that my brother or sisters would receive if they were living at the decease of my said wife." The said widow, Betsey Howard, remarried in about one year after the death of the testator, and after such remarriage, and within about two years from the testator's death, the said executor and executrix, under the power given them in the said will, sold all of the real estate of which the testator died seised, and converted the same into money and securities. Two questions are presented on this appeal: (1) whether, under the seventh provision of the will, Henry Milks, the son of Amanda Milks, a sister of the testator, is entitled to take under that provision; and (2) whether the sum of \$619.35, which represents in part the income which accrued after the marriage of the widow, Betsey Howard, and prior to her death, on the one-half of the estate, and to which the widow was not entitled, belonged to the estate of Harry Howard, the father of the testator, and his heir at law, or went into the residue, and passed under the seventh provision of the will. The surrogate decided that, under the seventh provision, Henry Milks took, on the death of the widow, the one-fifth part of the residue, and that the sum of \$619.35, the in-

come above mentioned, fell into the residue, and was distributable under the seventh provision. The general term, on appeal, reversed the decision of the surrogate as to the first question, and in other respects affirmed his decree.

Wm. H. Henderson, for appellant Milks.
Jas. E. Bixby, for Charlotte Kavanaugh, appellant and respondent.

ANDREWS, C. J. (after stating the facts). The devise of the residuary estate to the sisters and to the children of the brother of the testator, in the seventh provision of the will, was contingent upon the death of the father and mother of the testator before the death of his widow. It was only upon the happening of both of these events before her death that the devise to them was to take effect. The father and mother both died after the testator's death and before the death of his widow, and, she having subsequently died, the main question is whether Henry Milks, the son of the testator's deceased sister Amanda, who died before the will was made, is entitled to share in the residue. The material words of the seventh provision are, "Shall descend to my sisters and their heirs and assigns, and to the children of my deceased brother and their heirs and assigns. The children of any of my sisters or of my brother are only to receive the same share that my brother or sisters would receive if they were living at the decease of my said wife." This is the case of a devise to a class of persons consisting of the sisters of the testator and the children of his deceased brother, and it is the general rule of construction that a future and contingent devise or bequest to a class takes effect on the happening of the contingency on which the limitation depends only in favor of those objects who at that time come within the description. *Doe v. Sheffield*, 13 East, 526; 1 Jarm. Wills (5th Ed.) 341; *Goebel v. Wolf*, 113 N. Y. 411, 21 N. E. 388. The only words of direct devise in the clause quoted are contained in the first paragraph, and, if that stood alone, there could be no reasonable doubt that the son of the testator's deceased sister Amanda was not included. The words "to my sisters and their heirs and assigns, and to the children of my deceased brother and their heirs and assigns," by natural construction embraced only the testator's living sisters and the children of his deceased brother. The words "and their heirs" are words of inheritance, inserted for greater precaution, to define the extent of the estate devised, and not to qualify the interest of the devisees. In other words, they are terms of limitation and not of purchase. *Thurber v. Chambers*, 66 N. Y. 42.

The second paragraph above quoted is relied upon as extending the classes described in the first paragraph, so as to embrace the son of the testator's deceased sister Amanda. It is to be observed that, if the testator had

intended that the son of Amanda should share in the residue, it was a very simple matter to have so declared, as he had done in respect to the children of his deceased brother. He had not overlooked the fact that his deceased sister Amanda had a son living. He gave a legacy to his grandnephew, the son of Henry Milks, and direct legacies to his other nephews and nieces. The apparent purpose of the second paragraph of the seventh provision of the will above quoted was to provide for the case of the death of any of his sisters, devisees under the first paragraph, intermediate his death and the vesting of the devise, by substituting their children in place of the deceased parent, and to declare that children entitled to take should take per stirpes. It may be possible that the testator's nephew, Henry Milks, is, by this construction of the will, excluded, contrary to the testator's intention. But the language of the will does not include him among the objects of the testator's bounty, and no intention to include him can be inferred from any circumstances in the case. All the persons in interest are collateral relatives, and a choice by a testator between collateral relatives is not repugnant to natural instincts to any such extent as in the case of immediate lineal descendants. We concur in the view of the general term as to the true construction of the seventh provision of the will.

Nor was there any error in the decree of the surrogate adjudging that the income of one-half of the estate accruing between the remarriage of testator's widow and her death fell into the residue. This part of the income was undisposed of, and the rule is now the same as respects devises and bequests, that any part of the estate not legally disposed of becomes a part of the residuary estate, and passes under a residuary clause embracing both real and personal property, in the absence of any contrary intention found in the will. *Youngs v. Youngs*, 45 N. Y. 254; *Cruikshank v. Home for the Friendless*, 113 N. Y. 337, 21 N. E. 64. These views lead to an affirmation of the judgment. All concur, except HAIGHT, J., not sitting. Judgment affirmed.

(151 N. Y. 253)

BUCHANAN v. WHITMAN.

(Court of Appeals of New York. Dec. 22, 1896.)

LEASE—WHEN TERM EXPIRES—RENEWAL.

1. Where a lessee under a lease dated April 8th, "to extend for the term of one year from the date hereof," took possession on April 8th, the term expired at midnight of April 7th in the next year. 27 N. Y. Supp. 604, affirmed.

2. A lease to two persons as partners, providing for renewal at the end of the term, is not renewed by the holding over of one of the partners after dissolution of the firm. 27 N. Y. Supp. 604, affirmed.

Appeal from supreme court, general term, Second department.

Summary proceedings by James A. Buchanan against Stephen M. Whitman to recover

possession of certain premises in the village of Port Jervis. From a judgment of the general term (27 N. Y. Supp. 604) reversing a judgment of the county court which reversed a judgment of a justice of the peace of the town of Deer Park, Orange county, defendant appeals by leave of the general term. Affirmed.

Lewis E. Carr, for appellant. H. B. Fullerton, for respondent.

BARTLETT, J. The plaintiff instituted summary proceedings to recover possession of premises leased by him to defendant, on the ground that the tenant was holding over after the expiration of his term. The defendant, answering the petition, denied that the term of his tenancy had expired, and averred that under the provisions of the lease he had the privilege of renewal for another year, of which he had availed himself.

The first important question presented is whether the term of the tenancy had expired when these proceedings were begun. The lease, bearing date the 8th day of April, 1892, contained this provision: "This lease is to extend for the term of one year from the date hereof." On the 8th of April, 1893, the plaintiff began these proceedings, and the question is presented whether he acted prematurely in so doing. It is the contention of the counsel for the defendant that the term of the lease continued during the entire day of April 8, 1893, while the plaintiff's counsel insists that the lease expired at midnight, April 7, 1893. This is a subject upon which a great diversity of opinion has prevailed in the courts of England and this country. Lord Mansfield, in *Pugh v. Duke of Leeds*, Cowp. 714, laid down the rule that "from the day" may either include or exclude that day, according to the context and subject-matter. It has been held in many cases that the court will so construe a lease as to carry out the intention of the parties, if possible. Mr. Parsons, in his work on Contracts, says: "The computation shall always conform to the intention of the parties so far as that can be ascertained from the contract aided by all admissible evidence." 2 Pars. Cont. 175. This rule is recognized in a late English work. *Foa, Landl. & Ten.* (2d Ed. 1895), p. 85. There are also text books in this country which announce the same doctrine. 4 Kent, Comm. 95, note b; *McAdam, Landl. & Ten.* p. 187. In *Deyo v. Bleakley*, 24 Barb. 9, the general term of the supreme court held that where the period for which the lease was granted was from the 1st day of April, 1853, for a term of five years, the day of the date of the lease was included in computing the term. The learned court was led to this conclusion by the fact that rent was made payable on the 1st day of April, July, October, and January in each year, thus disclosing the clear intention of the parties that the term of the lease should begin on the 1st day of April, 1853. In the case at bar we find that

the parties have given a practical construction to the lease under consideration. The plaintiff, testifying in his own behalf, stated, among other things, that the lessees took possession of the premises April 8, 1892. It would be difficult, in the face of this uncontradicted fact, to hold that the lease did not commence on that day. It is therefore unnecessary to decide the question argued by the appellant as to the effect of the language already quoted from the lease, standing alone, and unexplained by the acts and intention of the parties. This leads to the conclusion that the tenancy terminated at midnight on the 7th of April, 1893, and that these proceedings were not prematurely instituted.

The remaining question is whether the defendant was holding over, under an election to remain in the premises for another year. The evidence discloses that, when the lease was given, the defendant was in partnership with one George H. Goble, and that both partners signed it. The plaintiff testifies that he was not notified of any dissolution of the partnership, although he had heard both parties say that a dissolution had taken place "within the last year." We do not think such an occupation as that of defendant, entirely unexplained, operated to renew the tenancy after the expiration of the original term granted to the partnership. The counsel for defendant cites the petition of plaintiff in this proceeding as a recognition of defendant as his substituted tenant in the place of the partnership, thus putting himself in a position where he could not deny the right of defendant to the benefit of the covenant for a renewal. The petition avers that the defendant was in occupation of the leased premises, but follows this up by the further allegation that he leased to defendant and Goble, and that there was a holding over after the expiration of term, without the permission of the landlord. There is no proof that the landlord recognized the defendant as his tenant after the dissolution of the partnership, or accepted payment of rent from him as an individual tenant under any new agreement, expressed or implied. The case falls within the principle laid down by this court in *James v. Pope*, 19 N. Y. 324, to the effect that where one of several partners holds over under a lease made to the partnership, the other partners retiring, it does not renew or continue the tenancy after the expiration of the original term.

The defendant's counsel insists that it was fatal error for the justice to admit evidence offered by the plaintiff, showing a breach of certain conditions of the lease. As the result of the views already expressed in this opinion is to render it impossible, as matter of law, for defendant to successfully defend this proceeding, the question of evidence need not be considered.

The judgment appealed from should be affirmed, with costs. All concur. Judgment affirmed.

(151 N. Y. 223)

JONES v. CITY OF ALBANY.

(Court of Appeals of New York. Dec. 22, 1896.)

MUNICIPAL CORPORATIONS — PRESENTATION OF CLAIMS—BEGINNING OF ACTIONS—PERSONAL INJURY—CONTRACT.

1. Albany City Charter, tit. 3, § 45, which provides that "all claims against the city for damages for injuries to the person * * * shall be presented to the common council in writing within three months after said injury is received," and that failure so to do shall bar any action therefor, "and the law department shall consider said claim, and report thereon to the common council within three months from the date of the reference of such claim," etc., does not prohibit the bringing of an action for a personal injury at any time after the presentation of the claim.

2. Albany City Charter, tit. 3, § 51, which provides, among other things, that "no action shall be brought or maintained until the claim shall have been presented, and a reasonable time shall have elapsed within which such claim might have been passed upon by the common council or chamberlain, as herein provided for," applies only to claims on contracts, since sections 46 to 50 relate exclusively to such claims, and the common council's jurisdiction of personal injury claims is expressly excluded by section 45.

Appeal from supreme court, general term, Third department.

Action by Emma Jones against the city of Albany for personal injuries. From a judgment dismissing the complaint, plaintiff appeals. Reversed.

Hugh Reilly, for appellant. John A. Delahanty, for respondent.

ANDREWS, C. J. The action was commenced on the 18th day of March, 1890, to recover damages alleged to have been sustained by the plaintiff from an injury which happened on the 15th day of November, 1889, by reason of a defective sidewalk, which the defendant negligently permitted to be out of repair. The complaint was dismissed on the trial upon the sole ground that the action was prematurely brought, and the correctness of this ruling presents the only material question on this appeal. The plaintiff presented her claim to the common council on the 24th day of January, 1890; and it was referred by that body to the law department of the city at the first regular meeting of the common council after its presentation, held on the 3d day of February, 1890. In the absence of any statute regulating the time of commencing an action of this character, it is clear that the action was not premature. When the action was commenced, the right of action was complete, according to the general rule; and the action could be brought at any time, subject to be defeated if the bringing of it was delayed beyond the period fixed by the general statute of limitations. But the legislature may regulate the right to bring an action against a municipal corporation for a tort or upon contract, by imposing conditions precedent to be observed by the plaintiff, or it may make a special statute of limitations, thereby changing the ordinary

rule and restricting the usual remedy in such cases. *Reining v. City of Buffalo*, 102 N. Y. 308, 6 N. E. 792. It was upon the ground that the legislature had interfered, and, by the charter of the city, had suspended the right to sue the city for a personal injury caused by negligence, until the lapse of a period after the presentation of a claim therefor to the common council, and that this action was brought before the expiration of that period, that the complaint was dismissed at the trial.

The whole question turns upon the construction of the charter provisions. Title 3 of the charter (Laws 1883, c. 298) is entitled the "Legislative Power"; and under the subtitle "Audit of Claims" are embraced seven sections (Nos. 45 to 51, inclusive) which regulate the presentation, audit, and enforcement of claims against the city. Section 45 relates solely to claims for personal injuries caused by defects or obstructions in the streets, and sections 46 to 50 relate exclusively to claims on contract or on account for work, labor, and materials. Section 45 is as follows: "Sec. 45. All claims against the city for damages for injuries to the person, claimed to have been caused or sustained by defects, want of repair or obstructions from snow or ice or other causes, in the highways, streets, sidewalks or crosswalks of the city, or because of negligence of the city as to the highways, streets, sidewalks or crosswalks of the city, shall be presented to the common council, in writing, within three months after said injury is received. Such writing shall describe the time, place, cause and extent of the injury, so far as then practicable, verified by the oath of the claimant. The omission to present said claim, as aforesaid, within three months, shall be a bar to any claim or action therefor against the city, and the law department shall consider said claim and report thereon to the common council within three months from the date of the reference of such claim, but no such claim shall be settled or paid except as prescribed in section ten of title five of this act." The section of the charter referred to in the last clause of section 45 authorizes the corporation counsel, by agreement in writing, subject to the approval of the mayor and board of finance, to compromise and settle any claims against the city, and requires such agreement, when made, to be reported to the common council at its next meeting, and which agreement the section declares "shall be and constitute a valid obligation against the city." There is nothing in section 45 which, in terms, restricts the right to bring an action for personal injury at any time after the injury happened, except that the claim must be first presented to the common council within three months after the injury had been received. It is manifest that the main purpose of this limitation was to prevent fraud in the assertion of unfounded claims, and to apprise the city in case of claims against it, so as to enable it to investigate the circumstances before the benefit of an investigation was lost or em-

barrassed by lapse of time. It is possible (as is claimed) that there may have been a subordinate purpose on the part of the legislature in enacting this restriction to place the common council in prompt possession of the facts upon which a claim was asserted, so as to enable the city to compromise or settle it, without litigation, if found to be meritorious. The city, upon the assumption that the purpose last adverted to was one of the purposes which influenced the legislature in requiring that claims should be presented within three months after the happening of an injury, bases upon this provision, in connection with the subsequent clause, that the "law department shall consider said claim and report thereon to the common council within three months from the date of the reference of such claim," the argument that the bringing of an action before the expiration of three months after the claim had been referred to the law department is impliedly prohibited. It is to be observed that no time is prescribed within which a claim duly presented shall be referred to the law department, nor, indeed, except by implication is there any duty imposed on the common council to make such reference. The city asks the court, in the absence of any direct words of prohibition in section 45 against bringing an action at any time after presentation of a claim, to imply such prohibition for the period of three months after reference to the law department, upon vague language, thereby putting an added restriction upon the ordinary common-law right of a suitor to bring an action to enforce his claim. It is the general rule that an intention to change the rule of the common law will not be presumed from doubtful statutory provisions. The presumption is that no such change is intended, unless the statute is explicit and clear in that direction. 1 Kent, Comm. (3d Ed.) 463; *People v. Palmer*, 109 N. Y. 118, 16 N. E. 529. The object of referring a claim to the law department is not defeated by the fact that the action is pending at the time of such reference. The investigation made by that department may be important in enabling the city to defend the claim, or may induce an effort to adjust it before incurring the expense of further litigation.

The instances are numerous where in city charters the legislature has prohibited actions on claims against municipal corporations until the lapse of a specified time after presentation. It has not been left to inference, but the time within which the remedy has been suspended is definitely stated. *Buffalo*, Laws 1836, c. 479, § 8; *Mt. Vernon*, Laws 1892, c. 182, § 164; *Troy*, Laws 1872, c. 129, tit. 6, § 10; *Rochester*, Laws 1890, c. 561, § 18; *Syracuse*, Laws 1888, c. 449, § 250; *Brooklyn*, Laws 1888, p. 1109, § 30. We think it is quite plain that section 45, above quoted, does not, standing alone, sustain the contention that the plaintiff's action was premature, and that, in the absence of other legislation, she was entitled to bring her action at any time after the

presentation of her claim. But it is insisted that section 51, in the same title, applies to the case, and affixes the limitation of a "reasonable time" after the presentation of a claim, during which no action can be brought; and that this reasonable time, as applied to claims under section 45, is the three months given to the law department in which to examine a claim and make a report. But we think it is clear that section 51 applies only to claims on contract to which the five preceding sections exclusively relate. The clause in section 51 on which the city relies is as follows: "Provided, further, however, that no action shall be brought or maintained until the claim shall have been presented and a reasonable time shall have elapsed within which such claim might have been passed upon by the common council or chamberlain, as herein provided for." Neither the common council nor chamberlain can pass upon a claim for personal injury coming within section 45. The jurisdiction of the common council to settle or adjust such a claim is expressly excluded by the terms of that section, and the only authority having power to do so is the body composed of the corporation counsel, the mayor, and board of finance. Title 5, § 10. But claims on contracts may be passed upon and audited by the common council or the chamberlain by the express terms of section 46, and to claims of this character alone does section 51 refer. All the clauses in that section are consistent alone with the construction that it refers to claims on contract only. The first clause refers to actions on claims where the "allowance of the common council or chamberlain shall not be accepted." The clause succeeding the one upon which the city relies, "nor shall the city be liable, nor shall a recovery be had against it, for any claim not contracted in the manner provided by law," also refers to claims on contract. The only section applicable to this case is section 45, and that, in our judgment, did not prohibit the bringing of an action for a personal injury at any time after the presentation of a claim. The judgment should therefore be reversed, and a new trial ordered. All concur. Judgment reversed.

(55 Ohio St. 342)

PENNSYLVANIA R. CO. v. SNYDER.

(Supreme Court of Ohio. Dec. 1, 1896.)

INJURY TO RAILROAD EMPLOYE—CONNECTING LINES—TRANSFER OF DEFECTIVE CAR—LIABILITY OF DELIVERING ROAD—CONTRIBUTORY NEGLIGENCE.

1. Where companies controlling connecting lines of railway transport over their respective lines loaded freight cars of the other, under a traffic arrangement by which they share the earnings, and one company delivers to the other, to be transported over its line, a car that is so defective in its equipments as to be dangerous to handle, which should have been inspected and repaired before being so delivered, and in consequence of such defective condition of the car an employé of the latter company receives an injury while handling it in the course of his employment, the negligence of the for-

mer company in delivering the car for transportation without proper inspection and repair is the proximate cause of the injury, although the employer company should also have made an inspection of the car when it was received, and was negligent in that duty; the negligence of the latter company, while contributing to produce the injury, is not an independent cause, breaking the causal connection between the injury and original negligence of the company furnishing the car for transportation; and either company, or both, may be held responsible, at the election of the party injured.

2. The company delivering the car to the other company should anticipate that employes of the latter would go upon and handle the car, and thereby be exposed to the danger of receiving injury, as a natural and probable consequence of its defective condition, and owes such employes the duty of using reasonable care to discover and remove its dangerous defects before it is so delivered. The services of such employes, being necessary to accomplish the transportation intended, the delivery of the car for that purpose amounts to an invitation to them to go upon and handle the car in the course of their employment, and an assurance that they could safely do so.

3. When a person, without his fault, is placed in a situation of danger, he is not to be held to the exercise of the same care and circumspection that prudent persons would exercise where no danger is present; nor can it be said that, as matter of law, he is guilty of contributory negligence because he fails to make the most judicious choice between hazards presented, or would have escaped injury if he had chosen differently. The question in such case is, not what a careful person would do under ordinary circumstances, but what would he be likely to do, or might reasonably be expected to do, in the presence of such existing peril, and is one of fact for the jury.

(Syllabus by the Court.)

Error to circuit court, Lucas county.

The original action was brought by the defendant in error, Jesse Snyder, against the Pennsylvania Railroad Company, plaintiff in error, and the Lake Shore & Michigan Southern Railway Company, in the court of common pleas of Lucas county.

The petition is as follows: "The said plaintiff complains of the defendant the Pennsylvania Railroad Company, and says: That it is a railroad corporation organized under the laws of the state of Pennsylvania, doing business and having a managing agent in the county of Lucas. That it owns and operates a line of freight cars known as the 'Empire Line,' and said cars are known as 'Empire Cars.' That said defendant, at the time hereinafter named, was accustomed to run its said cars over the various lines of railroad of said Lucas county, among other roads being that of the defendant the Lake Shore & Michigan Railway Company, for the purpose of transporting freight. That it is the duty of the said Pennsylvania Railroad Company to keep all such cars they may have occasion to run over said lines of railroad in ordinary condition and repair, so that the switchmen, brakemen, and other persons employed on and about said cars can perform their duties with reasonable safety to their lives and limbs. Plaintiff further says: That the defendant the Lake Shore & Michigan Southern Railway Company is a railroad corporation

organized under the laws of the state of Ohio, owning and operating a line of railroad extending from the city of Toledo, Ohio, through said county of Lucas, and to the city of Detroit, Michigan. That it is the duty of the Lake Shore & Michigan Southern Railway Company to have all the freight cars, with the ladders and appliances upon the same, in such repair and condition as to render it reasonably safe for the switchmen and brakemen employed in and about its freight trains to perform their duties upon the same. On and for a long time previous to the 17th day of November, 1893, this plaintiff was engaged by the said Lake Shore & Michigan Southern Railway Company as a switchman in the yards of the said company, at a place known as 'Air Line Junction,' at the city of Toledo, in the said Lucas county, Ohio. That in said yards the defendant has a great number of tracks, where it is accustomed to make up its trains and switch cars back and forth. That said Empire cars are what is known as 'box cars,' and each of the same is furnished at the end thereof with a ladder, for the purpose of allowing the switchmen, brakemen, and others who may have occasion to climb upon said cars, the means of doing so. That said Pennsylvania Railroad Company was accustomed, prior to said time, in the construction of said cars, to place upon said cars what is known as a 'handhold,' the same being a round piece of iron which is attached to the top of the cars, near the end thereof, and directly above and over the upper round of said ladder, to which said switchmen, brakemen, and other persons who may have to climb to the top of said cars on said ladder, were accustomed to grab to assist them in climbing to the top of said cars. That on or about the 17th day of November, 1893, the said defendant the Pennsylvania Railroad Company carelessly, wrongfully, and negligently caused to be delivered, for the purpose of being transported to the city of Detroit, or some other point unknown to plaintiff, to the same defendant the Lake Shore & Michigan Southern Railway Company, one of its said Empire Line box cars, the number and description of which are to plaintiff unknown. That said car was defective, dangerous, and unfit for service in this: that the ladder upon one end of said car was loose and insecure, so that a person who might attempt to mount the same would be liable to be thrown from the same, and receive great injury. Said car was also defective in that said defendant had permitted the handhold with which said car was originally supplied, immediately above said ladder, and upon the top of said car, to become displaced and carried away, and that said car at said time was not furnished with a handhold, as it should have been, so that a person mounting said ladder and reaching to the top of the same would be without means by which he could reach the top of said car. All of the foregoing was well known, or by

the use of reasonable care might have been known, to each of the said defendants, and was unknown to this plaintiff, and that he had no means of knowing the same. Plaintiff further says that the said defendant the Lake Shore & Michigan Southern Railway Company, on the said 17th day of November, 1893, wrongfully, carelessly, and negligently caused the said car to be run into its said yard, and be coupled with other cars, and be placed in a train which was standing upon track No. 8 in said yard, in order to be run to the said city of Detroit. That at or about the hour of 11:30 o'clock in the nighttime of said day, this plaintiff was engaged as a switchman for the said defendant the Lake Shore & Michigan Southern Railway Company, under the direction and control of George Pierce, the conductor who had in charge the management of the same freight train, employed by the said defendant the Lake Shore & Michigan Southern Railway Company. That said conductor directed the engineer upon the engine to attach the engine to said train, and draw the cars down to the southeasterly end of the said track, so that the same could be transferred, on what is known as the 'Cross-Over Track,' to the main line of defendant's said road, running to said city of Detroit. That the said conductor directed this plaintiff, and it was his duty, to climb upon the said Empire car, the same being the last car of said train, and, when said train had passed a switch leading to said cross-over track, to signal the engineer in said engine to stop said train. In compliance with said order, and in pursuance of his duty as switchman, this plaintiff attempted to climb up the ladder on the end of said Empire car, and when near the top of said car, reached for the handhold which should have been upon the top thereof; but by reason of the said defective condition of said ladder, and of the absence of the handhold, the plaintiff was unable to reach the top of the said car, and, the train being in motion, he was unable to retain his position upon said ladder, and was violently thrown from the same upon the rail of the track over which the car was passing. His right leg struck across one of the rails of said track, and was crushed, mangled, and broken between the ankle and knee. His right ankle was also severely sprained and bruised. All of which has caused permanent injury to the plaintiff. That the plaintiff was confined to his bed for the period of four weeks after said accident, when it became necessary to, and the physicians of the defendant the Lake Shore & Michigan Southern Railway Company did, perform a difficult and painful operation upon the said leg, by wiring the bones of the same, which had been broken, together, so that the same might knit and heal. Plaintiff was confined to his bed for a period of six weeks after said operation, and has since said time been wholly unable to perform any labor, and has been crippled for

life. Plaintiff says he suffered the said injuries entirely by reason of the negligence of the said defendants in having in use in the said railroad yard the said car in such a defective condition, and that said injuries were received by him wholly without fault on his part, and while he was in the faithful performance of his duty, and solely by the negligence and carelessness of the said defendants." And the plaintiff prays judgment for a specified sum, his damages so sustained.

The Pennsylvania Company filed the following answer: "(1) The said defendant Pennsylvania Railroad Company, for its answer to the plaintiff's petition, says it admits that it is a railroad corporation organized under the laws of the state of Pennsylvania; that it owns and operates a line of freight cars known as the 'Empire Line'; that said cars are run over the various lines of railroad, and among others that of the said defendant the Lake Shore & Michigan Southern Railway Company, for the purpose of transporting freight; that said defendant the Lake Shore & Michigan Southern Railway Company is a railroad corporation organized under the laws of the state of Ohio, owning and operating a line of railroad through Lucas county; that said plaintiff, on and prior to the 17th day of November, 1893, was employed by the said defendant the Lake Shore & Michigan Southern Railway Company as a switchman in the yards of said company at Toledo, Ohio; that said Lake Shore & Michigan Southern Railway Company has a great number of tracks at Air Line Junction, where it is accustomed to make up trains; that said Empire cars are what is known as 'box cars.' This answering defendant denies each and every allegation contained in the plaintiff's petition, and not herein expressly admitted. (2) This answering defendant further says that said Empire Line car referred to in the plaintiff's petition was, on the 16th day of November, 1893, delivered by the Pennsylvania Railroad Company to the Lake Shore & Michigan Southern Railway Company at Erie, Pennsylvania, for the purpose of being used by the latter company in the transportation of merchandise which the said Lake Shore & Michigan Southern Railway Company might desire to carry therein; that, in consideration of the aforesaid use of said car by the said Lake Shore Company, it agreed to pay this answering defendant mileage therefor, the amount depending upon the distance which the said car might be transported by the said Lake Shore Company in the operation of its business; that before said car was delivered to the said Lake Shore Company at Erie, Pennsylvania, as aforesaid, the same was inspected by the latter company, and found to be in good, serviceable condition; that, so far as this answering defendant knew, or might have known by the exercise of reasonable care, the said car was in good con-

dition on the day aforesaid, when the same was delivered to the Lake Shore Company at Erie; that thereafter, and up to and including the 17th day of November, 1893, this answering defendant had no control or management whatever over the handling or transportation of said car; that the same was not, on said 17th day of November, 1893, in the service of this answering defendant, but was used by the Lake Shore & Michigan Southern Railway Company, and under its sole control and management. This answering defendant further says that said car, when originally built, was constructed after the most approved methods of building cars at that time, and that continuously from the time of its construction until the date of its delivery to the said Lake Shore Company, as aforesaid, this answering defendant caused the said car to be repaired when necessary, and to be kept in good, serviceable condition for railroad purposes. Wherefore this answering defendant prays that, as to it, said petition may be dismissed."

The allegations of new matter in the answer were controverted by reply. The action as against the Lake Shore Company was dismissed by the plaintiff, and thereafter the cause proceeded to trial upon the issues joined between him and the Pennsylvania Company. The trial resulted in a verdict and judgment for the plaintiff, which judgment was affirmed by the circuit court, and error is prosecuted here to obtain the reversal of both judgments. Affirmed.

E. W. Tollerton, for plaintiff in error.
Hurd, Brumback & Thatcher, for defendant in error.

WILLIAMS, C. J. (after stating the facts). It is not disputed that the plaintiff below received the injury of which he complains in the manner alleged in his petition, nor is it contended there is any sufficient ground for disturbing the finding of the jury that the plaintiff in error was guilty of the negligence with which it is charged. One contention of the plaintiff in error is that its negligence was not the proximate cause of the injury; that the causal connection was broken by the intervening negligence of the Lake Shore Company, which, it is claimed, is alone responsible for the injury. An instruction to that effect, which the court was requested to give in charge to the jury, was refused, and in that way the question is presented. The record discloses that the Empire Line of freight cars, to which the car in question belonged, was owned and operated by the plaintiff in error for the transportation of through freight, collected on its Philadelphia & Erie Division, over the road of the Lake Shore Company, from its connecting point at Erie, to stations on its line, and on other connecting lines, under a traffic arrangement between the companies, by which they were to share in the earnings of the transportation according to the dis-

tance the cars should be hauled over their respective roads. Under the arrangement the plaintiff in error, before delivering its cars to the Lake Shore Company, was to have them properly inspected and put in safe condition for hauling; and it was also understood that the company receiving the cars should have them inspected when received. The company hauling a car was required to provide the oil and other supplies for keeping it in running condition, and to repair any damage done while in its possession; all other repairs to be at the expense of the plaintiff in error. The car in question, when delivered to the Lake Shore Company to be hauled over its road, was defective and unsafe in the respects described in the petition, which a proper inspection would have discovered; and the negligence of the plaintiff in error consisted in the failure to make such inspection, and delivering the car to the Lake Shore Company without having first put it in a safe condition for transportation; while the negligence of the latter company was its omission to have the car properly inspected, and hauling it in its defective condition. Its liability for that negligence cannot well be denied. It was under no obligation to receive and place in charge of its employes a car with defective and dangerous equipments; and the rule, which requires the observance of due care on the part of the employer in providing machinery and appliances that are safe and suitable for the use of the servant in the course of his employment, is not limited to such as are the property of the employer. It is not any the less obligatory upon a railroad company, for the protection of its employes, to see that foreign cars run over its road are not so defective as to be dangerous, than it is to see that its own are free from dangerous defects. But it does not follow that, because the Lake Shore Company is liable for the damages sustained by the plaintiff below, the plaintiff in error may not be also. To relieve the latter from the consequences of its negligence, it is not enough that the act of the Lake Shore Company was nearest in the order of events to the injury, nor that, without it, the injury would not have occurred. To have that effect it must have been the efficient, independent, and self-producing cause, disconnected from the negligence of the plaintiff in error. The causal connection is not broken "if the intervening event is one which might in the natural course of things be anticipated as not entirely improbable, and the defendant's negligence is an essential link in the chain of causation." *Shear. & R. Neg.* (4th Ed.) § 32. It is not essential to the liability of the plaintiff in error that its negligence should be the sole cause of the injury; but if that result was produced by the negligence of both companies, each contributing a necessary condition to the result, either or both might be held responsible at the election of the party injured. Neither could claim exoneration on account of the fault of the other. The negligence of the plaintiff in error

was undoubtedly the primary cause. If it had not furnished the defective car, the injury could not have occurred. Neither could it, if the Lake Shore Company had not run the car over its road. And it might not have done so, if that company had made a proper inspection of the car. But it was the act of that company in hauling the car over its road that contributed to bring about the injury, rather than its failure to have it properly inspected; for, if the car had not been so moved, no injury could have happened, however negligent the inspection may have been. The most that can be claimed from the omission of the proper inspection by the Lake Shore Company is that it failed to cure or remove the previous negligence of the plaintiff in error, and thereby interrupt the consequences which were likely to, and did, flow from it. That failure cannot with propriety be said to have broken the connection between the negligence of the plaintiff in error and the injury resulting from the use of the defective car, or to have been the self-operating cause of the injury. That the car would be hauled over the road of the Lake Shore Company was contemplated by both of the companies when it was delivered. It was delivered for that purpose. The plaintiff in error knew it could not be so hauled without the services of brakemen and other employes of the company hauling it, and ordinary prudence would suggest that, if it furnished a defective car, or failed to observe due care in providing cars that were reasonably safe and fit for the service contemplated, those employes might, and probably would, suffer injuries in consequence. The jury might, therefore, properly find, as they did, under instructions to which no exceptions were taken, that, while the negligence of the Lake Shore Company was a contributing condition to the injury sustained by the plaintiff below, the negligence of the plaintiff in error was the culpable and proximate cause.

It is further claimed that the plaintiff in error was under no obligation or duty to the employes of the Lake Shore Company to exercise care in the inspection of cars furnished the latter company, or in making repairs necessary to have them in proper condition; and, as both companies were mutually in fault with respect to the car in question, so that neither could be made liable to the other, the plaintiff below was without remedy against the Pennsylvania Company, because his injury was received while acting exclusively under the employment of the Lake Shore Company; the servant being bound, it is argued, by the act of the master. We think this position is not tenable. It was not necessary to the liability of the plaintiff in error that a contractual relation should exist between it and the plaintiff below, nor that the injury should be one resulting from the violation of a duty it owed the general public. Whenever a person should reasonably apprehend that, as the natural and probable consequences of his act or neglect,

another will be placed in a situation of danger of receiving an injury, a duty of exercising due care arises; and, if the injury results from the failure to use such care, a liability to the person injured will generally exist, in the absence of any other controlling fact. As said in Bish. Noncont. Law, § 523: "One's responsibility for his acts is not limited to their immediate effects. He is liable, also, for their natural and probable consequences. * * * Nor is it material whether those consequences come from the acts alone, or from them and subsequent independent forces operating with them, provided those forces are of a sort reasonably to be anticipated." The test is to be found in the probable injurious consequences to be anticipated, and not in the number of subsequent events and agencies that may arise. It has already been observed that the traffic arrangement between these two railroad companies contemplated that cars furnished by the plaintiff in error to the other company would be handled by the employes of the company receiving them, and a prudent person would reasonably anticipate and foresee that such employes would be exposed to the danger of receiving injuries in handling a defective car so furnished, or one with defective appliances; and, therefore, the plaintiff in error owed a duty to such employes, operating a train in which such a car might be placed, which was to use reasonable care in making inspection of the cars, and putting them in safe condition, before they should be placed in charge of the employes. The services of such employes being necessary to accomplish the transportation intended, the delivery of a car to be transported over the road amounts to an invitation to the employes to go upon and handle it, and an assurance that they may safely do so, in the course of their employment, in transporting it to its destination. The case of *Moon v. Railroad Co.*, 46 Minn. 106, 48 N. W. 679, is quite like the one before us in its features thus far considered, and presents substantially the same questions. That is a well-considered case, and the decision is in harmony with our view of the law.

Another ground urged for the reversal of the judgment is that the evidence, without conflict, establishes negligence on the part of the defendant in error which contributed to the injury he sustained. Without entering into a general review of the evidence relating to the manner in which the injury was caused or the conduct of the defendant in error, it is sufficient to say that, without his fault, and while in the performance of his duties in handling the car in question, he found himself in a situation of danger, on account of a defective ladder attached to the car which, at the time, he was attempting to ascend in order to manage the brakes as his duty required. The ladder had one broken round, and was loose and shaky; but that was not discovered by him until after he got upon it, and was in the effort to reach the

top of the car. While engaged in that effort, and in a very brief time after he stepped on the ladder, he was thrown to the ground, and injured. It is claimed that, when he discovered the danger he was in, he should have stepped to the ground, and that he could have done so with safety. By his failure to do that, it is contended, he brought about the injury, or, at least, contributed to produce it. When confronted with his peril, two ways of escape would naturally be suggested,—one to leap from the car to the ground, and the other to do as he did, strive to reach the top of the car. It is not certain that the adoption of the former course presented by the alternative would have proven better than the latter. It might seem so from a deliberate survey of the situation after the disaster had occurred; but, when it is considered that it occurred in the darkness of the night, while the car was in motion, without opportunity of accurate observation of the condition of the ground, it is little more than conjecture that the defendant in error could, or would, by leaping to the ground, have escaped injury. And, in the exigencies of the situation in which he was placed, it could neither be expected nor required that he should exercise the same deliberate judgment that prudent persons would exercise where no danger is present, nor make the most judicious choice between hazards. The question in such case is, not what a careful person would do under ordinary circumstances, but what would he be likely to do, or might reasonably be expected to do in the presence of the existing peril, and is one of fact for the jury. Measuring the conduct of the defendant in error by this rule, the jury have found he was not guilty of contributory negligence, and our duty does not lead us into an inquiry to ascertain on which side the preponderance of the evidence may be found. Judgment affirmed.

(163 Ill. 625)

GLOBE ACCIDENT INS. CO. v. GERISCH.

(Supreme Court of Illinois. Nov. 23, 1896.)

EVIDENCE—DECLARATIONS—ACCIDENT INSURANCE—NOTICE OF DEATH.

1. The statements of deceased to his physician and others in regard to the cause of the injury from which he was suffering, made at different times, from several hours to three days after the supposed accident, are inadmissible in an action on an accident insurance policy issued to him, as they form no part of the *res gestæ*. 61 Ill. App. 140, reversed.

2. In an action on an accident policy, an allegation that deceased accidentally and fatally strained his body "by lifting a box of ashes and cinders," from which injury he died, is not sustained by evidence that deceased was in the habit of carrying out certain ashes every evening, and that on the evening of the alleged injury he was seen shoveling ashes into a wooden box in which he usually carried them out; that the ashes were carried out that evening, though no one saw him lift the box and carry them out; and the further evidence of physicians who attended deceased that he died of intense inflammation of the intestines, su-

perinduced, in their opinion, by some strain or external violence,—as the presumption that deceased lifted the box of ashes cannot be indulged in favor of the further presumption that death ensued from the injury thereby sustained.

3. A clause in an accident policy, providing that unless "claimant" gives written notice within seven days, stating date and causes of injury, "all claims therefor shall be forfeited," applies to the insured and not to his legal representatives, and where insured died on the seventh day after the injury, the policy is not forfeited by the failure of his legal representative, who did not take out letters of administration for several months thereafter, to give the required notice, as there was no "claimant" within seven days from the date of the injury. 61 Ill. App. 140, affirmed.

4. Under a clause in an accident policy providing for a forfeiture unless within 30 days from date of death the company be given verified written proof thereof by "claimant," verified written proof furnished within 30 days from the death of insured by one who was not appointed administrator for several months thereafter, is sufficient, as the grant of letters of administration relates back to the death of insured, and the administrator became "claimant" by relation, from his death. 61 Ill. App. 140, affirmed.

Appeal from appellate court, Third district.

Action by Maria M. Gerisch against the Globe Accident Insurance Company. Judgment for plaintiff. Defendant appeals. Reversed.

Chiperfield, Grant & Chiperfield, for appellant. Abbott & Worley, for appellee.

BAKER, J. This action was upon a policy of accident insurance issued to Phillip Gerisch, the plaintiff's intestate. The declaration averred that the deceased accidentally severely and fatally strained and injured his body, in the abdominal region, by lifting a box of ashes and cinders, from which strain and injury he died. The cause was tried in the Canton city court, before the court without a jury. After plaintiff had rested her case, the defendant demurred to the evidence, but the court overruled the demurrer, found the issues for the plaintiff, and rendered judgment in her favor for \$2,000; and the judgment has been affirmed by the appellate court.

The important question is whether the evidence sufficiently tends to show that the death of the deceased was caused in the manner alleged in the declaration. The statements made by Gerisch to his physician and to other persons in regard to the cause of the injury from which he was suffering were received in evidence by the trial court over the objection of defendant. None of these statements were made until several hours, and most of them two or three days, after the supposed accident. They formed no part of the *res gestæ*, and under no rule of law are they competent evidence. *Railway Co. v. Becker*, 128 Ill. 545, 21 N. E. 524. Nor is there an exception made in favor of the statement made to his physicians. Had such statement related only to the part of

his person that was hurt, his sufferings, symptoms, and the like, it would be competent evidence; but the declaration of the insured as to the cause of his injury is not proper or competent evidence. Whatever the rule may be in other jurisdictions, such is the law in this state. *Railroad Co. v. Sutton*, 42 Ill. 438; *Collins v. Waters*, 54 Ill. 485.

But, excluding these statements from consideration, is there sufficient other evidence to establish, *prima facie*, the case stated in the declaration? The demurrer, of course, admits all that the competent evidence proves or tends to prove. It was the duty of Gerisch, in pursuance of a contract with one Jacobs, to carry out the ashes and cinders from the furnace of the latter's greenhouse to the street, about 70 feet distant; and he was in the habit of doing so every evening. On the evening on which it is claimed he was injured, he was seen shoveling the ashes and cinders from the furnace into a wooden box, in which he usually carried them out into the street. The box held about 1½ buckets, and was then nearly full. No one saw him lift the box or carry out the ashes. Still the ashes were, as matter of fact, carried out that evening. Although there is no direct evidence that Gerisch lifted the box and carried out the ashes, yet, from the facts and circumstances above stated, the presumption that he did so could justly be drawn. Such a conclusion is both reasonable and natural. About half past 9 o'clock that evening, but just how long after he was seen shoveling the ashes does not appear, he complained of pains in the lower part of the abdomen, which continued to increase in severity until the second day thereafter, when he took to his bed, and a few days later died. Several physicians were in attendance at the bedside of Gerisch, all of whom testified at the trial. It seems that, two days before his death, as a last resort, they performed a surgical operation upon him, and their testimony is based to a considerable extent upon the information obtained from an examination of the injured parts. They all agree that the cause of his death was intense inflammation and strangulation of the intestines, and that the diseased condition arose from the dropping of the bowels through an adhesive band—an unnatural growth—which extended from the wall of the abdomen across to the intestines. They further agree that some force or muscular shock was required to push the bowels through this band, and they give it as their opinion that some strain or external violence caused the injury which resulted in their patient's death. This evidence is sufficient, when uncontradicted, to make out the point sought to be established by it; that is, that Gerisch was strained or was injured by some external force. There is, however, no proof that the deceased strained and injured his body "by lifting a box of cinders

and ashes"; and one essential fact—indeed, the all-important fact—is therefore wanting in order to make out this case. If, from the fact that he lifted a box of ashes, and from the further fact that he not long afterwards suffered from the effects of a strain, it can be inferred that such strain was caused by so lifting said box of ashes, the missing link in the chain will be supplied. But this presumption cannot be indulged. As we have seen, the fact upon which it is sought to base this presumption, viz. that Gerisch lifted the box, is itself but a presumption, drawn from other facts in evidence. And the law is that a presumption cannot be based upon a presumption. For there is no open and visible connection between the facts out of which the first presumption arises and the fact sought to be established by the dependent presumption. *Douglass v. Mitchell's Ex'r*, 35 Pa. St. 440; *U. S. v. Crusell*, 14 Wall. 1; *U. S. v. Ross*, 92 U. S. 281. In the case last cited, it is said, in passing upon this question: "Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliably drawn from premises which are uncertain. Whenever circumstantial evidence is relied upon to prove a fact, the circumstances must be proved, and not themselves presumed." The record, therefore, does not make out a *prima facie* case for the plaintiff, and the trial court erred in overruling the demurrer to the evidence.

It is contended by the defendant that the policy was forfeited because the plaintiff gave no notice to the company within seven days, etc. The provision of the policy upon which this point is based is as follows: "Unless claimant gives home office, at Indianapolis, within 7 days, written notice, stating name, address, occupation, date and causes of injury, and within 90 days from date of injury, and within 30 days from date of death, verified written proof thereof, all claims therefor shall be forfeited." The policy was payable, in case of the death of the insured, to his legal representatives. Now, Gerisch died on the seventh day after he was injured, and within 30 days after his death the plaintiff caused "verified written proof thereof" to be sent to the defendant at its home office in Indianapolis. But the point made is that she did not send written notice to the company of the fact of the injury within 7 days after the injury occurred. The plaintiff did not become the "claimant" until she had taken out letters of administration, and there was consequently no "claimant" within 7 days from the date of the injury. It is clear that this provision for notice within 7 days cannot apply to her. It is applicable to the insured only, and not to his legal representative. No other construction of it is reasonable. Moreover, this clause in the policy is for a forfeiture, and is in the form and phrases adopt-

ed by the company; and, if it is of uncertain meaning, it must be construed most strongly against the company. It might be suggested that, if the plaintiff did not become the claimant until she had taken out letters of administration, then, since she did not take out such letters until several months after the death of the insured, the "verified written proof" of death necessary to be sent to the company within 30 days from the date of death, did not meet with the requirement of the policy that it be sent by the "claimant." But a well-settled principle of law here comes to the plaintiff's assistance. It is the doctrine of relation. Under it the grant of letters of administration related back to the date of the intestate's death, and validated all acts which came within the scope of an administrator's authority, and which were, in their nature, beneficial to the estate. She became "claimant" by relation from the death of the intestate. *Makepeace v. Moore*, 5 Gilman, 474; *Wells v. Miller*, 45 Ill. 382; 7 Am. & Eng. Enc. Law, 194, and cases cited in note 1. It follows there was no forfeiture of the policy.

For the errors indicated herein, the judgments of the appellate court and of the Canton city court are reversed, and the cause is remanded to the latter court for a new trial. Reversed and remanded.

(163 Ill. 636)

HARSHBARGER v. CARROLL et al.

(Supreme Court of Illinois. Nov. 23, 1896.)

DEED—DELIVERY—CONSTRUCTION.

1. Evidence that a deed executed by a father to his daughter, reciting that it was "only to take effect at the death of the grantor," was recorded about a year after it was executed, and remained of record for about 20 years; that the deed was in the possession of the grantee; that the grantor knew it was recorded; that he treated the land as that of the grantee, and spoke of it as hers to his neighbors on many occasions,—is sufficient, in the absence of clear proof to the contrary, to show delivery of the deed.

2. A warranty deed by a father to his daughter, reciting that it is "only to take effect at the death of the grantor," is not void, as being a conditional testamentary devise by deed, but operates to convey the fee to the grantee, subject to a life estate in the grantor.

Appeal from circuit court, Douglas county; Francis M. Wright, Judge.

Suit in equity by Samuel Harshbarger against William E. Carroll and others to set aside conveyances. Judgment for defendants. Plaintiff appeals. Affirmed.

John J. Rea and Thomas W. Roberts, for appellant. Eckhart & Moore, for appellees.

WILKIN, J. On the 17th day of March, 1871, appellant Samuel Harshbarger made and executed a warranty deed purporting to convey 160 acres of land to his daughter, Sylvia, "and her heirs, only to take effect at the death of the grantor." Sylvia afterwards

intermarried with David Cade. In 1879 she died, leaving a daughter, Della Cade, her only heir. David Cade died in 1893. The daughter, in 1894, executed and delivered to William E. Carroll a warranty deed, purporting to convey the land deeded to her mother. Samuel Harshbarger, the complainant, files this bill in the circuit court of Douglas county, to remove the two conveyances from the records of the county, as clouds upon his title, alleging the making of the deed to his daughter, Sylvia, but averring that it was never delivered to her; that the deed was made to her with the understanding that she was to take care of him in his old age; but that she failed to do so. It is further averred that some person (whom he believes to have been David Cade) fraudulently abstracted the deed from among his papers, made certain changes therein, and caused it to be recorded, without his knowledge or consent, and that he knew nothing of the recording of the deed until about 60 days before the filing of the bill in this cause. William E. Carroll and his wife and Della Cade are made parties defendant. Upon the hearing, the bill was dismissed for want of equity, and complainant now prosecutes this appeal.

The several grounds of error urged by appellant may be properly considered under the heads, viz.: First, did the court below err in finding that there was a delivery of the deed by appellant to his daughter; and, second, in not finding that the deed was testamentary in its character, and void as being in conflict with the statute of wills?

It appears that the grantor, at the time of making this deed, conveyed lands to several of his children, delivering their deeds, which were recorded soon thereafter. Sylvia was his only daughter, yet unmarried, and resided with him. Her deed was placed on record by some one in 1872, before her marriage. The evidence regarding the delivery of the deed is somewhat vague, and admitted to be conflicting; yet we think the more reasonable testimony sufficiently shows the deed to have been in the possession of the daughter (the grantee) and her husband, David Cade. Where a deed duly executed is found in the hands of the grantee, there is a strong implication that it has been delivered, and only clear and convincing evidence can overcome the presumption. *Tunison v. Chamblin*, 88 Ill. 379. The deed had been recorded, and that also raises the presumption that it had been delivered. *Himes v. Keighblynger*, 14 Ill. 469; *Warren v. Town of Jacksonville*, 15 Ill. 236.

The theory of appellant that the deed had been abstracted from his papers, and placed on record by David Cade, is not supported by the evidence, as it clearly appears that it was recorded before he came into appellant's family, and even before he had met and become acquainted with the daughter, Sylvia. Under these facts, the burden was cast upon appellant to clearly show that the deed was not delivered. The evidence tends to show that

he knew it had been recorded. The file mark of the recorder showing that fact was upon it, and, since the death of the grantee, it has been in his possession. His brother testifies positively to a conversation with him in which he told him it was recorded. It is clear that he treated the land as that of his daughter, speaking of it as hers to his neighbors and friends on many occasions. Taking these facts into consideration, and also that the lands had been assessed in the name of the daughter, and the taxes paid by complainant, we think the chancellor was fully justified in finding that the deed had been delivered.

But it is contended that, no matter whether it was delivered or not, she acquired no right or interest in the land conveyed, because it is absolutely void upon its face, being in conflict with the statute of wills. The language of the deed is: "This indenture, made this 17th day of March, in the year of our Lord one thousand eight hundred and seventy-one, between Samuel Harshbarger, Sr., party of the first part, and Sylvia Harshbarger and her heirs (only to take effect at the death of the grantor), party of the second part, witnesseth: That," etc. Then follow formal parts of the old form warranty deed. Appellant's counsel insist that it thus appears that the grantor intended a conditional testamentary devise, and undertook to make a deed fill the office of a will. We do not think so. The cases cited by counsel supporting their view are not in point, as here the deed was delivered to the grantee. This case is similar in fact and principle to that of *Shackleton v. Sabree*, 86 Ill. 610. In that case the language of the deed was: "This deed not to take effect until after my decease; not to be recorded until after my decease." The deed was properly executed and delivered. There, as here, the contention was urged that the deed was in the nature of a testamentary paper, and, as such, was not so executed and authenticated as to become operative and valid. In disposing of that contention it was said: "Was this deed void, or did it operate to convey the fee at the death of the grantor? Had he conveyed a life estate to another, or had he conveyed to another to hold in trust for him during his life, then it would have been free from all doubt; or had he, in the same instrument, reserved a life estate to himself, we apprehend that it will be conceded that the title would have passed to the grantee; * * * and, had he expressly reserved in this deed a life estate, he would have held in the same manner. If, then, in either of these cases, the grantor could thus hold the title necessary to support a remainder, why not when, by operation of law and construction of the deed, he holds a life estate in legal effect the same? We are unable to perceive any reason in law or in fact." And, further: "Here the remainderman was in being, named as grantee, and no reason is seen, since livery of seisin has been abolished, why the fee in remainder did not vest on the delivery of the deed, which has

been adopted as a substitute for livery." By the act of delivery, the title to the fee in the lands in controversy vested in Sylvia Harshbarger, reserving a life estate in the grantor. The decree of the court below is in conformity with the facts and law of the case, and will be affirmed. Affirmed.

(163 Ill. 622)

MOORE et al. v. CITY OF MATTOON.

(Supreme Court of Illinois. Nov. 23, 1896.)

PUBLIC IMPROVEMENTS—FAILURE OF ALL COMMISSIONERS TO ACT.

Under Rev. St. c. 24, art. 9, §§ 20-26, relative to local improvements by cities, providing that the city council shall appoint three commissioners, who shall make an estimate of the cost, and report the same in writing to the council, and shall make an assessment, which shall be filed with the county court, a report signed by two only of the three commissioners appointed does not comply with the statute, and judgment confirming special assessments for the cost of such improvements ordered upon the report is void.

Error to Coles county court; L. C. Henley, Judge.

Proceedings by the city of Mattoon to confirm special assessments for street improvements. Default judgments rendered against John W. Moore and others, who bring writ of error. Reversed.

D. T. McIntyre, for plaintiffs in error. T. N. Henley, James W. Craig, and Edward C. Craig, for defendant in error.

BAKER, J. The city of Mattoon ordered the improvement of Charleston street, in said city, between the east line of West First street and the west line of East Ninth street, by grading, curbing, tiling, and paving; the same to be paid for by special assessment. Proceedings were had in the county court of Coles county, upon application of the city, wherein a default was taken against the plaintiffs in error, and judgment rendered confirming the assessment roll. The cause is brought here by writ of error.

Among other objections raised against the validity of the judgment are these: That the ordinance upon which it is based is uncertain and insufficient, and that the report of the commissioners appointed by the council is not a compliance with the requirements of the statute. If either of these objections is well made, the judgment of confirmation must be reversed; for the foundation of a valid judgment is a valid ordinance and valid report.

The objection made to the report of the commissioners appointed by the city council to estimate the cost of the proposed improvement is that said report was made and signed by two only of the three commissioners. The statute¹ requires that the petition filed in the county court shall recite the report of said commissioners, thereby making a proper report a prerequisite to a valid judgment of confirmation. Here J. A. McFall, L. L. Leh-

man, and William R. Mitchell were appointed commissioners, and the report annexed to the petition was signed by but two of them, McFall and Lehman. It nowhere appears that the third commissioner, Mitchell, met or acted with those who made the report or took any part in the proceedings. The report is consequently insufficient. The statute contemplates that the commissioners shall act jointly. Action by two only of them cannot be sustained. *Adcock v. City of Chicago*, 160 Ill. 611, 43 N. E. 589; *McChesney v. People*, 148 Ill. 221, 35 N. E. 739; *Boynnton v. People*, 155 Ill. 68, 39 N. E. 622.

The objection made to the validity of the ordinance is that it does not indicate the nature, character, locality, and description of the proposed improvement. In respect to one or more of the matters to which our attention is called, the ordinance cannot be regarded as a model of perspicuity; but a majority of the court are of opinion that, when all of its various provisions are taken into consideration, there is not such a failure to specify the nature, character, locality, and description of the improvement as to invalidate such ordinance.

For the error indicated herein, the judgment of confirmation, as to the property of plaintiffs in error, is reversed. Reversed.

(163 Ill. 351)

MASON v. CITY OF CHICAGO et al.

KOHLSAAT v. SAME.

(Supreme Court of Illinois. Nov. 9, 1896.)

DEDICATION OF STREET—RIGHT OF PURCHASER OF LOTS — WHEN LOST BY LACHES — ACTION — WHEN COMMENCED AS TO INTERVENER.

1. Purchasers of lots from an owner of a tract who has platted it are barred of any right to claim that certain parts of the tract are dedicated to use as streets or public grounds, either on the ground that they are so shown by the plat, or were so represented by their vendor, where such portions have been visibly occupied and used as private property for more than 20 years since their purchase.

2. Where persons intervene, and become parties to a pending suit, as to them the suit is to be regarded as having been commenced at the time of their intervention.

Appeal from superior court, Cook county; Elliott Anthony, Judge.

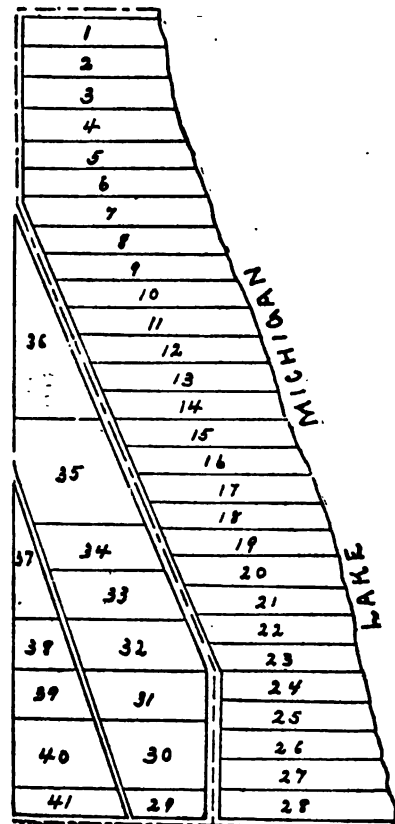
Consolidated suits in chancery, the first by the city of Chicago and city of Lake View against Parker R. Mason and Peter N. Kohlsaat, and the second by Peter N. Kohlsaat, Parker R. Mason, and others against the city of Chicago and the city of Lake View and others, interveners. Decrees in favor of the city of Chicago and the interveners, and Mason and Kohlsaat appeal. Reversed.

On the 25th day of December, 1884, the town of Lake View, since included as a part of the city of Chicago, filed its bill in chancery against appellants, alleging that Elisha E. Hundley, by his plat of what was designated as "Hundley's Subdivision" of a tract therein described, dedicated the certain strip of land in question in this case as a public street or highway; that the

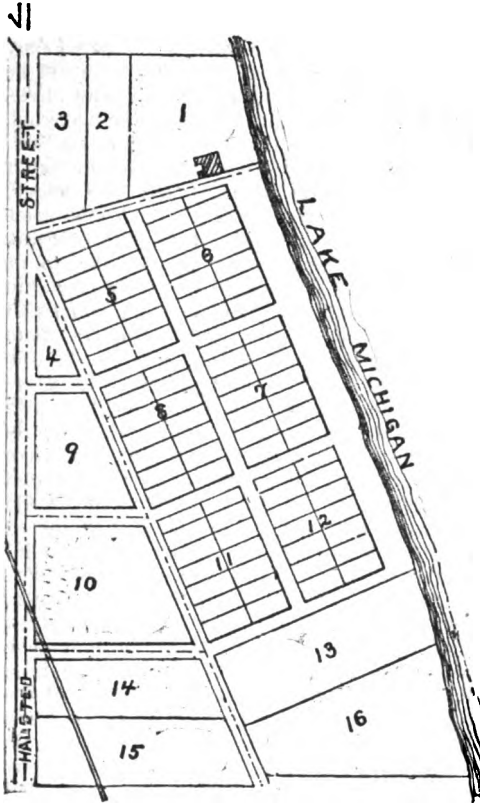
¹ Rev. St. c. 24, art. 9, §§ 20-26.

defendants had entered into possession of that strip under a claim of ownership, and excluded the public therefrom, and were then engaged in carting and removing sand and gravel from the premises. The bill prayed for an accounting and injunction. It was afterwards amended, and was answered by defendants denying the alleged dedication, and admitting that they had excluded the public from said strip of land, setting up as a defense the statute of limitations and laches, and the final judgment in their favor rendered in an action of ejectment brought by said complaint to recover said strip. Afterwards, on December 22, 1888, appellants and others filed their bill in chancery against the city of Lake View and Sanders, its commissioner of public works, alleging that complainants were the owners of the said strip of land, and that the said strip had never been dedicated to the public for any purpose, and that the city of Lake View and its said commissioner were threatening to remove complainants' fences and improvements from the strip, and to devote the land which belonged to them to the uses of the public; praying that the defendants be enjoined from so doing. Answer was filed to this bill, and on the 5th of February, 1892, the city of Chicago, as successor to the town of Lake View, filed its cross bill against appellants, alleging that Hundley, by his plat of said subdivision, dedicated the strip of land in question to the public, and that the town of Lake View accepted the dedication, praying the same relief as is prayed in the bill of the town of Lake View. On the same day James Payne and some 20 others, by leave of court intervened, and became parties to the said bill filed by appellants, and filed their answers and cross bills therein, alleging that they were, respectively, owners and in possession of certain lots and premises situated in said resubdivision, and as such owners were interested in said litigation, and in having said strip of land in controversy kept open, and alleging that said Hundley, by his said plat, and by his acts and declarations, intended to and did dedicate the said strip of land to the use and benefit of the public as a street, driveway, highway, or public ground, so far as the owners of said subdivision were concerned, and that they had a peculiar and special interest in maintaining said strip as devoted to such uses. They further alleged that on December 3, 1873, said Hundley executed and delivered a deed to Parker H. Mason, one of appellants, conveying all the riparian rights which he had in front of lots 1 to 21 and 33 to 37, in Pine Grove, the subdivision previously made, and the said Mason and others claiming under him were claiming to own the land east of said lots, and to have the absolute right to control and dispose of the sand and soil thereof, and that the said lot owners in said resubdivision had no right or interest therein. They also alleged that after the death of Hundley, the executors of his will, by their deed, purported to convey all the interest of themselves and the said Hundley to the land lying between the east line of lots from 4 to 11 in block 7 in said subdivision and Lake

Michigan to the wife of said Mason, which deed was made October 13, 1882. The cross bill also alleged that for 20 years or more said Hundley had abandoned all claim of ownership to said strip in its entire length and breadth and recognized the same to be devoted to the uses and benefits of the public, and represented said lots to be fronting upon said strip of land as devoted to the uses aforesaid. The cross bill further alleged that said deeds tended to create a cloud on the title and rights of the complainants, and that the property owned by them respectively was purchased directly from said Hundley, and that it was part of the consideration that said strip of land was, and always should be, open to the uses and purposes aforesaid; prayed for a cancellation of the deeds aforesaid, and that the defendants be restrained from selling or hauling away sand and gravel, and committing waste thereon, etc. Answers and replications were filed, and upon the hearing of both bills before the same chancellor at the same time one Levi W. Yaggy, who testified as a witness, claimed to be the owner and in possession of lots 1 and 2 in block 7, fronting upon the strip of land in question, was made defendant, and adopted as his own the answer and cross bill of said Payne and others. It appeared that in February, 1853, Elisha E. Hundley made a plat of certain lands of which he was the owner, and which included the strip in controversy, under the name of "Pine Grove," the following being a copy of that plat:



Afterwards, on October 24, 1855, said Hundley, as the owner of lots 3 to 21 and 33 to 37 in said subdivision, resubdivided the same, and made, acknowledged, and recorded the plat of said resubdivision, upon which this controversy has arisen, and which is as follows:



Upon the final hearing of the two cases the court found the equities in favor of the city of Chicago and the said property owners and against appellants, and that the strip of land in question had been dedicated to the public as a street or highway, and had been duly accepted as such by the proper authorities, and sustained also the cross bills of the individual property owners. A separate decree was rendered in each case, and in its findings covered, the entire strip of the lake front, including that part in front of block 12 as well as the parts in front of blocks 6 and 7, but it was provided in the decree by consent that they should not affect the part in front of block 12. So much of said strip as lay between block 12 and Lake Michigan had been in the case of *City of Chicago v. Drexel*, 141 Ill. 89, 30 N. E. 774, adjudged to be the private property of the said Drexel. From these decrees Mason and Kohl-saat have prosecuted these appeals, and they have been taken and considered together.

J. E. Munroe and E. Roby, for appellants.
W. G. Beal, for appellees.

CARTER, J. (after stating the facts). It was determined in *City of Chicago v. Drexel*,

141 Ill. 89, 30 N. E. 774, that the plat of October 24, 1855, involved in that as well as in this case, was not in conformity with the statute, and did not operate as a statutory dedication or conveyance to the public or to any municipality of the strip of land lying between the east line of blocks 6, 7, and 12 and Lake Michigan. We are satisfied with that decision and the reasons given in the opinion in that case, and see no reason for further discussion of that question. Even if the fee had been vested in the town of Lake View by the plat, it is clear, as there shown, that the judgment rendered for the defendants (appellants here) in the ejectment suit brought by the town before it was united with Chicago, claiming title in fee, would preclude the city of Chicago from now claiming to be the owner in fee of said land. The question chiefly argued and pressed upon our attention by counsel on both sides is, was there or not a dedication as at common law of said strip of land by Mr. Hundley, evidenced by the making and recording of the plat, and by his contemporaneous and subsequent acts and declarations? Only so much of said strip as lies between block 12 and the lake was involved in that case, but the evidence there as here related to the entire strip, and it was held that the evidence was not sufficient to show with sufficient certainty and clearness either any intention on the part of Mr. Hundley to make such dedication, or any acceptance on the part of the public or of the town. We have carefully examined and considered the evidence, and, while it is claimed on the part of appellee that a stronger case was here made by the city in the court below than was made in the *Drexel Case*, we are unable to see that it is sufficient to establish the dedication claimed, and have arrived at the same conclusion reached in that case, so far as the rights of the public or of the city are concerned, to so much of said strip as lies between blocks 6 and 7 and Lake Michigan, and not included within the boundaries of the east and west streets extended to the water's edge, called, beginning at the north end, respectively, Grace, Nellie, and Addison streets. The claim of Payne, Yaggy, and others, individual property owners in said resubdivision, that they purchased their respective lots by the plan and plat laid out and adopted by Mr. Hundley, showing this and other strips of land left open for streets, highways, and public grounds, and upon representations made by him and his agents that said strips were so intended, and that said Hundley and all claiming through or under him are estopped from denying such dedication, so far at least as the rights of said property owners are concerned, presents a question which was not involved in the *Drexel Case*. But, from the view we have taken of the case, this claim is not sustained by the evidence, at least no further than as it may affect said east and west streets mentioned in the records as Grace, Nellie, Addi-

son, and Cornelia streets. These streets, while not specified on the plat as streets, nor designated by name, so as to make a sufficient statutory dedication, were so laid out as to correspond at their eastern termini with what were already public streets known, respectively, by the names above mentioned, and apparently intended as extensions of such streets throughout the resubdivision, and were, with what are now called Evanston and Pine Grove avenues, intersecting them at right angles, and extending through said subdivision, treated by Mr. Hundley, not only as shown by the plat, but by his subsequent acts, as public streets, and were accepted, improved, and used as such by the public. It is true, there is no contention as to these cross streets, except as to whether they end in a cul-de-sac at the western line of the land in controversy or extend through the same to the water's edge. In truth, it is not so much contended by appellees that these streets extend to the water's edge as that by their connection with the strip in controversy lying between the water's edge and what by the plat appears to be their eastern termini it is made to appear that by the making and recording of the plat they are stamped with the character of public ground. So far as appears from the face of the plat itself, this would seem to be true, except, perhaps, as to Grace street, where the center line appears to have been extended to the lake; but in considering whether or not there has been a common-law dedication, or whether or not, as to the individual property owners who claim to have purchased by the plat, appellants are estopped from denying that the strips in question are streets or public grounds, under the issues many facts and circumstances shown by the evidence must also be considered in connection with the plat. Mr. Wilson, who seems to have been connected officially with the town of Lake View since 1870, part of the time as town clerk, testified that by the direction of the town board he graded and improved Grace street to the lake, and in doing so deposited the refuse sand and other material on this open strip in front of block 6; that the work was done in 1870 or 1871, and that Mr. Hundley then claimed the land where he deposited the sand in front of block 6 as belonging to him, and threatened to sue Wilson. As we understand the testimony of this witness, Mr. Hundley did not complain of the improvement of Grace street, but of the placing of the excavated material on his land in front of block 6. Mr. Hundley's position in this respect is better established by his acts, which are clearly proved in dealing with the land, than by the testimony of witnesses as to what he said so many years ago. About the time mentioned by Wilson, Hundley built a fence upon the strip in controversy along the south side of Grace street, and extended it 175 feet east of the east line of the block to a point not far short of the water's edge, and thence

southerly about 140 feet. He also built a sidewalk on the south side of Grace street across this strip outside of this fence, and extending more than 100 feet towards the lake. This fence and the sidewalk was never removed, but still remain. This was, of course, many years after the plat was made, but there is not sufficient evidence in the record to show that Mr. Hundley had previously dedicated this strip to the public, or, if he had that intention when the plat was made, that his offered dedication had been accepted. Some—perhaps the larger number—of the witnesses testify that following the making of the plat he said he intended that there should be a public street along there, while some say he said he intended it for the abutting property owners fronting on the lake, to be improved and beautified for their use and benefit. The latter view is more consistent with the acts of all parties in interest than is the former; yet the evidence, when considered in all its bearings, tends to prove rather the lack of any settled definite purpose on the part of Mr. Hundley in this regard than otherwise. Counsel for appellees ask, why would he make and record a plat with lots fronting upon this strip if he did not intend it as a street or highway by means of which access might be had to such lots? And it is justly said that it could not well be supposed that he intended these lots to abut upon a piece of private property which might, after the lots were sold, be built upon or devoted to private use to the almost total destruction of the value and usefulness of the lots fronting upon it. Still it is not, nor can it be, claimed that simply by so dividing and platting his land, and in a manner insufficient to establish a statutory dedication, that act alone would amount to a dedication at common law. He might, of course, make such a plat, and reserve the question of the use of the strip for future determination. He could devote it to public uses, or so long as he retained control of it, and did not by the sale of lots with reference to it as open public ground, or as a street, estop himself, he could, in the absence of acceptance of it by the public, change his mind in dealing with it, even if he had originally intended to dedicate it as a public highway.

A part of the strip in question in front of block 7 was fenced in as early as 1862, and since 1871, Mason, one of the appellants, has been in possession of all that part of the strip in front of block 7, claiming to own it. He fenced it in in 1872, and it has remained so fenced ever since, except that it was opened that year to allow the owners of property abutting on this strip to construct at their own expense a 20-foot driveway, which driveway, after having been used for a short time, was washed away, or covered with sand by the action of the waters, and was abandoned, and the fence restored. The property owners abutting on this strip expended considerable sums of money in erecting piers on the mar-

gin of the lake to prevent, and did thereby prevent, the encroachment of the lake upon much of the land in controversy as well as upon their lots, and by the same means the width of the strip was increased. Some of these owners made other improvements by hauling and depositing black soil upon the sandy beach, by planting trees, sowing grass seed, and otherwise improving the land. Hundley, and after his death his executors, made deeds to several of the lot owners whose lots abutted on this strip, conveying to them all riparian rights in front of their property, and by other deeds purported to convey in express terms parts of the strip itself. It is claimed by appellees that the fencing in of portions of the strip was not done under claim of ownership, and in hostility to the claims of appellees, but to protect the lots of the lot owners from sand which the wind carried upon their premises, and to keep out intruders, who were in the habit of hauling away the sand and gravel to be used for building purposes, which was deposited on the beach of the lake. But this view is not, we think, established by the evidence, nor is it shown that the public had any rights to be thus invaded. If it had, it is somewhat strange that no action was taken for so many years by the town of Lake View, or by any one representing the public interests, when the town had notice, as Mr. Willson testifies, that Mr. Hundley was claiming the strip as his private property, and he and those in privity with him were in possession of it, and devoting it to their own private uses. Nor was there any money expended or labor bestowed on behalf of the town or the public in any way upon the land in question. But under their several claims of ownership and possession, the appellants, or some of them, and those with whom they were in privity, retained possession, improved parts of the land, and sold and removed large quantities of sand and gravel from other parts without hindrance for more than 20 years. There was no traveled road there. It was, so far as it was unfenced and sufficiently level, used to some extent by the public in passing along the lake shore, but no more than any vacant and unoccupied land similarly situated would be used. But it was not only proved without contradiction that it was Mr. Hundley's intention that the east and west streets above mentioned should be public streets through to the lake as continuations of the streets with which they connect on the west, but it was proved also that they were kept open and used to the water's edge, and that sewers were laid and extended in some of them to the lake. It is worthy of notice, also, that in fencing in portions of the strip in question neither Mr. Hundley nor those succeeding him in interest extended their fences across these streets. They were taken possession of by the public, and used up to their connection with the lake, itself a great public highway; and, although it is said that, so far as indi-

cated on the plat itself, there is no more evidence of an intention to dedicate them to the public than the strip in controversy, still, in the lapse of time, they have been differently treated by all concerned, and it is now too late, we think, to regard them otherwise than as public streets to the water's edge. But we cannot regard the setting apart of them and their appropriation and improvement through the strip in question as sufficient evidence, when considered with the other evidence in the record, of a dedication by the owner, and an acceptance thereof by the public authorities, of the strip in question to public uses, so far as the land lies in front of blocks 6 and 7. The evidence is voluminous, and no extended view of it can be here made, but it does not greatly differ from the facts presented in *City of Chicago v. Drexel*, where the south end of the strip in front of the strip in front of block 12 was adjudged to be private property, except, as before said, in respect to the claims of individual property owners who are interested in having this strip declared to be a public street; and we are now brought to a more direct consideration of that branch of the case.

It is insisted that the law is that where an owner sells and conveys lots according to a plat showing the subdivision of the land into blocks, lots, and streets, there is an implied covenant with the purchaser that such streets shall remain open as public streets, independently of the question whether or not there has otherwise been a dedication of such streets to, or an acceptance of them by, the public, and that such purchasers have rights in such streets which they may themselves enforce to prevent their appropriation or obstruction; and that this principle is not limited in its application to the single street on which the lots so purchased are situated. *Zearing v. Raber*, 74 Ill. 413. In *Earl v. City of Chicago*, 136 Ill. 277, 26 N. E. 370, in citing *Littler v. City of Lincoln*, 106 Ill. 353, and *Hamilton v. Railroad Co.*, 124 Ill. 236, 15 N. E. 854, this court said: "The announcement of the principle that there must be acceptance of the street as a public highway, is qualified by the statement that the owner is estopped to deny the dedication whenever private rights intervene. In the latter case it is also said that there may well be private rights in respect to streets in grantees of conveyances made under the plat, although there may have been no complete dedication of the streets to the public by an acceptance of the proffered dedication. In *Zearing v. Raber*, 74 Ill. 409, this court said: 'It is unimportant whether the public have so far accepted the dedication as to be bound to keep the street in repair, since the question involved is simply one of private right.' The doctrine of that case and *Gridley v. Hopkins*, 84 Ill. 523; *Maywood Co. v. Village of Maywood*, 118 Ill. 61, 6 N. E. 866; *Smith v. Town of Flora*, 64 Ill. 93,—and of numerous other cases, and of the common law,—is that, if the owner

of the land exhibits a map or plan of a town, or addition platted thereon, and on which a street is defined, and sells lots abutting on such street, and with clear reference to the plat exhibited, then the purchasers of such lots have a right to have that street remain open forever; and such right is not a mere right that the purchasers may use that street, but is a right vested in the purchasers that all persons may use it; that the sale and conveyance of lots according to the plat implied a grant or covenant to the purchasers of lots and their grantees; that the public street indicated upon the plat shall be forever open to the use of the public as a public highway, free from all claim or interference of the proprietor, or those claiming under him, inconsistent with such use; and that the owner and all claiming under him will be perpetually estopped from denying the existence of the street." It is contended by appellants that this principle applies only to the purchasers of lots abutting, calling to bind, on the particular street, and counsel cites *Hawley v. Mayor, etc.*, 33 Md. 270, where it was, among other things, said: "The doctrine of implied covenants will not be held to create a right of way over all the lands of a vendor which may lie, however remote, in the bed of a street. The lands must be contiguous to the lot sold, and there must be some point of limitation. The true doctrine is, as we understand it, that the purchaser of a lot calling to bind on a street not yet opened by the public authorities is entitled to a right of way over it if it is the lands of his vendor to its full extent and dimensions only until it reaches some other street or public highway." Counsel cite, also, in support of this view, *Littler v. City of Lincoln*, 106 Ill. 353; *City of Chicago v. Association*, 102 Ill. 379; *City of East St. Louis v. O'Flynn*, 119 Ill. 200, 10 N. E. 395; *Village of Winnetka v. Prouty*, 107 Ill. 225; *Brick Co. v. City of Chicago*, 138 Ill. 628, 28 N. E. 756, and other cases. The same question of fact arises, however, namely, was the strip in question defined as a street or public ground? The point, as applicable here, where Payne, Yaggy, and others became parties, is, that all but Yaggy purchased lots which were not adjacent to the strip in question, but which abutted on streets from thence fully recognized as public streets, and opened, improved, and since maintained as such, and most of them more or less remote from this strip on the lake. Payne, who is the only one of the non-adjacent proprietors whose case deserves special attention, owned lots 1, 2, 13, and 14, and the north half of lots 3 and 12, in block 11. Some of these lots abutted on Evanston and some on Pine Grove avenue, and from all there was free access to the lake by way of Addison street. He testified that he purchased these lots from Hundley, through his agent, Reese, in 1868, and has lived there since 1870, and that when he first knew the property, in 1867, it was fenced into blocks; that he

wanted to buy property running to the lake, and that he first tried to buy in block 7, but was informed by Reese that they were not offering that property, as it did not go to the lake, that there was a street intervening; that Reese represented that this strip of land was a street; that he (witness) then tried to buy in block 16, which was acre property carrying riparian rights. As Payne was desirous of purchasing land running to the lake, and first tried to buy in block 7, and was refused because the lots did not run to the lake, that there was a street intervening, it would seem he did not then understand from the plat that the open space to the lake was a public street, else he would not have endeavored to purchase there so as to have his land run to the lake. At any rate, his testimony at this point is more consistent with the view that he supposed purchasers of lots fronting on this strip on the lake would acquire rights to the strip which other lot owners would not enjoy. But the proprietor of the subdivision was then not offering those lots for sale, according to the testimony of this witness, and the only reason given is that Reese said there was a street intervening. It would seem more in line with the evidence, and consistent with all proper inferences to be drawn from it, that the use to which the strip in question should finally be devoted was as yet an unsolved problem with Mr. Hundley. At any rate, it cannot be claimed that simply by the sale of the lots in block 11 to Payne, there could arise any implied covenant to him that the strip in controversy in front of blocks 6 and 7 should be devoted to the purposes of a street or way, either for the benefit of the lot owners or the public at large, for the plat did not designate any purpose for which such strip should be used; but this omission was sought to be supplied by the testimony of Payne of representations made to him by the owner's agent when he endeavored to purchase block 7. Whatever else might here be said, it would seem to be sufficient to say that he did not buy upon such representations in block 7, but afterwards bought in block 11 without any representations whatever; and, so far as the evidence discloses, without being induced or in any way influenced to purchase by what had been said about the strip in question. So far as Yaggy's rights are concerned, he simply testified that he was—that is, at the time of the trial, in 1892—the owner and in possession of lots 1 and 2 in block 7. Of whom or when he bought or how he derived title was not shown. At the time of the trial this strip in front of Yaggy's lots was, and had been for more than 20 years, in possession of others under claim of ownership; and Yaggy's rights, if he had any, were barred. So, too, in regard to Payne and other individual lot owners. They stood by and saw this strip which they now claim was intended as a street or way for their benefit inclosed, appropriated, and used by Hundley, Mason,

Kohlsaat, and others as private property without in any manner seeking to enforce their alleged rights for more than 20 years; and, without extending this opinion in the discussion of the relative rights of abutting and other lot owners, we conclude the consideration of the case by holding that all of their alleged rights are barred by lapse of time and laches. They became parties to the suit in 1892, and, so far as their rights are concerned, the suit must, as to them, be regarded as having been then first commenced. *Dunphy v. Riddle*, 86 Ill. 22. The decree in each case is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion. Reversed and remanded.

The record in this case was in the lifetime of Mr. Justice BAILEY assigned to him to prepare the opinion of the court, but he died before any opinion was prepared, and the record was reassigned after his death.

(163 Ill. 38)

MOORE v. PARISH et al.¹

(Supreme Court of Illinois. March 28, 1896.)

MECHANIC'S LIEN—NOTICE.

1. Rev. St. 1891, c. 82, § 4, requires the notice for a mechanic's lien to set forth the times when the material was furnished or labor performed. *Held* that, where a contract for the carpenter work on a building required all the labor and material to be furnished for a certain price, the notice of lien need only state the dates between which the labor and material were furnished, and the value of both in a lump sum, though the contractor was prevented by the owner from completing his contract, and therefore was only entitled to a reasonable compensation for as much thereof as had been performed in proportion to the contract price.

2. Where all the carpenter work in a row of five houses, having continuous front and back walls, and constructed on two lots, is done under one contract, for a lump sum, without any amount being designated for each house, the notice of lien therefor may include both lots and all the houses.

Appeal from appellate court, First district.

Action by Anton Moore against Carrie I. Parish and others. From a judgment of the appellate court (58 Ill. App. 617) affirming a judgment for defendants, plaintiff appeals. Reversed.

Jas. C. McShane, for appellant. Ashcraft, Gordon & Cox, for appellees.

CARTWRIGHT, J. Appellant was petitioner in the circuit court in a proceeding to establish a mechanic's lien upon certain premises, under a contract made with James A. Parish, who was the owner of the premises at the time the work was done. Appellees were defendants in that proceeding, and were interested in the premises as owners and subsequent incumbrancers. The petition was dismissed by the circuit court, and the decree dismissing the same has been affirm-

ed by the appellate court. The petition averred the making of a contract by the petitioner with James A. Parish, the owner, for doing the carpenter work, and furnishing the materials for the same, in the erection of a block of five dwelling houses built together as one building, for the agreed price of \$7,760, and that he partly performed said contract, until Parish took it out of his hands. It further alleged that, after making said contract, the petitioner and Parish entered into separate contracts for other work on the buildings, at the agreed price of \$566; that Parish failed to pay the installments due according to the terms of the contract, by which petitioner was prevented from completing the work, as well as by Parish taking it out of petitioner's hands; that Parish was entitled to certain credits named in the petition, and a sum stated as requisite to finish the work; and that there was a balance of \$3,753 due the petitioner for work and material. On a reference of the case to the master, the petitioner offered in evidence a claim for a lien filed March 25, 1891, in the office of the clerk of the circuit court of Cook county, where the premises were situated, which was as follows:

"State of Illinois, County of Cook—ss.: Anton Moore vs. James A. Parish. Claim for Lien. Anton Moore, being first duly sworn, on oath says: That he is the contractor for the carpenter work and material for the same on the buildings situated on the premises hereinafter described; and that the attached Exhibit A is a just and true statement of the account due him, the said Anton Moore, from said James A. Parish for said carpenter work, including material for same furnished said James A. Parish at the time in said statement mentioned, which various amounts are due and payable to the said Moore from and after the respective dates thereof; and affiant says that the labor and material in said statement mentioned were used in the construction of and improvement of brick buildings, situate upon the following described premises, in the county of Cook and state of Illinois, to wit: Lots 1, 2, 3, 4, and 5 of subdivision of lots (23) and (24) by James A. Parish, of sub. block (1) of Hutchins' sub. of blk. (3) in sub. by ex'ors of E. K. Hubbard of E. ½ of S. W. ¼ in Sec. (2), T. (38) N., R. 14 E. of the 3rd P. M. in Cook county, otherwise known as 4,403, 4,405, 4,407, and 4,409 Berkeley avenue, Chicago. And affiant says that there is now due and owing to him, the said Anton Moore, from said James A. Parish, at whose request said material and labor was furnished as aforesaid, after allowing him all just credits, deductions, and set-offs, the sum of \$3,753, for which amount said Anton Moore claims a lien upon the above-described premises. Anton Moore.

"Subscribed and sworn to before me, this 24th day of March, A. D. 1891. [Seal.] James C. McShane, Notary Public."

"Exhibit A. Chicago, Illinois, March 24,

¹ Rehearing denied November 6, 1896.

1891. James A. Parish to Anton Moore, Dr. To balance due for carpenter work and material for same, furnished under contract during a period commencing about May 1, 1890, and ending about January 15, 1891, \$3,753.00."

The master held this notice of claim to be insufficient, and refused to admit it in evidence. The solicitor for petitioner offered to support the allegations of the petition in all other respects by proof; but the master, having held that the notice was insufficient, and that the claim for lien could not be sustained under any proof, reported to the court, recommending a decree dismissing the petition for want of equity, at petitioner's costs. The court, on exceptions to the report, sustained the master. The grounds of objection to this notice are that it was void for want of dates and items showing what part or portion of the claim was for work, and what for materials, and for want of a sufficient verification.

The claim for lien required from the contractor is "a just and true statement or account or demand due him, after allowing all credits, setting forth the times when such material was furnished or labor performed, and containing a correct description of the property to be charged with the lien, and verified by an affidavit." Rev. St. 1891, c. 82, § 4. Under the contract set out in the petition in this case, the petitioner was to furnish the material and perform the labor in doing the carpenter work on the whole block of buildings, and there were no items to be set down forming an account. There were no distinctions between labor and material in the contract, and no price was fixed for either, nor for separate items of either. Under that contract there was no duty of the petitioner to keep an account of the items, or to furnish them to the other party. In an action to enforce his rights, he could not be called upon to prove the items or work or material, or the particular dates upon which each was furnished, or the price. The entire job constituted but a single item, and the time when the material was furnished and labor performed was properly set forth by giving the period during which the contract was executed. Phil. Mech. Liens, § 352; 2 Jones, Liens, § 418; Lumber Co. v. Newton, 72 Iowa, 90, 33 N. W. 377; Davis v. Hines, 6 Ohio St. 473; Thomas v. Huesman, 10 Ohio St. 152; Baptist Church v. Trout, 28 Pa. St. 153; Lee v. Burke, 66 Pa. St. 336; Hilliker v. Francisco, 65 Mo. 598; Wilson v. Merryman, 48 Md. 328; Wescott v. Bunker, 83 Me. 499, 22 Atl. 388; Doolittle v. Plenz, 16 Neb. 153, 20 N. W. 116. If, from the nature of the contract, there had been a running account, consisting of items of either labor or material, for which fixed prices were or should be charged, the rule might be different. The cases of McDonald v. Rosengarten, 134 Ill. 126, 25 N. E. 429, and Campbell v. Jacobson, 145 Ill. 389, 34 N. E. 39, are relied upon as holding that this account should have been itemized. That question

was not decided in either of those cases, but it was held that a claim for lien must comply with the statute by setting forth the times when the material was furnished or labor performed; and in the first case it was said: "The purpose of requiring the claim to set forth the times when such material was furnished or labor performed is obviously to enable those interested to know from the claim itself that it is such as can be enforced." It was not held in either case that the claimant was bound to state in his notice of lien any more than he would be bound to prove in order to enforce the lien. In this instance the time during which the contract was performed was substantially stated, affording such information as was required under the rule that it should be sufficient to enable those interested to know that it could be enforced.

But it is also argued that this case is taken out of the rule that, under an entire contract for a stipulated sum, the work and material need not be separated and itemized, by the fact that the work was not completed. Section 11 of the lien law provided that when the owner of the land should fail to perform his part of the contract, and by reason thereof the other party should, without his own fault, be prevented from performing his part, he should be entitled to a reasonable compensation for as much thereof as had been performed in proportion to the price stipulated for the whole. It is claimed that under this section the petitioner must recover on a quantum meruit, and must state and prove the items. This, however, is not correct. The petitioner was performing a contract where it was neither required nor expected that he would keep an account of the items, and, if kept, it would not afford a basis for determining the amount due him. The statute provided that he should recover a reasonable compensation for that part of the contract performed, in proportion to the price stipulated for the whole. When prevented from the further fulfillment of his contract, the petitioner would have no way of making an account of the dates when he was engaged in performing his contract, or of the separate items of materials furnished, and could not be expected to furnish such an account. His claim was to be adjusted according to the proportion of the entire contract performed; and there was no greater necessity for a bill of particulars than if his whole contract had been performed.

The affidavit is objected to on the ground that it does not state when the amount claimed became due. It sufficiently shows that the amount was due and payable from and after the date named in Exhibit A. The affidavit stated that Exhibit A was a just and true statement of the account due the petitioner, and was a sufficient verification, within the rule stated in McDonald v. Rosengarten, supra.

The claim for lien is also further objected

to on the ground that one notice was not sufficient to include all the lots and the entire building embraced in the petition. It was stipulated by the parties before the master that the walls in the front and rear were continuous walls, and the building was divided into five residences by brick partition walls; that the carpenter work was to have been done under one contract, made by defendant James A. Parish, the owner of the whole premises, with the petitioner, the contract being for all the carpenter work, without any separate amount designated for either house; that the petitioner worked on each at practically the same time; and that the contract for mason and cut-stone work was also made as an entirety, without reference to any particular house. The contract being for an entire sum, the lien attached to all the lots. And even if petitioner might serve his claim for lien, if he chose to do so, and third persons would not be prejudiced thereby, provided he should prove an apportionment of the time and material, yet he was not bound to do so. What was furnished for one residence, or what for another, was not material to his rights in any way; and, if it was of importance to the owner or any subsequent purchaser or incumbrancer, it would be for the person so interested to make such a showing, if it could be done, as would protect the equitable rights of all parties to the proceeding. *Lumber Co. v. Newton*, supra; *Doolittle v. Plenz*, supra; *Choteau v. Thompson*, 2 Ohio St. 114; *James v. Hambleton*, 42 Ill. 308. The judgment of the appellate court, and the decree of the circuit court, will be reversed, and the cause remanded to the latter court for further proceedings in accordance with this opinion. Reversed and remanded.

(164 Ill. 144)

TROGDON v. WALSTON et al.

(Supreme Court of Illinois. Nov. 23, 1896.)

MORTGAGE—WHAT CONSTITUTES—EVIDENCE.

1. It appeared that defendant's interest had been sold under execution; that, after defendant's right of redemption expired, the purchaser at the sale assigned the sheriff's certificate to plaintiff, with the acquiescence of defendant. At the same time plaintiff delivered to defendant a written agreement, reciting that he held the certificate of sale until repayment of the money paid by him, whereupon he agreed to deliver the certificate to defendant. The money was to be repaid by a certain date, or the agreement was to be void. The money was not so repaid, and thereafter plaintiff, without the knowledge of defendant, obtained a sheriff's deed conveying defendant's interest. At the time plaintiff purchased sheriff's certificate he was anxious that defendant should get back his interest, as it would be sufficient to satisfy another judgment against defendant on which plaintiff was security. Defendant testified that the certificate was assigned to plaintiff to secure the repayment of the loan, which plaintiff denied. Defendant's testimony was corroborated by other circumstances. *Held*, that the transaction constituted a mortgage, and that defendant was the owner of his in-

terest, subject to plaintiff's lien for the money advanced.

2. It may be shown by parol evidence that an assignment of a sheriff's certificate of sale and sheriff's deed, though purporting to convey absolutely the interest of the judgment debtor, were intended as security for money advanced by the assignee of the certificate to the judgment debtor.

Appeal from circuit court, Edgar county; F. Bookwalter, Judge.

Suit for partition by Judge Trogdon against Cynthia Walston, A. Y. Trogdon, and others. Decree for defendant A. Y. Trogdon. Plaintiff appeals. Affirmed.

Dundas & O'Hair, for appellant. Jas. A. Eads, H. Van Sellar, and H. S. Tanner, for appellees.

BAKER, J. This cause was heard in the circuit court of Edgar county, before the chancellor, upon the amended bill of Judge Trogdon, the appellant here, the amended cross bill of A. Y. Trogdon, one of the appellees, the answers to said amended bill and amended cross bill, and the replications thereto. The amended bill was for partition of a certain tract of land of about 160 acres, formerly owned by one Samuel Trogdon, deceased, the grandfather of the complainant. It made A. Y. Trogdon and the other heirs parties defendant, set forth the interest of each of the heirs in the land, and averred, among other things, that all of the interest of A. Y. Trogdon in said land, excepting $\frac{1}{216}$ thereof, became vested in the complainant in the following manner, to wit: That the sheriff of Edgar county, by virtue of an execution issued from the Edgar circuit court, in favor of one William C. Townsend against A. Y. Trogdon, sold, on the 30th day of August, 1890, all of the interest of said A. Y. Trogdon in said land to the plaintiff in the execution, William C. Townsend; that said Townsend afterwards, on November 27, 1891, assigned the certificate of sale to the complainant in the bill, and that later, on the 13th day of December, 1892, the said sheriff executed and delivered to the complainant a sheriff's deed conveying to him all the interest that the said A. Y. Trogdon had at that time in said land. It further averred that the said $\frac{1}{216}$ of the land became vested in A. Y. Trogdon subsequent to the making of the sheriff's deed. A. Y. Trogdon, both by answer and amended cross bill, denied that the complainant became the absolute purchaser of his interest in the land by virtue of said certificate and sheriff's deed, and alleged that both of those instruments were merely held by the complainant in trust for him, to secure the payment to complainant of a certain sum of money due and owing to him by the said A. Y. Trogdon. The report of the master in chancery, to whom the cause was referred for proofs, found the issue to be with A. Y. Trogdon; that the complainant merely held the title to A. Y. Trogdon's interest in the premises in trust to secure the payment to him, the complainant, of the sum of \$250, with interest

thereon at the rate of 7 per cent. per annum from November 27, 1891. The court sustained the findings of the master, and decreed that A. Y. Trogdon was the owner of the portion of the land in dispute, subject to complainant's lien for the sum of \$250 and interest, as aforesaid. It is to this portion of the decree only that the appellant objects, the decree having settled satisfactorily to all of the parties in interest all of the other matters in controversy in the cause. He claims that the court erred in finding as it did on this question, instead of decreeing that he was the absolute owner of the disputed interest in the land.

On November 27, 1891, and after appellee's right of redemption had expired, William C. Townsend, the purchaser at the execution sale, assigned the sheriff's certificate of sale to the appellant herein, who, on the same day signed and delivered to appellee the following written agreement: "For and in consideration I hereby agree to cancel and deliver up to A. Y. Trogdon a certificate of sale made to W. C. Townsend on judgment of Townsend against A. Y. Trogdon; sale made about August 30, 1890, for \$520.49. Whereas, Judge Trogdon has bought said certificate for two hundred and fifty dollars on November 27, 1891: Now, the said Judge Trogdon holds said certificate until said money is to be paid to him with seven per cent. interest. Said money to be paid on or before June 27, 1892, or this will be void. [Signed] Judge Trogdon." At this time a judgment was outstanding against appellee and the appellant, the latter being security; and it appears appellant was anxious that appellee should get back his interest in the land, which was worth far more than it had sold for at the execution sale. It would be more than sufficient to pay off this judgment, and would thus relieve him. In fact, he had frequently spoken to appellee on the subject, and urged him to buy the certificate. The evidence shows that on said 27th day of November, 1891, appellant met appellee, and asked him if he would purchase the certificate of sale held by Townsend, and appellee replied that he could not, because he had no money. Thereupon appellant said that he would buy it, to which appellee assented. They then went together to the office of one J. E. Dyas, who held the certificate as attorney for Townsend, and told him their errand. Appellant offered \$250 for the certificate, but Dyas refused to sell it for less than \$300. Appellant refused to pay that amount. At this juncture appellee called Dyas into another room, where the latter consented to take the former's note for \$50 in payment of so much of the price demanded. The note was then and there made and handed by appellee to Dyas. They then returned to the other room, where they had left appellant, and Dyas told him he would take his \$250, and assign to him the certificate, provided appellee would release him (Dyas) and his client (Townsend) from any liability for damages growing out of the sale of the land, which, it seems, had been sold for more

than was due on the judgment. The transfer of the certificate was agreed to on this basis. Appellee thereupon signed the release, and Dyas assigned the certificate to appellant, who paid him \$250. About the same time the agreement signed by appellant and above set forth was given by him to appellee. As to these facts there is no dispute. Whether or not appellant then knew that appellee had given Dyas a note for \$50 does not clearly appear, the testimony on this point being conflicting. Light on this question, however, is not necessary to a decision of the case. Appellee testified that the understanding between him and appellant, at the time of the purchase of Townsend's certificate, was that appellant was assisting him to get back his property; that the \$250 advanced by appellant and paid to Dyas was a loan to him (appellee); and that the certificate was assigned to appellant in order that he might have a lien for the repayment to him by appellee of the said \$250, and interest thereon. Appellant, on the other hand, testified that there was no such understanding, but that his purchase of the certificate was purely on his own account, and free from any interest of appellee therein. The testimony of appellee is corroborated by the facts that he paid \$50 of the money given to Dyas, and signed the release. He would not have done these things had he not understood that he was to be materially benefited thereby. The further facts that appellant was interested in appellee's regaining his title to the land, that he took the latter with him to Dyas' office, where appellee assisted him in making the bargain for the purchase of the certificate of sale, and that he signed and gave to appellee the agreement before mentioned, all tend strongly to sustain the position of appellee that this transaction was but a mortgage. Appellant obtained his sheriff's deed without the knowledge of appellee, who did not become aware of the fact until a long time thereafter. It is contended by appellant that the only understanding between them was that he was to extend the time of redemption, and that this was evidenced by the agreement of November 27, 1891, which he signed and gave to appellee, and which the latter accepted. That writing, if read alone, and without regard to the other evidence in the case, would seem to bear out this contention. However, when taken in connection with the facts and circumstances in evidence, its true meaning is plain; that is, it but sustains the position of appellee that the certificate was held by appellant merely as a mortgage to secure the payment of the \$250. The date named in the writing for the payment of the amount due simply fixed the time when appellant might foreclose his lien. The fact that the assignment of the certificate of sale and the sheriff's deed purport to convey absolutely to appellant the appellee's interest in the land here in question is not conclusive of their true character, for it is competent to show by parol evidence that they were in fact intended as a mortgage. *Whittemore v. Fish-*

er, 132 Ill. 243, 24 N. E. 636. Our conclusion is that the decree below was right, and it is accordingly affirmed. Affirmed.

(164 Ill. 282)

CROCKER v. MANLEY.

(Supreme Court of Illinois. Nov. 23, 1896.)

CANCELLATION OF DEED—FRAUD—EVIDENCE.

In a suit to set aside conveyances of land made in exchange for stock of a mining company on the ground of fraudulent misrepresentations made by defendant, it appeared defendant represented to plaintiff that the mines were rich, would pay a dividend of from 20 to 100 per cent., and there was enough silver ore on the dump at the mines to pay the par value of the stock; also that the mine was a fissure vein, running east and west nearly half a mile, varying in width from 6 to 50 feet, and 200 feet deep, which was true substantially; also that a car load of ore taken from the mine assayed 68 ounces per ton,—a statement which was based on information from the superintendent of the mine, and made by defendant in good faith, though in fact it was not shown to be true. Defendant also represented that the general assays reached over 200 ounces per ton, which was true of the samples taken before the mine was worked and when the statement was made. Before making the conveyances, plaintiff visited the mine, inspected it thoroughly, took samples of ore, had them assayed, and was entirely satisfied. It did not appear that any fraud was practiced on him in showing him the mine or giving him samples of ore, which he selected himself. *Held*, that the evidence does not authorize a court of equity to rescind the contract.

Appeal from superior court, Cook county; Theodore Brentano, Judge.

Bill in chancery by William F. Manley against Alvin E. Crocker and others to set aside conveyances made by plaintiff to defendant Crocker on the ground of fraudulent misrepresentations. Judgment for plaintiff. Defendant Crocker appeals. Reversed.

This was a bill in equity, brought by William F. Manley against Alvin E. Crocker, the appellant, the San Javier Mining & Milling Company, and T. C. Mills, to set aside conveyances from Manley to Crocker, and from latter to Mills, of certain real estate in Oak Park, a suburb of Chicago, claimed to be worth \$22,500, which it was alleged were procured by fraud and false representations. The superior court decreed in favor of the complainant, and from that decree Crocker appeals.

The record is somewhat voluminous, but the principal question presented is whether the evidence sustains the decree. In the year 1892 the appellant, who has for a number of years resided in Richmond, Ind., purchased a silver mine near La Ventura, in Mexico. After making the purchase, he organized a corporation under the laws of New Jersey, with a capital of \$500,000. The appellee, Manley, who also resided at Richmond, learned of the mine through a man named Leonard, and entered into negotiations with Leonard, who acted as agent for the company or Crocker, to purchase stock in the company. Leonard, as the complainant testified,

made various statements to him in regard to the mine and its rich qualities, and he agreed to take 1,000 shares of stock, provided Crocker's statements agreed with those of Leonard when he returned from Mexico. Crocker returned about March 6, 1893, and complainant had an interview with him at Leonard's store, where Crocker made a few statements in regard to the mine. Manley requested that the statements be reduced to writing, which was done within a few days, and upon securing the statement in writing Manley took 1,000 shares of stock for \$5,000, and gave two notes in payment,—one for \$2,000, payable to Leonard; and the other for \$3,000, payable to Crocker. On the 11th day of March, Manley took 1,000 shares more of stock at \$5 per share, and executed his note for the same. On the 23d day of March he agreed with Leonard to take 1,000 shares more, but the stock was not issued until in July. In the last week in April Manley went to Mexico for the purpose of making a personal examination of the mine. Upon arriving at the mine, he made an examination of the property, went into the shafts, took specimens of the ore from the shafts and dumps, and, after making all the investigation and examination he desired, he returned to Chicago, and had the specimen assayed, and expressed himself well satisfied with the mine and its prospects. Some time after Manley returned, he made an effort to sell his Chicago property, for the purpose of raising money to pay his notes given for stock, but, not being able to do so, he proposed to Crocker to return the stock and cancel the notes, but Crocker expressed a desire to have him remain in the company, and on June 10th submitted the following proposition: "Richmond, Ind., June 10, '93. Wm. F. Manley—Dear Sir: I will give you \$75 a front foot for lots 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50,—300 feet fronting on Madison street, and 140 feet on Waller avenue, Austin, a suburb and part of Chicago, Illinois, making the total price \$22,500, less the school-fund mortgage, and that portion of the mortgage held by the Home National Bank of Chicago, which may apply to and cover on lots 39 and 40, as shown by plat submitted to me this day; also less the taxes for this year, due in August or September next, and the assessments for improvements heretofore made upon the lots by the city, and the interest which has accrued up to the date of transfer. The payment shall be: I will surrender two notes which I hold against you for \$3,500 each, and take up the notes which Valentine Leonard holds against you of \$5,000, and pay the balance, whatever it may be, in stock at par in the San Javier Mining & Milling Company of La Ventura, Mexico, certificates for said stock to be issued to you as soon as the titles are all right, and transfers made by a good and sufficient deed of general warranty. [Signed] Yours, truly, Alvin E. Crocker. June 13, 1893." Manley accepted the proposition in

writing as follows: "I hereby accept the above proposition, with the following stipulations: The said Crocker is to pay a certain note for \$3,000, which has been discounted at the First National Bank, and given by me to him on March 3, 1893, due in six months from date, and assume the payment of \$1,000 of the mortgage which covers on lots 39 and 40, held by the parties named above. [Signed] W. F. Manley." On the 3d day of July, 1893, in pursuance of the contract, Manley conveyed the property to Crocker, who issued to him 1,000 shares of stock, as specified in the contract. At the same time the 1,000 shares of stock purchased through Leonard on March 23d were also issued, and delivered to Manley. A mill having been erected at the mine, the company, through Crocker, as manager, operated the mine during the summer and a part of the fall of 1893, but the results did not prove satisfactory, and the work at the mine was discontinued. In the meantime one Ewing, who had been in charge of the mining under Crocker, was discharged, and on the 9th day of November he wrote Manley a letter, in which he informed him that he had been imposed upon; that the mine was worthless, etc. Finally, in the month of March, Manley tendered back the stock he held in the company, and demanded a reconveyance of the Chicago property. This being refused, he filed this bill.

The fraudulent representations alleged in the bill are substantially as follows: That there was a certain valid corporation by name of the San Javier Mining & Milling Company, duly organized under the laws of the state of New Jersey, owning and operating certain silver mines and mill and machinery for operating the same, situate near La Ventura, Mexico; that said defendant, Crocker, was treasurer of said corporation, and manager of the mill and mines owned and operated by the mining and milling company, in Mexico; that he, the said Crocker, was the owner of a large proportion of stock of company; that said defendant, Crocker, by himself and agents, and defendant company, by its agents, falsely and fraudulently represented to your orator that said mines were rich with silver, and that they would pay a dividend of from 20 to 100 per cent. per annum upon the par value of the stock of said company; that there was enough silver ore on the dump at the mines to pay the par value of all of the stock that had been issued by the said mining and milling company, which was one-half million dollars; that the vein of ore in said mine was 16 feet in width, and assayed over \$1,000 per ton; that the depth of the vein of ore was 200 feet, and the assays of the ore ran in richness from 30 ounces troy per ton to 1,500 ounces; that said vein ran from east to west, lacking 40 feet of one-half mile, and varied in width from 6 to 50 feet; and further represented that the manager of the mine for the company said unqualifiedly that

he would pay 100 per cent. dividend, using the ore alone then developed and on the dump; that he also stated that, to reduce 50 tons per day, you could not use up the body of ore on hand in five years, without going any deeper in the shafts; that the said Crocker, the mining and milling company, and their agents and representatives, further represented that the mine was what was known as a "fissure vein," and that it grew richer the deeper you went into the mine; that there never had been such a development of rich ore in such a large body as was shown by the shafts in this mine; that they had recently sent a car load of ore taken from their said mine to a smelter in Monterey, Mexico, which assayed 68 ounces per ton of 2,000 pounds; that the average assays of the ore of said mine were over 200 ounces per ton; that they had a proposition from bankers in New York that they would list the stock on exchange, and capitalize the company at \$10,000,000, and dispose of all the stock within 60 days, if said mine paid 20 per cent. on the stock the first year; that he further represented that said defendants had at that time machinery in Mexico for the mill of 50 tons capacity per day; that they had shipped the boiler and the engine from Richmond, Ind., and the stamping machinery from Brooklyn, N. Y.; that all of said machinery was then in the City of Mexico, and would be put up and operated within 90 days from that time, and from thenceforward the company would pay dividends upon the stock. It is also alleged in the bill that in first instance, and before the issuance of said stock and acceptance of it by your orator, the said defendant, Crocker, made said statements to your orator orally, but at the time said he would, in addition to that, make a written statement covering the same statements that he made orally to your orator, and in pursuance of said statement the said defendant, Crocker, made and signed certain written statements, in which he detailed in part the representations that he had made to your orator orally in order to induce him to purchase and accept 1,000 shares of stock, and delivered said written statement to your orator, which is in the words and figures following, to wit: "March 10, 1895. Wm. F. Manley, Esq., Richmond, Ind.—Dear Sir: Inclosed I hand you cost of reduction of ore from the San Javier mines in Mexico, which I wish you to examine, and which I hope may meet with your approval, because it is very conservative, and can be verified at any time, and, with the assurance I have from our manager, can be and will be increased fivefold the first year. The ore body developing a vein of ore sixteen feet in width and assaying way up into the thousands per ton. The depth of this vein of ore is now about 200 feet, and the assays of the ore to run in richness from thirty oz. troy per ton to 1,500. This vein runs due east and west lacking forty feet of half a mile, and varies

in width from six to fifty feet. Our manager says, unqualifiedly, that he will pay 100 per cent. dividend, and using the ore alone now developed and on the dump. Using his own language: 'If you reduce fifty tons a day, you cannot use up the body of the ore now on hand, and you need not go one inch deeper in the shaft.' You are perfectly aware that all mines, especially fissure mines, grow richer the deeper you go, and the general expression in regard to the San Javier mines is that there has never been such a development of rich ore in such a large body as is shown in the shafts of this mine. Besides the statement which I give of cost of reduction, showing such a large profit, I would say that the difference in the wages between Mexico and Colorado will make a difference in favor of Mexico, guarantying itself an immense dividend. Then all of our expenses to Mexicans is paid in Mexican money, while all of our receipts will be exchange, bearing at least fifty per cent. premium. We lately sent a carload of ore, taken from the mine to the Monterey smelter, which assayed sixty-eight oz. per ton of 2,000 lbs. Our general assays of numbers of ounces per ton reaches now over 200 oz. per ton. There is not one feature in regard to this mining property but what it is indicative of very large dividends. We have no ice, snow, or sleet; can work 365 days in a year; and if we do our part, which our own interest compels us to do, there is no doubt but the returns for every dollar invested in this stock will bring larger returns than you have ever received before. Indeed, we have a proposition from bankers in New York, if we pay the dividends we know we can, that they will list the stock on the exchange, and capitalize the company at ten million dollars, and dispose of all the stock inside of sixty days. Yours, very truly, Alvin E. Crocker, Treasurer."

S. S. Gregory, for appellant. Walter Olds, C. F. Griffen, and W. S. Oppenheim, for appellee.

CRAIG, J. (after stating the facts). In regard to the allegations in the bill as to the organization of the company, its ownership of the mines, stock owned by Crocker, and that he was treasurer and manager, there is no controversy, it not being claimed that there was any falsity as to these averments. In reference to a large portion of the other averments of fact set up and relied upon in the bill, it will be found upon close examination that in the main they are not representations of fact, but, on the other hand, they are mere matters of opinion. Under the latter head may be mentioned the following: That the mines were rich with silver, and that they would pay a dividend of from 20 to 100 per cent.; that there was enough silver ore on the dump at the mines to pay the par value of the stock; and other "like statements. These allegations of mere mat-

ter of opinion, as will be seen from the authorities hereinafter referred to, whether false or true, do not form a basis upon which an action can be founded. There are, however, some four or five allegations of fact, as contradistinguished from allegations of opinion, which we will consider. In regard to the allegations that the vein ran from east to west lacking 40 feet of a half mile, that it varied in width from 6 to 50 feet, and that the depth of the vein was 200 feet, from an examination of the testimony of the defendant and the complainant and the superintendent, Ewing, and the report of Bridge, it will be found that the representations made by the defendant in this branch of the case were substantially correct.

The next allegation of fact is that the mine was what was known as a "fissure vein." Crocker testified that the vein was a fissure vein, as that term was understood. He testified: "A fissure vein, according to Hughes' Dictionary, is a longitudinal opening with a foreign substance in it. The vein is a fissure vein in the San Javier and Guadalupe mines." In this he seems to be corroborated by Bridge, and contradicted only by Ewing, and Ewing's evidence is contradicted by his statement to Manley at the time he visited the mine. Under the evidence, it cannot be said that this statement was false.

The next allegation of fact is that a car load of ore taken from the mine had been sent to the Monterey smelter, which assayed 68 ounces per ton. The defendant Crocker testified that before the statement was made, and before he incorporated it into his written statement to Manley, Jamiqueberry, the superintendent, informed him of the fact, and that Ewing, who was also in charge of the mines, corroborated the statement. The statement was, therefore, made by the defendant in good faith, believing it to be true. Whether the statement was true or false is left in doubt from the evidence. A car of ore was shipped to Monterey, but whether it was shipped from the mine in question or some other mine is left in doubt from the evidence. Ewing testified that he shipped the car from the Incarnacion mines, while the witness Shope testified that he shipped a half car, but not from the mine in question. It may be true that this statement was false, but there is so much uncertainty and doubt in regard to what the fact really was that it would not be safe to convict a person of fraud on such uncertain testimony.

The next allegation of fact was that "our general assays of number of ounces per ton reaches now over 200 oz. per ton." This statement was made before the defendant had worked the mine, and, of course, had reference to assays of samples of ore; and it appears from the testimony that assays of sample or specimen ores run higher than the ore when milled in large quantities, and we find no evidence in the record that the statement was not true.

There is also an allegation that there was a statement that the mill at the mines was to be capable of crushing 50 tons per day. The writing containing the defendant's statements contains no such statement, and Crocker testified that in all the conversations the talk was that the mill was to be a 10-stamp mill. In this he is corroborated by C. N. Harold, who testified that Crocker said he would have the mill running in 90 days, and the capacity was to be 30 tons a day, and he intended to add more soon.

Under the facts established by the evidence, was the complainant entitled to a decree? In *Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, the supreme court of the United States lay down the rule in regard to a recovery in a case of this character as follows: "First, that the defendant has made a representation in regard to a material fact; secondly, that such representation is false; thirdly, that such representation was not believed by the defendant, on reasonable grounds to be true; fourthly, that it was made with the intent that it should be acted upon; fifthly, that it was acted upon by complainant to his damage; and, sixthly, that in so acting on it the complainant was ignorant of the falsity, and reasonably believed it to be true." In regard to kind or character of representations which are actionable, 1 Bigelow, *Frauds*, pp. 473, 474, lays down the rule that the representations must consist of matters of fact, and not of opinion. In *Hemmer v. Cooper*, 8 Allen, 334, in speaking in regard to representations of a vendor in regard to the price he paid for it, the court said: "The representations of a vendor of real estate to the vendee, as to the price which he paid for it, are to be regarded in the same light as representations respecting its value. A purchaser ought not to rely upon them; for it is settled that, even when they are false, and uttered with a view to deceive, they furnish no ground of action. *Medbury v. Watson*, 6 Metc. (Mass.) 246, and cases there cited." In *Holbrook v. Connor*, 60 Me. 578, the same doctrine is announced. In *Hank v. Brownell*, 120 Ill. 163, 11 N. E. 416, the cases from Massachusetts and Maine are cited with approval, and it is said: "Where the vendor and vendee are dealing at arm's length with each other, the representations of the former as to the cost of his property, even though false, and made with a view to deceive, will furnish no ground of action. They are looked upon merely as representations in regard to value, urged for the purpose of enhancing the price, and any purchaser who relies upon them is considered as too careless of his own interest to be entitled to relief." In *Noetling v. Wright*, 73 Ill. 390, in speaking in regard to representations made by a vendor of property as to value, the price he has been offered, or the good qualities of the property, it is said: "Statements of this character do not in any wise relieve the purchaser from the responsibility of investigation into the true condition

or the value of the property about to be purchased. Such statements are only regarded as *gratis dicta*, and it is well said by Kerr in his work on *Fraud and Mistake* (page 84); 'A man who relies on such affirmations, made by a person whose interest might so readily prompt him to invest the property with exaggerated value, does so at his peril, and must take the consequences of his imprudence.'" *Tuck v. Downing*, 76 Ill. 71, was a bill to rescind a contract for fraud, where mining stock had been sold as in the case here; and in discussing what may be regarded as mere opinion or a statement of fact it is, among other things, said: "The extravagant declarations of appellant after his return to Erie with the committee of examination, and made in their presence, that a silver mine with copper croppings was an inexhaustible mine of wealth; that the *Aqua Frio* and *Black Metallic* were the biggest things in Utah; that situated at the Fork Hills was greatly to their advantage; that they were well-developed mines with well-defined veins; that he had never seen, in all his experience, such a 'blow out'; that a furnace ought to be erected at once, as the ore could be mined, and all the money put into it could be got out in a few months,—was mere gassing, and for the purpose of extolling what these men, through their committee, had seen, and could judge of the prospects and promise for themselves. There was nothing unlawful or prohibited in law in all this. It was after this examination and report by Camp and Barr the share was bought by complainant, and the note in question executed, and a deed delivered and accepted for the property. It is impossible their statement should be regarded as anything more than opinions, for no man can tell how a discovery like this may result. Appellee could have understood them in no other sense, and the same may be said of the report of the committee. They were opinions founded on facts as they appeared to them." In *Development Co. v. Silva*, 125 U. S. 247, 8 Sup. Ct. 881, *Tuck v. Downing* was cited, and a large part of the opinion quoted with approval. In *Farnsworth v. Duffner*, 142 U. S. 43, 12 Sup. Ct. 164, the same doctrine is announced. There are other authorities holding to the same doctrine, but it will not be necessary to cite them here. It is manifest under the law as established in the text-books and in the decisions of the different courts the complainant has failed to make out a case wherein he was entitled to recover.

There is another fact connected with the case that has an important bearing. It appears that in the latter part of April, 1893,—long before the conveyance was made which complainant seeks to set aside,—he determined to visit the mine for the purpose of determining for himself whether the mine was in fact what it was represented to be. He went to the mines, and was met by Ewing, the superintendent, O. P. Crocker, a son of the defendant, McGuire, and a Mexican. He made a

thorough examination of the mine and its prospects. He walked over the grounds, went into the shafts, made selections of specimens for assay, placed each specimen in a small sack prepared for that purpose, marked each one, and then placed the small sacks in a large one, and brought the specimens home with him, and had them assayed. Upon his return he gave glowing accounts of the mine, and the richness of its ore. The witness Harold detailed a conversation he had with Manley after his return, substantially as follows: "I think I asked him something about the quantity of ore he found, and as we looked at each sample I would ask him how much. He would make the remark that there were thousands of tons, and of others not quite so much, but he said there was plenty of ore; and again I think he made the statement to me that there was all the ore there that you could wish for." And on cross-examination he said: "He [referring to Manley] said there was a great quantity of ore on the dump, and that a number of assays were made from the dump, which showed it to be very valuable; and, judging from the quantity on the dump, he thought there was \$100,000 on the dump. He also based his opinion on what he saw in the mine; not only what he saw in the mine, but the length of the mine where they could trace the ore." Other witnesses corroborate these statements. When the complainant was in the mine he was afforded every facility to examine and investigate that he desired, and the specimens which he brought away were of his own selection; and on the hearing the court found that no fraud or deception was practiced on the complainant in the selection of the specimens, nor were they tampered with by the defendant, and the finding seems to be sustained by the evidence. In regard to the assays of the specimens, and the faith of the complainant in the mine if the specimens fairly represented the ore in the mine, he testified: "Q. Was the result of these assays satisfactory to you? A. They were. Q. They were such, were they not, that if you believed that that ore—that these specimens—fairly represented the ore in that mine, you would still regard that as a good mine, would you not? A. I felt quite well satisfied. Q. That would be your feeling now, would it not? A. Yes, sir. Q. If you felt that it was honest? A. The assays I had made, made an average of 228 ounces per ton. Q. Did you include those high-grade assays? A. All of them. Q. 371 and 2,300 ounces? A. Yes, sir. And I consulted with some miners here, who told me that, if the mine did have that, well, we had a perfect bonanza, and I am very much pleased with the result of the assays. Q. And you would still feel, notwithstanding everything else that has been said and done, if you were convinced that the specimens you obtained represented an honest average of the mine, you would still feel that it was a good mine, would you not? A. I would. I think it would pay well." The evidence in this rec-

ord falls to show that the complainant was imposed upon in the selection of the specimens, or that any fraud was practiced on him after they were selected. If, therefore, the specimens failed to represent an honest average of the mine, the complainant, and he alone, was to blame.

In *Farnsworth v. Duffner*, supra, which was a bill for the rescission of a contract of purchase, and to recover the money paid on the contract, on the ground that it was entered into by false and fraudulent representations, in the decision of the case it was held, where the means of knowledge are at hand, and equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means he will not be heard to say that he has been deceived by the vendee's misrepresentations. It is there, among other things, said: "In *Ludington v. Renick*, 7 W. Va. 273, it was held that 'a party seeking the rescission of a contract on the ground of misrepresentation must establish the same by clear and irrefragable evidence; and if it appears that he has resorted to the proper means of verification, so as to show that he in fact relied upon his own inquiries, or if the means of investigation and verification were at hand, and his attention drawn to them, relief will be denied.' In the case of *Attwood v. Small*, decided by the house of lords, and reported in 6 Clark & F. 232, 233, it was held that 'if a purchaser, choosing to judge for himself, does not avail himself of the knowledge or means of knowledge open to him or to his agents, he cannot be heard to say he was deceived by the vendor's representations.' And in 2 Pom. Eq. Jur. § 892, it is declared that a party is not justified in relying upon representations made to him: '(1) When, before entering into the contract or other transaction, he actually resorts to the proper means of ascertaining the truth and verifying the statement; (2) when, having the opportunity of making such examination, he is charged with the knowledge which he necessarily would have obtained if he had prosecuted it with diligence; (3) when the representation is concerning generalities equally within the knowledge or the means of acquiring knowledge possessed by both parties.' But, if the neglect to make reasonable examinations would preclude a party from rescinding a contract on the ground of false and fraudulent representations, a fortiori is he precluded when it appears that he did make such examination, and relied upon the evidence obtained by such examination, and not upon the representations."

What was said in the case cited applies here. The complainant, apparently not being satisfied with the representations of Crocker in regard to the mine, proceeded to the mine to see and investigate for himself. After making a thorough examination he had, so far as appears, as much information in regard to the mine and its richness as the defendant, Crocker, and he doubtless relied upon the informa-

tion obtained, rather than upon representations which had been made before.

In view of all the facts, we do not think the evidence makes out a case which would authorize a court of equity to rescind the contract. The judgment of the superior court will be reversed, and the cause will be remanded, with directions to dismiss the bill.

(146 Ind. 366)

HARRISON v. STANTON et al.

(Supreme Court of Indiana. Dec. 3, 1896.)

WILLS—CONTEST—BOND BY CONTESTANT—WHEN NECESSARY.

Rev. St. 1894, § 2765 (Rev. St. 1881, § 2595), gives the right to resist the probate of a will without giving a bond. Rev. St. 1894, § 2766 (Rev. St. 1881, § 2596), provides that any person who has not resisted the probate of a will may contest its validity at any time within three years after the same has been offered for probate, in the manner and on the grounds therein specified. Rev. St. 1894, § 2767 (Rev. St. 1881, § 2597), provides that, before any proceeding shall be had on an application to contest a will after probate thereof, the person making the same, or some other person in his behalf, shall file a bond, with sufficient sureties, etc., conditioned for the due prosecution of such proceeding and for the payment of all costs, etc. *Held*, that if Rev. St. 1894, § 261 (Rev. St. 1881, § 260), authorizing the court to grant a person leave to sue in forma pauperis, applies to a contestant of a will after it has been probated, under Rev. St. 1894, § 2766 (Rev. St. 1881, § 2596), such person is not relieved from the necessity of giving bond, as required by Rev. St. 1894, § 2767 (Rev. St. 1881, § 2597).

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Action by Emma Harrison against Ambrose P. Stanton and others to contest the validity of the will of John Herron, deceased. From a judgment dismissing the proceeding at plaintiff's cost, on failure by her to file a bond conditioned for the due prosecution of such proceeding, and for the payment of all costs in case judgment be awarded against her, as required by Rev. St. 1894, § 2767 (Rev. St. 1881, § 2597), plaintiff appeals. *Affirmed*.

J. E. Watson, R. W. McBride, C. S. Denney, Wilson Morrow, J. F. McKee, and W. N. Pickerrill, for appellant. J. E. Scott and Miller, Winter & Elam, for appellees.

JORDAN, J. Appellant, on the 18th day of October, 1895, instituted this proceeding, under sections 2766 and 2767, Rev. St. 1894 (sections 2596 and 2597, Rev. St. 1881), to contest the validity of the will of John Herron, who died a resident of Marion county, Ind., leaving an estate of the probable value of \$200,000. The will in contest was admitted to probate on May 17, 1895, in the circuit court of Marion county, Ind. At the time of the filing of her complaint, the appellant also petitioned the court to allow her to prosecute this suit as a poor person, basing her right on section 261, Rev. St. 1894 (section 260, Rev. St. 1881), being section 17 of the Code of 1881, which reads as follows: "Any poor person,

not having sufficient means to prosecute or defend an action, may apply to the court in which the action is intended to be brought, or is pending, for leave to prosecute or defend as a poor person. The court, if satisfied that such person has not sufficient means to prosecute or defend the action, shall admit the applicant to prosecute or defend as a poor person, and shall assign him an attorney to defend or prosecute the cause, and all other officers requisite for the prosecution or defense, who shall do their duty therein without taking any fee or reward therefor from such poor person." By her verified petition, it appeared that she was a poor person, destitute of means, and unable to procure any responsible person to become her surety on the bond required to be filed by section 2767, Rev. St. 1894 (section 2597, Rev. St. 1881). She supported the facts set forth in her petition by the affidavits of other persons, and also showed by the affidavits of two reputable attorneys at law that she, in their opinion, had a meritorious cause of action, etc. Pending her application for leave to sue in forma pauperis, appellee Stanton, executor of the will, moved the court to dismiss the action, for the reason that no bond had been filed, as required by the section above mentioned. The court denied appellant's application for leave to prosecute her contest proceeding as a poor person, and ordered that she file a bond within 30 days. Upon failure to file the required bond within the limit fixed, the court sustained appellee's motion, and dismissed the proceeding at appellant's cost, and upon this action of the court appellant bases her alleged error. Assuming, without deciding, that the right to sue in forma pauperis, as granted by section 261, Rev. St. 1894 (section 260, Rev. St. 1881), can be, as appellant insists, extended, by construction, to proceedings to contest a will under the statute relating to wills, we must next inquire: Could such leave, if granted by the court in pursuance of the section of the Civil Code, be held in any manner to have the force or effect to dispense with the bond in question, and thereby relieve the appellant of the imperative obligation of filing one, as imposed by the statute upon a person seeking to annul a will after the probate thereof? If this question can be answered in the negative, it would follow that the court properly dismissed the proceeding upon the failure of appellant to file the requisite bond, and its action must be affirmed.

The insistence of appellant's learned counsel is that the provisions of section 261, Rev. St. 1894 (section 260, Rev. St. 1881), ought to be imported by construction into section 2767, Rev. St. 1894 (section 2597, Rev. St. 1881), and ingrafted onto it as an exception to the extent of relieving a poor person contesting a will from the necessity of filing a bond. A solution of the question involved requires an examination, to an extent, of the statute relating to the execution, probate, and contest of wills. By section 38 of this act, being sec-

tion 2765, Rev. St. 1894 (section 2595, Rev. St. 1881), the right is given to resist the probate of a will, without giving a bond. Section 39, being section 2766, Rev. St. 1894 (section 2596, Rev. St. 1881), provides as follows: "Any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the circuit court of the county where the testator died, or where any part of his estate is, his allegation, in writing, verified by his affidavit, setting forth the unsoundness of mind of the testator, the undue execution of the will, that the same was executed under duress or was obtained by fraud, or any other valid objection to its validity or the probate thereof; and the executor and all other persons beneficially interested therein shall be made defendants thereto." This latter section, it seems, is intended to apply to persons who have not resisted the probate or assailed the validity of a will, under section 2765, Rev. St. 1894 (section 2595, Rev. St. 1881). *Duckworth v. Hibbs*, 38 Ind. 78. Section 2767, Rev. St. 1894 (section 2597, Rev. St. 1881), being the one more especially in controversy, reads as follows: "Before any proceeding shall be had on an application to contest a will after probate thereof, the person making the same, or some other person in his behalf, shall file a bond, with sufficient sureties, in such amount as shall be approved by the clerk of such circuit court, conditioned for the due prosecution of such proceedings, and for the payment of all costs thereon in case judgment be awarded against him." The right, as it now exists in this state, to resist the probate of a will, or to contest its validity, is purely statutory, and such remedy or right is a special proceeding provided by statute. *Harris v. Harris*, 61 Ind. 117; *Deig v. Morehead*, 110 Ind. 451, 11 N. E. 458; *McDonald v. McDonald*, 142 Ind. 55, 41 N. E. 336. Under section 2765, Rev. St. 1894 (section 2595, Rev. St. 1881), this right may be exercised without the complainant being required to file a bond; but, after the will has been once admitted to probate, the right to attack its validity upon any or all of the grounds mentioned in section 2766, Rev. St. 1894 (section 2596, Rev. St. 1881), is coupled with and given only upon the stipulated condition that a bond be filed for the due prosecution of such proceeding, and for the payment of all cost in case judgment be awarded against the contesting party. While the filing of this required obligation, within the meaning and terms of the section in question, cannot be said to be a condition precedent to the commencement of the suit, however, after it is once instituted, the statute denies the authority or power of the court to further proceed in the action, in the absence of the filing of the prescribed bond. It is true that the court, in its discretion, may allow a reasonable time to the plaintiff to secure and file the bond. Nevertheless, upon his failure to file one, the court must dismiss the proceeding. *Burns v.*

Travis, 117 Ind. 44, 18 N. E. 45; *Lange v. Dammler*, 119 Ind. 567, 21 N. E. 749. The fact that a person seeking to avail himself or herself of the statutory right to contest a will after its probate is poor and destitute of means cannot exempt him or her from the imperative demands of the statute. It is a general rule that a person asking a right or remedy conferred by statute must bring himself substantially within the provisions or requirements of the statute conferring such right. *Goodwin v. Smith*, 72 Ind. 113; *Massey v. Dunlap* (Ind. Sup.) 44 N. E. 642; *Suth. St. Const.* § 393. The legislature, in the enactment of the statute relative to contests of wills, seems to have given and extended the right or remedy to annul a will thereunder equally to all persons, without regard to their status as to wealth or poverty. This statutory remedy can only be made available to those who substantially comply with the conditions or directions of the statute. It cannot be enlarged nor changed by construction to conform it to some particular case. *Suth. St. Const.* §§ 392, 456; *Willett v. Porter*, 42 Ind. 250. The common law did not authorize any one to sue in forma pauperis, and it was only in pursuance of the provisions of the statute of 11 Hen. VII. c. 12, that a plaintiff who was a pauper could be admitted to sue as a poor person. *Tidd, Prac.* 97. And by statute 23 Hen. VIII. c. 15, such person was exempt from the payment of cost to the defendant in an action of debt in the event he was nonsuited, or had a verdict returned against him; but he might be subjected to such other punishment as the justices before whom the action was pending might deem reasonable. *Tidd, Prac.* 97, 98. While the privilege granted to a poor person is just and proper, still it is not to be extended by construction beyond its true scope and purpose. *Hoey v. McCarthy*, 124 Ind. 464, 24 N. E. 1038.

Appellant, however, insists that the court should so construe section 261, Rev. St. 1894 (section 260, Rev. St. 1881), as to make it control the requirement of section 2767, Rev. St. 1894 (section 2597, Rev. St. 1881), and hold that, under the provisions of the former, she could be relieved from filing the bond provided by the latter. The question with which we have to deal under the facts in this case is not one of judicial discretion, but is one relative to the existence of a remedy or right of purely statutory character. This right, we have seen, is made to depend upon the condition that a bond be given, not only to secure the payment of cost, but also to secure the due prosecution of the proceeding. Were we to yield to the insistence of appellant, we would have to eliminate from the statute a feature imposed by the legislature as an essential condition upon the right conferred, and one which limits the very power of the court to proceed in an action instituted to annul a will. This would be judicial legislation, instead of judicial construction. In *State v. Delano*, 37 Ind. 249, the relator, who was a poor person,

was defeated in his action upon the official bond of a constable before a justice of the peace. He applied to the common pleas court for an order to prosecute his action therein upon an appeal, as a poor person. The court ordered that a transcript of the proceedings before the justice be certified, and that the relator be allowed to prosecute his cause as a poor person. Subsequently, the appeal was dismissed by the court, for the reason that no appeal bond was filed. This court, by Worden, C. J., in construing the above section of the Code providing for the prosecutions or defense of suits by poor persons, said: "This statute does not, as we think, dispense with a bond. It simply provides the party with attorneys and other officers requisite for the prosecution or defense of his suit, who are to serve him without fee or reward. It does not furnish officers or witnesses to serve the other party without fee or reward; and, if the opposite party recover in the action, he is entitled to recover his costs of the poor person. The poor person is not exempt from the payment of whatever judgment the other party may recover against him, whether for costs or otherwise; and this he is required to do by the conditions of the appeal bond." If the section of the Code in question cannot exempt a poor person from giving an appeal bond, upon which his right to an appeal from a justice of the peace depends, with equal force and reason, at least, it may be said that it cannot be construed so as to exempt him from filing a bond upon which his statutory right to contest a will also depends. The cases cited by counsel for appellant cannot be held to be controlling upon the question here involved. This court, in the cases of Hood v. Pearson, 67 Ind. 368, and Britton v. Rowe, 115 Ind. 55, 17 N. E. 254, affirmed the right of an infant to prosecute as a poor person without the intervention of a next friend. In Wright v. McLariban, 92 Ind. 103, and in Fuller v. Mehl, 124 Ind. 60, 33 N. E. 773, it was held that a nonresident who had been permitted to prosecute as a poor person was relieved from giving a cost bond, required of nonresidents, by another provision of the Civil Code. In the cases last cited, the right of action in each existed independently of the provisions or requirements of the Code. Consequently, it was held that the right granted to him under section 261, Rev. St. 1894 (section 260, Rev. St. 1881), operated as an exemption from the obligations required by the other provisions of the Code. The court seems to have considered these provisions as restrictions only upon the manner of enforcing such a right of action by a particular party, and construed them in connection and with reference to the meaning and intent of the legislature in awarding by another section of the Code the right to prosecute as a poor person. The restrictions or limitations which were under consideration in these cases were not conditions upon which the right or remedy of the party rested. To grant a statutory remedy upon a condition with which both the

rich and poor alike must comply when they attempt to exercise such right is a matter wholly within the province of the legislature; and if the remedy is conditioned upon a bond being given, and, for this reason, it can be said to work an injustice or hardship upon the poor suitor, our answer to this contention must be, "*Ita lex scripta est*,"—the law is so written,—and must be accepted and applied by the court as enacted. It follows that the action of the lower court in dismissing the contest proceedings, in the absence of the required bond, was right, and its judgment is therefore affirmed.

(147 Ind. 208)

LOUISVILLE, N. A. & C. RY. CO. v.
HOWELL.¹

(Supreme Court of Indiana. Dec. 3, 1896.)

INJURY TO EMPLOYE—CONTRIBUTORY NEGLIGENCE
—DEFECTIVE APPLIANCES—EVIDENCE.

1. In an action for injuries caused by a defective coupling link, where the complaint alleges that defendant knew of the defect, or "might by due inspection have known of the defect," and that plaintiff knew nothing of it, it does not show plaintiff guilty of contributory negligence.

2. An employé has the right to assume that the employer has performed his duty in regard to the appliances furnished.

3. Two cars connected by a defective link were by order of defendant coupled to the train, at night, on which plaintiff was a brakeman. There was evidence that there was a train inspector at the place where the cars were attached to the train, and that a proper inspection would have shown the link to be defective. *Held*, that plaintiff, thereafter injured by such defect, was entitled to recover.

4. A medical expert cannot, on direct or indirect examination, be asked what is said in a certain book as to the difference between certain diseases, in order to determine which of the diseases was indicated by the appearance of plaintiff's wound.

Appeal from circuit court, Washington county; S. B. Voyles, Judge.

Action by Benjamin F. Howell against the Louisville, New Albany & Chicago Railway Company. Judgment for plaintiff. Defendant appeals. Affirmed.

E. C. Field, W. S. Kinnan, and Elliott & Hostetter, for appellant. Zaring & Hottel and Mitchell & Mitchell, for appellee.

HOWARD, J. The appellee was a freight brakeman in the service of appellant, and brought this action to recover damages for injury alleged to have been caused by negligence of appellant in the use of a defective coupling link. The particulars of the accident are stated in appellant's brief as follows: "The appellant had a freight train bound from Bloomington to New Albany, Ind., on July 27, 1894. That train had received an order to meet a north-bound train at Salem, Ind. At this place there was a siding, and the freight train in question headed in upon this siding, in order to leave the main track unobstructed for the passage of the north-bound train. On this siding there were idle cars, which it was necessary to move further in on the siding in order to let the train in far enough to

¹ Rehearing denied.

clear the main track. The engine and train moved up near to these other cars, when it was necessary for the appellee, as a part of his duties, to stand on the front of the pilot of the engine, and hold up what is known as a 'shackle bar,' which is an iron coupling appliance about three or four inches in diameter, and four or five feet in length, extending over the pilot; and when used it was necessary for appellee to raise the lower end of it up to a point level with the drawbar on the car in front, in order to couple the engine thereto. While the appellee was on the pilot, holding up this shackle bar to make such coupling, the engine and train moved forward towards the cars in front to enable appellee to make the coupling. The train was a heavy one, and was moving up grade; and, when at or near to said standing cars, the train broke in two between the second and third cars next back of the engine, and the engine suddenly shot forward, and threw appellee backward, and he was caught by the shackle bar, and his arm was broken and badly mashed." After the accident it was discovered, by an inspection made by the trainmen, that the defective coupling link, the parting of which had caused the train to break in two, and so brought about appellee's injury, had an old, rusted flaw, and "was cracked and broken, and about one-third of the way into," as the verdict states it. The sufficiency of the complaint, and the correctness of the court's rulings in sustaining a demurrer to the second paragraph of answer, and in overruling the motion for a new trial, are called in question.

That part of the complaint which it is claimed shows contributory negligence on the part of the appellee is as follows: "That defendant was using on said train a defective coupling link, which was cracked and worn and partly broken, and was being used to couple the first car behind the engine to the one immediately behind it; that said defect in said link, and the said worn, cracked, and broken place therein, was patent and open to the inspection of defendant if an examination of the same had been made, and defendant knew, or might have known, of said defective, worn, cracked, and broken condition of said link; that said link was unsafe and unfit for use on said train, and defendant knew this, or might by due inspection have known the same, but carelessly and negligently used, and continued to use, and caused to be used, said coupling link on said freight train; that plaintiff knew nothing of said defective, cracked, worn, and broken condition of said link, but was wholly ignorant of the same, and could not have known of the same unless he had made a careful examination and inspection of the same for the purpose of ascertaining its condition, which he did not do." To contend that, because it is alleged that the defect in the coupling was "patent and open to the inspection of defendant if an examination of the same had been made," it therefore follows that the defect was one which was ob-

vious "to ordinary careful observation," and consequently one which appellee should have seen and avoided, is to mistake the plain meaning of the language of the pleader. The words used, and their context, plainly indicate that the defect was one which could have been easily discovered on a careful examination by appellant's inspectors. There is nothing in the complaint to show that appellee had anything to do with the coupling link. Had he coupled the cars between which the link was used, and thus handled the defective appliance, and so had opportunity to observe it, there might be some propriety in holding him accountable for a knowledge of its condition. Employés are rightly held chargeable with knowledge of the condition of the tools and parts of machinery and appliances which they use or with which they come in contact. In this case, for example, had there been an open and obvious defect in the shackle bar which appellee was holding in his hands at the time he was hurt, and had he been injured by reason of such defect, then the authorities cited by counsel might be in point. It is, as counsel say,—citing *Railway Co. v. Morgan*, 132 Ind. 446, 31 N. E. 661, and 32 N. E. 85,—obvious defects, and such as could be discovered by reasonable observation, that are perils of the service, and as such assumed by the employé. It is true, as said in *Railroad Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287, that "an employé is required to observe and avoid all known or obvious perils, even though they may arise from defective machinery and appliances; but he is not bound to search for defects, or make a critical inspection of the appliances which are provided for his use. These are duties of the employer, who is required, not only to furnish reasonably safe and suitable tools and machinery, but to exercise such a continuing supervision over them, by such reasonably careful and skillful inspection and repair, as will keep the implements which employés are required to use in such a condition as not unnecessarily to expose them to unknown and extraordinary hazards." So, also, it was said in *Railway Co. v. Buck*, 116 Ind. 566, 19 N. E. 453, *Mitchell, J.*, speaking for the court in both cases: "While the employer may expect that an employé will be vigilant to observe, and that he will be on the alert to avoid, all known and obvious perils, even though they may arise from defective tools and machinery, yet the latter is not bound to search for defects, or inspect the appliances furnished him to see whether or not there are latent imperfections in or about them which render their use more hazardous. These are duties of the master; and, unless the defects are such as to be obvious to any one giving attention to the duties of the occasion, the employé has a right to assume that the employer has performed his duty in respect to the implements and machinery furnished. *Bradbury v. Goodwin*, 108 Ind. 286, 9 N. E. 302; *Railway Co. v. Leverett*, 48 Ark. 333, 3 S. W. 50; *Railroad Co. v.*

Gildersleeve, 33 Mich. 133; Hughes v. Railroad Co., 27 Minn. 137, 6 N. W. 553; Wood, Mast. & Serv. § 376." See, also, Railroad Co. v. Fry, 131 Ind. 319, 28 N. E. 989. In the case before us, did it appear that the appellee had coupled the two cars which had broken apart, and had used the broken link for that purpose, and were the break such as to be open and obvious to ordinary careful observation, then he might well be held chargeable with knowledge of the defect; but, having no occasion to use the link and knowing nothing of its defective condition, he was "not bound to search for defects." Even if the link were an appliance which appellee had used, he would not be required to inspect it to see whether or not there were latent defects in or about it, still less when he had no occasion to use it or to know anything of its condition. He had a right to assume that his employer had furnished an engine and cars, the appliances of which were in a reasonably safe condition. He was not required to make "a careful examination and inspection for the purpose" of seeing whether this duty had been performed. In the case last above cited, it was shown "that the defect in the machinery was unknown" to the injured employé; "that it was not obvious, and could not have been discovered except by stooping down and looking under the car." This the court, in effect, held he was not required to do, saying that the facts showed that he "was not guilty of contributory negligence in going between the cars to uncouple them, notwithstanding the defective condition of the appliances." The defect was one that might readily have been discovered by proper inspection; but this the employer, and not the employé, was bound to make. In the case at bar, the appellee was not even using the defective link, and had not used it, but was using a totally different appliance, and in a different part of the train, and knew nothing of the defect which caused his hurt. We have no doubt that the complaint was sufficient.

It is next contended that the court erred in sustaining the demurrer to the second paragraph of the answer. We have carefully read this paragraph of answer, and are satisfied that appellant suffered no harm by the ruling complained of. It is, in effect, an argumentative denial of certain of the allegations of the complaint, setting out also certain averments that might be supported by the introduction in evidence of the rules of the company. These rules might, however, have been quite as well introduced under the general denial; and, as a matter of fact, all the rules relating to brakemen were introduced in evidence. Other reasons are urged by appellee's counsel in support of the court's ruling, but this we think sufficient.

In the special verdict returned by the jury the facts are found substantially as alleged in the complaint. It is found that the two cars between which was the defective link were, by order of appellant, taken into the train, so

coupled together, between 11 and 12 o'clock at night, at Bedford, where the train stopped just long enough to put the cars into the train, giving appellee neither time nor opportunity to inspect the cars. It therefore appears that appellee did not see or use the defective coupling link, the two cars being coupled together before the arrival of his train, and that he had neither time nor opportunity to examine or inspect the link, even if it were his duty to make such inspection. Moreover, even if but a single car had been received at Bedford, and coupled into the train by appellee, still he could not be held chargeable with a knowledge of any defects but those readily discernible on the brief examination which he could make. "It is evident," as said by Judge Elliott in *Matchett v. Railway Co.*, 132 Ind. 334, 31 N. E. 792, "that a brakeman receiving a car into a train out on the road cannot be held to the same degree of care as a regular inspector, or a man properly supplied with tools." The verdict further shows that the appellant negligently used, and caused to be used, the defective link to couple the two cars in question, and knew, or might by inspection have known, of its defective condition. This finding is directly supported by the evidence, which shows that the company at that time had a train inspector at Bedford,—the point where the two cars were taken in. Rule 178, read in evidence, and which counsel think shows that the verdict was not supported by the evidence, has to do altogether with care required in coupling cars. But appellee was not hurt in coupling cars, nor in consequence of any coupling which he had done, but by reason of a defective link with which he had nothing and could have nothing to do. The verdict, as we think, supports the judgment, and is itself supported by the evidence.

Some contentions made by appellant seem to be based upon a misapprehension of the facts disclosed in the record. Objection, for example, is made to the exclusion of certain evidence sought to be elicited from Dr. Murphy, one of appellant's witnesses. In the course of his re-examination this witness was asked by appellant's counsel what was said in a certain named medical authority as to the difference between necrosis and caries of the bone, with a view to determine which of these diseases was indicated by the discharges from appellee's wound; and counsel cite authority to show that, on cross-examination, such questions are proper. There is no doubt that in order to test an expert's knowledge it is proper, on cross-examination, to read statements from writers of repute who have treated of the subject concerning which the expert has testified, and ask him questions touching the views advanced by such text writers. *Hess v. Lowrey*, 122 Ind. 233, 23 N. E. 156. The trouble with appellant's contention is that the question here asked was not on cross-examination; and the evidence thus sought was but of a self-serving character. Judgment affirmed.

(146 Ind. 421)

PITTSBURGH, C., C. & ST. L. RY. CO. v. TOWN OF CROWN POINT.

(Supreme Court of Indiana. Dec. 16, 1896.)

MUNICIPAL CORPORATIONS—VALIDITY OF ORDINANCES—GATES AT RAILROAD CROSSINGS.

1. Municipal corporations possess only such powers as are granted by the legislature in express words, and those necessarily implied by the powers expressly granted.

2. An ordinance will not be upheld by virtue of the incidental powers of a municipality, or under a general grant of authority, unless it be reasonable, and not oppressive.

3. Rev. St. 1894, § 4404 (Rev. St. 1881, § 3367), gives the board of trustees of an incorporated town exclusive control over streets within the limits of the town. Section 4357 (3333) authorizes the town to prevent and remove a nuisance, to regulate the use of firearms or other things endangering persons or property, to prevent interference with the free use of the streets, and to make such ordinances as may be necessary to carry into effect the provisions of the act. *Held* not to give towns the right to provide by ordinance that a railroad company shall keep at its own expense a watchman, and erect gates on each side of the track at each street crossing.

Appeal from circuit court, Lake county; J. H. Gillett, Judge.

Action by the town of Crown Point against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. From an order overruling a demurrer to the complaint, and from a judgment for plaintiff, defendant appeals. Reversed.

N. O. Ross and J. B. Peterson, for appellant. Willis O. McMahan, for appellee.

MONKS, J. The question involved in this appeal is as to the power of incorporated towns to compel by ordinance a railroad company to keep a watchman and erect and maintain gates at points where the tracks cross a street, and impose penalties for the failure so to do. It is the law in this jurisdiction that municipal corporations possess and can exercise such powers only as are granted by the legislature in express words, and those necessarily or fairly implied or incident to the powers expressly granted, and those essential to the declared objects and purposes of the corporation. No incidental powers can be implied, except such as are essential to the accomplishment of the purposes of their creation, and for their continued existence. *City of Shelbyville v. Cleveland, C., C. & St. L. Ry. Co.* (last term) 44 N. E. 929, and authorities cited; *Champer v. City of Greencastle*, 138 Ind. 339, 35 N. E. 14, and cases cited; 1 Dill. Mun. Corp. §§ 89, 90. Doubtful claims to power, or any doubt or ambiguity in the terms used by the legislature, are resolved against the corporation. *Minturn v. Larue*, 23 How. 435; *Bloom v. Xenia*, 32 Ohio St. 465; *Ravenna v. Pennsylvania Co.*, 45 Ohio St. 118, 12 N. E. 445; *Cooley*, Const. Lim. 233, 234; 1 Dill. Mun. Corp. §§ 89-91; *Tied. Mun. Corp.* § 110. It is also settled law that where the legislature in terms confers upon a municipal corporation the power to pass ordinances of a specified nature

and character, and with precision defines the details of the same, and prescribes the penalties that may be imposed, if the power thus granted be not in conflict with the constitution, an ordinance within the powers granted, prescribing penalties within the designated limit, cannot be set aside by the courts because they may deem it unreasonable, or against public policy. But where the power to legislate upon a given subject is granted, and the mode of its exercise and the details of such legislation are not prescribed, then the ordinance passed pursuant thereto must be a reasonable exercise of the power, or it will be pronounced invalid. In other words, an ordinance expressly authorized by specific and definite legislative authority will be upheld, unless it conflicts with the constitution; while an ordinance which the municipality seeks to uphold by virtue of its incidental powers, or under a general grant of authority, will be declared invalid, unless it be reasonable, fair, and impartial, and not arbitrary or oppressive. *City of Shelbyville v. Cleveland, C., C. & St. L. Ry. Co.*, supra, and authorities cited; *Haynes v. City of Cape May*, 50 N. J. Law, 55, 13 Atl. 231; *Hawes v. City of Chicago*, 158 Ill. 653, 42 N. E. 373; *City of Chicago v. Rumpff*, 45 Ill. 90; *Ex parte Chin Yan*, 60 Cal. 78; *Davis v. Town of Anita*, 73 Iowa, 325, 35 N. W. 244; *Burg v. Railway Co.*, 90 Iowa, 106, 57 N. W. 680; *Meyers v. Railway Co.*, 57 Iowa, 555, 10 N. W. 896; *Phillips v. City of Denver*, 19 Colo. 179, 34 Pac. 902; *City of St. Paul v. Colter*, 12 Minn. 41 (Gil. 16); *Evison v. Railway Co.*, 45 Minn. 370, 48 N. W. 6; 1 Dill. Mun. Corp. 319, 330; *Tied. Mun. Corp.* § 110; *Robinson v. Mayor*, etc., 34 Am. Dec., note, 627, 643. It is contended by appellee that section 4404 and clauses 4, 6, 9, and 16 of section 4357, Rev. St. 1894 (sections 3367, 3333, Rev. St. 1881; sections 3367, 3333, *Horner's Rev. St. 1896*), grant the power in question. By section 4404 (3367), supra, the board of trustees of an incorporated town is given the "exclusive control over the streets, alleys and highways and bridges within the corporate limits of such town." Said clauses of section 4357 (3333), supra, are as follows:

"Fourth. To declare what shall constitute a nuisance, and to prevent, abate and remove the same; and to take such other measures for the preservation of the public health as they shall deem necessary."

"Sixth. * * * To regulate or prohibit the use of fire arms, fireworks, or other things tending to endanger persons or property; to prevent interference with the free use of the streets and alleys of the town, and to preserve peace and good order and prevent vice and immorality."

"Ninth. To lay out, open, grade and otherwise improve the streets, alleys, sewers, sidewalks and crossings, and keep them in repair and vacate the same."

"Sixteenth. To make and establish such by-laws, ordinances, and regulations not repug-

nant to the laws of this state, as may be necessary to carry into effect the provisions of this act."

The question before us, and which we are called upon to decide, is not whether the legislature, in the exercise of its broad police power, should compel railroads to keep watchmen and erect and maintain gates at their own expense at street crossings, nor is it whether the legislature should grant such power to incorporated towns, but it is whether the legislature has granted such power to incorporated towns. It is clear said sections 4357 (3333) and 4404 (3367), *supra*, do not, in express words, grant the power to pass the ordinance in question. Can such power be fairly implied from those expressly granted, or is such power essential to the declared objects or purpose of the corporation? We think not. It may be admitted that incorporated towns have the power to regulate public travel upon the streets so as to make their use reasonably safe at all times for those who go upon them, and to enact ordinances for the protection of health, life, and property. It is true that the persons and property of those who attempt to cross a railroad track are subject to risk. The question, however, is not whether the incorporated town has a right to protect its inhabitants or their property, but whether it has the right to compel the railroad company to do so at its own expense. The propositions are essentially different. It is not enough to show that incorporated towns have been given the power to regulate travel upon the streets, and to protect life and property. It may be that, under the provisions of the statute above set forth, incorporated towns have the power to keep watchmen and erect and maintain gates at points where a railroad crosses the streets of the town; but this, if true, would not uphold the ordinance in question. Under such a power, if it exists, the watchman must be employed, and the gates erected and maintained, at the expense of the town. To sustain the ordinance, it must be shown that they have been empowered to compel railroad companies, at their own expense, to employ a watchman, and erect and maintain gates, at each street crossing,—the agency here invoked to accomplish the object. If the employment of the watchman and erection and maintenance of the gates by the incorporated town would as well accomplish the object, it cannot be said that the power to compel the railroad company to do so is implied from the authority to regulate public travel upon the streets and protect life and property. A railroad company, in crossing the streets, is on an equality with the citizen. Their rights are mutual. The streets are for public use, and the company has the right to propel its locomotives and cars across them, and is not a wrongdoer in so doing. It is liable in damages to any one who, without fault on his part, is injured by the negligence of the railroad company at such crossings. It is clear,

therefore, that a railroad company is not guilty of any crime or wrongful act in running cars on its tracks across a street. Neither would such an ordinance prevent interference with the free use of the streets and alleys of the town. On the contrary, the use of the streets would not be as free, perhaps, with gates and watchmen as without them. The provision of clause 6, granting the power "to regulate or prohibit the use of firearms or other things tending to endanger persons or property," gives no aid to appellee's contention. If it were admitted that this provision applied to railroads, it would only authorize an ordinance as to the manner in which railroads should manage their trains and property within the limits of the corporation. There is a wide difference between the power to compel the employment of watchmen, and the erection and maintenance of gates, and the power to regulate the speed of cars within the corporate limits of a town. The object in the latter case is to be attained by the management and use by the company of its machinery, and such regulation relates to how the company shall manage its own property within the corporate limits; while the requirement of gates and watchmen relates to how the company shall compel or induce others upon the streets to regulate themselves and their property when approaching and about to cross its tracks. Sections 4357 (3333) and 4404 (3367), *supra*, may authorize an ordinance, not unreasonable in its terms, to prevent the standing of cars and other obstructions on railroad tracks at street crossings, so as to obstruct the same, or an ordinance regulating the speed of railroad trains within the corporate limits of a town, but most certainly not an ordinance to compel the railroad company to keep at its own expense a watchman, and erect and maintain a gate on each side of the track, at each street crossing. Incorporated cities exercise this power, but not by virtue of the control given them by the legislature over the streets and alleys, nor their power to lay out, open, and improve streets and alleys, but under clause 42, § 3541, Rev. St. 1894 (section 3106, Rev. St. 1881; section 3106, Horner's Rev. St. 1896). *Kistner v. City of Indianapolis*, 100 Ind. 210. It follows that the court erred in overruling the demurrer to the complaint. Judgment reversed, with instructions to sustain the demurrer to the complaint, and for further proceedings not in conflict with this opinion.

(146 Ind. 466.)

**CITY OF LA PORTE v. GAMEWELL
FIRE-ALARM TEL. CO.**

(Supreme Court of Indiana. Dec. 22, 1896.)
MUNICIPAL CORPORATIONS—LIMITATION ON INDEBTEDNESS.

Where a city contracted for a fire-alarm system at a time when it was indebted beyond the constitutional limit, and it had no money in its treasury to pay for such system, either at the time the contract was made or when the

system was completed and accepted, such contract was within Const. art. 13, limiting municipal indebtedness to 2 per cent. of the value of its taxable property, though the city had on hand sufficient funds to pay for it at the time fixed for payment by the contract.

Appeal from circuit court, La Porte county; Lucius Hubbard, Judge.

Action by the Gamewell Fire-Alarm Telegraph Company against the city of La Porte to recover the contract price of a fire-alarm system furnished by plaintiff to defendant. From a judgment in favor of plaintiff, defendant appeals. Reversed.

William B. Biddle and John H. Bradley, for appellant. Andrew Anderson, for appellee.

MONKS, J. This action was brought by appellee against appellant to recover the contract price of a fire-alarm system furnished by appellee. The court, at the request of the parties, made a special finding of facts, and stated, as a conclusion of law thereon, that appellee was entitled to recover the contract price. To this conclusion of law, appellant excepted. The assignment of errors calls in question the conclusion of law.

It appears from the special finding that on August 5, 1890, appellee entered into a contract with appellant to furnish and put in complete working order appellee's system of fire alarm, for the sum of \$3,500, to be paid May 1, 1891. The contract provided that, when said system was completed, appellant should accept the same, and deliver to appellee a certificate to that effect. The work was completed and accepted by appellant December 18, 1890. At the time of entering into the contract, and until May 1, 1891, appellant was indebted, not including appellee's claim, over \$5,000 more than 2 per cent. on the assessed value of its taxable property. At the date of said contract, \$2,639.80 was on hand in the city treasury. When the work was completed and accepted, there was on hand in the general fund \$359. On May 1, 1891, there was \$10,328.80 in the city treasury belonging to the general fund collected from the duplicate of 1890. On June 30, 1890, the common council of appellant, by resolution duly passed, ordered that a tax of \$1.06 on each \$100 of valuation of taxable property be levied,—74 cents for general purposes, and 31 cents for the purpose of paying \$5,000 of the city debt and the interest on the city debt. The amount of said levy was \$31,285. No specific levy was ever made for the purpose of meeting any indebtedness to appellee. On June 22, 1891, the common council passed a resolution declaring "that \$3,532.68 be set aside out of the general fund for the purpose of paying the order drawn in favor of the Gamewell Fire-Alarm Telegraph Company, which was ordered drawn May 25, 1891, by the common council, and which the mayor refused to sign."

Appellant earnestly insists that, by the con-

tract sued upon, appellant became indebted to appellee, and that the same was void, under the provisions of article 13 of the constitution, for the reason that appellant was already indebted in excess of the amount allowed by said article. Article 13 of the constitution adopted in 1881 is as follows: "No political or municipal corporation in this state shall ever become indebted in any manner or for any purpose, to an amount in the aggregate exceeding two per centum of the value of the taxable property within such corporation, to be ascertained by the last assessment for the state and county taxes previous to the incurring of such indebtedness; and all bonds or obligations in excess of such amount given by such corporation shall be void: provided, that in time of war, foreign invasion or other great public calamity, on petition of a majority of the property owners, in number and value within the limits of such corporation, the public authorities, in their discretion, may incur obligations necessary for the public protection and defense to such an amount as may be required in such petition." This clause in our constitution is, in legal effect, the same as that of Iowa, and was, no doubt, taken from the constitution of that state. It is a familiar rule that, where a clause is taken from the constitution or statute of another state, it will be deemed to have the meaning given it by the courts of that state. Under this provision, every indebtedness incurred "in any manner, or for any purpose," is within the prohibition. *City of Council Bluffs v. Stewart*, 51 Iowa, 385, 1 N. W. 628; *Scott v. City of Davenport*, 34 Iowa, 208; *Grant v. City of Davenport*, 36 Iowa, 396, 401; *French v. City of Burlington*, 42 Iowa, 614; *Anderson v. Insurance Co.*, 88 Iowa, 579, 55 N. W. 348; *Brown v. City of Corry (Pa. Sup.)* 34 Atl. 854; *Lake Co. v. Rollins*, 130 U. S. 662, 9 Sup. Ct. 651; *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220; *Litchfield v. Ballou*, 114 U. S. 190, 5 Sup. Ct. 820; note to *Beard v. City of Hopkinsville (Ky.)* 23 Lawy. Rep. Ann. 402-408; s. c. 24 S. W. 872; note to same case, 44 Am. St. Rep. 229, 243.

The controlling question in this case is, do the facts found show an indebtedness of appellant within the inhibition imposed by the foregoing article of the constitution? A debt, in its general sense, is a specific sum of money, which is due or owing from one person to another, and denotes not only an obligation of the debtor to pay, but the right of the creditor to receive and enforce payment. *State v. Hawes*, 112 Ind. 323, 14 N. E. 87; *City of Valparaiso v. Gardner*, 97 Ind. 1; *Crowder v. Town of Sullivan*, 128 Ind. 486, 23 N. E. 94. It is the rule in this state that when a municipal corporation contracts for a usual and necessary thing, such as water or light, and agrees to pay for it annually or monthly, as furnished, the contract does not create an indebtedness for the aggregate sum of all the installments, since the debt for

each year or month does not come into existence until it is earned. The earning of each year's or month's compensation is essential to the existence of a debt. *Crowder v. Town of Sullivan*, supra, and authorities cited; *City of Valparaiso v. Gardner*, supra, and cases cited; *Foland v. Town of Frankton*, 142 Ind. 546, 41 N. E. 1031, and authorities cited; *Seward v. Town of Liberty*, 142 Ind. 551, 554, 42 N. E. 39; 1 Dill. Mun. Corp. (4th Ed.) § 136a; *Wade v. Oakmont Borough*, 165 Pa. St. 479, 30 Atl. 959; *Brown v. City of Corry* (Pa. Sup.) 34 Atl. 854. If the city can pay this indebtedness when it comes into existence without exceeding the constitutional limit, there is no indebtedness, and therefore no violation of the constitution. But if the indebtedness of the city already equals or exceeds the constitutional limit, and the current revenues are not sufficient to pay such indebtedness when it comes into existence, including other expenses for which the city is liable, an indebtedness is thereby created, and there is a violation of the constitution. *City of Valparaiso v. Gardner*, supra; Dill. Mun. Corp. §§ 136, 136a; Appeal of *City of Erie*, 91 Pa. St. 399. It is also the law that items of expense essential to the maintenance of corporate existence, such as light, water, labor, and the like, constitute current expense, payable out of current revenues. *Foland v. Town of Frankton*, 142 Ind. 550, 41 N. E. 1031. When the current revenues are sufficient to fully pay the current expenses necessarily incurred to sustain corporate life, no indebtedness is incurred; but a debt cannot be made beyond the constitutional limit, even for the current expenses mentioned, no matter how urgent. *Sackett v. City of New Albany*, 88 Ind. 473; *City of Valparaiso v. Gardner*, supra.

It is clear, therefore, that whenever a city whose indebtedness exceeds the constitutional limit does not have money on hand arising from current revenues to meet its debts, of whatever character, as they come into existence, whether for light, water, labor, or any other expense, the city has become indebted, and the constitution is violated. It is not sufficient, however, merely to have on hand enough money to pay each indebtedness as it comes into existence; but the same must be paid as it comes into existence, or there must be enough money on hand to pay all of such indebtedness outstanding, or there is an indebtedness created, and the constitution is thereby violated. If, to avoid the constitutional inhibition, it is only necessary to have on hand sufficient money to pay an indebtedness when it comes into existence, without paying or keeping on hand enough money to pay it, there would be no restraint upon the power of a municipality to become indebted. Obligations payable out of a particular fund, and for which the fund only, and not the municipality, is liable, are not within the inhibition. *Quill v. Indianapolis*, 124 Ind. 292, 23 N. E. 788;

Strieb v. Cox, 111 Ind. 299, 12 N. E. 481; *Board, etc., v. Hill*, 115 Ind. 316, 16 N. E. 156; *City of New Albany v. McCulloch*, 127 Ind. 500, 505, 26 N. E. 1074; *Hitchcock v. Galveston*, 96 U. S. 341; *City of Galveston v. Heard*, 54 Tex. 420; *Davis v. Des Moines*, 71 Iowa, 500, 32 N. W. 470; *Baker v. City of Seattle*, 2 Wash. 576, 27 Pac. 462; *Austin v. City of Seattle*, 2 Wash. 673, 27 Pac. 557. The same rule applies to agreements to accept certificates of assessments in full satisfaction. *Davis v. Des Moines*, supra. But anything that renders the city liable brings the indebtedness within the restriction. *Fowler v. City of Superior*, 85 Wis. 411, 54 N. W. 800. It is held in some states, under constitutional provisions substantially the same as ours, that a municipality which has reached its limit may anticipate the collection of the revenue appropriated to its use, by drawing warrants against taxes levied, but not collected; thus substantially appropriating and assigning the amount drawn to the holder of the warrant. *French v. City of Burlington*, supra; *Law v. People*, 87 Ill. 385; *City of Springfield v. Edwards*, 84 Ill. 626; *City of East St. Louis v. Flannigan*, 26 Ill. App. 449; *Koppikus v. State Capitol Com'rs*, 16 Cal. 248. But, in order to escape the inhibition of the constitution, the tax must not only have been levied, but the warrant must be drawn, payable out of the particular fund, and be such, in legal effect, as to discharge the municipality from all liability. *City of Springfield v. Edwards*, supra; *Law v. People*, supra; *Fuller v. Chicago*, 89 Ill. 282; *People v. May*, 9 Colo. 404, 12 Pac. 838. In *City of Valparaiso v. Gardner* this court said: "If a bond, note, or other obligation is executed, then, doubtless, a debt is created, for such things constitute evidences of indebtedness. * * * So, if the consideration of the contract is received at once, instead of being yielded at intervals, then it might be said that there was a debt; but where nothing is owing until after the thing contracted for is done or furnished, and that thing is a part of the necessary expense of the municipality, there will be no debt, if, when the thing is done or furnished, there will be money in the treasury, yielded by current revenues, sufficient to fully pay the claim, without encroaching upon other funds."

Conceding, without deciding, that a fire-alarm system is a necessary or ordinary annual expense of a municipality, and essential to its existence, yet appellee's claim is within the inhibition of the constitution. In this case it is not material whether the indebtedness came into existence on December 18, 1890, when appellee completed the work, and the same was accepted by appellant, or at the date of the contract, August 5, 1890. It is clear that the indebtedness came into existence December 18th, when the work was completed and accepted, if not before. There was not sufficient cash in the city treasury to pay said indebtedness at that

time, and the constitutional provision was violated. But it is urged that the debt was not payable until May 1, 1891, and that there was sufficient cash in the treasury to pay the same at that time. The rule is that the cash must be in the treasury to pay the same when the debt comes into existence, not when it becomes due (*City of Valparaiso v. Gardner*, 97 Ind. 8); otherwise, the city could issue bonds for borrowed money or other existing indebtedness, or become so indebted in other ways, far in excess of the constitutional limit, and by making the same payable in annual installments, and each year levying and collecting sufficient taxes to pay the same, avoid the constitutional inhibition.

It is claimed by appellee that under the law as declared in *Brashear v. City of Madison*, 142 Ind. 685, 36 N. E. 252, and 42 N. E. 349, appellant is liable, and the conclusion of law therefore correct. The case cited was brought to enjoin the city of Madison from entering into a contract with the appellee in the case for the erection and location of a fire-alarm system in said city, for which the city was to pay, when completed, \$5,000, upon the ground that the city was indebted in excess of the constitutional limit. In that case this court held that it was shown by allegations of the complaint that it was not proposed to create an indebtedness, but simply to make a cash purchase. In overruling the petition for a rehearing, this court said: "The theory of the original opinion is that, to sustain the suit, appellants were required to show that the maximum debt limit, as prescribed by the constitution, had been reached, and that the city was about to create an additional debt, and that they had failed to show this. This failure, it was held, was due to the fact that it was not proposed to create a debt, but simply to make a cash purchase, the city having in its treasury the funds with which to pay therefor." Counsel for appellee cites *Powell v. City of Madison*, 107 Ind. 106, 8 N. E. 31. That was a suit to enjoin the officers of that city from issuing bonds to a certain amount, or any part of them, or in any manner borrowing money or creating a debt under and by virtue of an ordinance to fund the indebtedness of the city set out in the complaint, upon the ground that the city was already indebted in excess of the constitutional limit. The city of Madison answered, admitting the indebtedness as stated in the complaint, but averred that the city did not intend to make use of or to appropriate any of such bonds, or any of the proceeds for which they might be sold, for the purpose of paying or extinguishing any part of the indebtedness of the city contracted since March 14, 1881, when article 13 of the constitution took effect, but solely and only to exchange such bonds for or use their proceeds in payment of bonds of such city outstanding for debts incurred before that date. This answer was held to be sufficient by this court, upon the ground that

the new bonds, as provided for in the ordinance, would represent the debt that the bonds issued prior to March 14, 1881, represented, and that thus no new debt would be created. If such new bonds were exchanged for the old ones, one would only be a substitute for the other, and be an extinguishment thereof, and the aggregate outstanding indebtedness would not be increased. Neither if the new bonds were sold for cash, and the old bonds paid therewith, would the indebtedness be increased. The presumption is that public officers will perform their duties honestly, and upon this presumption the injunction in that cause was refused. But if the proceeds of the sale of the new bonds were misapplied by the officers, and the old bonds not paid, the indebtedness would be increased. It was not held in *Powell v. City of Madison*, supra, that the new bonds would be valid under such circumstances. It was held by the supreme court of the United States, in *Doon Tp. v. Cummins*, 142 U. S. 366, 12 Sup. Ct. 220, under the provisions of the constitution of Iowa, that when the bonds had been sold to pay off other bonds which were equal to the constitutional limit, and the money received for the new bonds was misapplied, and the old bonds not paid, the new bonds were invalid, and not collectible. To the same effect is *Anderson v. Insurance Co.*, 88 Iowa, 579, 55 N. W. 348. This question, however, is not involved in this case, and it is not necessary to determine whether or not the same rule prevails in this state. It is the duty of persons dealing with public officers to take notice of their official and fiduciary character, and that they can only bind the public corporation they represent in the manner and to the extent authorized by law. *Bloomington School Tp. v. National School Furnishing Co.*, 107 Ind. 43-45, 7 N. E. 760, and cases cited; *Julian v. State*, 122 Ind. 68, 73, 23 N. E. 690; *Honey Creek School Tp. v. Barnes*, 119 Ind. 213, 217, 21 N. E. 747; *Union School Tp. v. First Nat. Bank*, 102 Ind. 464, 470, 2 N. E. 194. Appellee was required to take notice of the fact that appellant was indebted beyond the constitutional limit, and that the city, therefore, had no power to become indebted. Appellant had no power, under the facts stated in the special finding, to become indebted to appellee, and the common council had no power to ratify or validate the same, by resolution or otherwise. *Doon Tp. v. Cummins*, supra; *Marsh v. Fulton Co.*, 10 Wall. 676; *Davless Co. v. Dickinson*, 117 U. S. 657, 6 Sup. Ct. 897; *Norton v. Shelby Co.*, 118 U. S. 425, 6 Sup. Ct. 1121; *Kane v. Independent School Dist.*, 82 Iowa, 5, 47 N. W. 1076; *Kelley v. Town of Milan*, 127 U. S. 139, 8 Sup. Ct. 1101. The resolution of the common council adopted June 22, 1891, was therefore ineffective, and gave no validity to appellee's claim.

It follows that the court erred in its conclusions of law. Judgment reversed, with

instructions to the court below to restate its conclusions of law, and render judgment in accordance with this opinion.

(146 Ind. 399)

FORGY v. DAVENPORT.

(Supreme Court of Indiana. Dec. 15, 1896.)

DOWER — RIGHT OF WIDOW TO CONVEY — LEASE FOR LIFE.

Rev. St. 1881, § 2484 (Rev. St. 1894, § 2641), providing that a widow, who has remarried, holding lands by virtue of her previous marriage, may not, if there are children of such prior marriage living, alienate the lands so held, does not render void a lease of such lands for her life.

Appeal from circuit court, Miami county; J. T. Cox, Judge.

Action by Sarah M. Davenport against George B. Forgy. On the overruling of a demurrer to the complaint, plaintiff had judgment, and defendant appeals. Reversed.

Mitchell, Antrim & McClintic, for appellant. Pettit & Stitt, for appellee.

MCCABE, J. The appellee brought suit in the Wabash circuit court to set aside a written lease by her to appellant of certain lands situate in Wabash county, and to quiet her alleged title thereto. The venue was changed to the Miami circuit court. That court overruled a demurrer to the complaint for want of sufficient facts, and, the defendant refusing to plead further or amend, the plaintiff had judgment.

It appears from the complaint: That John McEnderfer died on December 1, 1886, seised in fee simple of certain lands in Wabash county, particularly described, among which was the 123 acres of land now in controversy, leaving surviving him the plaintiff as his widow, and Eldora McEnderfer, who is still living, and a minor, the fruit of said marriage, as his only heirs at law. That said 123 acres was duly set off to said plaintiff in partition proceedings as her undivided interest in the realty of which her said husband died seised. That afterwards, on January 1, 1889, the plaintiff intermarried with John H. Davenport, who is still living, and she has ever since been, and is now, his lawful wife. That thereafter, to wit, on January 15, 1892, and while still the wife of said Davenport, and the owner of said land, she and her said husband executed to the defendant a lease of said land for the consideration of \$1,000 for the term of her natural life, reading as follows: "January 15th, 1892. This agreement witnesses that for and in consideration of the sum of \$1,000.00 this day paid Sarah M. Davenport by George B. Forgy, of Cass county, Indiana, the receipt whereof is hereby acknowledged, Sarah M. Davenport and John H. Davenport, of Wabash county, Indiana, have this day leased to George B. Forgy, of Cass county, Indiana, for the term of the natural life of said Sarah M. Davenport, the following lands in Wabash county, Indiana, to wit: The south 123 acres off of the south end of the east half of sec-

tion 6, town 29 north, of range 6 east, being the same lands mortgaged as described in Record 4, at pp. 30 and 31 of the Mortgage Records of Wabash county, Indiana. Sarah M. Davenport. John H. Davenport. Acknowledged January 15th, 1892. Recorded January 19th, 1892, in O, 38." That defendant caused said instrument to be duly recorded in the records of Wabash county aforesaid on January 19, 1892, in Record O, and has ever since claimed, and now claims, that the same is in full force in law. That said lease is void. That defendant is claiming to be entitled to possession under said lease, which casts a cloud upon plaintiff's title and fee-simple ownership. Wherefore plaintiff prays the court that defendant's claim be declared null and void, and that plaintiff's title to said real estate be quieted.

The precise question here involved has never yet been decided by this court, though a great many decisions have been made from which the inference may be drawn that a lease of the kind here involved would be void. The most prominent of that kind of cases, and the one most relied on by the appellee to sustain the ruling of the trial court in holding the lease void, is Vinnedge v. Shaffer, 35 Ind. 341. That was an attempt to foreclose a mortgage executed by a married woman and her husband on real estate held by her in virtue of a previous marriage. The eighteenth section of the statute of descents then read: "If a widow shall marry a second or any subsequent time, holding real estate in virtue of any previous marriage, such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate, and if during such marriage, such widow shall die such real estate shall go to her children by the marriage in virtue of which such real estate came to her, if any there be." This court said in that case that: "The restraint upon alienation, by the terms of the statute, is as absolute where there are no children of the marriage in virtue of which she received the property as where there are. The object of the statute seems to be twofold: First, to protect a woman who has thus received real estate by virtue of a former marriage from improvident and injudicious alienations thereof during a second or subsequent marriage; and, second, to preserve the property for the children of the marriage in virtue of which she received it, where there are such children, in case of her death during such second or subsequent marriage." It was held that the mortgage was in some sense an alienation, and fairly within the prohibition of the statute, because it might in many cases be an indirect mode of alienation, thereby violating the maxim that what cannot be done directly cannot be done indirectly. The court refused to follow the contention of counsel in that case that the wife might alienate an estate in such real estate during her life, and the fee conditionally, because it would defeat one of the purposes of the statute, namely, to protect her against improvident and injudicious aliena-

tions thereof during a second or subsequent marriage. This case was followed by many cases affirming the same doctrine, one of which is *Sebrell v. Hughes*, 72 Ind. 183. That was a case where the widow, holding real estate by virtue of the previous marriage, had married a second time, and, with her second husband, attempted to convey such real estate. It was there said that: "It is doubtless true that the deed of Nancy J. Francis and her husband to Hughes conveyed no title. Said Nancy had a good title and estate in fee simple, but by reason of section 18 of the law of descent (1 Rev. St. 1876, p. 411) she was, during coverture of her second marriage, forbidden to convey. This disability being for her own benefit, as well as that of her own children by her first husband, her deed constituted no estoppel against her; and if she had chosen to reassert her title, and reclaim the possession, at any time, she could have done so,"—citing several cases, among which is *Vinnedge v. Shaffer*, supra. To the same effect as to an attempt to convey by deed are *Knight v. McDonald*, 37 Ind. 463; *Griner v. Butler*, 61 Ind. 362; *Edmondson v. Corn*, 62 Ind. 17; *Avery v. Akins*, 74 Ind. 283; *Insurance Co. v. Athon*, 78 Ind. 10; *Mattox v. Hightshue*, 39 Ind. 95; *Marsh v. Thompson*, 102 Ind. 272, 1 N. E. 630. Other cases of mortgages by the widow and her subsequent husband of real estate held by her in virtue of her previous marriage have followed *Vinnedge v. Shaffer*, supra, holding such mortgages void, namely: *Bowers v. Van Winkle*, 41 Ind. 432; *McCullough v. Davis*, 108 Ind. 292, 9 N. E. 276; *Insurance Co. v. Buck*, 108 Ind. 174, 9 N. E. 153. It has also been held that such real estate so held by such widow who has married a second or subsequent time cannot be sold on execution against her during such subsequent marriage, by reason of the restraint upon alienation imposed by said section of the statute, in *Schlemmer v. Rossler*, 59 Ind. 326; *Miller v. Noble*, 86 Ind. 527; and *Smith v. Beard*, 73 Ind. 159. All these cases, it is argued, inferentially hold that such widow, during such subsequent marriage, cannot alienate a life estate in such lands by a lease or otherwise. Because it is claimed that the mortgages, voluntary deeds, and sheriffs' sales involved in those cases might have been upheld to the extent of conveying a life estate if the statute does not restrain the alienation of a life estate. But none of the cases referred to assign any reason for the holding but the first two, and they assign the reason that one of the objects of the restraint upon alienation was to protect the woman from improvident and injudicious alienations during a second or subsequent marriage.

As to the power of a court to declare a deed purporting to convey a fee-simple title by one holding the title in fee simple to be only a conveyance of a life estate, it is neither mentioned nor discussed; nor is a word said as to whether a sale of a life estate only on execution of land against one holding the title in fee simple can be made; or whether

a mortgage purporting to mortgage the fee by one holding the fee can be converted into a mortgage of a life estate, so as to avoid the effect of the prohibition against alienating the fee, is not alluded to in any of those cases. A deed or mortgage purporting to convey or mortgage the fee by one holding only a life estate might be sufficient to convey or mortgage the life estate, that being all the interest the mortgagor or grantor had in the real estate. But whether his mortgage, deed, or sale against him on execution purporting to mortgage, convey, or sell the fee, he being the owner of the title in fee simple, can be converted into a mortgage, conveyance, or sheriff's sale of a life estate only, so as to avoid a statutory prohibition against alienations, presents a different question. Such was the nature of all the mortgages, deeds, and sheriffs' sales involved in the cases above referred to. The land here involved descended to the appellee from her former husband, and the title in fee simple vested in her by virtue of the section of the statute of descents preceding the one already referred to, being the old seventeenth section. Rev. St. 1894, § 2640 (Rev. St. 1881, § 2483); *Schlemmer v. Rossler*, supra; *Philpot v. Webb*, 20 Ind. 509; *Jackson v. Finch*, 27 Ind. 816. And her second or subsequent marriage did not divest her title. *Small v. Roberts*, 51 Ind. 281; *Philpot v. Webb*, supra. In the case of *Jackson v. Finch*, supra, it was sought to recover back money paid on an executory contract made by a widow and her subsequent husband for the conveyance of land held by her in virtue of her previous marriage. The defendants tendered to the plaintiff a quitclaim deed, which he refused to accept. It was there said: "It is contended that a less estate may be alienated by her, and that the quitclaim deed passed that estate. According to appellee's own evidence, she contracted to sell her interest in the land of her late husband. This she could not do. Her offer to convey a less interest than she contracted to convey was not a compliance with her contract." The cases above referred to as holding that a widow, during a subsequent marriage, cannot mortgage or convey land held by her in virtue of a previous marriage, and that such land cannot be sold on execution against her during such subsequent marriage, are not, necessarily, inconsistent with the power to lease the same by her for life, unless it be those of said cases which hold that the restraint on or suspension of her power of alienation is to protect her against improvident and injudicious alienations during the subsequent marriage, as well as to preserve the property for the children in case of her death during the subsequent marriage.

The section of the statute has been materially modified by amendment since all of those decisions were made except one, namely, *Insurance Co. v. Buck*, supra. But that case does not proceed upon the ground that

the restraint on, or suspension of, the power of alienation was for the benefit of the woman. It was simply an attempt to mortgage the fee, during a subsequent marriage, by a widow, of lands held by her in virtue of her previous marriage. As before observed, the decision in that case is not necessarily inconsistent with the power to lease such land during her life, even though the section of the statute imposing the restraint had been so changed before that decision as to take away one of the objects of the original section, namely, the protection of the woman against improvident and injudicious alienations. In 1879 the section was so amended as to read as follows: "If a widow marry a second or subsequent time, holding real estate in virtue of any previous marriage, and there be a child or children or their descendants alive by such marriage, such widow may not, during such second or subsequent marriage, with or without the assent of her husband alienate such real estate; and if during such marriage, such widow shall die, such real estate shall go to her children by the marriage in virtue of which such real estate came to her if any there be. Provided, however, that such widow and her living husband may alienate such real estate, if her children by the marriage in virtue of which such real estate came to her shall be of the age of twenty one years and join in such conveyance: and provided further, that in case there be no child or children or their descendants by the marriage in virtue of which such real estate came to such widow, then, in such case, such widow may during such second or subsequent marriage, by her second or subsequent husband joining in the conveyance thereof, alienate such real estate in fee simple." It is, we think, very clear, if the original section had for one of its objects the protection of women against improvident and injudicious alienations during subsequent marriage, that object has been entirely taken away by the amendment; and that the amendment leaves but one object to be accomplished by the suspension of or restraint on alienation during the second or subsequent marriage, and that is to preserve the fee simple for the children of the marriage in virtue of which she received it, in case she dies during such second or subsequent marriage (see *Marsh v. Thompson*, supra), because the restraint on or suspension of the power of alienation ceases if the second or subsequent marriage ceases for any cause during her life (*Piper v. May*, 51 Ind. 283). And if she had children by the second or subsequent marriage, and dies unmarried, leaving children by both marriages, the land received in virtue of the first marriage will descend to all her children alike. *Teter v. Clayton*, 71 Ind. 237.

The single object of the section, as above indicated, can be fully accomplished by restraining or suspending the power of alienation of the fee during the second or subse-

quent marriage. To accomplish that object, it is wholly unnecessary to interfere with the power to lease for a term of years or for the life of the owner. But let us see what it is that the statute prohibits the alienation of during the second or subsequent marriage. It is real estate held by such widow in virtue of any previous marriage. How does she hold it? The section in question does not provide. But the preceding section, being the old seventeenth section, provides that: "If a husband die testate or intestate leaving a widow one-third of his real estate shall descend to her in fee simple." Rev. St. 1894, § 2640 (Rev. St. 1881, § 2483). The estate, therefore, which such widow holds in virtue of her previous marriage, as referred to in the amended eighteenth section, quoted above, is an estate in fee simple. And that is the estate which the section has reference to in the provision that "such widow may not, during such second or subsequent marriage, with or without the assent of the husband, alienate such real estate," and in the last proviso providing, in case there be no child or children or their descendants of the marriage in virtue of which such real estate came to her, that such widow may, during such subsequent marriage, by such husband joining in the conveyance thereof, "alienate such real estate in fee simple." This view is strongly supported by some of the earlier cases in this court construing the section even before its amendment. In *Blackleach v. Harvey*, 14 Ind. 564, it was said, at pages 565, 566, that: "It has already been intimated in a former opinion that the object of the section [18] and others, of the law of descents, was to preserve and transmit the estate to the children of the prior marriage. *Ogle v. Stoops*, 11 Ind. 380, and cases cited. It could not be to protect the widow or wife from encroachment on the part of her husband, for the law allows first wives to convey their property with the consent of their husbands (*Reese v. Cochran*, 10 Ind. 195); and, beyond doubt, first wives need as much protection from the influence of their husbands as do second. This being so, it would seem that section 18, above quoted, should only be applied in restraint of the right of the wife to convey in fee simple her real estate, while she had children living by a former husband, who might inherit it. * * *

The statute of Gloucester prohibited the alienation by the widow of the estate assigned to her as dower; but it was held that an alienation for life simply, being no more than her interest, as it worked no wrong to her heirs, was not within the statute. See 2 Shars. Bl. Comm. p. 137, and note 26." And in *Jackson v. Finch*, 27 Ind., 316, in speaking of the two sections of the statute of descents mentioned, it was said: "But in the statute under consideration there was a new estate created for the first time in the widow,—that of an estate in fee in a specified portion of the lands of the hus-

band. The eighteenth section is a provision in relation to the manner in which this new estate was to be held so far as her power of alienation was concerned. There was no existing evil to be remedied. There is nothing to guide us as to the intention of the legislature but the plain and obvious meaning of the words of the statute. Indeed, the language is so plain that it does not admit of interpretation, 'Such widow may not, during such marriage, with or without the assent of her husband, alienate such real estate.' Her estate is a fee. That estate, by the express words of the statute, cannot be alienated during her second or subsequent marriage." But that she might dispose of an estate less than the fee simple, provided such disposition does not interfere with or defeat the object of the statute in preserving the estate in fee for the children of the previous marriage in case of her death during such second or subsequent marriage, if not contemplated by the section quoted, seems unavoidably required by a subsequent statute. That statute was enacted in 1881, and section 2 thereof reads thus: "A married woman may take, acquire, and hold property, real or personal, by conveyance, gift, devise or descent, or by purchase with her separate means or money; and the same, together with all the rents, issues, income and profits thereof, shall be and remain her own separate property, and under her own control, the same as if she were unmarried. And she may, in her own name, as if she were unmarried, at any time during coverture, sell, barter, exchange and convey her personal property; and she may also, in like manner, make any contracts with reference to the same; but she shall not enter into any executory contract to sell or convey or mortgage her real estate, nor shall she convey or mortgage the same, unless her husband join in such contract, conveyance or mortgage: provided, however, that she shall be bound by an estoppel in pais like any other person." Rev. St. 1894, § 6962 (Rev. St. 1881, § 5117). We have seen that she is the owner of the land in fee simple, with the power of alienation thereof suspended during the second or subsequent marriage. That is the only qualification to her absolute ownership, and that only subsists during the subsequent marriage. The statute last quoted, therefore, makes all the rents, issues, income, and profits thereof her separate property, and places the same under her control, the same as if she were unmarried. She cannot have and control the rents, unless she can rent the land. Indeed, she cannot derive any benefit from her farm unless she can rent or lease it for a given time. We judicially know that she cannot rent a farm for a less term than one year, because it takes that length of time practically for the lessee to derive any benefit from such lease or renting. Therefore all must concede that she is at least impliedly authorized to rent or

lease it at least one year. And if one year, then the same principle would authorize her to rent for a term of years. If, however, she should die during the marriage, and before the expiration of the term, leaving a child or children or descendants by the marriage in virtue of which the real estate came to her, the lease would expire by operation of law before the expiration of the term by the land descending to her children. Thus it seems that such leases, whether for a long or a short term, would be valid during her life at least. Then, if a lease which, by its own provisions, is to be for the term of her life, is not valid, why should a lease for a year, or a term of years, be valid for that portion of the term during which she lives? for that may be a lease beyond her life. All must admit that under the statutes quoted a lease for a year or a term of years is valid at least for so much of the term as she lives. And, if that is so, a lease which, by its own terms, is limited to the term of her natural life, is less objectionable, and less liable to conflict with the statute, than a lease for a year or a term of years. Indeed, a lease for her life cannot come in conflict with the statute, or defeat its object to preserve the estate for the children, while a lease for a year or a term of years might, if enforced according to its terms. We therefore conclude that the lease in this case was valid, and that the court below erred in overruling the demurrer to the complaint seeking to avoid it. The judgment is reversed, with instructions to sustain the demurrer to the complaint.

(146 Ind. 393)

BOWER et al. v. BOWER et al.

(Supreme Court of Indiana. Dec. 15, 1896.)

TRIAL—SPECIAL VERDICT—GENERAL VERDICT—
APPEAL—ASSIGNMENT OF ERROR—SUFFICIENCY
—WILL—INCAPACITY OF TESTATOR.

1. A special verdict is not subject to a motion for venire de novo when it finds facts sufficient to enable the court to pronounce judgment, although the jury fails to find on all the issues.

2. Under Rev. St. 1881, § 546 (Rev. St. 1894, § 555), as amended by Act March 11, 1895, relating to special verdicts, it is not necessary, where a special verdict is rendered upon all the issues of the cause, that a general verdict should be returned.

3. It is not necessary that the special verdict should contain the formal conclusion that "if, upon the facts found, the law is with plaintiff, then we find for plaintiff; if the law is with defendant, we find for defendant."

4. Where the court gave instructions numbered 1 to 6 on its own motion, and at the request of plaintiff another set of instructions numbered 1 to 10, an assignment of error that "the court erred in giving instructions numbered one to six, inclusive," refers to the instructions given on the court's own motion.

5. An assignment of error based upon the giving of instructions cannot be sustained where the instructions, as a whole, are correct, though objectionable as to isolated phrases.

6. On the contest of a will, a finding by the jury that testator, at the time of its execution, did not have mind and memory sufficient

to understand the ordinary affairs of life, the value of his property, or the number and names of the persons who were the natural objects of his bounty, nor any general knowledge of the estate of which he was possessed, was sufficient to support a judgment setting aside the will on the ground of the incapacity of the testator.

Appeal from circuit court, Clark county; George H. D. Gibson, Judge.

Action by Eliza Bower and others against William E. Bower and others to contest the validity of the will of Andrew Bower, deceased. From a judgment for plaintiffs, defendants appeal. Affirmed.

For former report, see 41 N. E. 523, 42 Ind. 194.

M. Z. Stannard and C. L. Jewett, for appellants. J. K. Marsh and W. H. Watson, for appellees.

JORDAN, C. J. This was an action by the appellees to contest the validity of the will of Andrew Bower, executed on September 5, 1887. The testator died in Clark county, Ind., on July 18, 1892, leaving the respective parties to this proceeding as his heirs at law. The grounds of the contest are: (1) That the testator, at the time of the execution of the will, was of unsound mind; (2) that it was unduly executed; (3) that it was procured to be executed through the fraud of the defendants. Upon a special verdict of the jury, the court rendered its judgment in favor of the appellees, adjudging the will to be null and void.

This is the second appeal by the appellants to this court. *Bower v. Bower*, 142 Ind. 194, 41 N. E. 523. The principal errors assigned and urged to secure a reversal of the judgment are: (1) Overruling appellants' motion for a *venire de novo*; (2) sustaining appellees' motion for judgment on the verdict of the jury; (3) overruling motion for a new trial. The special verdict was framed under section 546, Rev. St. 1881 (section 555, Rev. St. 1894), as amended by an act approved March 11, 1895 (Acts 1895, p. 248), and consisted of a number of interrogatories submitted to and answered by the jury. An examination of the verdict discloses that the jury responded to and found upon the issues involved in the action. Under the rule which now prevails in this jurisdiction, a special verdict is not subject to a motion for a *venire de novo* when it finds facts sufficient to enable the court to pronounce judgment thereon, although the jury fails to find upon all the issues. *Board v. Pearson*, 120 Ind. 426, 22 N. E. 134, and cases there cited. Three hundred and ninety-five interrogatories were answered by the jury. Many of these were wholly unnecessary, and could be of no useful purpose, and only served to perplex and consume the time of the jury. It is insisted by counsel for appellant that, in addition to the answers of the jury to these interrogatories, there should have been a general verdict, finding in favor of the plaintiffs, in order to authorize the court to render judgment in their favor; and for this reason it is

also contended that a *venire de novo* should have been awarded. The special verdict in this case, at the request of appellants, was directed by the court to be returned upon all of the issues in the cause. In answer to appellants' contention, we think that it was the evident purpose of the legislature, by the amendment, to change the practice as it formerly existed under the section amended, of permitting the court to submit to the jury two special verdicts drafted by the respective parties in a narrative form, leaving the jurors to accept and return the one which they considered the evidence sustained, and in the future to require that a special verdict shall be framed by the means of interrogatories, each of which is to be answered by the jury, under the evidence, and each to be so framed as to require the finding thereon to embrace but a single fact. The statute, as amended, directs that counsel on either side shall prepare such special verdict, meaning and intending that counsel on each side shall prepare such a number of interrogatories as may be necessary to cover all of the facts material to the issues in the action, all of which interrogatories are to be submitted to the court, subject to its change, modification, and final approval. When so approved, the court should cause them to be numbered, not in separate sets, but as an entirety, from one to the close, and submit them to the jury with the instruction that each be answered, and all returned as a special verdict in the cause. When the demand is for such a verdict upon "all of the issues of the cause," then it must be so framed as to embrace and cover all facts material to the issues involved, and in this event the statute, as amended, does not contemplate a general verdict, but leaves the court to pronounce its judgment upon the special verdict, as was the former practice. In the event, however, the demand is not for a special finding upon all of the issues, but for a special finding by the jury upon a part, only, of the material facts, then, in addition to this, the jury must be instructed by the court to return a general verdict, and in such a case they are only required to answer the interrogatories submitted to them, in the event a general verdict is returned. Under this latter practice, the special finding of facts still controls the general verdict, as provided by section 556, Rev. St. 1894 (section 547, Rev. St. 1881). In other words, when the request is not for a special finding upon all of the issues, but only upon some particular question of fact germane to the issues, we are of the opinion that the legislature, by the amendment, did not intend to change the law in this respect, but has left it substantially as it was prior to the passage of the amendatory act.

It is further urged that, in case the verdict in dispute can be considered as a special one, it is nevertheless insufficient, for the further reason that it does not conclude, with the usual formula, to wit: "If, upon the facts found, the law is with the plaintiff, then we find for

plaintiff. If the law is with the defendant, then we find for the defendant." While it is the proper practice for a special verdict to contain a formal conclusion substantially as the one insisted upon by counsel, still the absence of such a conclusion will not vitiate a special verdict, which in other respects is sufficient. *Railway Co. v. Lucas*, 119 Ind. 583, 21 N. E. 968; *Railroad Co. v. Taft*, 2 Ind. App. 237, 28 N. E. 443. The court did not err in overruling the motion for a venire de novo.

The next insistence is that certain instructions given by the court on its own motion, and others given at the request of appellees, are erroneous. Two sets of instructions appear in the record, the first consisting of those given by the court on its own motion. These are numbered from 1 to 6. The second set embraces those given at the request of appellees, and are numbered from 1 to 10. The third assignment of reasons for a new trial, as it appears in the motion, is as follows: "(3) Because the court erred in giving to the jury instructions numbered 1 to 6, inclusive, and in each thereof." This is the only assignment in the motion for a new trial based upon the giving of instructions. It is evident, therefore, that the only instructions, the giving of which was assigned as a ground for a new trial, were those numbered from 1 to 6, given by the court on its motion. The giving of the other 10 charges at the request of appellees, not being assigned as a ground for a new trial, for this reason presents no question for our consideration. We have examined the instructions given by the court upon its own motion, and we are of the opinion that when they are construed as a whole, as they must be, they are not open to the criticism of appellants. These charges, in effect, advised the jurors as to the nature or character of the special verdict which they were required to return, and as to the issues involved in the action, and also in regard to the rules for weighing or reconciling conflicting evidence. While some of the expressions or terms employed by the court may possibly be subject to some objections, nevertheless the charges, as a whole, fairly advised the jury as to its duty relative to the special finding of facts, and in no manner were they harmful to appellants. While we cannot consider the objections urged against the instructions given at the request of appellees, for the reason heretofore stated, and while we do not mean to intimate that they were not a correct exposition of the law pertaining to the issues, had the verdict been a general instead of a special one, however, we again repeat that, where there is a special verdict to be returned upon all of the issues as in the case at bar, there is no use nor propriety in the trial court giving general instructions covering the law of the case. It is to be regretted that trial judges, where there is a special verdict, so frequently fail to observe this rule. See *Elliott*, App. Proc. § 645, and the authorities there cited; *Railway Co. v. Lynch* (at last term) 44 N. E. 907, and the long list of cases there cited.

Appellants contend that, under the special finding of facts, the court erred in overruling the motion for judgment in their favor. Among other material facts, the following are disclosed by the jury's answers to the following interrogatories, which formed part of the special verdict. "(237) Did Andrew Bower, at the time of the alleged execution of the paper writing which is the subject of this contest, have mind and memory sufficient to understand the ordinary affairs of life, and act with discretion therein, and did he know his children and grandchildren, and have a general knowledge of the estate of which he was possessed? Answer. No. (238) Did Andrew Bower, at the time of the alleged execution of the paper writing which is the subject of this contest, have mind and memory sufficient to understand the ordinary affairs of life, the value and extent of his property, the number and names of the persons who were the natural objects of his bounty, their deserts with reference to their conduct and treatment of him, their capacity and necessity, and did he have sufficient active memory to retain all these facts in his mind long enough to have his will prepared? Ans. No. (239) Did Andrew Bower, whose will is the subject of this contest, on the 26th day of August, 1887, have a general knowledge of the estate of which he was possessed? Ans. No." We think it is clearly established, by the above finding of facts, that the testator, at the time he executed the will in dispute, did not possess sufficient mental capacity, under the law, to make a will disposing of his estate. *Todd v. Fenton*, 66 Ind. 25; *Lowder v. Lowder*, 58 Ind. 538; *Durham v. Smith*, 120 Ind. 463, 22 N. E. 333; *Burkhart v. Gladish*, 123 Ind. 337, 24 N. E. 118; *Harrison v. Bishop*, 131 Ind. 161, 30 N. E. 1069.

The verdict fully supports the judgment, and there is evidence supporting the former. No available error appearing in the record, the judgment is affirmed.

(146 Ind. 411)

FIRST NAT. BANK OF INDIANAPOLIS v. NEW.

(Supreme Court of Indiana. Dec. 16, 1896.)

NOTE—PAYMENT.

1. Defendant and another made a note payable to a certain bank under an agreement that, if defendant would assign to the bank a certain judgment owned by him, he should be relieved of all liability on the note. On the death of the other maker of the note it was proven as a claim against his estate, and defendant assigned, in accordance with the agreement, the judgment held by him to the bank. A receiver thereafter appointed for the bank sold all the notes and choses in action of the bank. *Held*, that the note had wholly ceased to be an asset of the bank before such sale by the receiver.

2. Where a president of a bank is held out to the public as empowered to attend to all the business of the bank, he has authority to adjust a claim in favor of the bank by taking an assignment of a judgment, and such adjustment is valid if the agreement is afterwards carried into effect.

3. An executed parol agreement to accept the assignment of a judgment in payment of a note may be proven even as against the note.

4. In an action on a note, 11 years after it was made, defendant testified that, in accordance with an agreement with the president of the bank, who was dead at the time of the suit, he had assigned a judgment in payment of the note. The note had been proven up against the estate of another maker of the note. A receiver was appointed for the bank, and he never heard of any claim held by the bank against the defendant, and, while he sold the claim against the estate of the other maker, and the judgment alleged to have been assigned in payment of the note he never saw or sold the note in question. No demand had been made of the defendant for more than 11 years, and until suit brought. Held sufficient to show a payment of the note.

Appeal from superior court, Marion county; P. W. Bartholomew, Judge.

Action by the First National Bank of Indianapolis against John C. New. Judgment for defendant, and plaintiff appeals. Affirmed.

Lamb & Hill, for appellant. Duncan, Smith & Hornbrook, for appellee.

HOWARD, J. This was an action by the appellant against the appellee on a promissory note executed by the appellee and one John Hanna on the 29th day of September, 1880, to the First National Bank of Indianapolis, No. 55. There was an answer in four paragraphs: (1) Admitting the execution of the note, but averring that, in consideration of the assignment to the bank of a certain judgment, the appellee was released of all liability on the note; (2) a plea of payment; (3) a general denial; and (4) averring that at the time of the execution of the note it was agreed between the bank and appellee that whenever appellee should assign the said judgment to the bank such assignment was to be accepted in full satisfaction of appellee's liability on the note; and that, in pursuance of said agreement, appellee did assign the judgment to the bank, and the same was accepted in full discharge of appellee's said liability. The cause was tried by the court, and a special finding of facts made, with conclusions of law in favor of appellee. Error is assigned on the conclusions of law, and also on the overruling of the motion for a new trial.

The facts, as found by the court, with the conclusions of law thereon, are as follows:

"(1) On the 29th day of September, 1880, the defendant, with one John Hanna, and as surety for him, executed to the First National Bank of Indianapolis, No. 55, the note in suit, in the form set out in the complaint; that William H. Morrison, president of the bank, transacted the business on behalf of the bank.

"(2) That, contemporaneous with the execution of the note, it was agreed by and between William H. Morrison, president of the bank, and said John Hanna and the defendant, that if thereafter said John C. New

should, upon the request of the bank, assign to said bank a certain judgment theretofore recovered by the Indiana National Bank against said John Hanna, Frederick Knefler, George W. Parker, and Aquilla Parker, on the 12th day of September, 1870, for \$2,782.47, in cause No. 14,297 in the superior court of Marion county, in the state of Indiana, and which had theretofore been assigned by said Indiana National Bank to said John C. New, such assignment would be accepted by the First National Bank of Indianapolis, Indiana, in full payment and discharge of said John C. New's liability on said note.

"(3) That since the 1st of March, 1878, said William H. Morrison had been president of said bank, and had, by the directors thereof, been intrusted, as chief executive officer of said bank, with the control and management of its affairs; that he spent his whole time during business hours at the bank, conducting its business; that he in all things directed the policy of the bank, discounted paper at his discretion, without consulting the directors or any other officer of the bank, and had the general management and control of its affairs with the consent of its directors; that the directors met at irregular intervals, sometimes months intervening between such meetings.

"(4) That after the maturity of said note said Morrison continued as president until in the month of March, 1881, when he died. That immediately after his death, Augustus D. Lynch was elected president of said bank, and continued as such until the 25th day of August, 1883, when he resigned, and A. B. Conduitt was elected as his successor.

"(5) That on the 31st day of August, 1881, the First National Bank of Indianapolis, Indiana, payee in said note, went into voluntary liquidation, its charter having expired, and on the 1st day of September, 1881, the First National Bank of Indianapolis, No. 2,556, the plaintiff in this action, began business.

"(6) That said John Hanna died in the month of September, 1882, and some time after his death, but prior to June 14, 1884, said note, with others, was delivered by the payee therein, Bank No. 55, to its attorneys, to be filed as a claim against the estate of said John Hanna, but without any instructions to proceed against John C. New. That said notes were filed as a claim against the estate of said John Hanna and allowed prior to June 14, 1884.

"(6½) That on the 24th day of December, 1883, the defendant, John C. New, at the request of the president of the First National Bank of Indianapolis, No. 55, assigned said judgment against Hanna, Knefler, George W. Parker, and Aquilla Parker to said Bank No. 55, which assignment to said Bank No. 55 was made by said New in fulfillment of his agreement with said William H. Morrison, president of said bank, made at the time of

the execution of said note; and said assignment was by said bank received in fulfillment of such agreement.

"(7) That afterwards, on the 14th day of June, 1884, Harry J. Milligan was by the United States court in and for the district of Indiana, in a certain cause pending in said court, appointed receiver of the First National Bank of Indianapolis, Indiana, No. 55, the original payee of said note.

"(8) That upon the appointment of said Milligan as such receiver he received the assets of said Bank No. 55 from the officers thereof. And that in transferring such assets to said receiver, the officers described the claim against the estate of John Hanna as one of the assets of said Bank No. 55, but no mention was made of any liability of said John C. New on said note; nor was said note ever delivered to said Milligan, as such receiver; nor did he ever at any time understand that he had an asset of said bank any note upon which John C. New was liable as maker or in any other capacity.

"(9) That on the 31st day of October, 1885, said Milligan, as such receiver, acting under a proper order of the United States circuit court, directing him to sell all the assets of said bank then undisposed of, made a sale of all such undisposed of assets. But at the time of his making such sale he did not have said note in his possession, did not know of its existence, did not understand he was selling any such note. In a schedule of assets for sale which he had caused to be printed, no mention was made of any such note. But therein there was disclosed and shown the claim against the estate of John Hanna. Upon such sale the plaintiff in this action, the First National Bank of Indianapolis, became the purchaser at a gross bid of all the assets of said Bank No. 55, then sold by said receiver under said order; and upon such sale executed to the plaintiff a certificate of such sale, reciting that he had been ordered to sell at public auction 'all the claims, notes, judgments, choses in action, * * * and all other property of said bank or said receivership,' and declaring that he had sold 'all property of every description belonging to said Bank No. 55 and of the receivership,' whether specifically described or not (saving and excepting certain claims not material to this issue), and confirming to said purchaser the sale of 'all claims, notes, accounts, judgments, choses in action * * * and all other property of said bank or said receivership' (saving and excepting some claims not material to this issue). That said assignee did not indorse to the purchaser the note in suit, although he did indorse to the purchaser all notes which he had in his possession, and he did formally assign to the purchaser the claim against the estate of John Hanna, and also the judgment hereinbefore referred to against Hanna, Knelfler, George W. Parker, and Aquilla Parker.

"(10) From the conduct of Mr. Morrison after

the maturity of the note in suit until his death, and of Mr. Lynch during his presidency, and Mr. Conduitt during his presidency, and of the other officers of the bank, the court infers as a fact, and therefore finds as a fact, that such officers at the time knew of the agreement made between the defendant and William H. Morrison on behalf of the bank, and the fact has escaped their recollection."

"On the foregoing facts the court states the following conclusions of law:

"(1) The title to said note never passed to and became vested in the plaintiff.

"(2) That, in any event, whether the title to said note became vested in the plaintiff or not, upon the assignment of said judgment by the defendant to the First National Bank of Indianapolis, No. 55, the defendant was discharged from all liability on said note.

"(3) That the law of the case is with the defendant, and he is entitled to judgment.

"Pliny W. Bartholomew, Judge."

It is claimed that the first conclusion of law must be erroneous, since the facts found, particularly those in the ninth finding, show that the title to the note passed, through the receiver, from the payee, Bank No. 55, to the appellant, Bank No. 2,556. Even if that were true, it would, perhaps, be immaterial, in view of the remaining conclusions of law. But we do not think the contention tenable. Undoubtedly, if the note remained an asset of Bank 55, such asset would become the property of Bank 2,556. It appears, however, by findings 2 and 6½, that all liability of John C. New on the note ceased on the assignment by him to the bank of the judgment mentioned in those findings; and by finding 6 it further appears that the note was filed and allowed, with other notes, as a claim against the estate of John Hanna, the other signer of the note, thus merging the note in such claim, so far as the liability of Hanna or his estate is concerned. The note, therefore, according to the findings, had wholly ceased to be an asset of Bank 55 before the appointment of the receiver. By finding 9 it is further shown that the claim allowed against the Hanna estate in favor of Bank 55, and also the said judgment assigned by appellee to said bank, both became, by assignment of the receiver, the property of the appellant, Bank No. 2,556.

Appellant's principal argument is directed to the contention that the court erred in overruling the motion for a new trial, for the reason, as claimed, that the findings are not supported by the evidence. If there was competent and sufficient evidence to sustain the findings, we could not disturb them, however much contradictory evidence might have been given. To enable appellee to succeed in his defense, it was necessary for him to prove (1) the parol agreement averred to have been made between him and the bank when he executed the note, according to the terms of which agreement he was to be re-

lieved of all liability on the note as soon as he should assign to the bank the judgment referred to; and (2) that the agreement so made was carried out by the assignment of the judgment, and its acceptance by the bank in discharge of his obligation on the note. The evidence of the appellee is to the effect that the agreement made at the signing of the note was with William H. Morrison, then president of the bank. It is contended very earnestly that Mr. Morrison, as president, had no power to make such an agreement on the part of the bank, inasmuch as the making of such an agreement was out of the ordinary course of the business of the bank, and, consequently, beyond the scope of his agency as president. Many extracts are made from the by-laws to show that the power claimed to have been exercised by him in making the contract was not given to the president. Numerous authorities, also, are cited to show that the president of a bank cannot have such power. It is true that, except as otherwise specifically provided in the charter, the business of a bank is in charge of its board of directors, and, without their authority to do so, the president cannot bind the bank in any unusual manner, or in any undertaking lying outside of its customary routine business. 1 Morse, Banks, § 144. But, as said by the same text writer, such unusual authority to the president may be given, not only by a formal vote of the board of directors, but also "by the existence of such facts as constitute a public holding out, and warrant the public in believing that the undertaking is within the scope of his legitimate delegated authority." *Id.* See, also, *National State Bank v. Vigo Co. Nat. Bank*, 141 Ind. 352, 40 N. E. 799; *Evansville Public Hall Co. v. Bank of Commerce*, 144 Ind. 34, 42 N. E. 1097. In this case, as the evidence shows, and as also expressly stated in the third finding of the court, Mr. Morrison was held out to the public as fully empowered to attend to all the business of the bank. Those dealing with the bank were therefore warranted in believing that he was authorized to attend to such general business with the public as might be transacted by the directors themselves. That would, of course, include such an adjustment of a claim in favor of the bank as was contemplated in this case, provided only the agreement was afterwards carried into effect. An executed parol agreement may be proved even as against a written obligation contemporaneous with the parol agreement. *Tucker v. Tucker*, 113 Ind. 272, 13 N. E. 710; *Zimmerman v. Adeo*, 126 Ind. 15, 25 N. E. 828. The proof that the agreement was so carried into effect by the assignment to the bank of the judgment against Hanna and others by appellee was made by evidence satisfactory to the court, and which we think sufficient for the purpose. That the evidence is not such as to be altogether free from criticism, or that there was other competent evidence opposed to it,

cannot be a reason for reversing the judgment. The transaction had taken place many years before the trial. The judgment assigned to the bank by appellee had been taken against Hanna and others 15 years before the trial, and the note in suit had been executed 11 years before that time. Mr. Morrison, the president of the bank, had been dead for 10 years, and Mr. Hanna, the judgment defendant, for 9 years. Only Mr. New was living of those who had any personal recollections of the original transactions, and his memory was sometimes at fault. Neither is the evidence as to the circumstances attending the assignment of the judgment made on December 24, 1883,—eight years before the trial,—quite satisfactory. The court, however, held it sufficient, and we cannot say that it is not.

Some circumstances lend strong presumptions in favor of the finding of the court. While Mr. Morrison was yet living, and remained president of the bank, knowing all about the transactions, and after the note was past due, Mr. New often had more money on deposit than would have paid the note; yet no call was ever made on him for payment. At Mr. Hanna's death attention was called to the note, and it was filed as a claim against his estate; yet no one asked Mr. New to pay the note, though both he and Mr. Hanna had signed it. In 1882, when a Mr. Shipp was elected director, he made diligent effort to learn the condition of the bank, yet he never heard of any indebtedness of Mr. New. In 1884, when the receiver was appointed, he never learned of any claim held by the bank against Mr. New; and, while the receiver did assign to the appellee the claim against the Hanna estate, of which the note was in part the foundation, and also the Hanna judgment, he never saw or assigned the note in question. The circumstance, too, that nothing was ever paid on the note, either principal or interest, although at the commencement of the trial it was past due for nearly 11 years,—a time longer than the period now provided by statute as a limitation to the bringing of an action on a promissory note,—is also to be taken into account in support of the claim that it was never expected that the note should be paid otherwise than by the assignment of the Hanna judgment. The judgment is affirmed.

(146 Ind. 445)

STONEHILL v. STONEHILL.

(Supreme Court of Indiana. Dec. 17, 1896.)
DIVORCE—SUPPORT OF MINOR CHILD—CONTEMPT.

Rev. St. 1894, § 1058 (Rev. St. 1881, § 1046), provides that the court, in decreeing a divorce, shall provide for the custody and support of the minor children. A decree provided for custody of a minor child by the wife, and for a fixed payment per week, for his support. *Held* that, on failure of defendant to obey such order as to the payments, plaintiff in the decree was entitled to a rule to show cause why he should not be adjudged for contempt.

Appeal from circuit court, St. Joseph county; Lucius Hubbard, Judge.

Bill by Ida M. Stonehill against Warren Stonehill for divorce. Decree of divorce granted. Motion for a rule against defendant for an attachment. Motion overruled, and plaintiff appeals. Reversed.

Wilbert Ward, for appellant.

MONKS, J. On the 9th day of April, 1895, by decree of the St. Joseph circuit court, appellant was granted a divorce from appellee, and given the custody of their child, and in the final decree it was ordered and adjudged that appellee should pay to appellant, for the support of said child, the sum of \$2.50 per week, and that appellant should have the sole care and custody of said child until the further order of the court. Afterwards, a copy of said decree, duly certified by the clerk of said court, was served upon appellee. Appellee failed, neglected, and refused to pay said allowance, or any part thereof, and in January, 1895, when there was due from appellee under said order \$90, appellant filed a written motion in the St. Joseph circuit court setting forth said facts, and moved the court thereon to enter a rule against appellee to show cause why an attachment should not issue against him for contempt of court in failing to pay said sum for the support of said child, as ordered by the court. The trial court overruled said motion, and refused to enter such rule.

The only question presented by the record is, had the court below the power or authority to enforce the order to pay \$2.50 per week for the support of the child by an attachment for contempt? Section 1053, Rev. St. 1894 (section 1046, Rev. St. 1881; section 1046, Horner's Rev. St. 1896), provides that the court, in decreeing a divorce, shall make provision for the guardianship, custody, support, and education of the minor children of said marriage. It was in compliance with the requirements of the foregoing section of the statute that the court below ordered appellee to pay appellant \$2.50 per week for the support of the child, and that she have the custody and control of the child until the further order of the court. That part of the decree as to the custody of the child until the further order of the court remained within the control of the court below, and is subject to revision or alteration from time to time, upon the application of either party. *Bush v. Bush*, 37 Ind. 165; *Bailey v. Schrader*, 34 Ind. 260; *Sullivan v. Learned*, 49 Ind. 252, 257, 258; *Williams v. Williams*, 13 Ind. 523; *Ryce v. Ryce*, 52 Ind. 64; *Joab v. Sheets*, 99 Ind. 328, 332; *Dubois v. Johnson*, 96 Ind. 6; 2 Work, Prac. § 1392, and cases cited. The court, under the statute, necessarily has the right to commit the custody of the children to either party, to the exclusion of the other, or to commit them to the custody of others; and in this case the court had the power, if application had been made by either party, to mod-

ify the order in regard to the custody of the child, and give the custody to appellee or to a stranger. If the court had this power, it necessarily follows that it also had the power, on application and notice, to modify the order in regard to the payment for support, not only as to amount, but as to the person to whom the same should be paid. *Cox v. Cox*, 25 Ind. 303. If the order were changed so as to give the custody to appellee or a stranger, the order requiring the payment for support to appellant could be modified, and the money ordered paid to some one else. The person to whom money for support of a child is ordered paid by the court receives it as a trustee, and can only expend the same for the benefit of the child. It is well-settled law that the circuit court has ample power and authority to punish for contempt any one who disobeys its orders, made in any case where it has jurisdiction of the subject-matter and parties. *Kernodle v. Cason*, 25 Ind. 362; *Joab v. Sheets*, supra, and cases cited on page 332; *Hawkins v. State*, 125 Ind. 570, 25 N. E. 818; *Little v. State*, 90 Ind. 338. Attachment for contempt is one of the methods for enforcing the payment of interlocutory orders in divorce cases, and final decrees for alimony and support, in many jurisdictions. *Buck v. Buck*, 60 Ill. 105; *Andrew v. Andrew*, 62 Vt. 340, 20 Atl. 817; *Galland v. Galland*, 44 Cal. 475; 2 Bish. Mar. & Div. § 1092, and cases cited; *Stew. Mar. & Div. § 378*, and cases cited; 2 Nels. Div. & Sep. § 939, and cases cited. See section 1054, Rev. St. 1894 (section 1042, Rev. St. 1881); *Kernodle v. Cason*, supra; 2 Work, Prac. § 1390; 1 Enc. Pl. & Prac. 437, 438. Imprisonment for contempt of court in failing to pay money as ordered by the court is not imprisonment for debt, within the meaning of the constitution. *Ex parte Perkins*, 18 Cal. 60; *Pain v. Pain*, 80 N. C. 322; 2 Nels. Div. & Sep. § 939; *Stew. Mar. & Div. § 378*. The verified motion of appellant showed that appellee had failed to pay said allowance, or any part thereof, and had thereby disobeyed the order of the court. Upon this showing she was entitled to have the court issue the rule to show cause as prayed for. The court therefore erred in overruling her motion and refusing said rule. Judgment reversed, with instructions to issue a rule against Warren Stonehill to show cause, at a time to be fixed by the court below, why he should not be attached for contempt for a failure to pay the \$2.50 per week, amounting to \$90, as ordered by the court, and for further proceedings not inconsistent with this opinion.

(147 Ind. 137)

KOONS et al. v. BEACH.¹

(Supreme Court of Indiana. Dec. 15, 1896.)

ATTORNEY AND CLIENT—STATUTORY LIEN FOR SERVICES—REQUISITES—EQUITABLE LIEN—EVIDENCE—REVIEW ON APPEAL—CONFLICTING EVIDENCE.

1. Under Rev. St. 1894, § 7238 (Rev. St. 1881, § 5276), giving an attorney a lien "on a judg-

¹Rehearing denied, 46 N. E. 557.

ment" obtained for his client by entering on the docket wherein the judgment is recorded, and at the time it is rendered, his intention to hold a lien thereon, etc., an attorney can acquire no statutory lien on a fund secured for his client by compromise, without a judgment.

2. An agreement between attorney and client that the former shall be paid out of whatever sum he succeeds in obtaining for his client by compromise with the person against whom the claim exists, gives the attorney an equitable lien on the fund so obtained, paramount to the rights of the client and his creditors.

3. The supreme court cannot review conflicting evidence.

4. In a suit by an attorney to enforce a lien for fees against a fund obtained for his client by compromise with the debtor, evidence of a conversation between plaintiff and an agent of the debtor as to defenses against the claim, and in reference to offers of compromise, were admissible to establish plaintiff's participancy in the negotiations which led to the settlement.

Appeal from circuit court, Henry county; E. H. Bundy, Judge.

Action by Frank E. Beach against Benjamin F. Koons, administrator, and others, to enforce a lien for attorney's fees. From a judgment for plaintiff, defendants appeal. Affirmed.

Brown & Brown, for appellants. M. E. Forkner and F. E. Beach, for appellee.

HACKNEY, J. This was a suit by the appellee to declare and enforce a lien for attorney's fees against a fund remaining in the hands of Koons, administrator, and primarily distributable to the appellant Cory, but claimed by the other appellants as assignees of Cory. Two questions are presented: The action of the court in overruling the several demurrers of the appellants to the complaint, and in overruling their motion for a new trial. The complaint alleged that the appellee was an attorney in regular practice; that Koons, as administrator, held for collection a policy of life insurance, payable to the estate of which he was administrator, and that Cory was, after the payment of the debts and costs of settling the estate, entitled to the balance of any sum collected upon said policy; that the insurance company was denying its liability upon said policy, and the administrator had employed attorneys to enforce the same; that said Cory had employed the appellee to assist in securing a compromise of the differences between said company and the estate, the compensation for such service having been agreed upon in an amount stated, and it having been agreed that appellee should be paid from the sum to be obtained in such compromise and settlement; that the appellee did assist in securing a compromise and settlement with said company by which 50 per centum of the policy was paid to said administrator; that the appellee entered upon the probate record containing the appointment of Koons, at the entry of said appointment, a notice of intention to maintain an attorney's lien for said fees; that a large sum will remain, upon

final settlement of the estate, for distribution to the credit of said Cory; that said Cory is insolvent, and has assigned his interest in said fund and all other property to the appellants Landis, and has given orders to others, his creditors, for sums, which the administrator threatens to pay to the exclusion of the appellee's claim, and without retaining any sum for his benefit.

As a legal lien, authorized by section 7238, Rev. St. 1894 (section 5276, Rev. St. 1881), the facts pleaded are not sufficient. Such a lien may be held "on any judgment rendered in favor of any person * * * employing such attorney to obtain the same: provided, that such attorney shall, at the time such judgment shall have been rendered, enter, in writing, upon the docket or record wherein the same is recorded, his intention to hold a lien thereon, together with the amount of his claim." In this case, so far as the complaint discloses, no judgment was rendered, no notice of lien was entered upon any judgment docket or order book, wherein a judgment would have been proper, and, necessarily the basis for such legal lien did not exist. 1 Wats. Indiana Stat. Liens, § 34; Alderman v. Nelson, 111 Ind. 255, 12 N. E. 394; Hill v. Brinkley, 10 Ind. 102; Hanna v. Coal Co., 5 Ind. App. 163, 31 N. E. 846.

While the complaint alleges notice of lien, entered upon the order appointing the administrator, its facts can only be considered with reference to the theory of an equitable lien. It is true that this court said in Alderman v. Nelson, supra: "It is not necessary to inquire whether an attorney had a lien on his client's judgment at common law, for the statute covers the entire subject, and creates the lien, and that is the only one that can be enforced." This statement was made with reference to liens upon judgments, and, if our statute covers the entire subject of such lien, it is clear that it does not attempt to cover the question of liens upon funds secured by the client through the aid of his employed attorney, and by other steps than a judgment. In the more recent case of Justice v. Justice, 115 Ind. 201, 16 N. E. 615, it was clearly established that the statutory lien was not the only lien afforded for the security of the attorney in the performance of services beneficial to his client, but that equity supplied a lien independent of the statute. In that case it was quoted with approval from Puett v. Beard, 86 Ind. 172, as follows: "It is generally agreed, both here and in England, that a solicitor has a lien for his costs upon a fund recovered by his aid, paramount to that of the persons interested in the fund or those claiming as their creditors;" citing authorities. And it was further quoted: "The reason for this rule is that the services of the solicitor have, in a certain sense, created the fund, and he ought in good conscience to be protected." This proposition is quoted with approval in Hanna v. Coal Co., supra. In 1 Wats. Indi-

ana Stat. Liens, § 36, it is said: "An agreement between an attorney and his client that the attorney shall have a lien for his services to a certain amount upon the proceeds of any judgment recovered, constitutes a valid equitable assignment of such proceeds pro tanto, which attaches to such proceeds as soon as the judgment is entered. Such an agreement is within the principle that an agreement between a debtor and a creditor that the creditor shall have a claim upon a specific fund for the payment of his debt is a binding equitable assignment of the fund pro tanto." See 21 Am. Law Rev. 79; Blankenbaker v. Bank, 85 Ind. 459; McNagney v. Frazer, 1 Ind. App. 98, 27 N. E. 431; Williams v. Ingersoll, 89 N. Y. 508; Courtney v. Courtney, 4 Ind. App. 221, 30 N. E. 914. From the rules stated, it follows that the fund acquired by the aid of the employed attorney is burdened by the agreed fee, and cannot be relieved by any act of the client.

In Justice v. Justice, supra, it was held that such lien was paramount to a judgment against the client, rendered before the proceeding in which the attorney's services aided in securing the property against which it was sought to enforce the judgment. It was there said: "A court of equity will control the legal lien of the judgment, and limit it to the actual interest of the judgment debtor in the property, and will fully protect the rights of those parties who have prior equitable interests in such property or the proceeds thereof." The complaint, in our opinion, made a case within the rules stated, and the demurrers were correctly overruled.

On the motion for a new trial one question is discussed involving the weight of the evidence, and we are asked to pass upon conflicting testimony. This, it has many times been held, we are not permitted to do.

It is complained, finally, that the trial court erred in permitting the appellee to testify to a conversation had by him with an agent of the insurance company as to defenses against the policy, and as to offers of compromise. Counsel do not refer us to the record in support of this complaint, and no reason occurs to us why such conversation may not have been proper in the discharge of appellee's duties as the attorney for Cory, and proof of them proper to establish his participancy in the negotiations which led to the compromise and settlement. We find no error for which the judgment should be reversed. Judgment affirmed.

(146 Ind. 427)

STATE v. DUGGINS.

(Supreme Court of Indiana. Dec. 17, 1896.)
INFORMATION—TIME AND PLACE OF FILING—FILE MARKS—FAILURE TO ENTER FILING IN ORDER BOOK.

1. An affidavit and information may be filed in the clerk's office in term time, and need not be filed in open court. Masterson v. State (Ind. Sup.) 43 N. E. 138, followed.

2. Under Rev. St. 1894, § 1802 (Rev. St. 1881, § 1733) declaring that an information need not state why the proceeding is by information instead of indictment, it is unnecessary to allege that the court is in session, and that the grand jury has been discharged for the term.

3. A showing, by the file marks on an affidavit and information, that the same were filed with the clerk in term time, is prima facie sufficient to give the court jurisdiction, without entry of such filing in the order book. State v. Matthews, 28 N. E. 703, 129 Ind. 281, followed.

Appeal from circuit court, Floyd county; Jacob Hester, Judge.

Americus Duggins was charged with assault and battery with intent to commit rape, and from a judgment sustaining a motion to quash the information the state appeals. Reversed.

Wm. C. Utz, Major W. Funk, Wm. A. Ketcham, Atty. Gen., and Merrill Moores, for the State. Kelso & Kelso, for appellee.

HACKNEY, J. It appears from the record "that on the 20th day of December, 1894, the same being the seventieth judicial day of the October term, 1894, of the Floyd circuit court," an "affidavit and information were filed in the clerk's office of" said court. Each said affidavit and information charged that the appellee, "on the 6th day of November, 1894, at said county of Floyd and state of Indiana, did then and there unlawfully, feloniously, and in a rude, insolent, and angry manner, touch, strike, pull, push, grasp and wound one Annie Schaum, a woman then and there being, with intent then and there and thereby, unlawfully, feloniously, forcibly, and against her will, to ravish and carnally know her, the said Annie Schaum," contrary, etc. The file mark upon each said affidavit and information copied into the record discloses a filing thereof on said 20th day of December, 1894. The appellee was arrested upon a warrant issued on said last-named day, and on the following day gave bond for his appearance on the first day of the next term of said court. At the next term of said court the appellee appeared in person and by counsel, and moved to quash said information, which motion was sustained, an exception was reserved, and that ruling is the only assigned error in this court.

We have not been favored with a brief on behalf of the appellee, and are not advised as to the reasons supporting the action of the trial court further than as counsel for the appellant have stated that, in the argument in the lower court in support of the motion, it was insisted (1) that the affidavit and information were filed in the clerk's office instead of having been filed in open court; (2) that allegations should have been made that the court was in session, and that the grand jury had been discharged for the term; and (3) that there had been no order-book entry of the filing of such affidavit and information. The first and third of these objections to the filing of an affidavit and information have

been held untenable. *Masterson v. State* (Ind. Sup.) 43 N. E. 138; *State v. Matthews*, 129 Ind. 281, 28 N. E. 703. It was held in the first of these cases that the court would know judicially that the day of the filing was in term time, and that it was sufficient if the filing was in the clerk's office. In the last case cited it was held that, if it appeared from the file mark, it was *prima facie* sufficient to give jurisdiction. The second objection stated has been held also to be of no avail. *Wright v. State* (Ind. Sup.) 43 N. E. 10; *Nichols v. State*, 127 Ind. 406, 28 N. E. 839; *State v. Drake*, 125 Ind. 367, 25 N. E. 434; *Rev. St. 1894, § 1802* (*Rev. St. 1881, § 1733*).¹ Ordinarily, the motion to quash has the effect of a demurrer, and admits the right to prosecute and the facts pleaded, but denies their sufficiency to constitute a cause of action. It may, therefore, be doubted whether the objections here made were raised by the motion to quash. We observe no defect in the charge, and accept the statement of counsel for the appellant as to the objections urged below, since the court's ruling must have been for some such reasons, or it would not have been deemed insufficient as charging an assault and battery. We are impressed that the information contains the essential elements of an assault and battery with the intent to commit an act which, if accomplished, would have been rape. It is therefore the opinion of this court that the ruling of the trial court was erroneous. The judgment is reversed, with instructions to the circuit court to overrule the appellee's motion to quash the information.

(147 Ind. 181)

LEGLER v. PAINE et al., County Com'rs.²

(Supreme Court of Indiana. Dec. 24, 1896.)

COUNTY OFFICERS—STATUTE FIXING COMPENSATION—VALIDITY—LOCAL LAWS.

1. The salary law of 1891 (Acts 1891, p. 424), as amended by Act Feb. 25, 1893 (Acts 1893, p. 142), in so far as it fixes the salaries of county officers in the various counties, and the fees to be taxed for services rendered, was constitutional. *Henderson v. State* (Ind. Sup.) 36 N. E. 257; *State v. Krost* (Ind. Sup.) 39 N. E. 46; *Walsh v. State* (Ind. Sup.) 41 N. E. 85, followed.

2. The fee and salary law of 1895 (Acts 1895, p. 318), which fixes the salary of the various county officers in each county, requires all fees for services rendered to be paid into the treasury, and provides that no officer's salary shall exceed the fees earned, reported, and paid into the treasury by him, is not in conflict with Const. art. 4, § 22, prohibiting local or special laws in relation to fees or salaries, except "to grade the compensation of officers in proportion to the population and the necessary services required." *Jordan, O. J., and McCabe, J., dissenting.*

Appeal from circuit court, Vanderburgh county; R. D. Richardson, Judge.

¹ This section provides that "it shall not be necessary, in an information, to state the reason why the proceeding is by information instead of indictment."

² Rehearing denied.

Action by Louis H. Legler against John G. Paine and others, as commissioners of Vanderburgh county, Ind., to recover for three months' services as county auditor. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Gilchrist & De Bruler, T. R. Marshall, and Miller, Winter & Elam, for appellant. W. S. Hurst and W. A. Ketcham, for appellees.

HOWARD, J. On the first Monday of December, 1895, the appellant, as auditor of Vanderburgh county, presented for allowance to appellees, then in regular session as the board of commissioners for said county, his claim for services as such auditor for the three months ending December 1, 1895. The bill was itemized, and showed on its face, as appears from the copy set out in the record, that it was made out and filed for allowance in pursuance of the provisions of the fee and salary law of 1879 (Acts 1879, p. 130; *Rev. St. 1894, § 7987*; *Rev. St. 1881, §§ 5907-5909*), except that the law of 1879, or any other law, so far as we know, did not authorize so much of the claim as asked for an allowance against the county for papers filed by the auditor. Under that law the compensation for such filings, if not due from persons having business in the auditor's office, was to be regarded as covered by the salary of the auditor. It could not be collected from the county. It has always been the law that an officer is entitled only to the fees allowed by statute, and that, before any such allowance is made him, he must point out the particular statute authorizing the allowance. *Stiffler v. Board*, 1 Ind. App. 368, 27 N. E. 641; *Noble v. Board*, 101 Ind. 127; *Wood v. Board*, 125 Ind. 270, 25 N. E. 188. The overcharge so made in the bill would not, of course, have prevented the allowance of the balance of the claim, if found due under the act, and had such act been in force. The board refused to allow the claim, or any part of it. The order of disallowance reads as follows: "And the board having considered the subject, and being sufficiently advised, now orders that, under the laws of this state, the auditor is entitled only to so much compensation for such quarter as equals the amount of fees he has collected during such quarter, and has turned into the county treasury; and, as neither such petition nor such claim shows that such auditor has turned over to the county treasurer any fees collected by him, such auditor is not entitled to the amount claimed by him in such statement and petition, and is not entitled to any allowance from this board, for his services during such quarter; and the petition and claim of such auditor for such allowance, or for any allowance, for his compensation is hereby denied." After the disallowance of his claim by the board of county commissioners, the auditor filed his complaint in the court below, setting out as a part of such complaint his petition and claim as filed with and disal-

lowed by the board, together with the action of the board thereon. In the complaint it is further and particularly stated that the allowance is asked for under the act of 1879, and that the board had refused to make such allowance for the reason that said act had been repealed by the fee and salary law of 1891, and also by that of 1895. Acts 1891, p. 424; Acts 1895, p. 319. It is, however, alleged by the auditor that the acts of 1891 and 1895 are both unconstitutional, for reasons set out in the complaint, and that the act of 1879 has, therefore, never been repealed, but is still in full force. The auditor further shows in his complaint that, although he is advised that the acts of 1891 and 1895 are void, yet he has complied with the provisions of those acts requiring him to file a report of fees received from persons doing business in his office; but that he has not paid such fees into the county treasury for the reason that he was compelled to pay the same for office expenses. The prayer is for judgment for the amount claimed, and that the court determine the compensation to which the auditor is entitled for his services as stated in his complaint. To this complaint the court sustained a demurrer for want of sufficient facts.

The provisions of the act of 1895 which the commissioners deemed sufficient to authorize the rejection of the auditor's claim are found in section 126 of the act, in which it is declared that: "If the clerk, auditor, treasurer, sheriff and recorder, in their respective counties, have not turned into the county treasury, out of the fees they may have collected, a sufficient sum to equal the total amount of their respective quarterly allowance of salary, then a sum only shall be allowed equalizing [equaling] the sum turned into such treasury by each respective officer actually earned during his term of office." And as the auditor had not paid into the county treasury any of the fees collected by him, the board found that, under the provisions of the act of 1895, he could, of course, be allowed nothing upon his salary.

Many other provisions of the act of 1895, as also of the act of 1891, make it manifest that, under the facts shown in the complaint, the auditor could be allowed no part of his quarterly salary under either of these acts. Section 21 of the act of 1895, and the same section of the act of 1891, provide for salaries for each of the county officers in the several counties of the state; and in both sections the express declaration is made that "they shall receive no other compensation whatever." Words could hardly be stronger or more explicit. All fees and other emoluments whatsoever are absolutely cut off, and each county officer is confined strictly to the salary provided for him. For all his services and expenses he receives that salary quarterly, by allowance of his board of county commissioners, and nothing more from any source. Section 115 of the act of 1895 and section 116 of the act of 1891 provide that the auditors of the

various counties shall tax and charge the fees and amounts provided by law on account of services performed by them; and, further, that "the fees and amounts so taxed shall be designated 'Auditor's Costs,' but they shall in no sense belong to or be the property of the auditor, but shall belong to and be the property of the county." The ensuing section in each act carries out the same requirement. Thus is the declaration made in section 21 re-enforced and emphasized: any fees or other emoluments collected by any county officer belong, not to the officer, but to the county. Even if the fees or other allowances should, for the time being, be collected from the county itself for services which the officer has rendered to the county, still, even in that case, such fees or allowances would not, for that reason, belong to the officer, but would, like other fees and allowances, be paid by him into the county treasury at the end of the quarter, to increase the fund out of which the officer's quarterly salary should be paid.

Finally, lest any lingering doubt should remain in the mind of the county board when about to pass upon the quarterly allowance of salary to the county officer, it is provided in section 136 of the act of 1895 and section 135 of the act of 1891 that nothing in the act shall be so construed, in any event, as to allow both fees and salaries. It is true that this section, in the act of 1895, has also the words, "except as otherwise specified"; but it is not anywhere "otherwise specified," save in relation to the treasurer's 4 per cent. for collection of delinquent taxes, and in relation to the sheriff's fees "in the execution of all processes issued from any other county than that of his residence." The words, therefore, with these two exceptions, add nothing to the section. The intent of the legislature, as drawn from the whole act, and from each of its provisions, must prevail; and this intent, read, as it must be, in the light of the circumstances surrounding the passage of the act, the earnest desire shown to destroy the evils which had grown up under the fee system, plainly is that the salary named for each officer shall constitute his sole compensation for all services, and that every fee and emolument whatever, and collected from whatsoever source, shall be paid by him into the county treasury at the end of each quarter; and that out of the fund so made up his quarterly salary shall be paid by allowance of the board of county commissioners. And should any officer so far forget his duty under the law in this respect as to fail to pay over to the county treasurer the amounts collected by him, then, besides forfeiting his salary, it is provided, by section 132 of each act, that he shall be liable to criminal prosecution in the name of the state.

Appellant alleges in his complaint that he has made the report required under sections 124 and 125, respectively, of the two acts. It is not enough, however, to have made the report of fees collected. The sections also re-

quire of the several officers that "they shall pay to the county treasurer the amount shown by said report, and take the county treasurer's receipt therefor, which receipt shall be filed in the county auditor's office, and the auditor shall give to the officer a quietus for the amount paid by such officer." This, appellant admits, he did not do. It is no excuse for his failure to observe the law that he needed the money for his own use, or for office expenses. It was not his money to use or pay out, but belonged to the county, to be paid over by him to the county treasurer at the end of the quarter, and before he should be entitled to any allowance of salary. It will not do to say that this is a useless and troublesome proceeding. The lawmaking power of the state, for reasons which were deemed good and sufficient, declared what should be done, and how it should be done. It is for all men to obey the law as it is written, but particularly for the officials of the state, who have taken a solemn oath to do so.

It seems very clear, then, that appellant was not entitled to receive any salary under the provisions of the law of 1895 or of 1891. His claim, however, and the real theory of his complaint, is that those acts are invalid, and that he should be paid under provisions of the act of 1879. If, indeed, the act of 1895 and that of 1891 should both be invalid, then the act of 1879 could not, of course, have been repealed by either of such later, but void, acts. The enactment of each would have been a vain ceremony, and would have left the older statute untouched, as the only living and valid fee and salary law; and appellant's claim, so far as well brought under that law, should have been allowed. This would follow from the rule that, when a legislative act is evidently intended to take the place of another act on the same subject, and in terms repeals such other act, then, in case the later act is found to be unconstitutional, the repealing section or clause will also go down with the rest of the void act, the legislature not having shown any intention of repealing the older statute, except by the substitution of the later one in its place. If, however, the act of 1895, or that of 1891, should be valid and constitutional, then the act of 1879, repealed thereby, would no longer be in existence, and hence no fees or salaries could be charged or paid thereunder. It would seem that this question, at least so far as relates to the constitutionality of the act of 1891, should be considered as closed by former decisions of this court. In *Henderson v. State*, 137 Ind. 552, 36 N. E. 257, the law was held valid as to sheriffs. This holding was adhered to in *State v. Krost*, 140 Ind. 41, 39 N. E. 46; and the law was there also held valid as to fees which a recorder should charge for recording a mortgage. In *State v. Bolce*, 140 Ind. 506, 39 N. E. 64, and 40 N. E. 113, while the law was found defective in certain particulars, yet

the rulings in *Henderson v. State* and *State v. Krost* were adhered to; and it was also expressly held that the act of 1879 had been repealed, as well as that under the act of 1891 an officer could not receive both fees and salary. Finally, in *Walsh v. State*, 142 Ind. 357, 41 N. E. 65, it was held that by the act approved February 25, 1893 (Acts 1893, p. 142), the defects found in the act of 1891 had been cured, and, consequently, that from and after May 18, 1893, when the amending statute went into effect, the act of 1891 became valid and constitutional in all respects. If those decisions are to stand, the act of 1879 has been effectually repealed, and was no longer in existence at the time when appellant's services were rendered; and he can, therefore, be allowed no compensation thereunder. If respect is to be entertained for the decisions of a court, those decisions, unless clearly wrong, must be maintained by the court itself and by all its members, even those who may have questioned the wisdom of the action first taken. The doctrine of *stare decisis*—in other words, to stand by the decided cases, and not needlessly disturb what has been settled—is one of the most wholesome rules of procedure. When a question has been deliberately passed upon by the highest tribunal of the state, the people should feel that they may repose securely under the decision. The stability of property rights and the safety of individual conduct and obligations, no less than the confidence with which officials may direct and measure their action under the law thus expounded, all demand that, unless for good reason shown, decisions once made should be adhered to.

In *Massachusetts v. Western Union Tel. Co.*, 141 U. S. 40, 11 Sup. Ct. 889, a law of the state of Massachusetts for the taxation of telegraph companies was upheld by a divided court. In *Telegraph Co. v. Taggart*, 163 U. S. 1, 16 Sup. Ct. 1054, the Indiana statute on the same subject was upheld by the same court without division, the court intimating that the legislature and the courts of this state had enacted and sustained the law in reliance upon the decision in the *Massachusetts* case. In *Chambers v. Kyle*, 67 Ind. 206, it was contended that the drainage act of March 11, 1867, was unconstitutional. The court said: "If this was an open question, it would deserve the most careful and serious consideration; but numerous ditches have been established, and are now maintained, under it; and its constitutionality has been thus so frequently recognized that we are bound by the precedents." In *Edger v. Board*, 70 Ind. 331, the provisions of the fee and salary law of 1879, in relation to the auditor, were construed as giving to that officer \$100 additional compensation, instead of \$225, as claimed by him, for each 1,000 inhabitants in the county over 20,000; and the like holding was made in the case of *Parker v. Board*, 84 Ind. 340. Notwithstanding those

decisions, the question was again presented in *Stout v. Board*, 107 Ind. 343, 8 N. E. 222, but the court said that three regular sessions of the legislature, besides special sessions, had been held since the decision in the *Edger Case*, and, as the legislature had manifested no disposition to modify the law, that body must be held to have acquiesced in the court's construction of the statute; and that, even if the court, as then constituted, were persuaded—as it was not—that the decision in the *Edger Case* had, in any respect, been at fault, such decision would not, for such cause, be changed, the court believing that a proper case for the application of the rule of *stare decisis* had been presented. A like conclusion was reached by us in the recent case of *Pennsylvania Co. v. State*, 142 Ind. 428, 41 N. E. 937. See, also, *Cooley, Const. Lim. (4th Ed.) c. 4*. In the case before us the fee and salary law of 1891 was recognized as valid by the legislature of 1893, in the amendment then made to the act. Yet more, after the general assembly had thus twice recognized the validity of such reform legislation, and after this court, in *Henderson v. State*, *State v. Krost*, and *State v. Boice*, *supra*, had affirmed its constitutionality, the legislature of 1895 enacted another law, based upon the same system, and, indeed, to a large extent, directly copied from the law of 1891. Finally, in *Walsh v. State*, *supra*, after three legislatures had thus sanctioned the principle of the act of 1891, and after its constitutionality had thus three times been affirmed, this court again explicitly affirmed it, and this time effectually closed the doors against the return of the act of 1879. It would seem, as said in *Stout v. Board*, *supra*, that “a fair case for the application of the doctrine of *stare decisis* is presented.”

It is, however, said by counsel that the reasons now urged against the validity of the act of 1891 were not presented or considered in our former decisions. This contention can hardly be admitted, in view of the earnest and vigorous dissenting opinion in the case of *Henderson v. State*, *supra*. As to questions concerning the uniformity of laws, general and special or local laws, gradation of fees inversely as the population of the several counties, with other questions now pressed upon our attention, and all of which were discussed in the dissenting opinion in that case, it goes without saying that they were not then passed over without careful consideration by the court. What a court has taken up for consideration is not always shown by what it has decided, but frequently also by what it has refused to decide. The learned counsel for appellant have made plausible arguments to show that under our constitution a proper law for the compensation of county officers should be general, and not local or special. That is what our fathers thought when they framed the constitution, in 1851. But, after 30 years' trial, under constitutional

provisions forbidding “local or special laws” regulating compensation of “county and township officers,” and “in relation to fees and salaries,” the people discovered that with such provisions it was impossible to eradicate the abuses that had grown up in connection with the odious fee system; and in 1881, to cure the evil which the legislature had been powerless to correct, they injected into the fundamental law the provision that local and special laws might “be so made as to grade the compensation of officers in proportion to the population, and the necessary services required.” In the additional brief for appellant, counsel go almost to the logical limit of their argument by gravely suggesting “that the amendment of 1881 (made to section 22, art. 4, of the constitution) did not modify or change the legal effect of that provision,” except, possibly, that it may have been intended that the fees of officers might be graded by “the fixing of a different fee for the same service in one county from that prescribed in another.” In this contention counsel reach the climax of absurdity; and we are half inclined to think that they speak in a humorous vein, when, with all apparent earnestness, they inform us that the framers of the amendment of 1881 intended merely to recognize the methods which had become fixed under the old fee and salary system, and to crystallize them into permanent and fundamental law. The fee and salary law of 1879 is seriously set before our eyes as thus confirmed and adopted by the constitution itself, and as displaying in its many sections and paragraphs the perfection of human wisdom in this species of legislation. It is a pity the legislators of 1891, 1893, and 1895 had not known of the true character and purpose of this amendment. It would have saved them much toll of brain and lying awake of nights. Mistaken men! They were of opinion that the constitution, by this amendment, had imposed on them a solemn duty, for 10 years neglected by their predecessors, to revise the fee and salary laws of the state, in compliance with the broader and freer method provided in that amendment, and which the changed condition of affairs in the several counties of the state had proved to be so necessary. But, with all their fertility of invention, counsel have failed to indicate to us how a general law in relation to the compensation of county officers should be framed. Their illustrations of what such a law should be relate almost exclusively to population of counties, and not to service of officers. But it was not necessary to amend the constitution in order to frame a general salary law, based upon the population of the different counties. Even before the adoption of the constitutional amendment of 1881, it had been held by this court that a law providing for compensation of county auditors according to population was valid. *Hanlon v. Board*, 53 Ind. 123. This case was approved in *State v. Reitz*, 62 Ind. 159, and the principle announced in the

first case was extended so as to embrace salaries of judges of criminal courts. Undoubtedly, the same holding would have been made as to all county officers, had the legislature seen fit to enact a law requiring that all fees should be paid into the county treasury, and that the several officers should be paid salaries in proportion to the population of their respective counties. Such a law would have been general, and not local or special, applying, as it would, to all persons of the same general class, and situated under the same circumstances; and it would not have needed the amendment in question to authorize the legislature to enact it. The principle of such a general law, as based upon the relative population of the several counties, would not be essentially different from that upon which our legislative and congressional apportionment laws are based. There the courts take jurisdiction, and determine the question as to whether the legislature has complied with the provisions of the constitution; for the reason that the sexennial enumeration taken in connection with such apportionment enables the court, quite as well as the legislature, to know whether the constitution has been complied with. *Parker v. State*, 133 Ind. 178, 32 N. E. 836, and 33 N. E. 119; *Denney v. State*, 144 Ind. 503, 42 N. E. 929. Here, also, if the officer's compensation were to be based solely upon population, the court might certainly determine whether the mandate of the constitution had been complied with. The law would be a general one, based upon population, as disclosed by the United States census or otherwise; and in such case the amendment to the constitution providing for local or special laws would not have been necessary. But the grading of the compensation of officers according to services rendered, or according to both the population and services, can evidently be done only by the enactment of a local and special law, or local and special laws. And the discretion of the legislature in relation to the passage of such laws, unless grossly abused, cannot be inquired into, for the sufficient reason, if for no other, that the courts cannot, as in apportionment cases, have any adequate means of knowing whether the legislation in respect to the services of officers was in compliance with the requirements of the constitution or not. The services will vary according to local conditions, and the varying business of the different counties, of which there can be no judicial knowledge. Such laws, as to compensation of officers for services rendered, must therefore be treated as are those relating to the removal of county seats, the formation of circuit or superior court districts, and the like local matters, and in accordance with the well-established doctrine that whether a general law was applicable or not is a question for the legislature, and not for the courts. *Gentile v. State*, 29 Ind. 409; *Mode v. Beasley*, 143 Ind. 306, 42 N. E. 727; *Woods v. McCay*, 144 Ind. 310, 43 N. E. 269. The new

power granted by the amendment is, therefore, one that relates particularly to services, no such additional power being needed, so far as population is concerned.

But it is said that the sections of the law providing that an officer shall be entitled only to so much of his salary as he has collected in fees shows that the act is not based in any degree upon population, but wholly upon services. This seems plausible; but, when closely looked into, the argument will be found fallacious. The fees themselves are dependent, not only upon services rendered, but also upon extent of population of the county; for the fees must be affected in amount by the number of people requiring official services, no less than by the number of acts of service required by each person. Hence, while population alone cannot be the sole measure of services required, yet extent of population will always enter into the calculation when the amount of the officer's compensation is to be fixed. The sections referred to, therefore, come to this: That in any case, even after the salary is determined, taking population and services into account, yet the legislature, although having exercised its best judgment, must nevertheless remain, in some degree, uncertain whether the compensation so fixed may not be too great; and hence it is provided, in substance, that the salary shall in no case exceed in amount the fees collected. This limit of compensation is precisely that which would obtain even under the fee system, where the elements of population and services must likewise measure the compensation. Here the salary takes the place of fees; but no more reason exists here than there for contending that the compensation, in any case, is dependent upon services alone, instead of upon population and services.

The validity of the act of 1893, amending section 93 of the act of 1891, in relation to certain officers of Shelby county, is also again called in question; and it is again contended that this was a case of amending one void statute by another. We are satisfied, however, that the reasoning of the court in *Walsh v. State*, supra, and the authorities there cited, have abundantly established the validity of the amendment so made.

Nor is the *Walsh Case* the first or only one in which this court has sanctioned such an amendment. The drainage act of March 11, 1867, as originally passed, was probably invalid, because of the omission of certain essential provisions as to the right of eminent domain. Those omissions were supplied by the drainage act of March 9, 1875; and this court, in *Chambers v. Kyle*, supra, held that the latter act thus cured the invalidity of the former. The court said: "Now, since the act of March 11, 1867, and the act of March 9, 1875, must be construed together, and seeing that the latter act declares that such proposed work must be necessary and conducive to public health, convenience, or of public benefit or utility,—the omission in the former

act having thus been supplied,—It is too late to hold it unconstitutional, even though such a decision might be wise if the act stood alone, and the question was still open.”

In addition to the objections made to the act of 1891, and which are common to that act and to the act of 1895, certain criticisms are specially directed against the act of 1895. These are, particularly, (1) that the act is made to apply only to officers elected and to be elected, since the general election of 1890; and (2) that the fees of the auditor's office are inadequate to his proper compensation, as elsewhere fixed in the act. The latter objection, in particular, is one for grave consideration, but its solution is not necessary to the determination of this case, for, as often held, a law will not be declared unconstitutional if the case presented can be rightly decided otherwise. The law of 1891, as amended, was, as we have seen, a valid enactment; and by that law the act of 1879 was repealed. Appellant can, therefore, have no compensation allowed him under the act of 1879; and, as he has not brought himself under the provisions of either the act of 1891 or that of 1895, as we have also seen, it follows that he cannot, under the allegations of his complaint, recover under any of the acts in question. It may be said, however, that should it be ascertained that the act of 1895, or any part of it, is invalid, for the reasons urged, or for any other reasons, then the act of 1891 would still be in full force and effect as the only valid and constitutional fee and salary law. Judgment affirmed.

NOTE. On March 31, 1896, this case was advanced, and distributed to JORDAN, J., who then took the same for examination and consideration; and thereafter, on December 15, 1896, brought in the record for action by the court. Thereupon, it being found, on consultation, that the court was divided as to the decision which should be rendered, the case was, by order of court, redistributed to the writer.

JORDAN, C. J. (dissenting). I am unable to concur with the holding of the majority of the court, which, in effect, affirms the constitutional validity of that part of the act of 1895 providing for the salaries or compensation of county officers. I deem it necessary to give the principal reasons in support of the conclusion which I have reached relative to the question which in my judgment is herein involved. It is evident that each of the sections of this statute fixing the compensation of the officers in the respective counties is a local and special provision, and cannot be applicable to any other county in the state. None of these sections are general or of uniform operation throughout the state. It is undisputed that the salary features of this act which apply to Benton county cannot be applicable to Bartholomew county. It is not the form, but the effect or operation, of a statute which determines its special character. A general law cannot be enacted

by the grouping together in the same act a number of special acts. *Board v. Stevenson*, 46 N. J. Law, 173. The constitution of New Jersey provides “that no private, local, or special bill shall be passed, unless public notice of the intention to apply therefor, and of the general object thereof, shall have been previously given.” A statute of that state providing for salaries differing in amounts for each prosecuting attorney in all of the counties of that state was, in the case last cited, held to be a local act, and void, in the absence of the required notice. The court, after considering questions regarding inequalities in the salaries, in the case cited said: “The constitutional amendment was designed to repress such preferences, and to secure uniformity in legislation. The grouping together in a single act of a number of special or local laws does not constitute a general law. This legislation is not general in its operation and effect, and is as clearly within the constitutional prohibition as if eight several acts had been passed, each applying to one of the counties named in the act of March, 1880. It is an evasion of, and not in conformity with, the requirement of the fundamental law. *Woodruff v. Board*, 42 N. J. Law, 533.” That the salary features of the act of 1895 (being the sections by which the compensation of county officers is fixed) are of such local and special character as to have rendered them all repugnant to section 22, art. 4, of our constitution, as it existed prior to the amendment of 1881, cannot be denied. *Railroad Co. v. Whiteneck*, 8 Ind. 217; *Cowdin v. Huff*, 10 Ind. 83; *Fulk v. Board*, 46 Ind. 150.

The question, then, arises, does the law offend this section as amended? The provisions of the constitution in question are as follows, the part in italics being added by the amendment of 1881: “The general assembly shall not pass local or special laws in any of the following enumerated cases,—that is to say: * * * In relation to fees or salaries; *except that the laws may be so made as to grade the compensation of officers in proportion to the population and the necessary services required.*” The rule asserted by the authorities as a safe one for the guidance of courts in the interpretation of written laws is that which requires them to look to the nature and object of the particular powers, duties, and rights prescribed in the light and aids of contemporary history, and to give the words of the statute or constitution in dispute such operation and force, consistent with the legitimate meaning, as will fairly secure and obtain the end proposed. The mandate of the constitution that “the general assembly shall not pass local or special laws * * * in relation to fees or salaries,” still remains, except as modified by the amendment, and full force and meaning must be given to it. What is the legitimate meaning that must be placed upon that part of that clause, “that the laws may be so

made as to grade the compensation of officers in proportion to the population and the necessary services required," as will secure and obtain the end in view, by its adoption? The public history which preceded the enactment of the amendment reflects light upon its true interpretation. Prior to the amendment, the legislature passed an act approved February 21, 1871 (Acts 1871, p. 25), regulating fees and salaries. This act, after fixing a level salary applicable to all county clerks, sheriffs, auditors, and treasurers throughout the state, sought to grade such salary by allowing respectively to each of these officers additional sums as pay for deputies, such sums to be based upon the population of the county in excess of 10,000. Other provisions were also made for additional compensation for services required. This statute, in like manner as that of 1895, provided that the fees earned should be turned into the county treasury, as a fund for the payment of salaries. While this act was general in some respects, it also possessed features of a local or special character. The validity of this law was assailed in this court upon the ground of its being local and special in character, and for the further reason that its provision requiring that the fees for the services of the officers be paid over to the county was invalid. *Wallace v. Board*, 37 Ind. 383; *Fulk v. Board*, 46 Ind. 150. In the case first cited the judges of this court, as then composed, were equally divided upon the question, some of them holding that the law was necessarily local or special, and therefore violated section 22, art. 4, of the constitution. In the appeal of *Fulk v. Board*, supra, this court held the act invalid upon both grounds.

Before the passage of the salary act of 1871, it is of general knowledge that a demand existed upon the part of the people for a reform in the laws awarding compensation to county officials, as it was manifest that under the fee system these officers, in many of the more populous counties, were too highly rewarded for their services. The act of 1871, supra, was accepted upon the part of the people in general, as supplying their demand for a reformation in the compensation of county officers. After the salient features of this law were condemned by the court as a violation of the constitution, as hereinbefore stated, a general demand arose for an amendment to that part of section 22 of article 4 which required, when considered with section 23, that all laws in relation to fees or salaries should be general, and of uniform operation throughout the state. The judicial condemnation of the act of 1871 having demonstrated that a statute of its character seeking to grade the compensation of county officers by similar provisions could not be sustained under the constitution as it then existed, therefore the general assembly of 1877, to obviate the constitutional inhibition which would render invalid such salary acts of the character

of the law of 1871, proposed the amendment in controversy to clause 14 of section 22. This amendment along with others was submitted to the electors of the state for their adoption or rejection on the first Monday in April, 1880. Acts 1879, p. 25. In the case of *State v. Swift*, 69 Ind. 505, it was held that the act of 1879, submitting the several amendments to the electors for their ratification, was defective, for certain stated reasons; and it was held that they were not adopted. The legislature of 1881 resubmitted the amendment in controversy, and it was adopted, with others, by the voters, in March, 1881. Viewed, then, in the light of the history and circumstances leading up to the proposal of the amendment, I think that the purpose or object intended to be obtained by this change in the constitution was that a law in relation to fees or salaries might be so made by the legislature as by its prescribed provisions the compensation of officers might thereby be graded in proportion to population and the necessary services required, and that such a law might—as did the one of 1871—embrace general provisions, and also local and special features, which would be necessary to grade or adjust the compensation of the officers in proportion to the population and services.

It would seem to be a reasonable conclusion that the clause, as amended, intended that the law should provide for what may be termed a general or level salary for each officer, applicable to all such officers in every county throughout the state. This salary might be fixed so as to sufficiently compensate the officers in the smaller and less populous counties, and then, in order to make it fully compensatory as to the officials in the larger and more populous counties, and also applicable in the future to all other counties as their population and the official services therein required might change, it should be graded by the means of rules or provisions prescribed or embraced within the statute, such rules or provisions of course to be applicable to population and necessary services; the grading, in other words, to be such that the additional compensation awarded by the law might increase or decrease as the population and services might fluctuate. The plain meaning and intention of the amendatory provision upon any view of the question is, I think, that the law itself is to do the grading by prescribing such a standard, system, or rules from which the compensation of each officer can, upon the basis prescribed, be ascertained. Of course, it is within the province of the legislature to make choice of the rules or means to be employed by which the required grading may be accomplished. As by what means the population may be ascertained as a basis for such grading—whether by the federal census, or by some census taken under a state law, or by the vote cast at the last general election—is a matter of legislative choice, and likewise also the standard fixed for grading as to the required services.

The law of 1895 contains no provisions, rules, or standard by which the salaries in question may be graded by its operation. The salary of each officer, as therein fixed, is purely local and special, having no application whatever to officers in any other county. Each of these 92 sections of the act are, in operation and effect, the same as so many separate local and special laws; each is made to apply only in express terms to a single county. It must be conceded that each of these sections has such fixed provisions as to render it nonelastic, and in no event, and under no circumstances, can its provisions operate beyond the particular geographical subdivision fixed. The salaries provided for the officers of Vigo county can never apply to those of any other county; neither can they vary with the changes of population or required services. It must be presumed that the compensation as fixed in each county is to continue for all time, as nothing to the contrary is disclosed.

Surely, the exception ingrafted upon the fourteenth clause of section 22 of article 4 was not intended to take the subject-matter—i. e. "fees and salaries"—entirely out of the prohibition of the section. The exception, at most, is intended to qualify the inhibition in two particulars only; that is to say, the legislation in relation to fees and salaries must still be general, but the laws "may be so made" as to embrace local or special features, grading the compensation of officers so as to adjust the same to population and services. Certainly it cannot be asserted that the legislature, under the amendment, is authorized arbitrarily to fix salaries for the officers of a single county, and by its own declaration that they were graded according to population and services thereby put the matter beyond judicial inquiry. There is nothing in the act of 1895 by which it can be made to appear that the salaries therein provided for the county officers are graded in proportion to population and necessary required services, except the mere declaration in section 21 that such is the fact. Such a legislative fiat that a salary law has been enacted in compliance with the constitution no more precludes a judicial investigation as to its constitutional validity upon that feature than could one in an apportionment act to the effect that the apportionment therein provided had been made according to the number of male inhabitants over the age of 21 years. This, under the decisions in the cases arising under such acts, has been held to be a judicial question; consequently a legislative declaration cannot preclude the courts from an examination relative thereto. *Parker v. State*, 133 Ind. 178, 32 N. E. 836, and 33 N. E. 119; *Denney v. State* (Ind. Sup.) 42 N. E. 929. As said in *State v. Boice*, 140 Ind., on page 511 (39 N. E. 65, 40 N. E. 113) of the opinion: "If the legislative construction of the law and constitution were conclusive, judicial inquiry and interpretation would be denied." As heretofore said, it should be pre-

sumed that the salary law of 1895, like all general legislation, is not to be temporary, but is to continue for the future. The compensations therein provided are inflexibly fixed for all time. Population and services may change, but these can exert no influence over the salaries as fixed by this law.

Our state is rapidly growing. Many of its counties, in the past few years, have doubled in population and business. It is highly desirable that a law providing for the compensation of our county officers should be passed embodying such provisions that their compensation should be adjusted upon some elastic basis, so that from time to time, as population and services change, the law may still, without new legislation, be both just to the public and likewise to the officials. This, it is manifest, cannot be attained under the act in dispute. While the act in controversy, by the declaration in section 21, professes to have graded the salaries in question in accordance with the population and necessary services required, it is manifest that under the provisions of section 126 such is not in reality a fact, as the compensation limited by this section has no reference to population, but is based upon, or limited to, the fees actually earned by the officers during their term of office. The reasons which are now urged against the validity of this law by counsel for appellant, as herein stated, were not considered in the case of *Henderson v. State*, 137 Ind. 552, 36 N. E. 257, nor were they in any other case before the court arising under the act of 1891; hence the decision in the *Henderson Case* cannot be accepted as a determination of all the questions arising in the case at bar, and the rule of *stare decisis*, for this reason, can exert no controlling influence. Without further extending this opinion, I think it clear, upon the grounds stated, that the salary provisions relating to county officers of the law of 1895 are open to the vice of local and special legislation, prohibited by sections 22, 23, art. 4, of the state constitution, and that the legislature has not enacted this statute upon the lines required or intended by the amendatory exception to clause 14 of section 22. Therefore it follows that the provisions in question are repugnant to the above sections of the constitution, and consequently are absolutely void.

McCABE, J. (dissenting). I concur in the dissenting opinion of Judge JORDAN for many of the reasons given by him for holding so much of the fee and salary law of 1895 unconstitutional as relates to the compensation of county officers. I concur in the said opinion especially that the question raised by the particular objection now urged against the part of the act mentioned was not considered and not decided in *Henderson v. Stout*, 137 Ind. 552, 36 N. E. 257. But I do not agree with him in all the reasons assigned by him for holding that part of the act unconstitutional. All must agree that local or

special legislation on the subject of fees or salaries is prohibited by section 22 of article 4 of the constitution, except that such legislation may be made local and special in order to "grade the compensation of officers in proportion to the population and necessary services required." It is not denied that the part of the act in question is local and special. Now, if it does not grade the compensation of officers in proportion to the population and necessary services required, then it falls clearly under the condemnation of the provision of the section of the constitution mentioned against local legislation. The fees which the act provides for the services of the various officers of the county are to be taxed, collected, and paid into the county treasury as the property of the county. It then gives to each officer a stated salary, to be paid out of such fees. But, if the fees collected are insufficient to pay the salary of each officer, it provides he is to have no more compensation. Two reasons exist why such a statute does not grade the compensation according to population and necessary services required:

1. This court judicially knows that the population and services required in each county will be constantly on the change, either by increase or decrease; but the act fixes the compensation at one grade, with no possibility of its going up or down with the increase or decrease of population or services required; and when such population and services required do so change, it is obvious that the act will not grade compensation in proportion to population and necessary services required. If the ordinary and necessarily expected future events will bring a statute in conflict with a constitutional provision, it is undoubtedly unconstitutional in the start.

2. If the fees collected by a given officer are insufficient to pay the salary provided for him, he gets no more salary than the fees collected by him. The act declares that the salary provided is graded in proportion to population and necessary services required; that is, he is to have no more of his stipulated salary than sufficient to equal the amount of fees collected by him. But it may be urged that limiting his salary to the amount of fees earned by him is an accurate and exact method of grading his compensation in proportion to services actually performed. But that leaves out of consideration an indispensable element required by the constitutional provision in question to enter into the gradation of the compensation of such officers, namely, population. Moreover, it would be a flat repudiation of the declaration made in section 21 of the act, that the salaries provided are graded in proportion to population and necessary services required.

Again, it is a well-known fact that large amounts of fees taxed in the various county offices are not collectible, because the parties against whom they are taxed are insolvent, worthless, and unable to and do not pay. This court may take judicial cognizance of

that fact. It cannot be said that such fees have not been earned by the officer taxing them. Because they are never collected, and never paid into the treasury, and there is not enough of those that have been collected to make the amount of salary fixed by the act, such officer's salary is cut down thereby below the amount fixed by the gradation thereof in proportion to population and necessary services required. It cannot be said that such deficiency or decrease arises from, or is caused by, a decrease in the services required or performed. The services have been performed in such cases, and not paid for, and no provision is made for their payment. There seems to be absolutely no escape from the conclusion that in that case compensation is not graded by the act in proportion to population and necessary services required, for in that case the salary provided for is not paid, and necessary services required and performed are not paid for at all. Therefore the act does not grade compensation according to population and necessary services required. And, being local and special, and failing to so grade the compensation, the act, as to county officers, falls within the inhibition of the constitutional provision against local and special legislation, and does not fall within the exception to that provision, and therefore is, in my opinion, unconstitutional and void.

(17 Ind. App. 73)

BEESON et al. v. TICE.¹

(Appellate Court of Indiana. Dec. 1, 1896.)

ANIMALS—IMPOUNDING—"RUNNING AT LARGE"—HIGHWAY—IS NOT A "PUBLIC COMMON."

1. A public highway is not "uninclosed land or public common," within the meaning of Burns' Rev. St. 1894, § 2833 (Horner's Rev. St. 1896, § 2639), authorizing the impounding of animals found pasturing in such places.

2. Under Burns' Rev. St. 1894, § 2838 (Horner's Rev. St. 1896, § 2643a), making it the duty of the road supervisor to impound stock running at large on the roads, cows which are in charge of boys who herd them cannot be considered as "running at large."

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Action of replevin by Carl Beeson and Willis Beeson, by their next friend, against John Tice. Judgment for defendant, and plaintiffs' appeal. Reversed.

John F. Neal and S. D. Stuart, for appellants. Kane & Kane, for appellee.

REINHARD, J. On the 3d day of June, 1895, the appellants, Carl Beeson and Willis Beeson, both minors, were in charge of 11 milch cows owned by different persons, who had intrusted the animals to their care, under a contract made with them by which they were to herd the cows at a certain price per week for each head. The appellants, on the day named, and on other days prior thereto, were grazing the animals along the public highway leading out of the city of Nobles-

¹Rehearing denied, 46 N. E. 154.

ville, and, on this occasion, had proceeded but a short distance from said city, on their way, as appellants claim, to White river, for the purpose of watering said cows, when they were overtaken by the appellee, who was at the time the supervisor of road district No. 5, in which the animals were then found, and who took said animals away from the appellants, and into his custody, claiming to do so in pursuance of his duty as such officer. The appellee thereupon impounded the animals, and posted a notice that he had, as such officer, on the 3d day of June, 1895, "taken up the following described animals [being the cows mentioned], found running at large, and pasturing upon the uninclosed lands and public commons of Noblesville township, Hamilton county, Indiana." On the 4th day of June, 1895, the appellants, by their next friend, instituted this action in replevin against the appellee, for the recovery of the possession of the cows. The cause was tried by the court, without a jury, and there was a finding and judgment in favor of the appellee, and against appellants, for costs. The overruling of the appellants' motion for a new trial is the only error assigned.

There is no substantial conflict in the evidence. The facts heretofore set out are practically agreed upon, and the principal question made upon them is as to their sufficiency to entitle the appellee to the judgment from which this appeal is taken. There was at the time no order of the county board permitting cattle or other animals to run at large. It would seem from the reading of the notice given by the appellee that the animals were taken up by the appellee by virtue of section 2833, Burns' Rev. St. 1894 (section 2639, Horner's Rev. St. 1896), which provides that "whenever any animal shall be found running at large or pasturing upon any of the uninclosed lands or public commons of any township, in any county in this state, which shall not be specified in the order of the board of commissioners of said county, as in the preceding section provided, to have the right to so run at large or pasture thereon, any person being a resident of said township shall be authorized to take up and impound said animals in any private or public pound within said township." It will be observed that this section does not authorize the road supervisor, as such, to take up the animals, but it authorizes any resident of the township to do so. Perhaps the fact that the appellee in this case was the road supervisor is sufficient evidence to prove that he is also a resident of the township in which the animals were taken up. The difficulty, however, of bringing the present case within the purview of the section of the statute above quoted, lies in the fact that here the animals were not pasturing upon the public commons or upon any uninclosed lands, for it cannot be held that a public highway is a common or an uninclosed piece of land. The International Dictionary defines a common to be "an

inclosed or uninclosed tract of ground, for pasturage, for pleasure, etc., the use of which belongs to the public or to a number of persons." Anderson's Law Dictionary gives it the definition: "The common field; ground set apart for public uses." We must take judicial cognizance of the fact that a public road or highway is not a common. It is used by the public under the right of eminent domain, and outside of this the owner of the fee has the absolute dominion over the soil. He, doubtless, has the right of pasturage and other products growing in the soil of the untraveled portion of the road adjoining his lands, and may have a remedy against all persons trespassing upon these rights. But it is only by statutory enactments that a supervisor of highways or other person is authorized to take up stock, pasturing in the highway, and it is to the statutes alone that the courts must look when called upon to declare such authority in favor of any person. Indeed, it is not contended by the learned counsel for the appellee that the animals in charge of the appellants in this highway were taken up by the appellee under and by virtue of the provisions of the section of the statute above set forth. What counsel do insist upon is that section 2838 of Burns' Rev. St. 1894 (section 2643a, Horner's Rev. St. 1896) "makes it the duty of all road supervisors, upon view or information, to cause all horses, mules, cattle, etc., running at large upon the roads, commons, or uninclosed lands, within their respective districts, which are not authorized to run at large by order of the board of commissioners as by law provided, to be impounded, etc., and provides for a penalty for failure to comply with the act." The section giving any resident of the township the authority to impound does not use the terms "roads, commons or uninclosed lands," as does the section which makes it the duty of supervisors to take up such stock. There is, therefore, no provision in the law which in express terms authorizes the impounding of animals found pasturing in the public highways. It follows, we think, that unless the cows were "running at large," within the meaning of the section which requires the road supervisor to impound such animals, they could not be lawfully taken up by the appellee.

We have not been able to find any construction of the term "running at large" by the courts of our own state, and counsel have not called our attention to any such. In Anderson's Law Dictionary the term "running at large" is defined as follows: "To stroll without restraint or confinement, as for an animal to run at large." Under the head of "At Large," he defines the latter words to mean: "Unconfined; unrestrained; in the free exercise of natural freedom or propensities, as an animal suffered to run at large." Under a similar statute, the supreme court of Michigan has decided that a herd of cattle in a highway, in charge of a boy 13 years old,

which had been there every day for a week or more, were not at large, within the meaning of the statute. The court said: "When cattle are in the public highway, in charge of a person directing or controlling their movements, they are not running at large, within the meaning of the statute. The language applies to animals in the highway without being in the custody or under the control of any person. Consequently, the defendant had no right to impound the cattle in this case, as the record shows that they were being tended by the plaintiff's servant, and were in his custody." *Bertwhistle v. Goodrich*, 53 Mich. 457, 19 N. W. 143. In a case of trespass for shooting a dog, it was claimed that the defendant had a right to shoot the dog by virtue of a statute of Vermont which permitted such shooting of dogs running at large. It was shown that the dog was in charge of his master, and was pursuing a fox, when shot by the defendant. It was held that the dog was not running at large, within the meaning of the statute. *Wright v. Clark*, 50 Vt. 130. In a California case it was held that cattle driven along a road in charge of a herder, and which in passing casually eat of the grass growing on the roadside, are not "estrays" or "running at large," within the meaning of a statute forbidding cattle or stock to run at large upon any public highway. *Thompson v. Corpstein*, 52 Cal. 653. See, also, *Russell v. Cone*, 46 Vt. 600. The California statute also forbids the pasturing of cattle in the highways. The case above cited declares that driving stock along the road, and permitting them casually to eat some of the grass growing therein, is not such pasturing, as the statute contemplates. Doubtless, if our statute made such pasturing unlawful, and a cause for taking them up by the supervisor, the appellee would have been justified in his act of impounding them; but, as we have seen, the statute makes no such provision. Here the cows were actually pasturing in the road, as we must assume; and, if this were a cause for taking them up, the case would be made out. But the statute under which the animals were taken into custody by the appellee applies only to animals running at large. Under the authorities cited, they cannot be said to be running at large when in charge of one or more attendants, as the animals were in the case before us. It may seem difficult to understand why the supervisor should not have as much authority for impounding stock which is being pastured in the public highways as a private citizen has to take up animals found pasturing upon the public commons. But it does not appear that the legislature has conferred such power upon a road supervisor or other person, and it is not our province to read such authority into the statute. The remedy must be sought in appropriate legislation. The evidence is insufficient to support the finding, and the motion for a new trial should have been sustained. Judgment reversed.

CITY OF DUNKIRK v. WALLACE.¹

(Appellate Court of Indiana. Dec. 3, 1896.)

PLEADING—MOTION TO MAKE COMPLAINT MORE SPECIFIC—EVIDENCE—CONTRACT—QUANTUM MERUIT.

1. Where the facts alleged state a cause of action, but a more specific statement is desired, the remedy is by motion.

2. Possible error in the admission of incompetent and immaterial evidence is without prejudice where, without such evidence, the findings are yet supported by relevant and uncontradicted evidence.

3. Where a person is in possession of a street under a grading contract with the city, and the city interrupts that possession in order to lay a sewer there, and afterwards turns the street over to another person to be macadamized, the city must pay for the grading done under the original contract.

Appeal from circuit court, Jay county; D. D. Heller, Judge.

Action by Patrick Wallace against the city of Dunkirk for breach of contract. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Headington & La Follette and J. J. Stewart, for appellant. Bell & Ross, for appellee.

ROSS, J. The appellee sued and recovered judgment against the appellant for \$760. It appears, from the facts alleged in the complaint, that on the 7th day of October, 1891, Hayes & Rees, contractors, entered into a contract with the appellant for the improvement of Meridian street in said city; that Rees subsequently sublet his interest in the contract to Edmund Stack and John Buckley; that Hayes, Stack, and Buckley thereupon sublet the work to the appellee, Patrick Wallace, who undertook and agreed to fulfill the terms and conditions of the contract with the appellant; that appellee commenced the improvement, and prosecuted the work for many weeks, with the knowledge and consent of the appellant, and had almost completed the grading, in accordance with said contract, when the appellant, without the knowledge or consent of appellee, entered into a contract with one A. A. Knapp Company for the construction of a sewer in and along said Meridian street where being improved; that the appellant requested appellee to cease work to permit the laying of the sewer before his work was completed; and that, upon his refusal to quit, and give possession of the street, the appellant threatened to enjoin him from the further prosecution of said work, whereupon he ceased to work, and permitted the sewer contractors to take possession of the street for the purpose of putting in such sewer; that when he ceased work, and gave up possession to the sewer contractors, it was late in the season, and at a time when he could do little more by way of completing his contract; that up to that time he had expended in making the improvement \$1,050, which was in the way of grading and filling, and was a permanent improvement, and val-

¹ Superseded by opinion, 48 N. E. 463.

uable to the appellant; that when the season opened again, so that appellee could prosecute his work, the appellant, without his knowledge or consent, had entered into a contract with new parties to macadamize said street, and appellant turned over the possession of said street to the new contractor, to the exclusion of appellee, the said new contract to take the place of, and the work to be done thereunder to be instead of, the work to be done by appellee. It is also alleged that the sewer contractor had done his work in such a manner as to seriously injure and destroy the grading and work done on the improvement by appellee, and, although appellant had been requested to have said street placed in the condition it was when appellee turned it over to the sewer contractor, appellant had failed and refused to comply, refused to recognize appellee's right to complete said work, and refused to recompense him for the work done, or to refund the money he had expended thereon.

When the appellant made the contract for the improvement of the street in question, it granted to the contractors and those acting under them the right to take possession of the street for the purpose of making the improvement, and it had no right to interfere with the legitimate prosecution of that work any more than if it were an individual and had made the contract; and any interference by it, resulting in injury or damage to the contractors or their subcontractors, it must answer for. It could not rescind the contract with appellee's assignors, and make another with other parties, to the injury of appellee, without incurring a liability for the damages resulting to appellee therefrom. According to the allegations of the complaint, the appellee did a great amount of work pursuant to the terms of his contract, and this work the appellant by its subsequent acts appropriated; and yet, because it is a municipal corporation, it has sought to take advantage of appellee, and refused to pay therefor. It is to be hoped that there is some little honor in the administration of municipal affairs, and, if unscrupulous persons get into control, and aim to cheat or defraud those who deal honestly with such corporations, that the courts will not hesitate to protect the innocent, and see that their injuries are compensated in damages.

Several technical objections have been made to the complaint, but, while it is more or less disconnected in its allegations, we think the facts alleged generally state a cause of action, and are sufficient to withstand a demurrer. If the appellant desired a more specific statement of the facts, its remedy was by a motion for that purpose.

The cause was tried by the court without the intervention of a jury, and a general finding made in favor of the appellee. The appellant filed a motion for a new trial, which was overruled by the court, and this ruling is the basis for the second specification of er-

ror assigned. Of the 28 reasons embraced in the motion for a new trial, 24 of them relate to rulings of the court in the admission and exclusion of evidence. If it were true that a part of the evidence admitted over appellant's objection was incompetent and irrelevant, a question we do not decide, nevertheless, if it were all withdrawn, there is still an abundance of relevant and uncontradicted evidence to sustain the court's findings on most of the questions of fact. As to the other questions of fact, upon which the evidence complained of had no bearing whatever, there is some conflict in the evidence; but the trial court gave credence to that introduced on behalf of appellee, and we cannot disturb its finding.

After reading the evidence we feel justified in saying that the appellee was rightfully in possession of the street, and making the improvement, at the time he was stopped by the appellant, even though the time granted in the original contract for the completion of the work had expired. The appellant, at the time its officers required the appellee to cease work, did not demand that he do so because the work was not completed within the time specified in the contract, but in order to enable the appellant to put in a sewer which it wanted put in before appellee should complete his work. These facts not only show that the appellant recognized the right of the appellee to do the work, but that the town authorities did not want him to complete the work until after the sewer was put in. If the appellant saw fit to interfere with the appellee's work, resulting in injury to him, it, and not he, should suffer therefor. When it subsequently entered into a new contract to improve the street with macadam, and turned the street over to the new contractor, it appropriated the work already done by the appellee, and justice requires that it should pay therefor. The damages assessed are not excessive. The judgment is affirmed.

(16 Ind. App. 408)

SPRINGFIELD FERTILIZER CO. v.
TOMPKINS.

(Appellate Court of Indiana. Dec. 2, 1896.)

PRINCIPAL AND AGENT—CONTRACT—PAROL EVIDENCE—LIABILITY OF AGENT.

1. An agent for the sale of goods of a manufacturing company, under a written contract by which he agreed to indorse all notes taken from customers, is not bound to indorse a note taken for goods sold by a general agent of the company over his protest, and after his statement that he would not indorse the note, although, after the sale was made, he delivered the goods sold, and took the note therefor, the same as other customers' notes, but refused to indorse it.

2. The fact that a written contract of agency states that it contains all the contract between the parties, and that no verbal agreement shall be binding, will not prevent the agent from proving by parol that a transaction between them was not within the contract.

Appeal from circuit court, Rush county; John D. Miller, Judge.

Action by the Springfield Fertilizer Company against John W. Tompkins. Judgment for defendant, and plaintiff appeals. Affirmed.

Henley & Guffin and Morgan & Morris, for appellant. Cullen & Megee, for appellee.

REINHARD, J. Appellant sued appellee in the court below on an account, alleging in its complaint that the appellee was indebted to the appellant in the sum of \$100 for goods and merchandise sold and delivered to the appellee at his special instance and request, as shown by contract, a copy of which is filed with the complaint, marked "Exhibit B" and "Exhibit C," and a bill of particulars of which is filed with the complaint, marked "Exhibit A"; that the sum of \$91.20 was due December 25, 1891, and is wholly unpaid, although payment of said sum was demanded at the date of the maturity of said debt; wherefore, etc. The written and printed contract for 1892 provides that "this paper contains the full and entire agreement between parties hereto, and that no outside verbal understanding is of any force or effect whatever, and is not to be held binding." The contract further stipulates that Tompkins is appointed the agent of the appellant for the sale of Springfield fertilizer "in Rushville and trade for the season of 1892." The appellant agrees to furnish the fertilizers to Tompkins in such quantities as the latter may from time to time order. Tompkins agrees to order of appellant as much of said fertilizers as the trade in said territory will demand, and to settle for the same as in the contract provided. The title in all fertilizers shipped to Tompkins, or their proceeds, is to be vested in the appellant, and subject to its order, until full settlement has been made for the same by the appellee; but, in case of loss by fire, the appellee is to be responsible for the same. Then follow the prices for the different brands of fertilizers, "delivered f. o. b. cars at Rushville, Ind., in car-load lots." It is further provided that all goods ordered are due and payable as follows: Tompkins to pay freights, and deduct same from price of goods, 60 days; "settlements to be made June 1, 189-, for all spring goods ordered, and October 1, 189-, for all fall goods ordered, in farmers' notes and cash, as fertilizers have been sold, except pure ground bone, which is net cash 30 days from shipment; all notes to be made payable at some bank, and to the order of the Springfield Fertilizer Company; said notes not to run longer than six months from date of sale for spring goods sold, and not longer than 12 months from date of sale for fall goods sold; notes to draw 6 per cent. interest from date, and to be guaranteed by" Tompkins. Tompkins agrees to take no other agency, nor to become interested in any way in the sale of any other fertilizers during the season of 1892; also, to circulate such advertising matter as may be supplied

from time to time, and to diligently canvass the territory assigned, and to work up the trade faithfully. The company reserves the right to revoke the agency at any time when Tompkins shall fail or neglect to perform the duties thereof. The contract for the season of 1891 does not differ materially in its terms from that for the season of 1892. The appellee answered the general denial and payment. The appellant's reply of general denial closed the issues. The cause was tried by the court, and resulted in a finding and judgment for appellee. The sole error relied upon is the overruling of the motion for a new trial. The grounds assigned in this motion are as follows: "(1) The decision of the court is contrary to law. (2) The decision of the court is contrary to the evidence. (3) The decision of the court is not sustained by sufficient evidence. (4) The court, on the trial of said cause, permitted, over the objection of plaintiff, the defendant and Robert Tompkins, John Cohn, and A. N. Norris each to testify that defendant told the agent of plaintiff that he (defendant) would not make any sale to said Norris, and would not guaranty any note that might be given by said Norris for goods sold to said Norris by said agent of plaintiff, J. H. Spencer by name; in all of which the court erred."

It will be seen, from the pleadings and contract above set forth, that the appellee was the local agent for the appellant to sell fertilizers. The goods were to be shipped to him by rail as required, and he was to sell them to farmers, taking their notes for the amount due, which notes were to be secured by the appellee's indorsement. It is manifest, from this arrangement, that a large discretion was necessarily given the appellee as to the persons to whom such sales were to be made, for otherwise the appellee might be forced to incur risks and liabilities that an ordinarily prudent business man would not be willing to assume. There is evidence to prove that one John H. Spencer, a general agent of the appellant, who had authority to sell the appellant's goods and establish agencies, came to Rushville, and informed the appellee that he was about to make a sale of a shipment of fertilizers to one Norris. Appellee protested that Norris was insolvent, and that, if a sale was made to him, he (appellee) would refuse to indorse or guaranty any note that Norris might execute. Spencer nevertheless sold the goods to Norris, and the fertilizers were shipped in bulk, with a consignment sent the appellee on his order. Norris came to the car, and received the fertilizers, and executed his note to appellant for the amount due from him, delivering the same to the appellee. The appellee sent the note to the appellant, but refused to indorse it. The appellant now seeks to hold the appellee liable for the price of the goods sold to Norris, and this is the subject of controversy in this action. If the court believed the evidence of the appellee, above alluded to, it was amply justified in its finding. The transaction with Norris was not

in violation of the written contract between appellee and appellant. The appellant, for aught appearing in the contract, was at liberty to make any sales within the appellee's territory that it elected to make, but it certainly could not hold the appellee liable therefor on his contract. The appellant's learned counsel insist that the evidence as to such independent sale was in plain contravention of the provisions of the written contract. Even if this were true, we do not see how the appellee could be bound by the transaction unless he had some connection with the sale. If he did not agree to the sale, but protested that he would not assume the responsibility for it, we do not understand by what principle of law he can be forced to make good the loss. But the sale to Norris by Spencer was not a violation of the contract. The appellant having the right to make such independent sales, and its agent, Spencer, having the general authority to do so, there was nothing in the contract between appellant and appellee which would prevent the performance of such an act. It is true the contract stipulates that it "contains the full and entire agreement between the parties thereto, and that no outside verbal understanding is of any force or effect whatever, and is not to be held binding." But the transaction between Spencer and Norris had nothing whatever to do with the contract between these parties, and how the appellee can be said to have violated its conditions or provisions by refusing to assent to the act of Spencer is not easy to perceive. It is not the theory of appellee that he and Spencer had a private understanding that, although the sale to Norris was to be effected through him, he was not to be held responsible for such sale; nor does the evidence relied upon by him warrant any such construction. On the other hand, as already stated, the appellee's evidence shows that the sale was made by Spencer over the appellee's protest, and in the face of his declaration that he would not indorse the note. The evidence sustains the finding.

For the reasons already stated, the court committed no error in admitting evidence to prove the transaction between appellant's agent, Spencer, and Norris, and what was said upon the subject between said Norris and appellee. Nor can we say that the fact that Tompkins ordered the fertilizer, including that of Norris, and charged himself with it, and notified Norris of its arrival, is conclusive evidence that the sale to Norris was not an independent sale by Spencer, but was effected by Tompkins in the performance of his contract with appellant. That it was evidence of that fact we readily grant. But the court had other evidence, and was not concluded by the establishment of this fact alone. It was the duty of the court to consider all the facts proved, and then decide whether the sale was made by Tompkins in the course of his em-

ployment, or was an independent sale by Spencer. The same is true as to the fact that Tompkins took the note. His acceptance of it, and its transmission by him to appellant without his indorsement thereon, was not conclusive proof that the sale to Norris was a part of appellee's business, under the contract between him and appellant. It was, at most, but a circumstance. Other circumstances relied upon affect only the weight of the evidence, as do those already named. We find no reversible error. Judgment affirmed.

(17 Ind. App. 700)

QUEEN et al. v. LIPINSKEY et al.¹

(Appellate Court of Indiana. Dec. 15, 1896.)

APPEAL—ADDITIONAL PARTIES.

Where judgment is rendered against several defendants, and certain of them appeal, an application by the appellants, after the expiration of the year allowed for the appeal, to amend their assignment of errors, making the other defendants parties, will not be entertained.

Appeal from circuit court, Huntington county; J. Q. Cline, Special Judge.

Action by Simon H. Lipinskey and Martin Mindnich against Jacob L. D. Queen and others. Judgment for plaintiffs, and certain defendants appeal. Dismissed.

Geo. D. Parks and France & Dungan, for appellants. B. M. Cobb and Spencer & Bran-
yan, for appellees.

DAVIS, J. On the 10th day of May, 1895, in the Huntington circuit court, Simon H. Lipinskey and Martin Mindnich recovered judgment in attachment proceedings against Jacob L. D. Queen and William L. White, First National Bank of Huntington, Charles W. Watkins, and Alvin McEndaffer. On October 28, 1895, said Queen, White, and Watkins filed a transcript on appeal from said judgment in the office of the clerk of the appellate court. Neither the First National Bank nor the said Alvin McEndaffer was in any manner made a party to said appeal. On August 20, 1896, appellee Mindnich filed a motion in this court to dismiss the appeal for the reason that the First National Bank and Alvin McEndaffer were not parties to the appeal. On the 3d of September, 1896, after the expiration of the year allowed for the appeal, the appellants filed an application asking leave to amend their assignment of errors, making said bank and McEndaffer parties to the appeal, and also; at the same time filed the refusal of the bank and McEndaffer to join in the appeal. The question presented for our consideration is identical with the question presented in *Holloran v. Railway Co.*, 129 Ind. 274, 28 N. E. 549, and on the authority of that decision the motion to dismiss is well taken. Appeal dismissed.

¹ Rehearing denied.

(16 Ind. App. 445)

INDIANA CANNING CO. v. PRIEST.

(Appellate Court of Indiana. Dec. 15, 1896.)

CONTRACTS—BREACH—EVIDENCE OF DAMAGE.

In an action for the breach of a contract to purchase all the tomatoes which plaintiff should grow and deliver to defendant, plaintiff can recover only the difference between the contract price and the cost of picking and delivering, where it is shown there is no market for the tomatoes.

Appeal from superior court, Vanderburgh county; J. H. Faster, Judge.

Action by Henry A. Priest against the Indiana Canning Company for breach of a contract to purchase tomatoes. From a judgment in favor of plaintiff, defendant appeals. Reversed.

Gilchrist & De Bruler, for appellant. Mattison, Posey & Clark and G. K. Denton, for appellee.

GAVIN, J. Appellee recovered damages for appellant's refusal to carry out its contract whereby it had agreed to purchase from him all the tomatoes he should raise upon a certain tract of land, delivery to be made by appellee at the appellant's factory. Appellee's evidence showed that up to September 12th he fulfilled his part of the contract by delivering the tomatoes then ripened, and that he was ready and willing to perform it in full by delivering 1,200 bushels more of the grade and quality called for by the contract, but upon that day appellant notified him it would receive no more from him, wherefore no further effort to deliver was made, but the tomatoes were permitted to rot in the field. It is conceded by appellee that the title to the tomatoes not delivered never passed to appellant, and that appellee was not entitled to recover the contract price as and for a completed sale, but could only claim such damages as he sustained by the refusal to receive any more tomatoes. *Ridgley v. Mooney* (Ind. App.) 45 N. E. 348; *Shippes v. Adkinson*, 8 Ind. App. 505, 36 N. E. 375. An examination of these cases and the authorities therein cited will disclose that it is incumbent upon him who claims such damages to present to the court such data as are necessary to enable the court or jury to properly determine the amount of damage actually sustained. This the appellee did not do. Assuming that he did prove that there was no available market for the tomatoes, and that he was thereby justified in allowing them to rot upon the ground, still, before appellee's damages could be ascertained, it was essential that he should prove the cost of picking and delivering them. They were raised six or seven miles from the factory. If the tomatoes were worthless, then the most which he could ask would be the contract price, less the cost of performing it. Had he proceeded to gather and tender at the place of delivery, then he might have maintained his action for the full contract price; but, not having done this, he ought not to recover as though

he had so done. There was no evidence whatever as to the cost of gathering and delivering the tomatoes, nor as to the value of the tomatoes in the field. It is true, the jury deducted 10 cents per bushel from what would otherwise be the contract price, possibly intending this as an allowance for such expense, but there is not a particle of evidence to enable us to determine whether or not this was the correct amount. The evidence is, therefore, insufficient to establish appellee's claim to more than nominal damages. Judgment reversed, with instructions to sustain the motion for new trial.

(16 Ind. App. 443)

ARNOLD et al. v. RIFNER.

(Appellate Court of Indiana. Dec. 15, 1896.)

MARRIED WOMEN—ACTION FOR EARNINGS.

A married woman may sue for compensation for nursing a stranger, as Rev. St. 1881, § 5130 (Burns' Rev. St. 1894, § 6975), gives a married woman the ownership of all earnings from any service rendered by her for persons other than her husband.

Appeal from circuit court, Henry county; E. H. Bundy, Judge.

Action by Jennie Rifner against Oliver O. Arnold, administrator de bonis non of the estate of William Rifner. A motion for a new trial after a verdict for plaintiff was denied, and defendant appeals. Affirmed.

Brown & Brown and O. N. Mikels, for appellant. W. O. Ballard and M. E. Forkner, for appellee.

ROSS, J. The appellee filed in the office of the clerk of Henry county a claim against the estate of William Rifner, of which appellant is administrator de bonis non, for services rendered in nursing and caring for the decedent in his lifetime. The claim, not having been allowed, was transferred to the issue docket, and a trial had before a jury, resulting in a verdict in her favor for \$1,084. The questions urged on this appeal arise on the ruling of the court in overruling the appellant's motion for a new trial. It is very earnestly insisted that the verdict of the jury is not sustained by sufficient evidence; that there is no evidence upon which appellee's claim can rest; that, even if she did render the services claimed, she had no right of action, inasmuch as she was a married woman at the time she rendered the alleged services.

Section 5130, Rev. St. 1881 (section 6975, Burns' Rev. St. 1894), provides that "a married woman may carry on any trade or business and perform any labor or service on her sole and separate account. The earnings and profits of any married woman, accruing from her trade, business, services or labor, other than labor for her husband, shall be her sole and separate property." Prior to the enactment of this statute, the common law was in force in this state, and the earnings of a wife belonged to her husband. *Baxter v. Prickett's*

Adm'r, 27 Ind. 490; *Jenkins v. Flinn*, 37 Ind. 349. By this statute, however, the earnings and profits of a married woman belong to her. The appellant insists that it is not the earnings of all of her labor except that rendered for her family that is hers, but that it is only the earnings and profits resulting from her labor in carrying on a trade or business that the statute makes her property. We cannot concur in this contention. The statute specially gives to a married woman, not only the earnings and profits accruing from any trade or business carried on by her, whether the result of her own labors or not, but it also makes her the owner of her earnings when she performs services for persons other than her husband or her family. The statute does not relieve the wife from the performance of any of the duties owing to her husband or family, but it simply vests in her the ownership of the earnings resulting from her services to others. The services claimed to have been rendered by the appellee, for which she filed the claim in controversy, were not such as were owing from her to either her husband or her family, and were not rendered for their comfort, welfare, or benefit. They were rendered to a stranger, to whom she owed no such duty. If the services were rendered by the appellee, there can be no doubt but that she is the proper person to receive pay therefor.

Counsel very earnestly attack the verdict of the jury, insisting that the evidence discloses not only that the appellee and her relatives (who they say were her witnesses) are attempting to defraud this estate, but that appellee has failed to prove that she rendered the services. We have read the evidence with more than ordinary care, and are convinced that the evidence introduced on the part of the appellee fully sustains her claim. In fact, if the decedent was as helpless and as much of a care as many of the witnesses testify he was, the appellee not only assumed grave responsibilities and risks, but rendered very onerous and unpleasant services for him. Such services, when rendered for a stranger, are much more unpleasant and distasteful than when rendered for one's own family, and this probably accounts for the value placed by the witnesses on such services. True, in many respects the testimony of the witnesses for the appellant might be, when submitted to a jury, sufficient to discredit that given in favor of the appellee; but the testimony of all of the witnesses may be true, and yet the appellee be entitled to recover. If we gather correctly the testimony of the appellant's witnesses, none of them denied the facts testified about by the appellee's witnesses. They simply testified from their knowledge and observation. None of them testified that the decedent did not do as appellee's witnesses testified, or that appellee did not render the services, but simply testified that, from their observation, the decedent was not in the condition that appellee's witnesses testified he was.

The instructions given by the court, of which the appellant complains, were proper, in view of the statute above referred to, which gives to the wife the ownership of all her earnings accruing from any services rendered by her for persons other than her husband or her family.

We find no error for which the judgment of the court below should be reversed. Judgment affirmed.

(16 Ind. App. 454)

METZGER v. SCHULTZ.

(Appellate Court of Indiana. Dec. 16, 1896.)

EVIDENCE—PRESUMPTION.

The presumption that, at a certain time after a gas pipe was put up, it was properly supported, arising from the fact that it was so supported when put up, is not overcome by the fact that after an explosion, occurring later, no supports were found.

On rehearing. Denied.

For former report, see 43 N. E. 836.

LOTZ, C. J. The appellee, in his argument in support of his petition for a rehearing, earnestly insists that we overlooked and failed to consider the point upon which he placed his chief reliance for an affirmation of the judgment,—that of negligence in the manner of constructing and failing to properly support the gas pipe. Upon this question it is contended that the evidence is conflicting, and that it was therefore a question for the jury, and not one upon which this court can arbitrarily say, as a matter of law, there was no negligence. The undisputed evidence shows that a competent and skillful gas fitter was employed to do the work, and his uncontradicted testimony was that he supported the pipe by chain or wire suspended from the joist of the building. It was true, there was some evidence to the effect that, after the explosion, no nails or wire or chain were found. But this evidence was very meager, and related to a time after a large quantity of brick and debris had been hurled with great violence against the pipe and joist. But if it be conceded that no supports were found after the explosion, this does not tend to prove the fact that the pipe was unsupported on the day the appellant leased the premises to Potter. The undisputed testimony showed that the pipe was supported when first erected. The presumption is that it so continued until a cause arose sufficient to destroy such supports. The general rule is that things once proved to have existed in a particular state are presumed to have continued in that state until the contrary is so established by evidence, either direct or presumptive. *Smith v. Railroad Co.*, 43 Barb. 225; *Lawson, Pres. Ev.* pp. 126-176. The burden rested upon the appellee to show that the pipe was unsafe and improperly supported on the day when Potter became the lessee. There was an entire absence of evidence on this point. Petition overruled.

(16 Ind. App. 484)

HORNBECK v. STATE.

(Appellate Court of Indiana. Dec. 17, 1896.)

ASSAULT AND BATTERY—EXCESSIVE PUNISHMENT OF CHILD—QUESTION FOR JURY.

Whether punishment inflicted by a father on his child, by striking him several times with a buggy whip, was so cruel and excessive as to constitute assault and battery, is a question for the jury.

Appeal from circuit court, Greene county; William W. Moffett, Judge.

Frank Hornbeck was convicted of assault and battery, and appeals. Affirmed.

Axtell & Riddle and Emerson Short, for appellant. W. A. Ketcham, Atty. Gen., Merrill Moores, Chas. D. Hunt, and W. H. Budwell, for the State.

LOTZ, C. J. The appellant was indicted and convicted of the crime of assault and battery in the court below. The only assignment of error presented for our consideration on this appeal is the overruling of appellant's motion for a new trial. The other errors assigned are waived. It is insisted that the verdict of the jury is contrary to the law and not supported by sufficient evidence. The assault and battery was committed upon the person of the appellant's own son, a lad of 13 years, by striking him a number of times with a buggy whip. The boy was disobedient, and the parent administered the punishment for the purpose of correcting him. The appellant's contention is that it was lawful for him to correct his son, and punish him for the disobedience, and that the punishment was neither excessive nor cruel. The law is well settled that a parent has the right to administer proper and reasonable chastisement to his child without being guilty of an assault and battery; but he has no right to administer unreasonable or cruel and inhuman punishment. If the punishment is excessive, unreasonable, or cruel it is unlawful. The mere fact that the punishment was administered by the appellant upon the person of his own child will not screen him from criminal liability. Whether or not the punishment inflicted in this case was excessive or cruel was a question for the jury. *Hinkle v. State*, 127 Ind. 490, 28 N. E. 777. The evidence in this case fully sustains the verdict. Judgment affirmed.

(16 Ind. App. 447)

TREMAIN v. SEVERIN et al.

(Appellate Court of Indiana. Dec. 16, 1896.)

CLAIMS AGAINST DECEASED SURETY—INSOLVENCY OF PRINCIPAL.

1. Under Rev. St. 1894, § 2468 (Rev. St. 1896, § 2313), declaring that the estate of a deceased surety on a contract shall not be liable therefor unless it is shown that the principal is a nonresident, or is insolvent, provided that, though the principal be a resident, and his insolvency be not proved, the claim may be allowed, and a sufficient amount to satisfy it be paid into court, which the creditor may there-

after obtain on showing that he has diligently prosecuted the principal to insolvency, or that such prosecution would not avail,—it is enough to prove insolvency of the principal at the time of the trial, without proof that the payee used due diligence to prosecute him; it not being shown that the surety gave notice to the payee, as provided by sections 1224, 1225, Rev. St. 1894 (sections 1210, 1211, Rev. St. 1896), to proceed against the principal.

2. One who writes another's name, in his presence, at his request, the other making his mark to the signature, does not thereby act as agent in the making of the contract, so as to be incompetent, under Rev. St. 1894, § 508, to testify against a decedent who was a party thereto.

Appeal from circuit court, Decatur county; John D. Miller, Judge.

Action by Henry Severin and others against Milton R. Tremain, administrator. Judgment for plaintiffs. Defendant appeals. Affirmed.

Ewing & Wallingford, for appellant. Herod & Herod, for appellees.

REINHARD, J. This action was brought in the nature of a claim filed by the appellees against the estate of the appellant's decedent on a promissory note. The cause was tried by the court, and there was a finding and judgment in favor of appellees, and an allowance for the entire amount of the claim. It is insisted that the evidence fails to support the verdict. The evidence shows that the note was executed by the decedent, Charles Anderson, as surety for John Swartz and Samuel Swartz. There was no proof that any suit was ever instituted against the principals, or either of them, and no excuse is shown for this omission, except that evidence was introduced tending to show that at the time of the trial both the principals were insolvent. No evidence was offered to show what the financial condition of the principal debtors was at the time of the maturity of the note or thereafter until the time of the trial. The note fell due in December, 1895. It is the contention of appellant's counsel that the failure of proof of the diligent prosecution of the note entitled the appellant to a finding and judgment in his favor, for the reason that the failure to so prosecute operated to discharge the appellant. This contention is founded upon the provision of the section of the statute which reads as follows: "If the decedent be a surety only in any joint or joint and several contract, or in any judgment founded thereon, his estate shall not be liable for the payment thereof, unless it be shown that the principal is a non-resident of this state or is insolvent; provided, that, although the principal be a resident of this state and his insolvency be not proved, nevertheless the claim may be allowed against the estate provisionally, to be paid on subsequent proof of the diligent prosecution of the principal to insolvency, or that such prosecution would not have availed. The final settlement of the estate shall not be delayed by reason of such allowance, but an amount of money sufficient to discharge the claim, or its pro rata share in case

the estate be insolvent, may be paid into court for that purpose. After notice to the creditor, and on proof that his demand has been paid, or that he has failed to diligently prosecute the principal, and that such prosecution would have availed, the court shall order the money reserved to be distributed to the heirs or legatees. The creditor may, at any time after notice to the parties interested, apply for the payment of his claim; and if it appear that he has diligently prosecuted the principal to insolvency, or that such prosecution would not have availed, the court shall order his claim to be paid." Burns' Rev. St. 1894, § 2468 (Horner's Rev. St. 1896, § 2313). Whether or not this contention of appellant's counsel can be upheld must depend, of course, upon the proper construction of the statute. In the case before us the contingency upon which the estate is primarily exempt from liability has arisen, unless the facts bring it within the scope of one of the exceptions named. The decedent was a surety upon a joint or joint and several contract. His estate is, therefore, not liable, unless the principals are nonresidents of the state, or insolvent. It was shown that the principals are insolvent. The estate is, therefore, liable. When the insolvency has been duly established, the latter portion of the section quoted—i. e. that portion which follows and is contained in the proviso—cannot be applicable, for the sufficient reason that no such case as is contemplated by such proviso has arisen. The case supposed is one in which the insolvency has not been proved. In that case the claimant has yet another remedy. He may have the claim allowed provisionally, to be paid only in the event that he prosecute the principal to insolvency after the allowance, or show that such prosecution would be of no avail. When the fact of the insolvency of the principal is established in the first instance, such fact in itself renders the estate liable without reference to what may take place thereafter. In the case at bar the insolvency was shown to the satisfaction of the court trying the cause. This was sufficient to defeat the immunity from liability which would otherwise have been available to the estate. The principals were shown to be insolvent, and therefore the estate is liable, notwithstanding the decedent was a surety. This general proposition is admitted by the appellant's counsel, if we correctly interpret their brief; but they further insist that the insolvency spoken of in the statute has reference, not to the time of the trial, but to the time of the maturity of the note, and thenceforth to the day of trial. If the principal was insolvent during all this time, then they concede that the estate would be liable, notwithstanding the fact that the decedent was only a surety. The only other alternative, counsel claim, upon which the estate may be held liable, is that the claimant must show that he used due diligence against the principal

debtor. By "due diligence" counsel mean, as they inform us, that suit must be brought by the holder of the note at the next term of court after the maturity of the note. In other words, their contention is that insolvency, at the time suit is brought, or at the time of trial, does not raise any presumption of insolvency prior to the time when suit was instituted, and that it follows conclusively, therefore, that in the present case due diligence was not used. It is true that suit might have been instituted upon the note as early as February, 1896. Whether the decedent was then living or not is not shown. It is also true that insolvency at the time of the trial does not necessarily establish insolvency at the time of the maturity of the note. But it was not necessary to prove insolvency in the present case at the time the note matured, and from that time until suit was brought. Nor was it incumbent on the appellees to prove that the principal debtors were prosecuted to insolvency, or that due diligence was used in that behalf as soon as the note matured. This is not a transaction between the holder and indorser of a note, nor is it the case of the payee of a note against a surety thereon, who has given notice to such payee to proceed against the principal. Burns' Rev. St. 1894, §§ 1224, 1225 (Horner's Rev. St. 1896, §§ 1210, 1211). Ordinarily, a surety on a note is not exempt from liability by reason of the fact that the holder of such note has failed to prosecute the principal to insolvency within a reasonable time after the instrument fell due. Sureties, as well as principals, are liable thereon as long as the action is not barred by the statute of limitations. If the surety desires suit to be instituted against the principal debtor, he must give notice to the holder, as required by the statute last cited. It is not claimed that such notice was given in the present case. The statute under which the appellant claims immunity from liability contains no provision whatever which requires the holder of the note to proceed against the principal as soon as the note matures, or within a reasonable time thereafter. All it requires at the hands of the payee or holder is to show that the principal is insolvent; i. e. insolvent at the time of the suit. There could be no reason for giving the statute the construction for which the appellant contends. The consequence of such a construction would be that in every case where a note upon which there is a surety had been running for a considerable time after its maturity, and the surety should die, the failure of the holder to bring suit immediately after maturity would discharge the estate of the surety, unless it be shown that the principal was insolvent during all the time between the maturity of the note and the filing thereof against the estate. The surety might have had ample time and opportunity during his life to notify the holder to sue as the statute requires, and yet he might have fail-

ed to do so, and this failure would constitute no excuse to the holder of the note for his own failure to prosecute such an action. In all such cases it would be impossible to enforce the collection of the note after the surety's death, while, if the surety were alive, he would be clearly liable. Such results as these, which would inevitably follow such construction, were never intended by the legislature in the enactment of the statute relied upon; and such a construction would, in our opinion, be utterly unwarranted. The obvious purpose of the statute was to compel the holders of such claims as this against estates of deceased sureties to first exhaust the property of the principal debtor before recourse is had against the estate of the decedent. If the principal is at the time insolvent, it would be an idle ceremony to proceed against him, for nothing could be accomplished thereby except the making of unnecessary costs. We therefore think that the claimants had done all they were required to do to entitle them to judgment against the estate of the surety when they proved the insolvency of the principal.

Appellant's counsel further insist that the court committed reversible error by overruling his objection to the testimony of John Swartz, a witness for the appellees. Counsel say that "the objection was made to his competency under section 508, Rev. St. 1894, which provides, *inter alia*, that "no person who shall have acted as agent in the making or continuing of any contract with a decedent shall be a competent witness in any suit upon or involving such contract, as to matters occurring prior to the death of the decedent, on behalf of the principal to such contract against the legal representations of the decedent." If the witness John Swartz was really an agent of the decedent in the sense in which the word is used in the statute, he was possibly not a competent witness. If, on the other hand, he was not such an agent, his testimony was properly received. The note was given to Severin, Ostermyer & Co. for a bill of groceries purchased of them by the firm of Samuel Swartz & Son. The note was signed by Samuel Swartz and John Swartz, the members of said firm, as principals, and the appellant's decedent as surety. John Swartz, the junior member of the firm, was the witness whose testimony was objected to. He testified that he requested the decedent to sign the note for him as surety, to which the decedent assented, and asked witness to write his (decedent's) name to the note, which was accordingly done, the decedent making his mark to the signature in the presence of Swartz. This is the sum total of the evidence upon the subject of agency. It is our opinion that Swartz was not incompetent as a witness from the fact that he was an agent in the making or continuing of the contract. The fact that Swartz wrote the decedent's name at his request, and in his presence, did not make him such an

agent as the statute contemplates. He was at most but an amanuensis,—an instrument by which the decedent accomplished the purpose of signing the note,—a mere instrument, like a stamp, or a pen. If the signature had been placed to the note by the witness at a time when appellant's decedent was not present, there might be some reason for the contention that Swartz was an agent. Moreover, it is, to say the least, a question of doubt whether the agent spoken of in the statute must not have been the agent of the opposite party, rather than the agent of the deceased person. The object of the statute, doubtless, was to prevent the living party from having an advantage over the dead person, or his property. Death has sealed the lips of the deceased, and the law aims to close the lips of the living party. If the agent of the living party were allowed to testify against the estate of the decedent, as to matters occurring during the life of the deceased, the purpose of the statute would, in many cases, be defeated. Was it not also the purpose of this statute to prevent the agent of the living party from testifying as to matters that occurred in the decedent's lifetime? Judgment affirmed.

(16 Ind. App. 464)

WILLIAMS v. HANLEY et al.

(Appellate Court of Indiana. Dec. 17, 1896.)

ABSTRACTERS—NEGLIGENCE—COMPLAINT—NOMINAL DAMAGES.

1. A complaint alleged that plaintiff, having purchased a tax lien, employed defendants to make an abstract; that they failed to note thereon a mortgage, and a pending suit to foreclose it; that plaintiff, relying on the abstract, failed to make the mortgagee a party to an action to foreclose the tax lien; that the tax lien was foreclosed, and, after expiration of the time allowed by court to redeem, plaintiff purchased under the foreclosure decree; that in the meantime the mortgagee foreclosed its mortgage without plaintiff's knowledge, the lien of the mortgagee not being cut off by foreclosure of the tax lien; that by reason thereof plaintiff was subjected to costly litigation, and was compelled to pay a certain sum in redemption and satisfaction of the mortgage, to save and protect the title derived through foreclosure of the tax lien. *Held*, that the complaint did not show plaintiff entitled to more than nominal damages, as, the tax lien being the superior lien, sale thereunder passed title as against the mortgagee, though it was not a party to the foreclosure, subject to the right of redemption, and the averment that plaintiff was compelled to pay out money to protect his title, and to litigate the question of priority, was a legal conclusion, not sustained by the specific averments.

2. A judgment sustaining a demurrer to a complaint showing that plaintiff is at most entitled only to nominal damages will not be reversed.

Appeal from circuit court, Fountain county; J. M. Rabb, Judge.

Action by Charles F. Williams against J. Frank Hanley and others. Judgment for defendants. Plaintiff appeals. Affirmed.

Paul & Bruner, for appellant. J. Frank Hanley, for appellees.

REINHARD, J. The error complained of consists in the sustaining of the demurrer of the appellees to the complaint of the appellant. The appellees are abstracters of titles to real estate. The gist of the complaint is that the appellant employed them to make an abstract of title to certain real estate, and that they negligently failed to abstract a mortgage of record in the recorder's office of Warren county, where the land is situated, and also failed to include in such abstract a suit then pending in the circuit court of said county for the foreclosure of said mortgage, and that the appellant was damaged by the failure of appellees to properly note said incumbrance in said abstract. The abstract of title and certificate thereto, made and signed by the appellees, are set forth in the complaint. It appears from the complaint that the appellees are professional abstracters of titles to real estate in Warren county, where they have an office and hold themselves out as skillful and experienced abstracters to the public, for hire. In February, 1891, the appellant purchased the real estate in question at a delinquent tax sale as the property of Joseph Hedrick. In March, 1893, more than two years after such purchase by him, the appellant received from the auditor of Warren county a tax deed for said lands, which was duly recorded. In September, 1893, appellant, desiring to bring suit to quiet his title to said lands, employed the appellees to make him an abstract of title thereto, for the purpose of ascertaining who had or held any lien of any kind upon said real estate of record in any of the county offices of said county, where such records are kept, and also his pendens and suits, if any were pending, affecting such real estate, in order that he might make all proper and necessary parties to his action to quiet title on his tax deed. The appellees undertook to make and complete for him an abstract of title to said lands from the year 1866 up to and including the 14th day of September, 1893, under said employment, but they so negligently and carelessly performed their undertaking that, in making said abstract, they failed and neglected to show or mention a certain mortgage on said real estate, long before that time duly recorded in the recorder's office of said county, securing a note of \$933.12 in favor of the First National Bank of Danville, Ill., and executed by said Hedrick, which mortgage was wholly uncanceled and unsatisfied; and that a suit was then, and for a long time, to wit, two months, had been, pending in the circuit court of Warren county to foreclose the same, which suit was properly docketed in the office of the clerk of said court, but the appellees failed and neglected to mention said pending suit or the existence of said mortgage in said abstract. The appellant was wholly ignorant of the existence of said mortgage

and pending suit. The appellees attached to said abstract their official certificate, stating that they had examined the records of said county from the 23d day of July, 1866, to the 14th day of September, 1893, and found no transfers, mortgages, or other liens affecting the title to the real estate described, and shown upon the public records of said county. Appellant paid appellees \$7.50 for making said abstract, in accordance with his contract with them. Shortly after receiving such abstract, and relying upon the correctness thereof, the appellant employed attorneys, and directed them to begin and prosecute an action in the proper court to quiet his title to said real estate, which they did in the Warren circuit court, at its October term, 1893; and, because of the negligent omission of appellees to mention said mortgage or the pending suit to foreclose the same, the appellant and his attorneys, relying upon said abstract, failed to make said the First National Bank of Danville, Ill., a party to his action to quiet title on said tax deed. Such proceedings were had in connection with his said action in said court as resulted in a foreclosure of his tax lien on the 13th day of October, 1893, for the sum of \$512.38 and costs in the decree. The court gave 30 days within which to redeem said lands, after the expiration of which, no one having redeemed the same, the lands were duly sold by the sheriff under said decree to one Voris, who purchased the same for appellant, who subsequently received a sheriff's deed therefor. In the meantime, said bank foreclosed its mortgage without the knowledge of appellant, and caused the lands to be sold on the decree of foreclosure, said bank and its lien not being cut off or barred by the foreclosure of the appellant's tax lien, because it was not made a party to appellant's suit. By reason thereof the appellant was subjected to the payment of heavy and expensive litigation, costing him in expenses and attorney's fees \$300, and he has been compelled to pay, in redemption and satisfaction of said bank's mortgage, in order to save and protect his title to said lands, under the purchase at the sale on the decree foreclosing the tax lien, the further sum of \$822.29, all of which became necessary by the negligence of the appellees in the making of said abstract of title, and by reason of said negligence the appellant has sustained damages in the sum of \$1,500.

Appellant's counsel insist that the complaint shows that the appellant is entitled to substantial damages, while appellees' counsel as earnestly contend that appellant does not show himself entitled to receive more than nominal damages. Was the appellant injured by the failure of the appellees to fulfill their contract? When the appellant employed the appellees to prepare the abstract he had already acquired the lien upon the land. The lien, being for taxes, was superior to any other lien upon the real estate. Had he made the bank a party to his foreclosure suit, he

could have secured a decree, as between him and the bank, establishing the priority of his lien. But his failure to make the bank a party did not operate as a waiver of his right of priority. A senior lienholder may foreclose his lien without making the junior lienholder a party, and still retain the priority of his lien; or, at least, the merger of the lien into the decree, and the subsequent sale thereunder, do not render the title of the purchaser at such sale inferior to the title acquired by another at a sale upon the decree of foreclosure of a junior lien, unless the holder of the superior lien is a party to the foreclosure suit of the junior lien and fails to set up the priority of his own lien, or is barred in some way by the judgment of the court. The appellant does not aver in his complaint that he was made a party to the foreclosure suit of the bank. Of course, if he was a party thereto, he could easily have asserted and established the priority of his own lien. If he was not a party, he could have lost no rights, for no decree rendered against him would have any validity. The purchaser at the sale upon the junior lien—the mortgage of the bank—acquired no title superior to that of the appellant, and could not maintain any action for the possession of the lands without first redeeming from the sale upon the superior lien. The bank, as the holder of a mortgage lien, was bound to take notice of the appellant's tax lien and the proceedings thereunder, whether made a party to such proceedings or not, and its only remedy was to redeem from the sale thereunder within the proper time. The sale under the tax lien, and purchase thereat by the appellant, passed the title to him as against the bank, notwithstanding the bank was not a party to the foreclosure proceedings of the tax lien subject to the right of redemption. *Jenkins v. Newman*, 122 Ind. 99, 23 N. E. 683. It is difficult to understand, therefore, how the appellant could have sustained any substantial damage by reason of the appellees' failure to mention the mortgage and pending suit of the bank in the abstract. It is not shown how the appellant was deprived of any rights, or parted with anything of value, in reliance upon the statements or omissions of the abstract. It is true the complaint avers that appellant was compelled to pay out money in order to protect his title, and to litigate the question of priority, but there is an utter failure to show any necessity for such payments. The demurrer only admits facts that are well pleaded. It does not admit a legal conclusion. It is the specific allegations of a pleading which control, and not the conclusions. A party may aver that he was injured by the wrongful acts of another, but, if the specific facts averred show that there could have been no damages, he can recover none, for the specific averments always control the general allegations in such a pleading. *Elliott, App. Proc.* p. 588; *Warbritton v. Demorett*, 129 Ind. 346, 351, 27 N. E. 730, and 23 N. E. 613; *Racer v. State*, 131

Ind. 393, 401, 31 N. E. 81; *Moyer v. Railroad Co.*, 132 Ind. 88, 90, 31 N. E. 567. If it had been made to appear by the averments of the complaint that the appellant was compelled to pay out any money for the purpose of a suit to foreclose the right of redemption of the bank, the case might be different. But this is not made to appear. The complaint, at most, shows that the appellant is entitled to nominal damages. A judgment will not be reversed for sustaining a demurrer to such a complaint. Judgment affirmed.

RICHARDS v. REEVES et al.¹

(Appellate Court of Indiana. Dec. 16, 1896.)

VOLUNTARY CONVEYANCE—MINOR BENEFICIARIES—FAMILY SETTLEMENT—SETTING ASIDE—GRANTOR'S IMPROVIDENCE—EQUITY.

1. A contract which inures to the benefit of a third person may be rescinded by the parties before its acceptance by him.

2. When a contract is made for the benefit of a minor, the law puts in an acceptance for him, though he be ignorant of its existence.

3. Where a conveyance has been made as a family settlement, neither the grantor nor the grantee can change the transaction to the detriment of minor beneficiaries.

4. A voluntary family settlement will be set aside when it appears that the grantor did not intend to make it irrevocable, or that the settlement would be unreasonable or improvident for the lack of provision of revocation.

5. Where equity would have revoked a voluntary family settlement at the suit of the grantor, to relieve him from his improvidence, and there has been an attempted revocation by the grantee's voluntary reconveyance, and such revocation has not been executed at the grantor's death, the grantee, then claiming the benefit of the revocation, must show that the grantor received the benefits sought to be gained by the revocation, and that he is entitled to the equity in his favor.

Appeal from circuit court, Sullivan county; William W. Moffitt, Judge.

Action by Julia Amanda Reeves and others against John R. Richards to recover moneys alleged to be due them under a family settlement. From a judgment in favor of plaintiffs, defendant appeals. Affirmed.

John S. Bays, for appellant. Briggs & Lindley, for appellees.

LOTZ, C. J. On the 9th day of September, 1879, Sarah I. Thompson was the owner of 40 acres of land in Sullivan county, Ind. She was the wife of William A. Thompson. On that day (her husband joining with her) she conveyed the land to the appellant, John R. Richards. The deed recited that the conveyance was made on the consideration of one dollar and love and affection, and that "the further consideration of this conveyance is that the said John R. Richards, his heirs or assigns, shall pay to Tamar Isabel Furnish, Julia Amanda Furnish, and William Claude Furnish, grandchildren of said Sarah I. Thompson, each the sum of \$100 on the arrival of each of them, respectively, at the age of twenty-one years"; and it was further

¹ Superseded by opinion, 47 N. E. 232. Transferred to Supreme Court. See 49 N. E. 343.

therein provided that "the grantors herein reserve the use and control, rents and profits, of said premises during their natural lives, or the life of either of them." This action was brought by the grandchildren named in the deed to recover the sum due each one, respectively. The complaint alleges that Julia A. has intermarried with one Reeves, and Tamar I. with one Todd, and that they each have attained the age of 21 years. To this complaint John R. Richards filed an answer, alleging that at the time the conveyance was made to him, as charged in the complaint, he was the son of said Sarah I. Thompson; that, at the time the deed was executed, the said Sarah and her husband were each old and infirm, and unable to work and earn a living, or to accumulate any property; that said real estate was all the property that she or either of them owned at said time or any subsequent time; that they believed the said lands would afford to them, and each of them, a full, complete, and necessary maintenance during their natural lives, and that, upon the death of herself and husband, it was the desire of said Sarah that the said lands should go to the defendant; that said Sarah also desired, provided she found herself able to do so, to give to the plaintiffs the sum of \$100 each out of said land, to be paid by defendant to them when each arrived at the age of twenty-one years, as a voluntary gift; that said Sarah believed that the rents and profits of the land would be sufficient to support herself and husband during their natural lives, and to pay all taxes and assessments against the same, and to keep up and make all necessary repairs thereon, and made such gift to plaintiffs under such belief; that it was the intention of said Sarah to reserve a support and maintenance for herself and husband out of said lands, and that she had no intention or purpose of depriving herself and husband of such support, or of making such deed irrevocable; that it was her intention to reserve the right to revoke the deed should she find the interest reserved to be insufficient to support herself and husband during their lives; that by her ignorance and mistake, and that of the scrivener who wrote the deed, she did not express such power of revocation in the deed, nor discover the fact that it was omitted until some time after its execution; that, at the time of the execution of such deed, the plaintiffs, nor either of them, were of age, and that such provision made for them was wholly without consideration; that, after the execution of the deed, the said Sarah and her husband attempted to support themselves out of the rents and profits of said land, and to pay the taxes and assessments, and keep up the necessary repairs thereon; that, after they had used the premises for about one year, the said Sarah was stricken with disease, became unable to work, and incurred great expense for medical treatment and medicines, and that she then discovered that it would be impossible for herself and husband to obtain sup-

port and maintenance from the premises, and pay all bills for medicine and medical attention and the taxes and assessments, and make repairs which the said premises then required; that, after she discovered that said land under such conveyance would not yield enough to sustain and support herself and husband, she demanded that the defendant reconvey the lands to her; that after such demand, and in order to secure such maintenance, it was agreed between said Sarah and defendant that such conveyance should be revoked; that the defendant should reconvey the lands to said Sarah; that, in pursuance therewith, the defendant did on the 3d day of February, 1881, reconvey the lands to said Sarah. This last deed recites that it is on the consideration of one dollar, and "the further consideration of this deed is that it is made for the purpose of annulling a deed from said Sarah I. Thompson and husband, dated September 9, 1879, to said John Richards." There is also an averment concerning an agreement on the part of Sarah to reconvey the lands back to the defendant; but there is no direct allegation that such last conveyance was ever made. It does appear from the complaint, however, that the defendant afterwards became the owner of the land, and, as we construe the entire pleadings, the lands were reconveyed in pursuance of this agreement.

The facts of this case, narrowed down, are that an old and infirm woman is the owner of 40 acres of land. She has a husband, who is also old and infirm. Neither of them is capable of earning anything. The husband has no property, and the wife has none except the land, and they are both dependent upon the land for their support and maintenance. The wife, believing that the rents and profits will be sufficient to support herself and husband during their lives, and being desirous of making a settlement of the remainder upon her children, conveys the fee of the land to her son, reserving the possession and rents and profits during her life and that of her husband, and requiring of her son, in part consideration of the conveyance, to pay to three of her grandchildren the sum of \$100 each when they should attain the age of 21. After the conveyance, the wife falls sick. Additional expenses are incurred, and the rents and profits are found to be insufficient to maintain the old people, and make necessary repairs, and pay taxes and assessments. It was never the intention of the mother to deprive herself and husband of a maintenance. The reservation is not sufficient for this purpose. On account of her ignorance and inexperience, no power of revocation is reserved in the deed. She demands a reconveyance from her son, so that she may secure such maintenance; and the son reconveys, and in the deed of reconveyance it is expressly stipulated that its purpose is to annul the first deed. It thus appears that the mother received back all of the property which she parted with, and that a new conveyance was made to the son,

revoking his obligation to the grandchildren, and substituting in lieu thereof an obligation to pay taxes, assessments, and make repairs, thereby securing to her and her husband a greater provision from the rents and profits for their maintenance and support.

The rule is well established that when one person makes a promise which inures to the benefit of another person, not a party to the contract, such third person may adopt the contract, and enforce it. But the parties to the contract have the right to rescind it before it is accepted, and, if rescinded before acceptance, it cannot be enforced by such third person. *Insurance Co. v. Hutchings*, 100 Ind. 496. But, if a contract or other provision be made for the benefit of a minor, the law applies or puts in an acceptance for him, even though he be ignorant of its existence (*Copeland v. Summers*, 138 Ind. 219, 35 N. E. 514, and 37 N. E. 971; *Pruitt v. Pruitt*, 91 Ind. 595); and, ordinarily, such a contract cannot be rescinded after acceptance. In the case at bar the first conveyance on the part of the mother was a voluntary one. Mrs. Thompson received no consideration for it whatever. She evidently intended to make some provision for her child and grandchildren out of her estate. The conveyance was in the nature of a family settlement, and it is the policy of the law to uphold family settlements. And when such settlement was finally closed, with the execution of the deed, neither the grantor nor the grantee could change the transaction to the detriment of the minor beneficiaries. *Waterman v. Morgan*, 114 Ind. 237, 16 N. E. 590. The rules above stated are general rules. They are sometimes varied, or exceptions to them tolerated, on account of equitable considerations. In the old case of *Villers v. Beaumont*, 1 Vern. 100, the lord chancellor said: "If a man improvidently bind himself up by a voluntary deed, and not reserve a liberty to himself by a power of revocation, this court will not loose the fetters he hath put on himself, but he must lie on his own folly." Some of the more recent cases, both in England and in this country, have modified this harsh rule, although it must be admitted there is much conflict in the authorities bearing on this question. The better rule seems to be that in a voluntary settlement the absence of a power of revocation throws upon the person seeking to uphold the settlement the burden of proving that such a power was intentionally excluded by the settlor, and that, in the absence of such proof, the settlement may be set aside. And if an action be brought by the settlor himself, to set aside such voluntary settlement, equity will set it aside when it appears that he did not intend to make it irrevocable, or where the settlement would be unreasonable or improvident for the lack of a provision for a revocation. Thus, in *Garnsey v. Mundy*, 24 N. J. Eq. 243, a voluntary deed of trust, reserving no power of revocation, made with a

nominal consideration, and without legal advice as to its effect, and when there was evidence that its effect was misunderstood by the grantor, was set aside, and a reconveyance ordered. And it was further held that the fact that the grantor's infant children who were beneficiaries under the deed would not prevent the relief. See, also, *Everitt v. Everitt*, L. R. 10 Eq. 405; *Wollaston v. Tribe*, L. R. 9 Eq. 44. In *Ewing v. Wilson*, 132 Ind. 223, 31 N. E. 64, a son conveyed a large amount of property to his father, in trust for himself. There was no power of revocation reserved in the deed. Among other things in the deed, it was provided that, if the son died, the trust property should descend to his legal representatives. *Ewing v. Jones*, 130 Ind. 249, 29 N. E. 1057. The father reconveyed the property to the son. After the death of the son, some of his heirs, as his legal representatives, brought suit to recover a part of the trust property, upon the theory that a reconveyance by the father did not divest them of their rights. It was there held, among other things, that parol evidence was admissible, even where there was no fraud or mistake to show the facts surrounding the execution of the instrument, and that the deed should be read in the light of the circumstances attending its execution, and as interpreted by the subsequent acts of the grantor and the grantee.

In the case under consideration, Mrs. Thompson and her husband were an old and infirm couple. She sought to make settlement upon her son and grandchildren, and to reserve out of her property enough to maintain herself and husband, and to pay the taxes and assessments, and make necessary repairs. Her reservation proved insufficient. The settlement was an unreasonable and improvident one, for the lack of a provision for revocation. Had Mrs. Thompson brought suit to set aside the settlement upon averment and proof of the facts above stated, it would have been the duty of a court of chancery to relieve her from her improvidence, and she might have secured a revocation of the conveyance. A revocation did occur by the voluntary acts of the grantors and grantee. If Mrs. Thompson might have appealed to a court of equity for revocation, we know of no substantial reason why her grantee may not interpose the same facts as a defense to the payment of the money stipulated when he has voluntarily reconveyed, provided he can show an equity in himself. But his reconveyance, according to the averments, was not wholly disinterested. His sole purpose was not to relieve his mother from her improvidence. There was also an effort to relieve himself of his obligation to make the payments to the grandchildren, and substitute another obligation in lieu thereof. But there is nothing to show that he ever performed any part of the second obligation, or that his mother ever received any benefit from the revocation. For aught that appears, she may

have paid the taxes and assessments, and made the repairs herself; or her lands may have been sacrificed for such taxes and assessments, and her condition, so far as securing a maintenance for herself and husband, may have been no better after the revocation than before. While there is an equity shown for the mother which might have entitled her to a revocation, there is no showing that the appellant performed his contract, or that he did anything that raises an equity in his favor. He will not be permitted to avail himself of an equity in favor of his mother, unless he can also show an equity in favor of himself. For want of such showing, we think the answer insufficient, and there was no error in sustaining the demurrer to it. Judgment affirmed.

(167 Mass. 300)

AUSTIN et al. v. KIMBALL.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1897.)

EJECTMENT—RECOVERY OF TERM—TITLE TO SUPPORT.

1. Ejectment lies for the recovery of a term.
2. The assignor of a term has no right to possession, so as to enable him to recover in ejectment from the landlord to whom the assignee yielded possession.

Exceptions from superior court, Suffolk county; John W. Hammond, Judge.

Ejectment by G. F. Austin & Co. against one Kimball. A verdict was directed for defendant, and plaintiffs except. Overruled.

Gorham D. Williams and James P. Prince, for plaintiffs. Sherman L. Whipple and William R. Sears, for defendant.

ALLEN, J. Sanborn was lessor to the plaintiffs. The plaintiffs had sublet No. 32 to Barnard & Co., with Sanborn's consent, and Barnard & Co. had assigned their lease to Wilkins. The plaintiffs accepted Wilkins as tenant in place of Barnard & Co., but it does not appear whether or not Sanborn consented to the assignment to Wilkins. The defendant Kimball took Sanborn's title, and entered upon No. 32 for breach of the condition of the lease from Sanborn to the plaintiffs. Kimball thus stood in Sanborn's place. Wilkins yielded possession, but it does not appear whether he was bound to yield possession or not. The plaintiffs now bring an action of ejectment for the recovery of the unexpired term of their lease from Sanborn. Such an action still exists in this commonwealth (*Hodgkins v. Price*, 137 Mass. 13); but it can only be maintained by one who has the right of possession (*Tayl. Landl. & Ten.* § 698 et seq.). Upon the facts of the present case the plaintiffs must fail because they had no right of possession. If Kimball's entry was lawful, then the plaintiffs' rights under their lease from Sanborn were at an end. If his entry was unlawful, then Wilkins was not bound to yield to it, and the plaintiffs' right to recover rent from him re-

mained unimpaired, and the right of possession was in Wilkins. *Morse v. Goddard*, 13 Metc. 177; *George v. Putney*, 4 Cush. 351; *Whitney v. Dinsmore*, 6 Cush. 124, 128; *Towne v. Butterfield*, 97 Mass. 105; *Holbrook v. Young*, 108 Mass. 83; *Cobb v. Lavalley*, 89 Ill. 331. Exceptions overruled.

(167 Mass. 328)

IASIGI v. SHAW et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1897.)

TRUSTS—CONSTRUCTION—INTEREST OF BENEFICIARY.

Under a provision of a will creating a trust fund, the net income from which was directed to be paid to a son of the testator "during his life, upon his receipt in writing therefor, at such times, in such manner, and in such sums as to my said trustees shall seem fit, and at his decease the principal sum of said several trust funds, with the income, if any, which shall have accrued thereon, shall be paid to and distributed among his issue," the son has no interest in the income in the hands of the trustees that can be reached by his creditors.

Appeal from supreme judicial court, Suffolk county; O. Allen, Judge.

Action in equity by Albert W. Iasigi against John Oakes Shaw, Jr., George L. Clarke, and Thomas G. Iasigi. Decree dismissing the bill, from which plaintiff appeals. Affirmed.

J. L. Thorndike, for appellant. Charles C. Read, for appellees John Oakes Shaw, Jr., and George Lemist Clarke.

BARKER, J. The decisions of this court which hold that a trust can be so framed that the interest of the beneficiary cannot be reached by his creditors, although there is no cesser or limitation of his estate in such an event, were considered in the recent case of *Wemyss v. White*, 159 Mass. 484, 34 N. E. 718, with the result then stated that "the question in every case is whether an equitable cestui que trust takes an absolute unqualified interest, which he can assign, and which can be reached by his creditors, or whether he takes merely a qualified interest, over which he has no power until the property, principal or income, comes into his possession. This question is to be determined by ascertaining the intention of the creator of the trust. * * * 'Such provision need not be in express terms, but it is sufficient if the intention is clearly to be gathered from the instrument, when considered in the light of the circumstances.'" In the present case we think it sufficiently appears that the testator intended that this son should have only a qualified interest in the income of the trust, subject entirely to the discretion of the trustees, and that he should have no power over the income until it should actually be paid into his own hands, and upon his own receipt in writing, by the trustees acting in their discretion; and that it was the further intention of the

testator that all income accruing during the life of the son, and not so paid to him, should, upon his death, go with the principal of the trust fund to his issue, or, in default of such issue, to his surviving brothers and sisters and the issue of any of his deceased brothers and sisters. This is the natural interpretation of the language of the clause creating the trust, in which the net income is directed to be paid to the son "during his life, upon his receipt in writing therefor, at such times, in such manner, and in such sums as to my said trustees shall seem fit; and, at his decease, the principal sum of said several trust funds, with the income of any which shall have accrued thereon, shall be paid and distributed among his issue," etc. We cannot accede to the construction of this clause contended for by the plaintiff, that the income must at all events be paid to the son at some time, and that the accrued income which is to go to his brothers and sisters at his decease is merely such as may come in between that time and the actual distribution of the fund. On the other hand, we think that the testator had in mind and provided for the contingency that the exercise of the discretion given to his trustees to pay the income to the son "at such times, in such manner, and in such sums" as to them should seem fit, would result in leaving in their hands, until the death of the son, income which it had not seemed fit to them to pay to him at all, and which in such case is given elsewhere by the will, by the directions that the fund, "with the income, if any, which shall have accrued thereon, shall be paid to and distributed among his issue surviving" at his decease, and that, if he leave no issue, "then said principal sum and the accumulations thereon" shall be otherwise distributed. This construction of the clause is to some extent strengthened by the other provisions of the will. The testator left a widow and ten children, five of whom were sons. The will established a trust for his wife, the income of which was to be paid to her in equal quarter-annual payments, but no payments should be made in anticipation, or except upon her written order or request. The bulk of the estate was given to his eldest son and to another person, as trustees, to hold until a date something more than two years after the testator's death, when, or sooner if the distribution would yield the sum of \$50,000 for each child, the principal was to be distributed among his children, the shares of each of the daughters and of the three younger sons being put in trust, and those of the two eldest sons paid to them, with a provision for an advancement to them to enable them to carry on without embarrassment the business in which they were engaged when the will was made. The trusts for the daughters were to be several and separate, and the net income was to be paid to each daughter during her life "upon her separate receipt,

but not by way of anticipation." The same clause which created the present trust created at the same time separate trusts in the same terms for another son, as well as for the son whose interest is the subject of the present suit. The share of the remaining son was put in trust until he should attain the age of 25 years, the net income until that time to be paid to him "upon his receipt in writing therefor at such times, in such sums, and in such manner as my said trustees shall deem expedient," the principal, with the income, if any, accrued thereon, to be then paid over to him; and with the power to dispose of his portion by will after attaining the age of 21, and the further direction to the trustees that, if he should die intestate, the portion should be distributed among those who would be entitled thereto if he had died possessed thereof as personal property. It thus appears that for some reason the testator, instead of treating the present son and one other of his sons as he did the other three, and providing that their portions should at length become their absolute property, gave these two sons only a limited and qualified interest, similar to that which he gave to his wife and daughters, and himself provided for the disposition of the portions at their decease, giving them no right even of disposal by will. This in some degree supports the conclusion that his intention was not to give to these two sons any absolute or unqualified interest, but one over which they should have no power except to receive such income as it should seem fit to the testator's trustees to pay them upon their receipts in writing. Decree dismissing the bill affirmed.

(167 Mass. 224)

YOUNG v. MILLER.

(Supreme Judicial Court of Massachusetts. Plymouth. Jan. 5, 1897.)

INJURIES TO EMPLOYE—ASSUMPTION OF RISK.

A master is not liable to an employé, a general workman, for injuries from falling through, at the noon hour, when not at work, trapdoors in the floor of the work building, left open by an employé, though the master has not warned him that they were open, when the employé knew that the trapdoors were there, and were liable to be open from time to time.

Exceptions from superior court, Plymouth county; Sheldon, Judge.

Action by Young against Miller for personal injuries. From a ruling of the court for defendant, plaintiff brings exceptions. Overruled.

Plaintiff was employed by defendant as a general workman, a part of his duty being to make the tools for the other workmen. At the trial it appeared that, while defendant's engineer was at work in the building, he left a trapdoor open, and plaintiff fell through it, and was injured.

R. O. Harris, for plaintiff. J. Lowell, Jr., and H. H. Darling, for defendant.

HOLMES, J. The plaintiff knew the permanent elements of the danger to which he was exposed. He knew that the trapdoors were where they were, and that they were likely to be opened from time to time. The doors of themselves were not a defect, and he took the risk of them. The only thing he did not know was the precise moment when the doors would be raised, but that he could find out if he looked. They were raised, and the accident happened, during the noon hour, at which time the plaintiff was not called on to work. A majority of the court are of opinion, although I share the doubts of the minority, that the defendant's duty did not extend to giving notice or warning that the doors were open to one who knew that they were liable to be so at any time. See *Keenan v. Illuminating Co.*, 159 Mass. 379, 34 N. E. 366; *McCann v. Kennedy*, 167 Mass. 23, 44 N. E. 1055.

Exceptions overruled.

(167 Mass. 225)

HOGARTH v. POCASSET MANUF'G CO.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 5, 1897.)

MASTER AND SERVANT—PERSONAL INJURY OF EMPLOYEE—ASSUMED RISK—CONSTRUCTION OF PLEADING.

1. It does not follow from the fact that the employé takes the risk of the dangers incident to the visible permanent structure of the building in which he works that, without being informed, he is chargeable with notice of every detail of the building, such as a trapdoor usually kept closed.

2. In an action to recover for a personal injury received by plaintiff, a mill operative, while working in defendant's factory, an allegation in the declaration that defendant negligently maintained a certain trap and opening in the floor, into which plaintiff fell, may be construed to mean that defendant was negligently keeping the trap open at the time of the accident, without charging any permanent defect in the structure of the building; and such construction will be given it where the case was tried on that theory by plaintiff without objection.

Exceptions from superior court, Bristol county; Elisha B. Maynard, Judge.

Action of tort at common law by Ellen Hogarth against the Pocasset Manufacturing Company to recover for personal injuries sustained by plaintiff while in defendant's employ as a mill operative. The declaration alleged that defendant negligently maintained in the floor of the room where plaintiff worked a certain trap and opening, into which plaintiff fell while exercising due care. Defendant requested the court to rule as follows: "(1) On the whole evidence the plaintiff cannot recover. (2) In the absence of evidence showing a better and safer way of oiling this bearing, it was not negligence on the part of the defendant to maintain the trapdoor as it was at the time of the accident." Plaintiff's counsel disclaimed recovery on the ground of any permanent defect in the structure of the building. The court refused to rule as requested, and submitted the case to the jury,

who found for plaintiff, and defendant brings exceptions. Exceptions overruled.

J. W. Cummings and E. Higginson, for plaintiff. Jennings & Morton, for defendant.

HOLMES, J. This case is not unlike *Young v. Miller* (Mass.) 45 N. E. 628, in its facts, except that here the plaintiff testified that she did not know of the trapdoor. Her testimony is hard to believe, no doubt, as she passed over the door many times a day, and as the wheels of her bobbin box probably jolted as they went over its hinges; but we cannot say that she must have known it. She may have been unusually absent minded. Again, it does not follow, from the fact that she took the risk of dangers permanently incident to the visible permanent structure (*Gleason v. Railroad Co.*, 159 Mass. 68, 34 N. E. 79), that she must be assumed actually to have known of every detail of the structure, and therefore to have known of the trapdoor, and the possibility of its being open once in a while. Thus it will be seen that the case is stronger than *Young v. Miller*, and, notwithstanding the decision in that case, which was very near the line, a majority of the court are of opinion that a jury might have found the plaintiff entitled to be warned to look out for the opening of the doors. On the evidence the plaintiff was entitled to go to the jury, and the judge was right in refusing to rule the other way.

It is argued for the defendant that the request had reference to the declaration, and that the declaration only charges an improper structure. Possibly, if attention had been called to it, that would have been the interpretation; but if it had been read so narrowly, and anything had been understood to depend on it, probably the plaintiff would have amended. Although the verb used is "maintained," the object is "trap and opening," and undoubtedly the plaintiff meant to charge the defendant with negligently keeping the opening at the moment of the accident. The plaintiff had conceded that there was no defect in the ways, works, and machinery. As the action was at common law, this fairly would have been understood by the judge to mean that there was no permanent defect in the structure. We must assume that the case was tried and went to the jury on the question whether there was negligence in regard to the hole at the moment of the accident, and that the judge was warranted in supposing that to be the issue which the parties meant to try. If the defendant intended to cut off that issue by reason of the form of the declaration, it should have called attention to it.

From what we have said it will be seen how we must deal with the second request. No doubt it was capable of an interpretation like the stricter interpretation of the count. But, so interpreted, the proposition was ad-

mitted, and the refusal of the judge must have been based on the obvious possibility that it might be understood to mean more. In view of the plaintiff's admission, it probably would have been taken to mean that there was no negligence on the defendant's part at the moment of the accident in having no signal of danger or protection at the trap, even as towards persons who did not know that the trapdoor was there. That was a question for the jury.

Exceptions overruled.

(55 Ohio St. 233)

**WHEELING, L. E. & P. COAL CO. v.
FIRST NAT. BANK OF
SMITHFIELD.**

(Supreme Court of Ohio. Nov. 17, 1896.)

**SALE ON EXECUTION — STATUTORY PROVISIONS —
VALIDITY OF LEVY AS AGAINST SUBSEQUENT
CREDITORS — FOREIGN EXECUTION — EXTENT OF
JUDGMENT LIEN — CONSTRUCTIVE NOTICE OF
LIEN.**

1. Statutory provisions prescribing the order to be observed by an officer in subjecting the debtor's property to sale on a writ of execution are directory in their nature, and for the benefit of the debtor, who may waive strict compliance therewith; and such waiver will be presumed unless he assert his right by a direct proceeding to set aside the action of the officer.

2. As against subsequent purchasers and creditors, it is not essential to the validity of a levy of an execution on land that the debtor be without chattel property on which to levy; nor will the levy be rendered invalid, or ineffectual to create a lien, by the omission of the officer to indorse on the writ, no goods.

3. A valid levy of a foreign execution on land of the debtor has the effect of extending the lien of the judgment to the land seized, and the lien is not limited in duration to the time the writ has to run, but may be preserved and continued in force as long as the judgment remains unsatisfied and is not allowed to become dormant, in like manner that the lien of the judgment on land in the county where rendered may be.

4. Return of the writ by direction of the creditor, without a sale of the property, is not a discharge of the lien.

5. The entries on the foreign execution docket, which the sheriff is required to make, of the date and amount of the judgment, with a copy of the levy and description of the land, are constructive notice of the lien, binding upon subsequent purchasers and creditors while the lien remains in force.

(Syllabus by the Court.)

Error to circuit court, Jefferson county.

Action by the First National Bank of Smithfield against the Wheeling, Lake Erie & Pittsburgh Coal Company. Judgment for plaintiff, and defendant brings error. Affirmed.

Swayne, Swayne, Hayes & Tyler and John M. Cook, for plaintiff in error. Earnest L. Finley, for defendant in error.

WILLIAMS, C. J. The First National Bank of Smithfield, defendant in error, duly recovered a money judgment against George Medill and others in the court of common pleas of Franklin county on the 19th day of June, 1888, and on the same day caused an execution to be

issued thereon to the sheriff of Jefferson county, who, on the 21st day of the same month, levied the writ on a tract of land situate in that county. The levy was indorsed on the writ, with a full description of the land, and an entry thereof was duly made by the sheriff in his foreign execution docket, showing the amount of the judgment, the description of the land, the date of the levy, and all other facts required by law to be entered on his docket. Those entries were made at the time of the levy, and indexed in the docket, direct and reverse. Afterwards, on the 10th day of July, 1888, the execution was returned, by order of the plaintiff's attorney, without further proceedings, which fact was also entered in the foreign execution docket. Both the levy and entries fail to state that no goods or chattels could be found whereon to levy the execution, and it does not appear that an effort was made to find any. The land on which the levy was made, was at the time owned by Medill, the judgment debtor, but was incumbered by a mortgage, previously executed by him, which had been recorded. Underlying the surface of the land was a vein of stone coal known as "No. 8 Vein, Pittsburgh Coal," which, after the levy of the execution, was released by the mortgagee from the operation of his mortgage, and soon thereafter sold and conveyed by Medill to one Harm, who then sold and conveyed the same to the plaintiff in error. These purchases were made in good faith, for value, and without actual knowledge of the execution levy or the judgment. After the last purchase was made, to wit, on the 30th day of March, 1891, the mortgage was foreclosed, and all of the land sold except the vein of coal which had been released, and the proceeds of the sale were insufficient to reach the judgment of the bank, but were exhausted in the payment of the mortgage indebtedness and prior liens. Thereupon the action below was brought by the bank, to which the plaintiff in error was made a party defendant, to obtain a sale of the vein of coal and subject the proceeds to the satisfaction of the bank's judgment. The plaintiff in error set up its claim as a purchaser of the coal vein, and prayed that its title might be protected. The circuit court, to which the cause had been taken on appeal, found the facts substantially as above stated, and decreed the sale of the property in question, and the application of the proceeds to the satisfaction of the bank's judgment; holding that, by the levy the bank obtained a valid lien, and that the plaintiff in error, under its purchase, took subject thereto. The contention of the plaintiff in error here is (1) that the bank acquired no lien on the land, because the levy was defective; or (2) if a lien was thereby obtained, it expired with the execution, and therefore was not subsisting when the plaintiff in error made its purchase.

The defect in the levy which it is claimed defeats the lien attempted to be obtained by it is the omission of the sheriff to indorse on the writ the want of goods and chattels of the judgment debtor on which to levy the

execution, and the absence of any showing that there was not sufficient property of that kind to satisfy the judgment. This claim is based upon section 5383 of the Revised Statutes, which provides that "the officer to whom a writ of execution is delivered shall proceed, immediately to levy the same upon the goods and chattels of the debtor; but if no goods and chattels can be found the officer shall endorse on the execution the words 'No goods,' and forthwith levy the same upon the lands and tenements of the debtor which are liable to satisfy the judgment." This section of the statute, it is contended, precludes the making of a valid levy on lands until the officer, after a proper search, has failed to find sufficient chattel property of the debtor to satisfy the writ; and the absence of an indorsement on the writ of the want of such property, appearing in the entries on the execution docket, prevents their operation as constructive notice, binding on subsequent purchasers or creditors. But it is generally held that statutory provisions, like those contained in the section referred to, prescribing the order to be observed by the officer in subjecting the property of the debtor to sale on writs of execution, are for the benefit of the debtor, which he may waive. They are directory in their nature, and, though a failure to observe the order prescribed is an irregularity which may be corrected in a direct proceeding instituted by the debtor, the levy is not open to collateral attack on that ground. While the statute enjoins the duty on the officer, in making a levy of his writ, to first seize the debtor's personal property before resorting to his real property, it does not declare that, unless that order is pursued, a levy on the debtor's land shall be invalid, or ineffectual to create a lien; and the failure of the officer to proceed in the precise order directed should not deprive the creditor of the benefit of the levy, so long, at least, as the debtor himself makes no objection to it. It may be to the advantage of the debtor to save his real property from sale, and this he may do by compelling resort first to be had to his chattel property when that is sufficient to satisfy the writ; but, if he chooses not to exercise his right in that respect, a stranger, who at the time had no interest in the property, cannot be heard to assert it for him, or interpose it as a ground of objection to a levy on the debtor's real property, nor would he seem to have any just ground of complaint where he buys after the lien has attached, and with legal notice of its existence. An entry upon the land by the officer holding the writ is not necessary to constitute a valid levy. It is sufficient if the levy be indorsed on the writ with a proper description of the land. The sheriff is required to keep in his office a foreign execution docket in which it is his duty to make entries of the date of each execution received by him from another county, and the date and amount of the judgment,

and copy therein, with his return, a full description of any real estate levied on; and the statute declares that "such entries so made shall be notice to subsequent purchasers and creditors of the matters therein contained." When a levy is made upon land, the presumption is there were no goods on which to levy; but, if a counter presumption should arise from the absence of an indorsement of no goods on the writ, that could only affect the burden of proof in a controversy where the fact is material,—that is, where the validity of the levy is attacked in a direct proceeding by a party entitled to attack it. So that when, as in the case now before us, lands are purchased from a judgment debtor after the levy of an execution upon them, and while the levy is a subsisting one, with legal notice of its existence, the omission of the officer to indorse "No goods" on the writ, or to make search for chattel property, does not render the levy invalid, or ineffectual as a lien, as against such purchaser.

The further inquiry in the case relates to the question whether the lien created by the levy had expired, or ceased to be operative, when the plaintiff in error acquired his title to the real property involved in this litigation. This question must find its solution in our legislation on the subject, the most important provisions of which are contained in sections 5374, 5375, and 5380 of the Revised Statutes. By the provisions of section 5374, the lands and tenements of a judgment debtor, not exempt by law, situated in any county in the state, are liable to be taken on execution. And section 5375 provides that "such lands and tenements, within the county where the judgment is rendered, shall be bound for the satisfaction thereof from the first day of the term at which the judgment is rendered, * * * and all other lands, as well as goods and chattels of the debtor, shall be bound from the time they are seized in execution." It is not doubted that, by force of this last section, the judgment operates as a lien on all the lands of the judgment debtor in the county where the judgment is rendered. This is so because the statute declares such lands shall be bound for the satisfaction of the judgment; and, as the same language is employed to create a charge upon the debtor's lands situate in another county, when taken on execution issued on the judgment, it would seem to follow that, when so taken, the lien of the judgment operates upon them thereafter, as it does upon lands in the county where the judgment is rendered. No distinction in this respect is made by the statute, the only difference being with regard to the time when the lien attaches; and in the one case the lien is general upon all the debtor's lands in the county, while in the other it becomes specific, and is limited to the lands actually seized. The reason for these differences is manifest. The judgment appears upon the

public records of the county where rendered, and is constructive notice to all persons dealing with the debtor's land situated in that county. Its existence and amount can be readily ascertained by an examination of the records. But it would be an unreasonable requirement that a person should make an examination of the public records of all the counties of the state before he could safely acquire property which is shown to be clear by the records of the county where it is situated. When, therefore, an execution issued to another county is there levied on lands, the sheriff is required to enter upon his foreign execution docket the date and amount of the judgment, by what court rendered, with a description of the land levied upon. This docket is a public record of that county, and the entries become, by force of the statute, constructive notice, like other records of the county. Thereafter the judgment has the same effect and operation, as a lien on the lands so taken, as it has upon lands in the county where rendered, and the lien may be preserved and continued in force in the same way. The effect of the levy is to extend the lien of the judgment to the land seized, with all the legal consequences incident to the judgment. The duration of the lien is not limited to the time the writ has to run. The language of section 5380, if execution be not sued out within five years from the rendition of the judgment, or if that period intervenes between executions, "the judgment shall become dormant, and shall cease to operate as a lien on the estate of the debtor," plainly imports that it shall not so cease to operate when executions are issued within the times mentioned; and that language is not limited in its application to the lien of the judgment on the lands of the debtor in the county where rendered.

It is contended, however, that other provisions of the statute require the sheriff to immediately proceed after levy of the execution to cause the lands to be appraised and sold, and that a return of the writ, after levy and before sale, by order of the creditor, thereby interrupting the officer's proceeding, and preventing the performance of his legal duties, discharges the levy, and terminates the lien. It is apparent that to sustain this contention would practically defeat the provisions of section 5380, which clearly permit the lien to continue for a period of five years between executions. Under that section it has been the common practice to cause executions to be levied, and direct a return of the writ without sale, in order to obtain or preserve a lien; and we do not understand it to be questioned that the statute permits this to be done where the levy is on lands situate in the county where the judgment was rendered. The operation of the statute authorizing the continuation of judgment liens in that mode is general, and without restriction as to where the lands may be situated; and the statutory provisions regulat-

ing the appraisement and sale of lands taken on execution are applicable alike in all cases, without regard to the county in which the lands may be located. Any argument of inconvenience or delay to other creditors, resulting from that method of perpetuating the judgment lien, applies with no more force where the writ is levied outside of the county than it does to other execution levies; and there can be no greater inconvenience or delay, in either case, than usually exists where property which other creditors seek to reach is incumbered with a valid lien. Such a lien does not interfere with the acquisition of subsequent liens, nor the remedies for their enforcement, nor the remedies of other creditors; and a purchaser always buys subject to a lien disclosed by public records which he is bound to examine. An examination of the sheriff's foreign execution docket by the plaintiff in error before the consummation of his purchase would have afforded sufficient information of the bank's lien upon the property, and that the judgment had not been satisfied or suffered to become dormant; and the circuit court, in our opinion, committed no error in directing the application of the proceeds of the sale to the satisfaction of the judgment. Judgment affirmed.

(55 Ohio St. 256)

MASON v. HULL et al.

(Supreme Court of Ohio. Nov. 17, 1896.)

LIEN OF FOREIGN EXECUTION—WAIVER—MARSHALING ASSETS.

1. A lien obtained by the levy of a foreign execution on the lands of the judgment debtor is not waived nor abandoned by suing out another execution on the judgment, and causing it to be levied on the same lands.

2. The rule that a creditor who has a lien on one fund only may compel another creditor having a prior lien thereon and also a lien upon another fund to exhaust the latter before resorting to the former is applicable only where both funds are the property of the common debtor. It has no application where the exclusive fund is the property of a surety for the debt for which that fund is bound.

(Syllabus by the Court.)

Error to circuit court, Crawford county.

Action between Lewis H. Mason and J. F. C. Hull and others to determine the priority of judgment and mortgage liens. From the judgment, Lewis H. Mason brings error. Reversed.

This case was argued and submitted with the preceding one.—Wheeling, L. E. & P. Coal Co. v. First Nat. Bank of Smithfield, 54 Ohio St. 14, 45 N. E. 630. The report of that case disposes of some of the questions involved in this one. A statement of the facts that are material in the consideration of other questions here presented will be found in the opinion.

Cahill Bros. and J. O. Tobias, for plaintiff in error. Harris & Sears and Finley & Bennett, for defendant in error Sturgeon.

WILLIAMS, C. J. The controversy here relates to the distribution of a fund in the hands

of Hull, as assignee for the benefit of the creditors of Michael Charlton. The fund is the proceeds of the sale of lands on which, at the time of the assignment, the plaintiff in error, and Sturgeon, the defendant in error, each claim to have had a lien, and, not being sufficient to satisfy both, the priority, as between them, is the matter in dispute here. The plaintiff in error recovered a money judgment against the assignor, Michael Charlton, and A. B. Charlton, in the court of common pleas of Wyandot county, on the 17th day of November, 1886, and caused an execution to issue thereon to the sheriff of Crawford county, who, on the 30th day of that month, levied the writ on the lands in question, then owned by Michael Charlton, and made all the necessary entries concerning the writ and levy in his foreign execution docket. The writ was returned by order of the plaintiff's attorney, without further proceedings under it. An execution was also issued on the judgment to the sheriff of Columbiana county, and was levied by him on lands there situate, belonging to A. B. Charlton, on the 18th day of November, 1886, and a return thereof made similar to that on the Crawford county execution. A. B. Charlton was surety of Michael Charlton for the debt on which the judgment was rendered. After the executions were so levied and returned, Michael Charlton executed two mortgages on the Crawford county lands, on which the levy had been made, to Sturgeon, as security for a bona fide indebtedness. One of the mortgages was filed for record August 22, 1887, and the other April 7, 1888. On the 7th day of November, 1891, the plaintiff in error caused another execution to be issued on his judgment recovered in Wyandot county, directed to the sheriff of Crawford county, which was on that day levied on the same lands that were seized on the first writ, and returned without sale; and a like proceeding was had with respect to the lands of A. B. Charlton, in Columbiana county. Upon this state of facts the court of common pleas gave the judgment lien priority over the mortgages, and directed the distribution of the fund accordingly. The circuit court reversed the judgment.

Under the decision in the case of *Wheeling, L. E. & P. Coal Co. v. First Nat. Bank of Smithfield*, 54 Ohio St. 14, 45 N. E. 630, the lien of the judgment on the Crawford county lands was a valid and subsisting one when the mortgages were executed and filed for record, and the lien of the latter was subordinate to that of the judgment, unless the issuing and levy of the subsequent execution constituted an abandonment of the lien resulting from the levy of the former one; and whether it did or not is one of the questions peculiar to this case. The object in suing out the last execution was to prevent the judgment from becoming dormant, and to continue its lien on the lands taken on the first writ. There was no other way in which that could be done, except, perhaps, by

suit to marshal the liens and bring the lands to sale. It is suggested that a writ could have been issued directing the sale under the former levy; but the requirement of such a writ to sell is not more imperative than that of the execution which was issued. The course pursued would be unobjectionable as a method of preserving the lien of the judgment on lands situated in the county where it was recovered. *Bouton v. Lord*, 10 Ohio St. 453; *Liebman v. Ashbacher*, 36 Ohio St. 94. And the statute does not require a different mode where the lands lie in another county. The mortgagee is in no worse position by the continuation of the lien by the method adopted than he was when his mortgages were made. They were subordinate to the judgment lien when taken, and the security thereby obtained has not been diminished. The judgment was then unsatisfied and is still so; and instead of the issuing and levying of the last execution indicating an intention to waive or abandon the lien created by the levy of the first one, or justifying any inference by the mortgagee to that effect, it afforded unequivocal evidence of the contrary intention. There was, therefore, no waiver or abandonment of the judgment lien; and, as it remained in force when the proceeding was commenced by the assignee to sell the lands, it was entitled to priority over the mortgages.

Another claim made in this case, but apparently not so much relied on, is that as the judgment was a lien on the lands of A. B. Charlton, in Columbiana county, as well as on those of Michael in Crawford county, while the mortgages were liens only on the latter, the plaintiff in error should be required to first exhaust the Columbiana county land, before resorting to that incumbered by the mortgages. But it is clear the facts do not make a case for the application of the principle that a creditor who has a lien on one fund only may compel another creditor having a prior lien thereon, and also a lien upon another fund, to exhaust the latter before resorting to the former fund. That rule applies only where both funds are the property of the common debtor, or person who ought in equity to pay both creditors; it has no application where the exclusive fund is the property of a surety for the debt for which that fund is bound. Here, A. B. Charlton was surety for Michael on the debt, the collection of which was sought by the levy of the execution on the lands of the former. It is his equitable right to have the principal's property applied to the satisfaction of the debt, to the exoneration of his own; or, if he should be compelled to pay it, he would be entitled to be subrogated to the rights of the creditor, and enforce the judgment lien against the property of the principal, and to all the benefits of that lien, which, being superior to Sturgeon's mortgages, would at last appropriate the fund in question in preference to the mortgages. The judgment of the circuit court must be reversed, and that of the common pleas affirmed.

(55 Ohio St. 398)

STRANAHAN BROS. CATERING CO. v. COIT.

(Supreme Court of Ohio. Dec. 8, 1896.)

MASTER AND SERVANT—MALICIOUS ACT OF SERVANT—LIABILITY OF MASTER—INJURY TO THIRD PERSONS—DAMAGES.

1. A master is liable for the malicious acts of his servant, whereby others are injured, if the acts are done within the scope of the employment, and in the execution of the service for which he was engaged by the master.

2. Where a master owes to a third person the performance of some duty, as to do or not to do a particular act, and commits the performance of the duty to a servant, the master cannot escape responsibility if the servant fails to perform it, whether such failure be accidental or willful, or whether it be the result of negligence or malice. Nor is the case altered if it appear that the malice was directed to the master.

3. Where a master is under contract to deliver to the proprietor of a cheese and butter factory pure milk, and has knowledge that the milk so delivered is to be mixed with the milk of other patrons, and intrusts the delivery to a servant, who, in the course of such employment, delivers adulterated milk, the master is liable for damages necessarily and directly resulting by reason of such delivery; and it is not a defense to show that the servant, without authority and purposely, and to gratify his malice towards his employer, and with intent to injure him, adulterated the milk so delivered by mixing with it water, and that the master had no knowledge of such adulteration. In such case the rule of damages is compensation for the injury.

Bradbury, J., dissenting.

(Syllabus by the Court.)

Error to circuit court, Portage county.

Action by the Stranahan Bros. Catering Company against Frank R. Coit. Judgment for defendant, and plaintiff brings error. Reversed.

The plaintiff's action was brought upon a petition of which the following is a copy: "Plaintiff is a corporation, duly organized and doing business, with its principal office in Cleveland, Ohio. That said plaintiff is engaged in the business of bakers and general caterers in the city of Cleveland, Ohio, and also in the manufacture of butter, cheese, and candies, and other confectionery. That in said business, and each of its branches, it requires, needs, and uses large quantities of pure milk and cream, butter, and cheese, and ships large quantities of butter and cheese into the general market. That as a part of its said business it runs a butter and cheese factory at Mantua, Ohio, where it purchases from its patrons, and receives, a large amount of milk, to be in part manufactured into butter and cheese, and in part shipped to its principal place of business, and in part skimmed and the cream therefrom sent to it at its said place of business in Cleveland, to be used in its said business as aforesaid. That defendant, Frank R. Coit, was one of plaintiff's patrons, and furnished large quantities of milk, delivered at its said factory at Mantua, Ohio. That said defendant promised and agreed, at the time of bringing, first, his milk

to plaintiff's said factory, to bring nothing but milk of first class or superior quality. That he brought milk to said factory from December 14, 1891, to November 21, 1892, and in all about 120,000 pounds, and received therefor the price of a superior quality of milk, to wit, about \$1,150; but that said defendant, Coit, instead of bringing first-class milk, or milk of a superior quality, during all of said time furnished plaintiff at its said factory, milk adulterated with water, only about two-thirds of which was milk and one-third water, and made foul by stale, filthy, and impure water, well knowing, at said time, it was to be placed with and mixed with the other milk of said factory, and knowing it was to be used in plaintiff's business as aforesaid. That the entire amount of milk received and used at said factory, as said defendant well knew, amounted to about 7,000 pounds daily, upon the average. By reason of said adulterated milk furnished by said defendant, the product of said factory was greatly lessened and damaged. That the butter and cheese manufactured therefrom, and the milk with which said adulterated milk furnished by defendant was mixed, were poor, and of an inferior quality, and soon became unfit for use, or for the trade, except as second or third class, or very inferior quality, and many times became wholly worthless. That large quantities of cream from said factory, which otherwise would have remained good, sweet, and wholesome, became thereby sour, tainted, and unfit for use, and entirely worthless, and the business of plaintiff greatly injured thereby; the said defendant well knowing the uses to which the milk and cream from said factory would be put, and that plaintiff's business, in a great measure, depended thereon; and defendant knew that plaintiff's said business depended upon the absolute purity of the milk from said factory. Yet defendant continued to thus send impure, unwholesome, foul, and adulterated milk to said factory, knowing the same to be adulterated, and palming off upon plaintiff, for pure milk, milk that had been watered and adulterated, and to the damage of plaintiff as set forth herein, in the sum and to the amount of (\$4,000) four thousand dollars. Wherefore plaintiff prays judgment against said defendant for said sum of \$4,000, with interest thereon from November 21, 1892." Defendant, by answer, admitted the corporate character of plaintiff, and that it was doing business at Cleveland and denied all other averments. By cross petition he alleged "that, on the 21st day of November, 1892, the said plaintiff was indebted to him for milk before that time furnished it, in the sum of \$219, that the same is now due and not paid," and prayed judgment for that sum and interest.

At the trial, as appears by the bill of exceptions, "the plaintiff, to maintain the issues on its part, introduced evidence tending to sustain the allegations of the petition; and the defendant offered evidence tending to show

that he, said defendant, did not water the milk, or know that it had been or was watered, and that he had in his employ one Ed. Miller, who assisted in milking the cows, and part of the time delivered the milk to the factory of plaintiff, and that the said Miller, without his (defendant's) knowledge, for the purpose of injuring the defendant, maliciously watered the milk which was delivered to plaintiff's factory by defendant or his employé, but without any knowledge or suspicion on defendant's part that it had been watered; that while said milk may have been watered by said Miller during the period he (said Miller) was in the employ of defendant, yet it was no part of his duty, nor was he in any way authorized, to water said milk, and that in doing it said Miller acted, not for defendant, but to injure defendant; but it was the duty of said Miller to milk the cows of defendant in his absence, and to assist defendant when at home, and in his (defendant's) absence to deliver the milk to plaintiff's factory, and that other times he was to deliver milk at the factory of plaintiff as a part of his employment a part of the time at least, but that it was no part of his duty, nor was he directed or in any way authorized, to water the milk, and that, in so doing, he was not acting for defendant, but solely out of malice, and for the purpose of injuring defendant, and to gratify a feeling of ill will towards defendant, of which defendant at the time was entirely ignorant. The plaintiff, upon this question, requested the court to charge the jury as follows: 'If the jury shall find that the milk of defendant was delivered at its factory watered, then the defendant would be liable for the damages that necessarily and directly resulted therefrom, even though the defendant did not water such milk, or authorize it to be done, or know the same was or had been watered, if the jury shall find it was watered by one Ed. Miller, the employé of defendant.' But the court refused to charge the jury as requested, but did charge the jury upon this question as follows: 'If it appear to you that the milk was adulterated by Miller maliciously, to injure Coit, and was without Coit's knowledge so delivered to the factory adulterated, then Mr. Coit is not liable to defendant for any damage resulting to them from such adulterated milk. Mr. Coit, however, would remain liable for the amount of water delivered, but only because it was not milk.' No other or further charge upon this subject was given to the jury, nor was the above charge in any way modified, changed, or withdrawn, but was, without change or modification, given by the court to the jury as the law by which they were to be governed in arriving at a verdict in the case."

Exceptions to the refusal to charge as requested, and to the charge as given, were duly entered by plaintiff. Verdict for \$185, for defendant and against plaintiff, was rendered, and a judgment thereon, and for costs, entered, which was affirmed by the circuit

court. The plaintiff asks reversal of these judgments.

I. T. Siddall, for plaintiff in error. J. H. Nichols, for defendant in error.

SPEAR, J. (after stating the facts). The questions arising on the record are: (1) Whether or not Coit is liable for the acts of Miller which produced the injury; (2) whether or not the plaintiff's damages, in case the jury found it sustained damages, could embrace all the injury arising from the adulterated character of the milk delivered; (3) if not, whether, in any view, the true rule is that, in case the jury found that the milk was adulterated by Miller maliciously, to injure Coit, and was, without Coit's knowledge, so delivered to the factory adulterated, plaintiff was entitled to a rebate for the water, so that Coit would be liable only for the amount of the water delivered, because it was not milk. The inquiry involves, primarily, a consideration of the liability of the master, although, reduced to its last analysis, it is an inquiry as to the proper rule of damages. Upon the face of things it is apparent that the question regarded as the controlling one is whether or not Coit is in any way responsible for the acts of Miller.

Let us first consider what result would follow if the case made is the same as though the claimed injury had arisen from Coit's own negligent act. What, under such circumstances, would be the proper rule? The petition alleged a contract. It was in the nature of a proposal and acceptance, Coit proposing and agreeing to deliver at the factory milk which should be milk of first quality, meaning, at the very least, milk not adulterated, and the company assenting, and, in consideration of the offer, impliedly, if not expressly, agreeing to receive and pay, for such milk as should be delivered, the price of first-quality milk. The acceptance of milk so delivered was a sufficient consideration for Coit's promise. It may be that, so far as the agreement was executory, it was unilateral, and that, had Coit failed to deliver any milk, the company could not have recovered damages for such failure; but we need not be concerned with that consideration, for milk was delivered, and nothing can be clearer than that, when Coit delivered, he was bound by the terms of his accepted proposal. *Benj. Sales*, 51; *Railway Co. v. Witham*, L. R. 9 C. P. 16. Inasmuch, therefore, as the evidence of plaintiff tended to sustain the allegations of the petition, the jury was justified in finding this contract,—that is, a contract by which Coit agreed to deliver milk of first-class or superior quality (i. e. pure milk),—and to further find that Coit had knowledge that the milk he delivered would be mixed with milk of other patrons, for the manufacture of butter and cheese in part, and in part skimmed for the cream, the product of which would be used by plaintiff in its business as caterers, etc., and in

part sold in the market, and that the milk delivered was under this contract. Such a contract carries with it a warranty that the goods shall be, and are, what they are agreed to be; for no particular form of words is required to constitute a warranty. As held in *Pasley v. Freeman*, 3 Term R. 57: "An affirmation at the time of a sale is a warranty, provided it appear on evidence to have been so intended." To which may be added, upon equally good authority, that "a positive affirmation of a material fact, intended to be relied upon as such, and which is so relied upon, constitutes in law a warranty, whether the vendor mentally intended to warrant or not; and that his intention is immaterial." American note to *Benj. Sales* (6th Ed.) 625; *Hawkins v. Pemberton*, 51 N. Y. 198; *Reed v. Hastings*, 61 Ill. 286; *Kenner v. Harding*, 85 Ill. 264. It is clearly sufficient if the declarations and agreement are so understood and acted upon by the parties; and, if made at the time of the sale, and as part of or inducement to the sale, as in this case, no other consideration is necessary, the price to be paid being a sufficient consideration. American note to *Benj. Sales* (6th Ed.) 622.

The liability of Colt was as broad under a breach of this contract as though there had been an express warranty by him of every lot of milk as it was delivered. *Moore v. King*, 57 Hun, 224, 10 N. Y. Supp. 651. The proper rule of damages for a breach in such a case would be such damages as may fairly and reasonably be considered, either as arising naturally from a breach, or what the parties might reasonably be supposed to have foreseen—to have had in contemplation—when they entered into the contract. The rule is that, if the special circumstances under which a contract is actually made are known to both parties, the damages resulting from the breach, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of such a contract under the special circumstances. *Hadley v. Baxendale*, 9 Exch. 341. Plaintiff and defendant were both handling milk extensively, and it is but fair to assume that each knew the effect of mixing impure milk with that which was pure, and the consequent result to the product. So they may be reasonably held to have had such damage in contemplation when they contracted, in case of breach. Probably, also, an implied warranty would be presumed, in view of the knowledge of the purpose, that the milk should be reasonably fit for that purpose; but this is not essential, nor is it important to pursue it at length, inasmuch as there was a contract. Under breach of such a contract, it is manifest that the vendee's damage should be at least compensation; and if the mixture of the impure milk with that which was pure, and its use in the factory, resulted in impairing the value of the product, it is equally manifest that compensation could not be awarded without taking that fact into the account.

Cases illustrative of the point are numerous. *Wilcox v. McCoy*, 21 Ohio St. 655, was based upon a claim for damages arising from a sale of sheep represented to be sound, but which were affected by a disease known as the "foot rot," whereby other sheep of the plaintiff were infected and injured. The claim was sustained. A number of similar cases are digested by Mr. Sedgwick in his work on Damages (sections 769, 765, 766, and 768), as follows: Where animals sold are warranted free of disease, loss through communication of disease to other animals of the purchaser may be recovered. *Mullett v. Mason*, L. R. 1 C. P. 559, and other cases. It is not necessary to the recovery of damages to show that the vendor knew that the diseased animal was to be placed with others belonging to plaintiff. *Packard v. Slack*, 32 Vt. 9. The defendant is presumed to anticipate that the animals he sells will be placed with others as a natural consequence of his act. *Sherrod v. Langdon*, 21 Iowa, 518. The expense of nursing and curing other animals, which contract disease from those sold, may also be recovered. *Long v. Clapp*, 15 Neb. 417, 19 N. W. 467. In *Randall v. Newson*, 2 Q. B. Div. 12, the plaintiff had bought of defendant a pole for his carriage. In driving, the horses swerved, and the pole broke short off at the carriage, and the horses were injured. The court held that the question should have been left with the jury whether the injury to the horses was or not a natural consequence of the defect in the pole. Where coloring matter, purchased for the purpose of coloring ice cream by a manufacturer of that article, proved to be poisonous, the purchaser was allowed to recover the value of the ice cream lost through the use of the poisonous coloring matter, and also compensation for injury to business. *Swain v. Schleffelin* (Sup.) 12 N. Y. Supp. 155. See *Jones v. George*, 61 Tex. 345; also, *Suth. Dam.* §§ 662-675, where the subject is discussed at length, and pertinent authorities cited. There is no reason to doubt that the law is entirely settled, and it is clear that, if the master be found liable, that liability covers all damages necessarily and directly resulting from the injurious acts.

It is also well settled that, where the injury results from the default of the contracting party himself, the motive which induces the act or the omission, unless the circumstances raise a claim for exemplary damages, is of no consequence. In such case, evidence of the defaulting party's motives, or of anything which affects only the moral character of the transaction, can have no weight, and is therefore inadmissible. Unless the intention belongs directly to the issue, it is not an element in the case. Compensation for breach of contract in relation to the payment of money or in relation to property ordinarily does not involve motive, for in the first case the failure to pay as agreed is measured absolutely by the sum and interest, no matter what vicious purpose

induced the failure; and, in the second, compensation—that is, to be placed in the same position he would have been in had the other party performed his contract—is the injured party's right, no matter how earnest the unavailing efforts to perform may have been, nor how free from intent to injure the motive of the defaulting party. 3 Pars. Cont. 167, and authorities cited. Was Coit liable for the consequences of Miller's malicious acts? In pursuing this inquiry it is important that we keep constantly in mind two controlling facts,—one that the relations of the plaintiff and defendant were contract relations, and those between the defendant and Miller were those of master and servant. The general rule undoubtedly is, although subject to notable exceptions, that the master is not liable for his servant's malicious acts, as shown in *Wright v. Wilcox*, 19 Wend. 345, where it was sought to recover against a father for the act of his son, who, while driving the father's horses and wagon about his father's business, intentionally whipped up the horses, and ran over one of a number of boys who were trying to get into the wagon. The driver, at the time, saw the boy was between the wheels, and thus likely to be injured. *Cowan, J.*, in deciding the case, remarked that it was impossible to sustain the verdict against the father because the act of the son was done with the willful intention to throw the boy off; that, while the son was in other respects in the service of his father, he was not in this, which was a plain trespass, for which the master (the father) was no more liable than if his servant had committed any other assault and battery. A case not dissimilar in principle is that of *Railroad Co. v. Wetmore*, 19 Ohio St. 110, where the plaintiff, after purchasing a ticket as a passenger, applied to one who had the duty of checking baggage to have his baggage checked, and, by his importunate conduct and abusive language towards the servant, provoked a quarrel, in which the servant, to gratify his personal resentment, struck the plaintiff with a hatchet. It was held "that the wrongful act of the servant in striking the plaintiff cannot be regarded as authorized by the master, nor as an act done in the execution of the service for which he was engaged by the master. And the fact that the blow was inflicted with a hatchet furnished by the master, to be used for a wholly different purpose in connection with the servant's business, is immaterial as respects the liability of the master." It was shown by the evidence that the assault was not committed in endeavoring to eject the plaintiff from the place where the baggage-man had special control, but outside of it, and at a place where he had no charge, and so was not a case of the use of excess of force, nor was it calculated to facilitate or promote the business for which the servant was employed. Other cases are to be found which go much further than these in exon-

erating the master. They are mostly old cases, and some of them have not been followed in the later decisions. Thus, in *Middleton v. Fowler*, 1 Salk, 282, where, in an action against the master of a stagecoach, to recover for the value of a trunk of a passenger, lost by the driver, into whose possession the trunk had been placed by the traveler, it was held by Holt, C. J., that the master was not liable. The language of the judge, that "no master is chargeable with the acts of the servant but when he acts in the execution of the authority given by his master," has been given too wide an interpretation; and, indeed, the law of the case would hardly be regarded as good law at the present day. See *Craker v. Railway Co.*, 36 Wis. 657, where the true distinction is clearly given. This case (as indeed is the larger portion of the reported cases involving the principle) was against a railroad company, the action being based on its common-law liability as a common carrier, and affords an instance of strict application of the rule of respondeat superior. But courts are supposed to enforce rules of law, where applicable, without respect to the personnel of the parties, and it is presumed that, where liability is found to attach to a master for the act of a servant, the rule of damages would be the same whether the master were an individual or a corporation.

The modern rule, and we believe it to be well established, is stated by Mr. Mechem in his work on Agency (section 740) thus: "The tendency of modern cases, however, is to attach less importance to the intention of the agent, and more to the question whether the act was done within the scope of the agent's employment; and it is believed that the true rule may be said to be that the principal is responsible for the willful or malicious acts of his agent if they are done in the course of his employment and within the scope of his authority, but that the principal is not liable for such acts, unless previously expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority, as where the agent steps aside from his employment to gratify some personal animosity, or to give vent to some private feeling of his own. The question of what acts are within the scope of the employment is no less difficult of determination here than in those cases where the principal's liability for the agent's negligence is involved, but the principles are the same. Indeed, the determination of whether the principal would have been liable had the same injury resulted from the agent's negligence or unskillfulness will often be of aid; for, if the act in the latter case would be within the scope of the employment, it is none the less so where the intention was willful. Where the principal owes to third persons the performance of some duty, as to do or not to do a particular act, and he commits the

performance of this duty to an agent, the principal cannot escape the responsibility civiliter if the agent fails to perform it, whether such failure be accidental or willful, or whether it be the result of negligence or malice." Continuing, the author says: "What is meant is that, if the agent, while engaged in doing something which he is authorized to do, and while acting in the execution of his authority, inflicts an injury upon third persons, though willfully or maliciously, the principal is liable; but if, on the other hand, the agent steps aside from his employment to do some act having no connection with the principal's business, and to which he is inspired by pure personal and private malice or ill will, the principal is not liable." Mr. Justice Story, in his work on Agency (section 452), gives the rule in these words: "It is a general doctrine of the law that, although the principal is not ordinarily liable (for he sometimes is) in a criminal suit for the acts or misdeeds of his agent, unless, indeed, he has authorized or co-operated in those acts or misdeeds, yet he is held liable to third persons in a civil suit for the frauds, deceits, concealments, misrepresentations, torts, negligences, and other malfeasances or misfeasances and omissions of duty of his agent in the course of his employment, although the principal did not authorize or participate in, or indeed know of, such misconduct, or even if he forbade the acts or disapproved of them. In all such cases the rule applies, respondeat superior; and it is founded upon public policy and convenience, for in no other way could there be any safety to third persons in their dealings, either directly with the principal, or indirectly with him through the instrumentality of agents. In every such case the principal holds out his agent as competent and fit to be trusted, and thereby, in effect, he warrants his fidelity and good conduct in all matters within the scope of the agency."

It is important to observe a distinction between liability for the malicious acts of an agent with respect to one with whom the principal holds contractual relations,—acts affecting the performance of the contract,—and with respect to others who may have suffered injury by reason of the agent's torts, as a failure to observe this distinction has resulted in apparent confusion of terms both in text-books and decisions. The distinction referred to is made apparent in an old English case. A traveler employed a livery stable keeper to drive him safely to his destination. The driver purposely and needlessly, to gratify his own personal malice, went out of his way to collide with another carriage, by which one riding therein was injured. The collision also injured the traveler. The action by the former against the master was predicated wholly on the claim that he was liable for the malicious act of his servant, committed without authority, and not in the line of his service. An action by the traveler would have rested

on the failure of the liveryman to perform his contract. And, as to the latter proposition, Prof. Wharton, in his work on Agency and Agents (section 487), gives this terse rule: "Principal who contracts to do a particular thing is liable for agent's torts which prevent the performance of the contract." One principle seems to be well settled by the later authorities, viz.: That if the act of the servant which has occasioned the mischief is within the scope of the employment, the fact that it was maliciously done does not affect the question of the master's liability under a proper rule of damages.

Coming, now, to the case at bar, were the acts of Miller, which caused the injury, in law the acts of his employer? That is, were they within the scope of his duties, or were they outside and beyond? And here we must not mistake the acts which caused the damage. At first blush it might seem that these acts were the watering of the milk, and those were not within any authority from the master. But not so. The putting of the water in the milk would have been quite innocuous, so far as plaintiff is concerned, had the compound not been delivered to the factory. It was the delivery there which produced the harm. In those acts of delivery Miller stood for and represented his master. Clearly, those deliveries were done in the course of his employment, "in the execution of the service for which he was engaged by the master." Under such conditions, why should the master not be liable? He had contracted to deliver pure milk, and, in trusting that duty to his servant, why had he not, applying the principle announced by Judge Story, held out that servant as fit to be trusted, and warranted his fidelity and good conduct in all matters connected with the performance of that contract? Why, in reason, should the loss occasioned by the rascality of the defendant's servant be thrown on the plaintiff? The latter had no voice in his selection; no control over his conduct. Does the servant's motive change the nature of the damages? Does it make the failure of the defendant to perform his contract any the less obvious, or any the less serious in results? As remarked by White, J., in *Railroad Co. v. Young*, 21 Ohio St. 524: "Where a person is injured by the acts of a servant, done in the course of his employment, we see no good reason why the motive or intention of the servant should operate to discharge the master from liability. If the nature of the injurious act is such as to make the master liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the master." And would any intelligent legal mind suppose for a moment that, the alleged contract being found, if the delivery of the objectionable compound at the factory had been through the mere negligence of the servant, the defendant would not be liable? Surely not. Nor does the enforcement of the rule of damages here

inbefore indicated involve punishment of one for the malicious act of another. If it were proposed to inflict punitive damages on the master where he is innocent of wrong intent, then that inequitable result would follow. But so long as compensation, and compensation only, is the rule, the motive of the servant not entering into the case one way or the other, the master is not held for the motive; he is held only for the act. So, in this case, if the testimony of the plaintiff tended to prove that Coit knew of the condition of the milk at the time of the delivery, as the record would imply, then proof to the contrary was competent, but for the purpose only of excluding a right to recover punitive damages.

This contract involved reciprocal duties, and gave corresponding legal rights. The defendant was to deliver pure milk; the plaintiff was to pay good money. Now, suppose, instead of this action, there were a suit of the defendant against the plaintiff for his season's milk, \$1,150, and the company had pleaded payment. At the trial it appeared that, on the day the account was due the company had given the money to one of its employes, with directions to go to the vendor and pay for the milk, and he had gone to the residence of the vendor and counted out, as the vendor supposed, \$1,150, and taken a receipt to the company. The next day, when a deposit in bank was attempted, it was found that a portion of the money was counterfeit. Suppose the testimony to further show that the employe, out of malice towards the company and greed in his own interest, had substituted counterfeit money and paid that. Would the company have a defense? The bills paid looked like good currency, as the milk delivered looked like pure milk. In fact both were tainted. Is there any real difference in the two cases? Is it not a failure to perform a contract in both? True, the method of making proof of damages is different; it is simple in one case, and much less so in the other. But, when arrived at, the result is precisely the same. It is compensation in both cases,—the making of the injured party whole. Our case is essentially dissimilar from that of *Railroad Co. v. Wetmore*, supra, where the defendant was exonerated. If Miller had got into a quarrel with the manager of the factory, about the delivery of milk, for instance, and, to gratify his own personal resentment, had lashed the other with the defendant's whip, which had been furnished him to drive the horses with, we would have had a case parallel with the one above cited. The view here indicated finds support in the broad principle that where one of two innocent persons must suffer he must be the sufferer who puts it in the power of the wrongdoer to cause the loss. "He, certainly, who trusts most, must suffer most." He through whose agency the loss occurred must sustain it. It is a principle founded on the highest considerations of justice and expe-

diency. The rule is elucidated in the opinion by Minshall, J., in the recent case of *Shurtz v. Colvin* (Ohio Sup.) 45 N. E. 527, and special reference is here made to that opinion for argument and illustrations. See, also, *Quick v. Milligan*, 108 Ind. 419, 9 N. E. 392; *Blight v. Schenck*, 10 Pa. St. 293; *Le Neve v. Le Neve*, 3 Atk. 646. If the foregoing conclusions are correct, it follows that the instructions given the jury did not cover the case before them. The case made was the case which, within the allegations of the petition, the evidence tended to prove. The vital points were the agreement to deliver pure milk, the delivery under it, the character of the milk delivered, and the resulting damage; and the questions the jury needed instructions upon, in case they found for the plaintiff on these propositions, were, the liability or nonliability of Coit, and the measure of damages in case he was to be held. The instruction given was if the adulteration was done by Miller maliciously, to injure Coit, and the delivery of the adulterated article was without Coit's knowledge, he was not liable for any damage; which, if we are right in the principles of law applicable to the case, was erroneous. The court also added that Coit would remain liable for the amount of water delivered, because it was not milk. This means, we suppose, that, on Coit's cross petition, he would not be allowed to recover pay for water. Of course he could not, but this instruction ignores any duty to deliver milk not adulterated, and would be proper in a case where the quantity delivered was the only question involved. But here was involved the question of damages for the impaired character of the article delivered, and it is difficult to see how, upon the view most favorable to Coit, the rule would not have been the ordinary commercial rule, viz. the difference between the value of the milk delivered and what its value would have been had no water been mixed with it. *Swan's Treatise* (14th Ed.) 784; *American note to Benj. Sales* (6th Ed.) 906.

There is another ground which would appear to defeat the attempted defense. The sale and delivery of adulterated milk is an offense against one of the pure-food statutes. The act of April 10, 1889, entitled "An act to regulate the sale of milk" (86 Ohio Laws, 229) provides "that whoever, by himself or by his servant or agent, * * * sells, exchanges, or delivers * * * adulterated milk, or milk to which water or any foreign substance has been added * * * shall be punished," etc. In the case of *State v. Kelly*, 54 Ohio St. 166, 43 N. E. 163, it is held that in a prosecution under the act of March 20, 1884, "to provide against the adulteration of foods and drugs, it is not a defense that the accused is ignorant of the adulteration of the article which he sells or offers for sale." These statutes have a like purpose. They are founded on the policy of protection

to the public,—the same policy which is recognized in numberless cases where, on a sale by victualers of articles of food for domestic consumption, the law implies a warranty that they are fit for such purpose,—and the seller will not be heard to say that he did not know they were not, nor to plead good faith in their sale. The rule of construction applied to the act last cited applies equally to the act to regulate the sale of milk; and it is the theory of the decision cited that it is the duty of the party, who, by himself or agent, sells such articles, to know their quality,—they must know, or take the consequences. An opposite construction, it is declared by the court, would defeat the humane purpose of the acts. The principle of *Rose v. King*, 49 Ohio St. 213, 30 N. E. 267, rules this case with respect to the civil remedy. Where a defendant is liable under the criminal statute, he is liable to a person directly injured, civilly.

These conclusions require a reversal of both judgments, and a new trial. Reversed.

BRADBURY, J. (dissenting). This decision seems to me to rest upon the unsound principle that one person may be held to respond in damages to another on account of injuries sustained by the malicious acts of a third person. Unfortunately the case was argued in this court upon one side only. The circuit court rendering the judgment is composed of men of experience, learning, and ability, and the views of that court upon the question were in harmony with those of the court of common pleas, but we have not had the benefit of that experience, learning, and ability, or of the research of counsel in support of their judgment. Their decision, I think, is correct, but I feel the embarrassment incident to an attempt to justify it without some intimation of the grounds upon which they placed it, or of the views of counsel for the party who prevailed in that court. The action did not sound in contract, the plaintiff was under no obligation to receive milk, and the defendant was under no obligation to deliver it, nor was any price fixed for that which might be delivered and received. The only averment of the petition relating to a promise is this: "Said defendant promised and agreed at the time of bringing, first, his milk to plaintiff's said factory to bring nothing but milk of first class or superior quality." No consideration is stated for this supposed promise, and an analysis of the petition shows that the promise was one implied from the fact that milk was to be delivered, and arose out of the circumstances surrounding the parties. The uses to which the milk, according to the averments of the petition, was to be devoted, was simply matter of inducement, showing what damages the defendant might be held to contemplate as the result of his wanton act. The gist of the action is that the defendant knowingly delivered foul and un-

wholesome milk. The averment being that the "defendant continued to thus send impure, unwholesome, foul and adulterated milk * * * knowing the same to be adulterated. * * *" The defendant denied this and the case was tried. The evidence was not set forth in full, the bill of exceptions showing merely that evidence was given tending to support the petition, and that evidence was also given tending to show that the milk was maliciously watered by an employé of defendant for the purpose, not of damaging the plaintiff, to whom the milk was delivered, but of injuring his employer, the defendant; that it was not his duty to water the milk, and in doing so he was not acting for defendant, but solely out of malice towards the defendant, and that defendant was entirely ignorant of his actions. In this view of the evidence, the following instructions were asked by the defendant, and were refused: "If the jury shall find that the milk of defendant was delivered at its factory watered, then the defendant would be liable for the damages that necessarily and directly resulted therefrom, even though the defendant did not water such milk or authorize it to be done, or know the same was or had been watered, if the jury shall find it was watered by one Ed. Miller, the employé of defendant." And the court did charge the jury as follows: "If it appear to you that the milk was adulterated by Miller maliciously, to injure Coit, and was without Coit's knowledge so delivered to the factory adulterated, then Mr. Coit is not liable to defendant for any damage resulting to them from such adulterated milk. Mr. Coit, however, would remain liable for the amount of water delivered, but only because it was not milk." The instructions given by the court of common pleas were directly applicable to the facts, and were sound, unless one man is to be mulct in damages for the malicious act of another. Employers are liable for that negligence of their servants which occurs in the course of the employment. And under certain peculiar circumstances, where the master owes a special duty to the party injured, he is held liable for malicious acts directed against the person to whom the master owes such special duty. This principle is generally, if not exclusively, confined to common carriers of passengers. I know of no principle, however, by which a master is held liable for a malicious act of a servant, not committed in the scope of his employment, directed against another; or where, as in this case, the malicious act was directed against the master himself, was not done in the course of the master's service, and incidentally injured another. Where a malicious act is done to the injury of another, the right of the latter to redress is against the party who caused the injury. If the person committing the act cannot respond in damages, the party injured can obtain no practical relief. This result often occurs, but is unavoidable.

able. The person doing the mischief is, in such cases, amenable to the public, if the act has been made a crime, otherwise he is answerable only at the bar of public opinion. In driving the vehicle in which this milk was carried to market, the servant had no duty to perform in respect to its quality. His authority was in all respects similar to that of the boy who drives a delivery wagon for a retail grocer. It is the duty of the boy to deliver the parcels as they may be wrapped up in the shop. It was the duty of this hired man of the defendant to deliver this milk in the condition it was when it left the defendant's farm. As well charge the grocer with civil liability for the death of a customer, because the boy maliciously stops at a drug store, procures arsenic, opens and distributes it through a package of sugar, as to charge the defendant in this case with liability because his hired man stopped at a wayside pool of stagnant water, maliciously dipped a bucket into it, and discharged its contents into the cans of milk committed to his charge. In each case the fact of employment gave the opportunity for the act, but the act was not in the line of the employment of either. The statutes in relation to adulterated food and milk are no more applicable in the one case than in the other. If they bear on the question at all, the penalties they denounce should be directed against the wrongdoers, and not one of the victims of the wrongful act. No authorities have been cited in support of these views. None are needed, if the analysis of the petition upon which they are founded is correct.

A copy of the petition and answer is appended, from which the character of the action and of the issues joined between the parties can be readily perceived.

(55 Ohio St. 497)

PITTSBURG, C., C. & ST. L. RY. CO. v. COX.

(Supreme Court of Ohio. Dec. 15, 1896.)

**ASSOCIATION OF RAILROAD COMPANY AND EMPLOYEES
—RELIEF FUND—CONTRACT OF MEMBERSHIP—VALIDITY—RELEASE.**

An employé of a railroad company voluntarily, and with full knowledge of the character and effect of the contract he was assuming, applied for admission to an association composed of the company and a portion of its employés, called the "Voluntary Relief Department," and, being admitted, contracted that the company might deduct from his wages the sum of 75 cents per month for the purpose of forming, with other like contributions by other employé members, and contributions which by the contract the company was obligated to make, a relief fund for the benefit of the employés in case of sickness, accident, or death; and contracted, further, that in case of accident the acceptance by him thereafter of relief from the relief fund so accumulated should have the effect to release the company from liability for damages. *Held:* (1) Such contract is not interdicted by the act of April 2, 1890 (87 Ohio Laws, 149), "for the protection and relief of railroad employes," etc. (2) The contract is not contrary to public policy.

45 N.E.—41

(3) The contract does not lack mutuality. (4) It is based upon a valid consideration.

(Syllabus by the Court.)

Error to circuit court, Warren county.

Action by Charles C. Cox against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant brings error. Reversed.

The action of the defendant in error against the company was to recover for injuries by reason of the alleged negligence of the company. By its first defense the company denied negligence on its part, and alleged that the accident was caused by the negligence of a fellow servant, for which the company was not liable. The second defense was as follows: (2) For a second defense to the plaintiff's petition, the defendant says that, if it is chargeable with the negligent acts complained of therein (a fact which this defendant wholly denies), nevertheless the said plaintiff ought not to maintain this, his action, for that, on or about the 16th day of April, 1889, the Pennsylvania Company, a railroad corporation of the state of Pennsylvania, owning and operating railroads in and through the states of Pennsylvania, Ohio, and Indiana, the Chicago, St. Louis & Pittsburgh Railroad Company, a railroad corporation of the states of Indiana and Illinois, owning and operating a railroad in the said states of Indiana, Illinois, and also in the state of Ohio, and the Pittsburgh, Cincinnati & St. Louis Railway Company, a railroad corporation of the state of Ohio, owning and operating certain railroads in the states of Pennsylvania, Ohio, and in the state of West Virginia, having formed, each, respectively, a relief department for the benefit of its service and employes, and in order to secure uniformity and economy in the management thereof, on the 1st day of July, 1889, associated themselves together for the purpose of a joint administration and regulation of the said respective relief departments under one common organization known as the "Voluntary Relief Department of the Pennsylvania Lines West of Pittsburgh." That on the 1st day of October, 1890, the said the Chicago, St. Louis & Pittsburgh Railroad Company and the Pittsburgh, Cincinnati & St. Louis Railway Company were consolidated under the corporate name of the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company, which company succeeded to all of the rights, and assumed all of the liabilities, of said constituent companies in said relief department. That the object of said voluntary relief department was and is the establishment and management of a fund known as the "Relief Fund," and which has been established in accordance therewith, for the payment of definite sums to employes contributing to the fund, who, under the regulations of said relief department, shall be entitled thereto when they are disabled by accident or sickness, and, in the event of their death, to the relatives or

other beneficiary specified in the application of such employé for membership, in said relief fund and department. That said relief fund from which benefits are paid is formed by voluntary contributions from employés, and appropriations, when necessary to make up any deficiency, by the several companies respectively, for the benefit of the employés of each who may be members thereof, and income or profit derived from investments of the moneys of the fund, and such gifts or legacies as may be made for the use of the fund. That those participating in the benefits of the relief fund must be employés in the service of at least one of said associated companies, are known as "members of the relief fund," and are classified according to the amount of their regular pay per month,—the first class consisting of those employés who receive not more than \$40 per month. Under the regulations of said relief department no employé is required to become a member of said relief fund, and his membership therein is purely voluntary, and he may withdraw therefrom at pleasure, upon giving notice, but when he does become a member thereof he authorizes his employer company to withhold from his monthly wages contributions for said relief fund, and which in the first class thereof is 75 cents per month, and which contribution entitles him during membership to benefits for disablement by accident, sickness, or death. That to entitle an employé to participate in the benefits of said relief fund he must be not over 45 years of age, pass a satisfactory medical examination, and make an application in the form prescribed by the regulations of said department, addressed to the superintendent of the relief department, and containing, among other things, the following stipulations, to wit: "I also agree that the said company [being his employer company] by its proper agent, and in the manner provided in said regulations, shall apply as a voluntary contribution from any wages earned by me under said employment, or from benefits that may hereafter become payable to me, at the rate of — per month, for the purpose of securing the benefits provided for in the regulations for a member of the relief fund of the class, and additional death benefit equal to — the death benefit of the first class. The death benefit shall be payable to — (here designate the beneficiary or beneficiaries). And I agree that the acceptance of benefits from said relief fund for injury or death shall operate as a release of all claims for damages against said company [being his employer company] arising from such injury or death, which could be made by or through me, and that I, or my legal representatives, will execute such further instrument as may be necessary formally to evidence such acquittance. I also agree that this application, when approved by the superintendent of the relief department, shall make me a member of the relief fund, and constitute a contract

between myself and the said company [being his employer company], or with any other company that is now, or may be hereafter, associated with said company in the management of the relief department, in case of a transfer of my services to any such other company during membership in the relief fund." That said applicant, if he passes the necessary medical examination, and is approved by the superintendent of the relief department, becomes a member of said relief fund, contributing as aforesaid and receiving benefits in the manner as aforesaid. That the said associated companies, in addition to the guaranty as aforesaid, supply all necessary facilities for conducting the business of said relief department, at their own expense, pay all of the operating expenses thereof, take charge of the funds thereof, pay interest thereon, and are responsible for their safe-keeping. That said relief department is managed by a superintendent, subject to the control of the general manager of the said Pennsylvania lines west of Pittsburg, medical examiners, and necessary clerical force. That in addition there is an advisory committee, consisting of said general manager, as aforesaid, who is ex officio a member and chairman of said committee, and 12 members, one-half of whom are chosen by said companies, and the other half by the employés of said companies who are members of said relief fund. That said advisory committee has general supervision of the operations of said relief department, and holds stated meetings once in three months at such time and place as it shall determine, and shall meet at other times at the call of the general manager as chairman. That if during the period prior to the 1st of July, 1892, or during any one of the successive periods of three years thereafter, the amount contributed by the members of the fund and received from other sources should not be sufficient to meet the liabilities incurred for such period, the proper company or companies in whose account the same occurs will pay the deficiency, and if at the end of any such period there should be a surplus, after making due allowance for liabilities incurred and not paid, such surplus shall not be used to make up any deficiency in any other such period, but shall be used in the promotion of a fund for the benefit of superannuated members, or in some other manner, for the sole benefit of the relief fund, as shall be determined by a vote of two-thirds of the advisory committee, and approved by the board of directors of the associated companies. That, during the last five years immediately preceding the filing of this petition, this defendant, under its guaranty as aforesaid, has paid into said fund, for the benefit of plaintiff and other employés of the defendant, the sum of \$21,000, in addition to its share of operating expenses of said department and interest upon the fund. That on the 25th day of October, 1892, the said plaintiff, with full knowledge of all the foregoing,

except that he may not have had actual knowledge of the payment of said \$21,000, made his voluntary written application, containing the stipulations as aforesaid, to the superintendent of said relief department, for membership in the first class of said relief fund, agreeing in said application that the defendant should apply, as a voluntary contribution from his wages, 75 cents per month for the purpose of securing to him the benefits provided for in the regulations for a member of the relief fund of the first class, and further agreeing therein that the acceptance of benefits from said relief fund for injury or death should operate as a release of all claims for damages against said defendant arising from said injury or death which could be made by or through him, and that he or his legal representatives would execute such further instrument as might be necessary formally to evidence such acquittance. That having passed the medical examiner's examination, and said application having been approved by the superintendent of said relief department, the said plaintiff, on the 1st day of November, 1892, became a member of said relief fund, contributing as aforesaid, and entitled to the benefits provided by the regulations of said relief department for members of the first class. That after the injuries received by the said plaintiff, and for a period from the 6th day of May, 1893, to June 30, 1894, he received as a member of said relief fund the benefits to which he was entitled for his injuries, amounting to \$196.25, with full knowledge upon his part that he was not bound to accept the same, but that in so doing he released the said defendant company from any claim for damages against it arising from the injuries received by him on or about the 6th day of May, 1893, and of which he complains in his petition in this action. That he has never been dismissed from said fund, although he has received no benefits since the 30th day of June, 1894, pursuant to a regulation of said department which provides that, if the member injured brings suit against his employer company to recover damages for the injuries on account of which benefits are paid, the said benefits cease until such time as said suit is discontinued by said injured member, when payment of benefits will be resumed. Reply to the first defense was interposed, and a demurrer to the second. This was overruled by the common pleas; and, upon trial on the pleadings, issue was found for defendant, and a judgment for it rendered. The circuit court reversed that judgment for error in overruling the demurrer, and the company now seeks a reversal of the latter judgment.

Chas. Darlington, for plaintiff in error. Albert Anderson and W. F. Eltzroth, for defendant in error.

SPEAR, J. (after stating the facts). The ruling of the common pleas on the demurrer

is assailed on the ground that the contract set up is invalid because (1) it is prohibited by the act of April 2, 1890 (87 Ohio Laws, 149), "for the protection and relief of railroad employes," etc.; (2) because it is against public policy; (3) for want of mutuality; and (4) for want of consideration moving from the company to Cox for the agreement to release claims for damages. In support of the second defense, it is insisted that the act of April 2, 1890, as to the clauses referred to, is unconstitutional, because it strikes down the voluntary right to contract; that the contract is not in fact against public policy, whether declared so by the statute or not, and that the mutual beneficial stipulations and averments of fact abundantly show both mutuality and consideration.

1. It would be a needless waste of effort to discuss the constitutional question propounded, unless, upon an examination of the contract and the statute, it shall be found that such a contract is among those forbidden. First, therefore, we give attention to that inquiry. The part of the statute to which attention is directed is the following: "And no railroad company, insurance society or association or other person shall demand, accept, require or enter into any contract, agreement, stipulation with any person about to enter, or in the employ of any railroad company whereby such person stipulates or agrees to surrender or waive any right to damages against any railroad company, thereafter arising for personal injury or death, or whereby he agrees to surrender or waive in case he asserts the same, any other right whatsoever." To what sort of a contract does this language apply? It is to be assumed that the legislature intended to confine its action in forbidding the making of contracts upon subjects in themselves lawful, by persons *sui juris*, to such contracts as are inimical to the state,—that is, against public policy; for the right to contract is one not given by legislation, but inherent, necessarily involved in the ownership of property, and as a primary prerogative of freedom (2 Whart. Cont. § 1061), and we should not construe the words of an act so as to restrain this right, where the conflict with public policy is not clear, unless the language will bear no other construction. As to the first clause, perhaps it is sufficient to say that it clearly appears the contract does not come within the terms of the inhibition, for the reason that the employé does not therein agree to waive a right to damages thereafter arising for personal injury or death. He agrees simply that he will elect, after the injury is incurred, which form of recompense he will demand. In what essential does the second clause differ from the first? It is the same, in effect, as though it should be worded, "or whereby, in case he asserts his right to sue the company for personal injury or death, he agrees to surrender or waive any other right whatsoever." He may not stipulate that, in case he sues the company for dam-

ages for personal injury, he will surrender any other right. What here is meant by the term "right"? Does it mean any fanciful claim which an ingenious person may invent, or does it mean a tangible legal right, one resting on contract or in tort, which would be recognized and enforced by law? Common sense would say, it seems to us, that it means the latter. This leads to an inquiry as to the character of the right which is secured to an employé who becomes a member of the "voluntary relief department," and entitled to the benefits of the "relief fund." If the contract be valid it gives to the member a right, in case of disability on account of hurt or sickness, to receive certain payments from the relief fund so long as the disability continues; but, as a condition of the exercise of this right, and as a modification of it, the member must disclaim any right to sue the company in whose employ he is for damages arising from the injury. That is, the right to the benefits is not, by the terms of the contract, an absolute right. It is, at best, a contingent right; and, if this be so, then it is not, unless the stipulation is to be overthrown as against public policy, a legal right, after the party has elected to sue the company, which the law recognizes and will enforce, for the law will not enforce as an ultimate right a claim which rests upon a condition which is repudiated by the party making the claim. Perhaps the point would be clearer if the party had, without accepting benefits, recovered against the company, and then sought to recover also the benefits against the fund. No one could possibly suppose, in such case, that his right to recover was absolute, or could in any aspect have a legal existence, or become the subject of a waiver, if the party's own contract is to be observed. This for the reason that he has no other right to surrender or waive, because, the moment he asserts the right to sue the company, the other, which is but a right inchoate, by the very terms of the contract which gave it existence, disappears. And, if the right is not an absolute one in the one case, how can it be in the other? Putting the conclusion in a sentence, the second inhibition is not essentially different from the first; it is but an extension of it. That applies only to waiver of a right to damages arising from personal injuries or death; this extends to all rights whatsoever. But, in any case, the law contemplates a legal right. Taking the statute as a whole, the contract inhibited is a contract which, by its terms, waives the right of action on the part of the employé, while the contract in question does not seek to waive a right of action, but expressly reserves it, and only gives to his election of remedies made after the injury the effect of a waiver of the other remedy. To deny such a right would be to deny the right to settle controversies. The law favors the exercise of this right; it does not disapprove it. The contract in question in *Railway Co. v. Spangler*, 44 Ohio St. 471, 8 N. E. 407, is of a class prohibited by

this statute. In that case it was held that "the liabilities of railroad companies for injuries caused to their servants by the carelessness of other employes who are placed in authority and control over them is founded upon considerations of public policy, and it is not competent for a railroad company to stipulate with its employes at the time, and as a part of their contract of employment, that such liability shall not attach to it." We think the contract set up in the answer is not fairly within the inhibitory terms of the act, when reasonably construed; and this conclusion makes it unnecessary to consider the question of the unconstitutionality of the statute.

2. Is the contract itself against public policy? To be so, it must, in some manner, contravene public right or the public welfare. It must be shown to have a mischievous tendency, as regards the public. And this should clearly appear. The ground urged is that it tends to make the company less careful in the operation of its road; in other words, it encourages negligence. And, if it be of that character, then it would contravene public policy and be void, in that it would have a tendency to induce the employment of men less prudent and careful, which would tend to endanger the property and the lives of travelers, as well as of its employes. But this claim arises, we think, from a misconception of the contract,—in assuming that, by the contract, the employé releases some future right of action against the company. On a previous page we have undertaken to show that such is not the case; that there is no waiver of any cause of action which the employé may become entitled to, and that it is not the signing of the contract, but the acceptance of benefits after the accident, that constitutes the release. When that occurs he is not stipulating for the future; he is but settling for the past. He accepts compensation for injury already received. A controlling distinction between *Railway Co. v. Spangler*, supra, and this case, is that in that case the party bargained away his right to an action in advance, while in this case he retains whatever right of action he may have until after knowledge of all the facts. Then he elects between the relief fund and the treasury of the company,—between a relief sure, immediate, and continuous, and one depending upon the hazards of litigation, and certain to be delayed. If he is injured, and the company is not liable (a condition which follows in much the larger proportion of the accidents to employes on railroads), he may accept the benefits; if the company is liable, he may decline benefits and sue. How can this injuriously affect the public? Is it not, on the other hand, a wise and humane provision for many of a class who, without it, when sick or injured, would be compelled to look to public charity for aid? And does it not hold out an incentive to faithful, efficient service, by en-

couraging expectation of benefits when the member becomes superannuated, and encourage economy and thrift by laying up something against a time of need? We fail to see how the contract, taken as a whole, encourages the employment of careless men. Those who apply for membership in this relief fund must not be over 45 years of age, and they must pass a satisfactory medical examination. Thus, feeble men, and those made infirm by old age, are likely to be excluded, and a class of active, healthy men selected for the control of those operations of the road that require skill and care, all of which manifestly has a tendency to secure, in the interest of the public, competent service and watchful vigilance. It cannot be said that the beneficial feature of the contract tends to make the employé less careful, and, therefore, is inimical to the public; for to do so would be to condemn the whole theory of insurance, and especially that relating to fire and accident. Nor is the contract a compulsory one. It is entered into voluntarily. If the employé conceives it to be for his interest to enter the relief class, he applies for the privilege; if not, he, with like exercise of his own judgment, stays out. The liberty of contract, being one of those rights secured by our constitution, is not to be restrained upon any insufficient or mere fanciful conceit of what may possibly happen. The citizen who is *sui juris* has a right to make a contract beneficial to himself, when neither immoral, fraudulent, nor illegal, and he should not be restrained in the exercise of such right, unless the public welfare clearly compels it. Nor should the employment of corporate capital, where its use is for beneficial purposes, be interfered with, unless the public welfare clearly demands such interference. If the laborer, having in mind the future, and desiring to provide against a condition of sickness or accident, joins a beneficial association having insurance features, and devotes a portion of his monthly earnings to that purpose; and if, on the other hand, the corporation, actuated by a desire to advance its material prosperity by attaching its employés the more firmly to its interests, and by the humane purpose of contributing from its earnings to their personal welfare, or acting from any other motive, good or bad, becomes a party to such contract, and renders, in effort and money, valuable assistance in effecting its beneficial purposes,—why should the law assume, unreasonably and arbitrarily, to deny the exercise of these rights? We think it should not, and we fail to perceive how the contract in question contravenes any interest of the public. Contracts similar in every essential particular have been sustained by the courts of Pennsylvania, Maryland, Indiana, Iowa, and Nebraska. *Graft v. Railroad Co.*, 8 Atl. 206; *Johnson v. Railroad Co.*, 163 Pa. St. 127, 29 Atl. 854; *Ringle v. Railroad Co.*, 164 Pa. St. 529, 30 Atl. 492;

Fuller v. Association, 67 Md. 433, 10 Atl. 237; *Leas v. Pennsylvania Co.* (Ind. App.) 37 N. E. 423; *Donald v. Railway Co.* (Iowa) 61 N. W. 971; *Railroad Co. v. Bell*, 44 Neb. 44, 62 N. W. 314. See, also, *Owens v. Railroad Co.* (Cir. Ct. S. D. Ohio; opinion by Sage, J.) 35 Fed. 715; *Martin v. Railroad Co.* (Cir. Ct. D. W. Va.) 41 Fed. 125; *Otis v. Pennsylvania Co.* (Cir. Ct. D. Ind.) 71 Fed. 136; *Shaver v. Pennsylvania Co.* (Cir. Ct. N. D. Ohio; opinion by Ricks, J.) 71 Fed. 931; *Bailey, Mast. Liab.* 480; *Railroad Co. v. Bryant*, 9 Ohio Cir. Ct. 332; and *Griffith v. Earl of Dudley*, L. R. 9 Q. B. 357.

3. Nor is the contract void for want of mutuality, nor for lack of consideration. Moved thereto by the stipulations of the employé members, the company assumes the obligation to take charge, in part, of the administration of the association, to pay all its operating expenses, to take care of its funds, pay interest thereon, and be responsible for their safe-keeping, and to make appropriations to supply any deficiencies. The promises are concurrent and obligatory upon both. Both promise and both pay in consideration of promises and payment by the other, and the fact that third persons are interested does not impair the force of the obligation. If these stipulations do not supply consideration, it would be difficult to frame such as would; and, there being express assent to the terms of the contract by both parties, the element of mutuality is not wanting. The law upon this subject in Ohio is too well established to need elaboration. *Judy v. Louderman*, 48 Ohio St. 562, 29 N. E. 181. See, also, *Leas v. Pennsylvania Co.*, supra, and *Otis v. Pennsylvania Co.*, supra.

Our conclusion is that the contract set up is not interdicted by the statute, and that it is neither against public policy nor void for want of mutuality or consideration. Judgment of the circuit court reversed, and that of the common pleas affirmed.

(148 Ind. 92)

ADAMS et al. v. VANDERBECK et al.¹

(Supreme Court of Indiana. Dec. 23, 1896.)

ACTION TO QUIET TITLE—APPEAL—INSTRUCTIONS—DEEDS—MORTGAGES—CONSIDERATION—PRE-EXISTING DEBT—VALIDITY AS TO SUBSEQUENT PURCHASERS.

1. In the absence of the evidence from the record, it will be presumed there was evidence to support instructions.

2. One taking a mortgage to secure a pre-existing debt is not a bona fide purchaser.

3. The extinguishment of a pre-existing debt is a sufficient consideration to support a conveyance of land, as against prior titles obtained from the grantor of which the grantee had no notice.

4. In an action to quiet title, an instruction, based on the evidence, that a grantee to whom a conveyance is made in consideration of the extinguishment by him of a pre-existing debt due from the grantor is not a bona fide purchaser, without limiting it only to prior conveyances by the grantor of which the grantee had notice, is reversible error.

¹Rehearing denied, 47 N. E. 24.

Appeal from circuit court, Henry county; George H. Koons, Special Judge.

Action by Margaret Vanderbeck and others against John E. Adams and others. From a judgment for plaintiffs, defendants appeal. Reversed.

Clay C. Hunt and M. E. Forkner, for appellants. Brown & Brown and D. W. Chambers, for appellees.

McCABE, J. The appellees sued the appellants to quiet title in and to certain real estate, particularly described, situate in Henry county, which appellees claim to own. The issues, made by the defendants' answer, of a general denial as to a part of the land, and a disclaimer as to the rest, were tried by a jury, resulting in a verdict and judgment in favor of the plaintiffs, the appellees, over defendants' motions for a new trial and venire de novo. The action of the circuit court in overruling the motion for a new trial and for a venire de novo is called in question by the assignment of errors.

Among the reasons assigned therefor in the motion for a new trial, and now urged as cause for reversal, are that the court erred in giving to the jury certain instructions and refusing and modifying an instruction. There is in the transcript what purports to be a bill of exceptions purporting to incorporate the evidence into the same, but it is conceded, even by the appellant, that it was not filed in time, and forms no part of the record. There is another bill of exceptions, numbered 1, embracing the instructions about which complaint is made. In this bill it is recited that the instructions were applicable to the evidence, in accordance with the statute dispensing with the necessity of bringing up the evidence on appeal prosecuted upon the question of the correctness of instructions. Rev. St. 1894, § 662 (Rev. St. 1881, § 650). This statute makes no change in the practice as to instructions given, but does as to those refused, because, as to those given, this court, without the aid of the statute, presumes that instructions were applicable, in the absence of the evidence. *Drinkout v. Eagle Works*, 90 Ind. 423; *Rozell v. City of Anderson*, 91 Ind. 591; *Shugart v. Miles*, 125 Ind. 445, 25 N. E. 551; *Kinney v. Dodge*, 101 Ind. 573. Therefore we must presume that the instructions given were applicable to the evidence.

So much of the instructions as are complained of read as follows: "But, if Reed took a conveyance of the land in controversy, before Hume's deed was made, in discharge of or as security for a precedent debt, Reed would not be an innocent purchaser, and could acquire no title as against Hume, although his deed would precede the deed to Hume." And again: "But if Reed acquired his title in payment of a precedent debt, he would not be a purchaser in good faith, and could not hold as against Hume's title; and if there was a misdescription of the land in the mortgage, and if said misdescription was

perpetuated in the deed to Hume from Reeder and in the deed from Hume to the Vanderbecks, the plaintiffs, and if at a subsequent period Hume and Reeder and Reeder's wife joined in a deed made by them to the Vanderbecks for the purpose of correcting said misdescription, said misdescription would not affect the plaintiff's title, unless, in the meantime, an innocent purchaser had acquired a title to said land pending said misdescription; and a deed made to Reed, or any third party, in payment of or as security for a precedent debt, would not give them a standing as an innocent purchaser. In such case, if you believe, from the evidence, that the deed from Thomas B. Reeder to Reed was in payment of or as security for the payment of a precedent debt, you should find for the plaintiff." So far as these instructions relate to the mortgage or security taken to secure a precedent debt not being sufficient to constitute the taker thereof a bona fide purchaser, they are undoubtedly correct, which appellants' counsel do not question. *Busenbarke v. Ramey*, 53 Ind. 499; *Gilchrist v. Gough*, 63 Ind. 576; *Davis v. Newcomb*, 72 Ind. 413; *Hewitt v. Powers*, 84 Ind. 295; *Louthain v. Miller*, 85 Ind. 161. See *Wert v. Naylor*, 93 Ind. 431.

But, as applicable to a conveyance in payment of a precedent debt, they present a different question. We are bound to presume that there was evidence to which each one of the features of the instructions mentioned was applicable. The question presented in *Wert v. Naylor*, supra, is there thus stated: "Will a conveyance of land by a debtor to a creditor in payment and satisfaction of a precedent debt make the creditor a bona fide purchaser of the land, as against prior equities of which he had no notice? * * * In the case at bar the conveyance was not a mere security. It was an absolute conveyance, and it is alleged, in the third paragraph of the answer and in the finding of the court, that such conveyance was taken in full payment and satisfaction of \$1,000 of the precedent debt, and without notice of the plaintiffs' claim. * * * A man who merely takes a security for a debt gives up nothing; but, if he satisfies the debt himself, he does give something, and he gives more than he who merely extends the time for payment of the precedent debt, which has often been held sufficient. * * * Pomeroy, in his *Equity Jurisprudence* (volume 2, p. 208), says that the weight of authority is in favor of the doctrine that the extinguishment or surrender of a precedent debt, in consideration of the conveyance of land, makes the grantee a bona fide purchaser, even against prior equities." To the same effect are numerous cases, cited in the opinion from which we have quoted. *Petry v. Ambrosier*, 100 Ind. 510; *Tarkington v. Purvis*, 128 Ind. 182, 25 N. E. 879; *Orb v. Coapstick*, 136 Ind. 313, 36 N. E. 278,—are not in point, and not in conflict with the case above cited.

We may presume that there was evidence

of a conveyance of land in payment and satisfaction of a pre-existing debt owing by the grantor to the grantee, and by agreement of the parties the debt was satisfied and extinguished by the conveyance, and that the grantee had no notice of any prior equity in the land. The instructions tell the jury that such a purchaser would not be a bona fide purchaser. It is true, according to the authorities cited, the grantee in such case must have taken the conveyance without any notice of the prior equity. But the instructions tell the jury that, if the conveyance was made in satisfaction and payment of a precedent debt, the grantee would not be a bona fide purchaser. Under such instruction, the jury would be bound to find that the grantee was not a bona fide purchaser, even though the evidence showed that he had no notice of the prior equity. That is not the law. It is true, if this feature of the instructions would be correct under any supposable state of the evidence, then we are by the established law of this state required to presume that such state of evidence existed, in the absence of the evidence in the record. But we are also required, as before remarked, to presume that there was evidence from which the jury might have found that the conveyance mentioned in said instructions was made in payment and satisfaction of a pre-existing debt, due from the grantor to the grantee, because, if there was no such evidence, that feature of the instructions was not applicable to the evidence. Hence, we must hold that feature of the instructions erroneous, and that the circuit court erred in overruling the motion for a new trial. The judgment is reversed, with instructions to grant defendants' motion for a new trial.

(147 Ind. 586)

BUCK et al. v. MILLER.¹

(Supreme Court of Indiana. Dec. 22, 1896.)

TAXATION OF CREDITS — RESIDENCE OF OWNER — SITUUS OF PROPERTY — ASSESSMENT — INJUNCTION.

1. Under Tax Law, § 3 (Rev. St. 1894, § 8410), which provides that "all property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation," and sections 51, 53, by which credits are classed as personal property, if a bond, note, or other evidence of amount due the creditor is itself within the jurisdiction of the state, it is taxable, without regard to where the debtor lives, or where the debt was contracted.

2. Under Tax Law, § 11, cl. 4, which provides that "personal property of non-residents of the state shall be assessed to the owner or to the person having the control thereof in the township, town or city where the same may be," etc., where a business is done in buying and selling property and making loans and investments, and the money, notes, and mortgages so used are retained in the state by the owner or his agent, they are subject to taxation, as well as any other kind of personal property.

3. A note or bond owned and held in another state by a nonresident cannot be taxed in Indiana, though secured by a lien on local property.

4. Where it is sought to enjoin the collection of taxes, plaintiff must show that the whole of

the property in question was not subject to taxation; for, if any of the taxes were legally assessed, then, in the absence of a showing of payment or tender, no relief can be granted.

Appeal from circuit court, Tippecanoe county; W. C. L. Taylor, Judge.

Action by James Buck and another, trustees under the will of Job M. Nash, deceased, against Henry A. Miller, treasurer, etc., to cancel taxes, and for a perpetual injunction. From a judgment sustaining a demurrer to the complaint, plaintiffs appeal. Affirmed.

Langdon & Coffroth, for appellants. John M. La Rue and W. R. Wood, for appellee.

HOWARD, J. The appellants, as trustees under the last will of Job M. Nash, deceased, have brought this action to enjoin the collection of taxes assessed against trust funds in their hands to the amount of \$268,000. It is alleged in the complaint that the county auditor, after notice given to the executors, placed upon the tax duplicate, as omitted property of the estate of said decedent, certain stocks, bonds, notes, and mortgages, of which the said trust funds form a part, and which had been held and owned by the said Nash during the years from 1881 to his death, in 1893, and had been by him omitted and withheld from taxation during all that time. It further appears that from 1880 to 1886 all loans or investments made in this state by Job M. Nash were managed by him in person; and that from 1887 until his death, in 1893, he had in his service an agent in Tippecanoe county to take charge of his real and personal property in the state, and to conduct his loan and investment business therein. It is also alleged "that said Job M. Nash was a citizen of and domiciled in another state than the state of Indiana during the whole of the year 1881, and continued to be such citizen and so domiciled until his death." The theory of appellants' complaint seems to be that all those obligations due Job M. Nash or his estate which were executed by nonresidents of the state are not taxable here. It is explicitly alleged: "That the said bonds, stocks, notes, and mortgages so executed by nonresidents of the state of Indiana were not and are not subject or liable to taxation in the state of Indiana, as they believe." And again: "The plaintiffs further say that they have not, nor has either of them, made any return for taxation in Indiana of any bond, note, mortgage, or other chose in action, payable by or executed by any person or persons or corporation, who was or were not inhabitants or citizens of the state last aforesaid, nor any mortgage not on lands in said state." It is, however, the credit, and not the debt, to which value attaches, and which is, therefore, taxable. It can consequently make no difference where the debtor lives, or where the debt was contracted, provided only the bond, note, or other evidence of amount due

¹Rehearing denied, 47 N. E. 2.

the creditor is itself within the jurisdiction of the state. By section 3 of the tax law (section 8410, Rev. St. 1894) it is provided that "all property within the jurisdiction of this state, not expressly exempted, shall be subject to taxation." By sections 51 and 53 of the same act, credits are classed as personal property. Personal property, in general, is assessed where its owner resides. But the situs of such property for the purpose of taxation does not always or necessarily follow the domicile of the owner. *Eversole v. Cook*, 92 Ind. 222. Many such exceptions, too, are made in section 11 of the tax law, among them the following, in clause 4: "Personal property of nonresidents of the state shall be assessed to the owner or to the person having the control thereof in the township, town, or city where the same may be, except that where such property is in transitu to some place within the state, it shall be assessed in such place." If, therefore, personal property is used in business in this state, it will be assessed here, even though the owner may reside elsewhere; and this must be true of credits and moneys as well as of other forms of personal property. A business may be done in buying and selling property and making loans and investments, collecting and reloaning the money so used from year to year; and, if the money, notes, and mortgages so used are retained in this state, they will be subject to taxation here, as well as any other kind of personal property. See *In re Whiting's Estate* (N. Y. App.) 44 N. E. 715, and *In re Houdayer's Estate*, Id. 718. "It is the general rule of law," said this court in *Herron v. Keeran*, 59 Ind. 472, "that the domicile of the owner is the place where, by a legal fiction, his personal property is regarded as having its situs, and where it is to be taxed. *Com. v. Chesapeake R. Co.*, 27 Grat. 344. But this rule is now departed from in most states as to chattels having a permanent situs in a state other than that of the residence of the owner. *Rieman v. Shepard*, 27 Ind. 288; *Burroughs, Tax'n*, 41. And the same departure has been taken in regard to notes and evidences of debts in the hands of an agent of the owner who resides in another state or county, which notes are taken for money loaned, and held for renewal or collection, with the view of reloaning the money by the agent in the same state; the business being permanent in the hands of the agent. *Burroughs, Tax'n*, 44 et seq.; *People v. Board of Trustees of Village of Ogdensburgh*, 48 N. Y. 390." See, also, *Forsman v. Byrns*, 68 Ind. 247. If notes and other choses in action were in this state temporarily, however, or in the hands of an attorney for collection merely, it would, of course, be different. *Herron v. Keeran*, supra. Still more, where the credit is owned and held in another state by a nonresident of this state. See *In re Bronson* (N. Y. App.) 44 N. E. 707. In such a case the note or

bond so owned and held cannot be taxed here, even though secured by lien on property in this state. *Senour v. Ruth*, 140 Ind. 318, 39 N. E. 946. It is the note or bond so held, and not its mere security, that is regarded as the evidence of value, and hence taxable.

While injunction is the proper remedy against the collection of taxes where the assessment is wholly void (*Senour v. Ruth*, supra), yet the burden is upon the plaintiff to allege and prove facts necessary to show that the whole of the property in question was not subject to assessment for taxation (*Saint v. Welsh*, 141 Ind. 382, 40 N. E. 903). If any of the taxes against which the injunction is sought were legally assessed, then, in the absence of a showing of payment or tender, no relief can be granted. *City of South Bend v. University of Notre Dame Du Lac*, 69 Ind. 344; *Shepardson v. Gillette*, 133 Ind. 125, 31 N. E. 788. In the case at bar there is no claim made that the bonds, notes, and other obligations placed upon the duplicates as omitted property were not in fact in the state, and subject to its jurisdiction at the several times when, by the decision of the auditor, they should have been returned for taxation. On the contrary, it is alleged in the complaint that during a part of this period the decedent was himself engaged in the business of making loans and investments in the state, while during the remainder of the time he was represented in this business by a local agent. If he lived here, and did business in the state, having with him his moneys, stocks, bonds, notes, and mortgages, as the capital and means of doing such business, then it would be immaterial whether he might claim citizenship in some other state or not. The law could not thus be evaded. His property so used in business and so held in this state would be subject to taxation under the statute cited. It would, of course, be the same if the property and business remained here in charge of an agent. The complaint nowhere states that the omitted property was not in the state at the times when the owner or holder failed to return it for taxation. Neither is it anywhere claimed that any taxes were in any place ever paid on such property. The plaintiffs content themselves with simply alleging that the domicile of the decedent during the period in question was in some other state, not named, and that the obligations placed upon the duplicate as omitted property were executed by, and due from nonresidents of, the state. This is not enough, and the court did not err in sustaining the demurrer to the complaint. Judgment affirmed.

(146 Ind. 448)

PORTER et al. v. CAYLOR et al.
(Supreme Court of Indiana. Dec. 18, 1896.)
MORTGAGES—CONDITION OF BOND.

The conditions of a bond given in consideration that the parties to a bastardy suit should

marry, and that the bond and mortgage should be security to the wife that her husband would "support and kindly treat" her, is violated where the conduct of the husband is such as to drive his wife from home.

Appeal from circuit court, Delaware county; A. Ellison, Special Judge.

Action by Joseph Porter, trustee, and Pearl M. Caylor, by Joseph Porter, her next friend, against Harry Caylor and others, on a bond and mortgage. From a special finding of facts by the court, with his conclusions of law thereon, plaintiffs appeal. Reversed.

Gregory & Silverburg, for appellants.

HOWARD, J. On July 26, 1893, the bond and mortgage sued on in this case were executed by the appellees in favor of Pearl M. Phipps, now the appellant Pearl M. Caylor, wife of the appellee Harry Caylor. The said Harry Caylor was at the time in jail, awaiting the action of the circuit court upon a charge of bastardy, preferred by the said Pearl M. Phipps, now Caylor. By way of compromise, it was then agreed between the parties that the bastardy suit should be dismissed on condition that said appellee Caylor should marry said appellant Phipps, and that both said appellees should execute to her a bond, secured by mortgage on real estate, the bond to be in the sum of \$500, liquidated damages, as security that he would enter into said marriage, and faithfully keep his vows, particularly binding him to "live with and support and kindly treat the said Pearl M. Phipps as his lawfully wedded wife, for the full term of ten years, unless prevented by death." In pursuance of said agreement and the execution of the bond and mortgage, the bastardy proceedings were dismissed, and the parties became husband and wife. They lived together until September of the same year, soon after which, it is alleged, the conditions of the bond were violated, and this action was brought to recover the damages provided for in the bond, and for the foreclosure of the mortgage. The appellant Porter appeared for the appellant Pearl M. Caylor as trustee and next friend; the record showing that at the time she became pregnant by the act of the appellee Caylor, as charged, she was as yet but a school girl, and not 15 years of age. The cause was submitted to the court for trial, and there was a special finding of the facts, with conclusions of law. The court found the facts in issue substantially as stated in the complaint: That Pearl M. Phipps (now Caylor) was at the date of the bond and mortgage unmarried, of the age of 15 years, and living with her parents in the city of Muncie; that she was then pregnant with a bastard child, of which the said Harry Caylor was the father; that he had been arrested and committed to jail on said charge; that the compromise was entered into, by the terms of which the bond and mortgage

were executed, the suit dismissed, and the parties married; that they lived together until September 1, 1893, when the wife went to her parents' home; that on September 28th she gave birth to the child, which died in a few days; that, at the date of the marriage, the husband was afflicted with a venereal disease, which, within two weeks thereafter, he communicated to his wife, and from which she suffered continuously until some time after the birth of her child; and that said disease caused the premature birth of said child. The court also found that when the said wife left her husband, and returned to the home of her parents, "it was not because of any abuse or mistreatment of said Harry Caylor towards her, but because she was not satisfied with the home and other provisions the said Harry Caylor had made for her." Still other findings, but immaterial to the issues, were made; and the court concluded, as a matter of law, "that the plaintiffs are entitled to take nothing by this suit."

We do not think the conclusions of law were justified by the findings. One of the facts found is an intimation that the wife abandoned her husband; and we presume that it was upon this chiefly that the conclusions of law were based. The finding in question is rather a conclusion of fact, and is itself inconsistent with the facts in issue, and expressly found by the court. Two weeks after their marriage, the husband communicated a loathsome disease to his wife, from which she continuously suffered thereafter. The enormity of this conjugal offense was intensified by the circumstance that the wife was then in the delicate state caused by approaching maternity, to say nothing of her being but a child herself; and, if ever the condition of the bond that the husband should "support and kindly treat" his wife should apply, it was then, when she was about to become mother of his child. "The husband's cruelty," says Mr. Bishop (Mar. & Div. [6th Ed.] § 741), "is aggravated by the woman's being in pregnancy, also by her being of advanced [or, we might add, of tender] age, for there may be relative cruelty, and what is tolerable by one may not be by another." Yet it is quite impossible to conceive that the particular cruelty indulged in, in this case, could be tolerable by any one. In this case, too, not only the suffering of the mother, but the premature birth and speedy death of the child, were direct results of this cruelty. The wife did not desert the husband. His conduct drove her forth. As said in the vigorous language of Judge Lotz in *Carr v. Carr*, 6 Ind. App. 377, 33 N. E. 805: "Although the evidence in this case shows that the wife left the defendant, it was under such circumstances that made him; and not her, the deserter." And the learned judge continues: "His conduct was not only vile, but it was infamous. It was bad enough for him to violate his marital

vows; but, when followed up by inoculating the wife with a loathsome disease, the depths of infamy had been sounded. The law does not require that the wife shall abase herself to the extent of condoning the adulterous conduct of the husband; much less is she required to jeopardize her health and life in order that she may receive food, raiment, and shelter from his iniquitous hand. She is entitled to enjoy his good fortunes, and bound to share his misfortunes, but she is not required to share his ignominy and shame, or to imperil her life and health on account of his wrongdoing." "For a husband knowingly to communicate venereal disease to his wife," says Mr. Bishop, in the work already cited (section 735), "is adequate legal cruelty; and, in aid of the necessary proofs of knowledge, the presumption will be that he was aware of his own diseased condition and the danger of infection." See, also, definition of "cruelty as to husband and wife," as quoted from the same text writer by Judge Worden, in *Small v. Small*, 57 Ind. 568.

That the conditions of the bond in suit were violated, and that the appellants were entitled to recover, there can be no doubt. A case in form and substance much like the case at bar, and in which the acts of the husband in the violation of the conditions of the bond given his wife were less reprehensible, was that of *Stanley v. Montgomery*, 102 Ind. 102, 28 N. E. 213, appealed for the second time, and decided in favor of the wife in *Stanley v. Stanley*, 112 Ind. 143, 13 N. E. 261. The judgment is reversed, with instructions to the court to restate its conclusions of law, and to enter judgment for the appellants.

(147 Ind. 510)

HOOVER v. WEESNER.¹

(Supreme Court of Indiana. Dec. 22, 1896.)

QUIETING TITLE—APPEAL—WAIVER OF ERRORS—BILL OF EXCEPTIONS—EVIDENCE—RECORD—INSTRUCTIONS—ABSTRACT OF TITLE—MOTION.

1. Where appellant's counsel, in their brief, say, "We respectfully ask the court to pass on the third and fifth assignments of error without argument, as we have nothing to offer except the statutes," and no statute is referred to or pointed out, there is an express waiver of any error.

2. The concluding clause of a bill of exceptions, that "this is all the evidence given in the case," is not final, where the bill shows, on its face, that it does not contain all the evidence.

3. The sufficiency of the evidence to support the verdict cannot be considered, where the evidence is not all in the record.

4. The record must affirmatively show that the bill of exceptions was filed in open court or in the clerk's office.

5. In a motion for a new trial on the ground that "the court erred in giving instructions Nos. 2, 3, 6, 8," etc., all of one series of instructions so joined must be erroneous, or the error assigned thereon is unavailable.

6. Where an abstract of title, in an action of trespass and to quiet title, is voluntarily furnished by plaintiff without an order of the court, it is not a part of his complaint, and hence not a part of the record.

7. Where an abstract of title is not a part of the record, and it is sought to have reviewed a ruling on a motion to make the abstract more specific, the motion and the ruling thereon must be brought into the record by a bill of exceptions.

8. Where an abstract of title is voluntarily furnished by plaintiff, it is not a part of the complaint, and its insufficiency alone does not render the complaint insufficient.

Appeal from circuit court, Wabash county; H. B. Shively, Judge.

Action by Clarkson W. Weesner against John I. Hoover. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Sayre & Conner, for appellant. A. H. Plummer and H. O. Pettit, for appellee.

McCABE, J. The appellee sued the appellant, in a complaint of three paragraphs, to recover damages for trespass to real estate in the first paragraph, and to quiet the appellee's alleged title to said real estate in each of the second and third paragraphs. The first trial resulted in a verdict and judgment for the defendant. A new trial was granted to him as of right under the statute, and thereupon the complaint was amended so as to make it consist of the three paragraphs, as above indicated. The complaint and issues as they stood on the first trial are not embraced in the transcript. The issues made upon the complaint, as above indicated, were tried, resulting in a verdict and judgment for the plaintiff (appellee) over defendant's (appellant's) motion for a new trial. The appellant has assigned for error the action of the circuit court (1) in overruling appellant's motion for a new trial; (2) in overruling appellant's motion to require appellee to make his abstract of title more specific; (3) in overruling appellant's motion to tax costs of first trial to appellee; (4) in overruling appellant's demurrer to each paragraph of the complaint; and (5) in overruling appellant's motion for a new trial as of right.

Of the third and fifth assignments of error, appellant's counsel, in their brief, say: "We respectfully ask the court to pass on the third and fifth assignments of error without argument, as we have nothing to offer except the statutes." No statute is referred to or pointed out. Such a brief amounts to an express waiver of the error, if any there was, in the rulings assigned for error, according to the established rules of practice in this court.

One of the grounds of the motion for a new trial is that the evidence is not sufficient to support the verdict. There are two reasons why we cannot pass on the sufficiency of the evidence to support the verdict: First, the bill of exceptions shows that the evidence is not all in the record. It is true that the bill concludes in the formal way, that "this is all the evidence given in the cause." But it has frequently been decided by this court that such a statement cannot avail, where the bill shows on its face that it does not contain all the evidence, as is the case here. *Weaver v. Kennedy*, 142 Ind. 440, 41 N. E.

¹Rehearing denied, 46 N. E. 305.

810, and cases there cited. That has been so often decided by this court as precluding a consideration of the sufficiency of the evidence, that a citation of the cases would needlessly incur this opinion. And, second, the record fails to show that the bill of exceptions was ever filed, either in open court or in the clerk's office. It has often been held by this court that the record must affirmatively show such filing. *Marley v. Noblett*, 42 Ind. 85; *Bargis v. Farrar*, 45 Ind. 41; *Board v. Eperson*, 50 Ind. 275; *Kirby v. Bowland*, 69 Ind. 290; *Guilr v. Gillett*, 124 Ind. 501, 24 N. E. 1036; *Loy v. Loy*, 90 Ind. 404; *Shulse v. McWilliams*, 104 Ind. 512, 3 N. E. 243; *Robinson v. Dickey*, 143 Ind. 214, 42 N. E. 638; *Miller v. Railroad Co.*, 143 Ind. 570, 41 N. E. 801, and 42 N. E. 806; *Railroad Co. v. O'Brien*, 142 Ind. 218, 41 N. E. 528; *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540.

Another ground of the motion for a new trial was the giving of a series of instructions. We would be fully justified in refusing to consider these instructions, because the evidence is not in the record. But the statement of these two grounds in the motion for a new trial is as follows: "(5) The court erred in giving instructions Nos. 2, 3, 6, 8, 10, 13, 14, 17, 18, 19, 23, and 34, on its own motion. (6) The court erred in giving instructions Nos. 21, 22, 23, 24, 29, 30, 31, 32, and 33, asked by the plaintiff." It is not claimed by the appellant's learned counsel that all of these instructions, or all of either series, are erroneous. We do not find that all of either series are erroneous. It has often been decided by this court that, under such a specification in a motion for a new trial, all of one series of instructions so joined in the motion must be erroneous, or the error assigned thereon is unavailable. *Lawrence v. Van Buskirk*, 140 Ind. 481, 40 N. E. 54; *Bement v. May*, 135 Ind. 644, 34 N. E. 327, and 35 N. E. 387; *Railroad Co. v. Madden*, 134 Ind. 462-475, 34 N. E. 227; *Pennsylvania Co. v. Sears*, 136 Ind. 460, 34 N. E. 15, and 36 N. E. 353; *Cargar v. Fee*, 140 Ind. 572, 39 N. E. 93; *Railroad Co. v. Snyder*, 140 Ind. 646, 39 N. E. 912.

The second assignment of error does not present the question as to whether the court erred in overruling the appellant's motion to require the appellee to make his abstract of title more specific. The statute provides that, upon motion, the court may in all proper cases "order * * * abstracts of title to be furnished." *Rev. St. 1894, § 366 (Rev. St. 1881, § 363)*. The abstract in this case was voluntarily furnished by the appellee, without being required to do so. It constituted no part of his complaint. Such abstract was not part of the record. *Roberts v. Vornholt*, 126 Ind. 511, 26 N. E. 207. There is no bill of exceptions bringing into the record the abstract of title and the motion to make it more specific. It is only when a motion rests upon matters apparent upon the face of the

record proper that it may be presented without a bill of exceptions. Where such motion depends upon and relates to collateral matters not appearing upon the face of the record, then such motion and the ruling thereon must be brought into the record by a bill of exceptions. *Ohandler v. State*, 141 Ind. 106, 39 N. E. 444, and cases there cited. But there was no error in overruling the motion, if it were in the record, because the abstract was, as required by the rule stated in *Roberts v. Vornholt*, supra, "a condensed history of the title to the land, consisting of a synopsis or summary of the material or operative portion of all the conveyances, of whatever kind or nature, which in any manner affect the land." The only defect in the several paragraphs of the complaint, pointed out in appellant's brief, is the alleged insufficiency of the abstract of title furnished. That document, we have seen, formed no part of the complaint, and therefore its supposed insufficiency would not render either paragraph of the complaint insufficient, even if the abstract were defective, as supposed. Finding no available error in the record, the judgment is affirmed.

(146 Ind. 452)

NEW YORK, C. & ST. L. R. CO. v.
OSTMAN.¹

(Supreme Court of Indiana. Dec. 22, 1896.)

MASTER AND SERVANT—RAILROADS—NEGLIGENCE
—INJURY TO TRAINMAN FROM STRUCTURE NEAR
TRACK—CONTRIBUTORY NEGLIGENCE.

1. The maintenance by a railroad company of a structure in close proximity to a side track does not constitute negligence towards employes operating its trains, unless it is dangerous to such employes while exercising ordinary care.

2. A locomotive fireman, engaged in switching cars on a side track of defendant's railroad, while leaning from the cab window, looking back, struck his head against a cattle chute, which stood 13 inches from the window as the engine passed, and was killed. He had been working in the same capacity, on the same engine, for 16 months, passing the station twice each week, had frequently done switching there, and the chute had been in the same place, and plainly to be seen, during such time. Deceased was 25 years old, and familiar with the printed rules of the company, which enjoined all employes to take time in all cases to do their duty in safety, whether acting under orders of a superior or not. *Held*, that the facts did not show that deceased was free from contributory negligence, and defendant could not be held liable for his death. *Howard, J., dissenting.*

Appeal from circuit court, Allen county; E. O'Rourke, Judge.

Action by Emma Ostman, administratrix of Charles Ostman, against the New York, Chicago & St. Louis Railroad Company, to recover for the death of plaintiff's intestate. Judgment for plaintiff, and defendant appeals. Reversed.

Morris, Bell, Barrett & Morris, for appellant. Ninde & Ninde, for appellee.

JORDAN, C. J. Appellee commenced this action in the lower court to recover damages

¹See 41 N. E. 1037.

of appellant arising out of the death of her decedent, Charles Ostman, by reason of the alleged negligence of the railroad company. The deceased was the husband of appellee, and the fatal accident which resulted in his death occurred on April 8, 1891, at Burr Oak, a station on appellant's line of railway. There was a special verdict returned by the jury, upon which the court rendered its judgment in favor of the appellee for \$4,000, the amount assessed by the jury. Among the errors assigned by the appellant is one based upon the action of the court in awarding a judgment to appellee, under the facts set out in the special verdict. From the special verdict the following facts appear: "The defendant owned and operated a railroad running from the city of Buffalo, in the state of New York, through the city of Ft. Wayne and the town of Burr Oak, in the state of Indiana, to the city of Chicago, in the state of Illinois. That the deceased for 18 months prior to his death was in the employ of the defendant as a locomotive fireman, and for 16 months prior to his death said deceased was employed by said defendant as fireman on its engine 169, and continued to be so employed till his death, as hereinafter set forth. That during said period said deceased, in the discharge of his duties, passed said station at Burr Oak twice each and every week, and frequently did switching and work at said station. That during all said period the defendant had a side track and spur switch at said town of Burr Oak, both of which were located north of the main track of said railroad. That said side track was about 800 feet long, the east switch of which was about 400 feet east of the cattle chute hereinafter described, and the west switch of which side track was west of the depot hereinafter described. That at said point, 450 feet west of said east switch, the defendant had maintained, near to and on the north side of said side track, cattle pens, from which there was a cattle chute, about 18 feet long, leading from said pens, so near to the track that, by the aid of fences, gates, and doors, the stock was driven from said pens into the defendant's cars to be transported. That said chute was constructed as follows: Three oak posts, 6 inches square, were planted in the ground about equally distant from the north rail of said side track. Said posts were 11 feet 6 inches high. One of said posts was located on the west side of said cattle chute, and one about the middle, and one on the east side thereof. That a fence was constructed from each of said posts north to said cattle pens. That said fence, from the said middle post, north, to the cattle pens, divided said chute into two parts. That by means of said middle fence the said chute, between it and said west fence, was 6 feet 2 inches wide; and the chute between said middle fence and the east fence was the same width. That said fence was constructed of pine boards 6 inches wide and 6 inches apart. That a

gate was constructed out of pine boards, so that the boards of said gate were so adjusted to said fence that each board of the gate was located in each space between the boards of the fence; and said gate was about 18 feet long and 3 feet 6 inches wide, and was operated by being pushed towards and from the car to be loaded. At the north end of the gate was a board or batten, nailed across the ends of the gate boards to hold them in place; and on the west side of the south end of the gate was a similar board, nailed across the ends of the boards of the gate; and on the east side of the gate and fence were boards, nailed so as to allow the gate to move north and south along the spaces between the boards of the fence. The said boards so nailed across the south ends of the gate boards were placed on the west side of the gate, so that, when the gate was shoved northward, the north edge of said board would strike the face of said post, and prevent said gate from slipping back till the south end thereof was back flush with the south face of the post; but, because of said board striking said post, the south end of the gate, at the time the deceased was killed, was 6 inches further south than the post and 6 inches nearer the track than said post. That the south face of said post was, at the time said deceased was killed, 38 inches north of the center of the top of the north rail of said side track, and the south end of said gate, at the time said deceased was killed, was 35 inches north of the said center of said rail. That the cab of said engine is 8 feet 6 inches wide. That the distance between the north side of said cab, at the window thereof where deceased was so looking out, and the part of said cattle chute his head came in collision with, was 13 inches. That said distance between said cab and said cattle chute made the said cattle chute so placed extrahazardous for the deceased and other trainmen of said defendant. That the deceased did not know, nor have any reason or opportunity to know, that any part of said chute was within said distance of 13 inches of said cab as it passed the same, but that the defendant and its proper agents and servants did know that said chute was said distance from the cab window as it passed said chute. That said chute had for a long time, to wit, for several years before the deceased was killed, come in collision with parts of the defendant's trains as they passed the same, and frequently knocked off markers from cars and collided with brake wheels attached thereto. That said defendant had notice of said facts, and that said chute was the distance aforesaid from said cab and track as they passed the same, long enough before the deceased was killed to have removed the same to a safe distance from the trains passing the same, and yet during all said time, before and up to the time said deceased was killed, the defendant negligently failed to remove the same, but negligently

maintained the same at said dangerous distance from said track and cabs as they passed the same. That the said cattle pens and chute could be seen for a distance of one-half mile and more along the track each side thereof. That when deceased was killed he was firing on said engine 169, which was then and there pulling a local freight train eastward over said railroad. That it became and was necessary to take a car then standing on said spur switch into said train, which was coupled onto said engine at the west end of said side track, and was being pulled out over said side track eastward, and past said cattle chute, at the time said deceased was killed, at the rate of about 10 miles per hour. That while said train was so moving eastward over said side track, it became and was then and there the duty of said deceased to lean out of said cab window on the north side of said cab, and look backward for signals, and to see if everything was all right. And the said deceased was so then and there, at the time he was killed, carefully, and in the proper discharge of his duty, looking out of said window, and looking back for said signals, and to see if everything was all right at the time his head and part of his shoulders were partly inside said window and partly outside thereof, so that, as he passed said chute, his head came in collision with said cattle chute, whereby his skull was mashed in and broken, and said deceased was killed. That he died within a few minutes after he so struck said cattle chute. And we, the jury, further find that the board so nailed on the west side of the south end of said gate was longer up and down by the space of two inches than the said gate was wide, and that the upper end of said board was two inches higher than the upper edge of said upper board of said gate, and that said board was so placed upon the south end of said gate that the south edge thereof was from a half inch to one and one-half inches further south than the south end of said boards of said gate. That the top end of said board was further south than the lower end thereof by the space of one inch. That, when said deceased was looking out for signals, and to see if everything was right as aforesaid, and as he passed said cattle chute, the back of his head struck the outer edge of said board so nailed across the south end of said gate as aforesaid, by which collision he was killed as aforesaid. That at the time said Ostman was employed as fireman on the defendant's road, to wit, 18 months prior to April 8, 1891, said defendant railroad company delivered to said Ostman, and said Ostman received and familiarized himself with, its books and rules and instructions, and at the time of his injuries on April 8, 1891, he knew and was familiar with the same. That there was in force on defendant's road, as shown by said book of rules and instructions, at the time of the employment of said Ostman, and continuously to a time subsequent

to April 8, 1891, the following rules: '(1) All persons entering into or remaining in the service of this company are warned that, in acceptance or obtaining employment, they must assume the risk attending it. Each employé is expected and required to look after and be responsible for his own safety, as well as to exercise the utmost caution to avoid injury to his fellows, to the public, and to property, especially in switching cars and in all movements of trains. (2) Employés of every grade are warned to see for themselves, before using them, that the machinery or tools which they are expected to use are in the proper condition for the services required, and, if not, to put them in proper condition, or see that they are so put, before using them; also, train and engine men must familiarize themselves with the tracks and dangerous points upon the lines. The company does not wish or expect its employés to incur any risk whatever from which, by the exercise of their own judgment, and by personal care, they could protect themselves, but enjoins upon them to take time in all cases to do their duty in safety, whether they may at the time be acting under orders of a superior or otherwise.' '(4) They must assist in keeping a constant lookout upon the track, and must instantly give the engineman notice of any obstruction or signal they may perceive.' And we further find that said deceased did not know that said cattle chute was so close to said track, or to his cab as it passed the same, as to be dangerous to him, or that it would come into collision with him as he passed the same, and while he was discharging his duties as such fireman. And we, the jury, further find that said deceased was so injured and killed without any fault whatever on his part." It is further found that the deceased was 25 years of age at the time of his death.

Appellant affirms that, under the special findings of the jury, the appellee was not entitled to a judgment; and this may be considered the principal question for our determination. The particular insistence is that the facts as found by the jury do not establish actionable negligence against appellant, nor do they show absence of contributory negligence upon the part of the deceased servant at the time of the fatal accident. It is well settled by numerous decisions of this court that in actions of this character, whenever the plaintiff sues to recover upon the ground of negligence, it must be shown that the master was guilty of the negligence charged, and that the servant was free from the contributory negligence on his part, at the particular time of the alleged injury or death. Neither of these essential factors can to any extent be presumed. The special verdict in the case at bar is open to the objection that in some respects it contains conclusions, rather than the finding of facts essential to the issues involved. The theory of the verdict is that the negligence to be imputed to the ap-

pellant, under the facts embraced therein, is that of erecting and maintaining the cattle chute in too close proximity to its side track. There is nothing disclosed in the findings of the jury going to show that the chute in question was not built and maintained in the usual and proper place for such buildings. It is a matter of general knowledge that such chutes are necessary contrivances in the operation of railroads, and that they must necessarily be constructed close enough to the track where used as will enable the company to load and unload cattle without injury to the latter. It would seem that the correct standard by which the negligence of the railroad company ought to be measured, when the action is for an injury or death to one of its trainmen arising out of its alleged negligence in erecting or maintaining a chute in too close proximity to its tracks, is that it must be, when so erected or maintained, dangerous or unsafe to persons operating its trains when they are exercising, under the particular circumstances, ordinary care. In the case of *Gould v. Railroad Co.*, 66 Iowa, 590, 24 N. W. 227, an engineer was killed by being struck upon the head by a "water crane," close to the track, while in the act of leaning out of the "gangway" of his engine, looking back for expected signals. The trial court charged the jury that if they found, from the evidence, that the water column was placed in such close proximity to the track as to be dangerous to persons operating the trains, they would be justified in finding that the defendant was guilty of negligence in the erection and location of the column. The court held that the giving of this instruction was error, and said: "It is not true that a railroad company is to be regarded as negligent in erecting and maintaining contrivances or things for use in the operation of their roads for the reason that they are dangerous to the persons operating the trains. Indeed, the whole business of operating trains is dangerous. It is full of perils to those employed therein. Because there is danger, it does not follow that the companies are negligent as to the thing from which the danger springs. The instruction should have expressed the thought that, if the crane was dangerous to persons operating trains in the exercise of ordinary care, the defendant was negligent in constructing it." The jury found that the part of the chute that struck the head of the plaintiff's intestate, while he was looking out and back was "thirteen inches from the side of the cab at the window from where he was looking out; * * * that said distance made it extrahazardous for the deceased and other trainmen; that the deceased did not know, or have any reason or opportunity to know, that any part of said chute was within thirteen inches of said cab as it passed the same." The finding that this distance between the particular point of the chute that struck the head of the deceased and the side of the cab, when

it was passing the chute, rendered the same extrahazardous, is more in the nature of a conclusion than the finding of a material fact, and for this reason must be disregarded in determining the sufficiency of the special findings.

While we have asserted the general rule applicable to the test or question of the negligence of the company, when it is involved as it is in the case under consideration, we may, however, pass without deciding whether the appellant was guilty of actionable negligence under the findings of the jury, as it does not appear, from the facts embraced in the verdict, that the deceased was himself free from contributory negligence at the time of the fatal accident. It is shown that, before the time of the occurrence, Ostman had been for 16 months and over continually in the employment of the appellant, as its fireman, upon the same engine upon which he was at work when killed; that the chute in question was so conspicuous that it and its location could be seen for a distance of a half mile and more "along the track each side thereof"; that, during this period of time, the deceased, in the discharge of his duties, passed the station where the chute was located, twice each week, and frequently did work and switching at this station. He was 25 years of age,—of sufficient age and capacity, by the use of his senses, to see, appreciate, and comprehend obvious dangers, and thereby avoid them. The finding that the deceased did not have an opportunity to know that the chute was in such close proximity to the side track, in consideration of the other facts, must be viewed more as a conclusion upon the part of the jury than finding of a material fact. He was, as it appears, familiar with and understood the rules of the company, and one of these rules expressly provided: "Also, trainmen and enginemen must familiarize themselves with the tracks and dangerous points upon the lines. The company does not wish or expect its employes to incur any risk whatever from which, by the exercise of their own judgment, or by personal care, they could protect themselves, *but enjoins upon them to take time in all cases to do their duty in safety, whether they may be at the time acting under orders of a superior or otherwise.*" (The italics are our own.) Under this rule deceased was required to familiarize himself with the tracks and dangerous points upon the lines, and it was not incumbent upon him to incur any risk from which, by the exercise of judgment and care, he could protect himself. This chute was not located upon the main track, but on the switch or side track at Burr Oak. As the deceased frequently did switching at this station, he consequently must have frequently passed this chute on the side track while switching, and thereby had ample opportunities to learn and be apprised of its close proximity to the track, and the danger of passing the same in his cab

when leaning out and looking in an opposite direction from the chute, as it appears he did, and what care was necessary to be exercised to escape injury therefrom when passing it. The fact that the jury found that he did not know and could not know of the hazard to which he would be subjected in passing the chute in the manner he did, at the time of his fatal injury, has no bearing upon the question of care upon his part. It is a finding which is antagonized by the specific facts disclosed by the verdict, and we must accept them as controlling under such circumstances. In addition to the duty resting upon the deceased to employ or exercise his senses while on duty, he, by the express provisions of the rule above set out, was admonished and enjoined to do so, and to take time, and to exercise care to protect himself from danger.

It is urged by the appellee that the facts show that her decedent did not know what distance the part of the chute which struck him was from the passing engine. In answer to this it may be said that the means of knowing by ordinary care is evidence of knowledge. *McKee v. Railroad Co.*, 83 Iowa, 616, 50 N. W. 209; *Pennsylvania Co. v. Finney* (Nov. term, 1895) 42 N. E. 816. In the former case it was held that a railroad employé, in going over the line of the railroad in the discharge of his duties, will be presumed to have known, from such opportunity, that the distance between a wing fence and a passing car was such as to make it unsafe to swing out more than two feet from the car. In the latter case the alleged negligence was based upon the company having located and maintained a water crane in close proximity to its main track, whereby Finney, who was a brakeman in its service, was killed, by being struck by the crane while descending from the car upon which he was braking. The employé in this case was 22 years of age. He had been in the services of the company for a period of 6 months, during which time he had passed the crane almost daily. It was held by this court that, under the facts in that case, the deceased was chargeable with contributory negligence. The court said: "Everything, as it appears, was open and visible to the decedent. He was a man 22 years of age, and, had he used his senses, and faculties with which it is presumed nature had endowed him, we think he would have escaped the danger to which it is contended appellant had exposed him. The means which a person has of knowing that, under the circumstances, he will expose himself to peril, are deemed in law to be evidence of knowledge of that fact. *Muldowney v. Railroad Co.*, 39 Iowa, 620; *McKee v. Railway Co.*, 83 Iowa, 616, 50 N. W. 209. In *Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741, this court said: "The law requires that men shall use the senses with which nature has endowed them, and when, without excuse, one fails to do so, and

is injured in consequence, he alone must suffer the consequences." See *Stone Co. v. O'Brien* (Ind. App.) 40 N. E. 430. In no case will the master be held liable to the servant where the latter brings injury upon himself which he might have avoided by the exercise of reasonable care and prudence. *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. 187." The facts in the Finney Case, supra, are similar in their character to those in this appeal, and the holding in that case is virtually decisive upon the question here involved. In the case of *Power Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30, it is said: "An employé who knows, or by the exercise of ordinary diligence could know, of any defects or imperfections in the things about which he is employed, and continues in the service without objection, and without promise of change, is presumed to have assumed all the consequences resulting from such defects, and to have waived all right to recover for injuries caused thereby." (The italics are our own.) See *Lovejoy v. Railroad Corp.*, 125 Mass. 79; *Brown v. Railroad Co.*, 69 Iowa, 161, 28 N. W. 487. We are of the opinion that, under the facts as they are disclosed by the finding in this case, knowledge of the hazard or danger, to which it is claimed by the appellee that her intestate was subjected and exposed by reason of the location of the cattle chute, and the manner in which it was maintained, must be imputed to him. It is not made to appear, by any reasonable inference that may be drawn from the specific facts found, that there was freedom from contributory negligence upon the part of the deceased at the time of the accident. The special verdict does not support the judgment. The judgment of the lower court is therefore reversed, and the cause remanded, with instructions to the court to vacate its judgment, and render a judgment in favor of appellant upon the special verdict.

HOWARD, J. (dissenting). I think that the facts found by the jury show that the company was negligent, and that the deceased was free from contributory negligence, and must therefore dissent from the conclusion reached by the court.

(146 Ind. 486)

THOMPSON v. CHICAGO & E. R. CO.

(Supreme Court of Indiana. Dec. 24, 1896.)

MASTER AND SERVANT—INJURY TO SERVANT—LIABILITY OF MASTER.

1. Plaintiff, a helper in defendant's shops, alleged that G., a machinist, under whose direction he was working, and who had power to discharge the men under him, ordered plaintiff, in a violent manner, and with profane language, to lift one end of a steam-chest cover, promising to assist him; that plaintiff was excited by G.'s language, and, fearing to lose his place, and in reliance on the promise of assistance, lifted the cover; but that G. did not lend a hand, and, as a result, plaintiff was ruptured; and that defendant knew when it employed G. that he was quick-tempered and pas-

sionate. *Held*, that as the negligence, if any, was that of a fellow servant, and there was nothing to show a breach of a duty by defendant, plaintiff could not recover.

2. A difference in rank or the power to control and direct or discharge from service is not the test as to whether one is a fellow servant or vice principal.

Appeal from circuit court, Huntington county; C. W. Watkins, Judge.

Action by Charles C. Thompson against the Chicago & Erie Railroad Company to recover for personal injuries. From a judgment for defendant, plaintiff appeals. Affirmed.

Sayler & Sayler, for appellant. W. O. Johnson and Kenner & Lesh, for appellee.

HACKNEY, J. The sufficiency of the appellant's amended complaint is the only question presented by the record. It alleged: That he was an employé of the appellee in its machine repair shops in the city of Huntington, working as a machinist's helper under one Grover, a machinist in appellee's employ. That he was subject to the directions of Grover, and was liable to dismissal from the service if not obedient to him. That Grover "was a very quick-tempered and passionate man, which the defendant, at the time it employed him in authority over the plaintiff, could have known, and did know, but, notwithstanding such knowledge, and disregarding the health and safety of its other employés, and particularly this plaintiff," it employed Grover, and put him in authority of the appellee. That it became necessary to place the heavy cover of a steam chest in position upon a locomotive, and for that purpose appellant was directed to lift one end, while two others should lift the other end, and while said Grover would stand upon the guards of the locomotive to receive the cover when lifted up to him. The appellant objected to the lifting against two men; when Grover said that he would stoop down and aid in the lifting, "and with violent and profane language, and with violent manner, ordered the plaintiff to lift said steam-chest cover. Said violent manner and said violent and profane language of the said Grover produced in the mind of the plaintiff great excitement and concern that he was in danger of losing his said employment," and by reason thereof, and in reliance upon the promised assistance from Grover, he did lift said cover, and said Grover did not lend him any assistance. That, as the result of said lifting, he was severely strained, and suffered a rupture. It is alleged, also, that Grover knew that such lifting was dangerous, and that the appellant did not know that it would injure him; and the pleading concludes, after an allegation that the appellee, with knowledge of appellant's injury, discharged him, and refused to give him employment, that the occurrence was without appellant's fault or negligence, and "was caused by the negligence and fault of the defendant, as herein set out."

The two inquiries which must control the

question presented by the complaint in review are these: Was Grover a vice principal? Or, if not, was the appellee negligent in employing or retaining him in his service? The learned counsel for the appellant stoutly maintain that Grover was a vice principal. The rule in this state, now firmly settled, is that a difference in rank or the power to control and direct or to discharge from service is not the test as to whether one is a fellow servant or a vice principal. The controlling inquiry must be as to whether the act or omission resulting in injury involved a duty owing by the master to the injured servant. *Coke Co. v. Peterson*, 136 Ind. 398, 35 N. E. 7; *Spencer v. Railway Co.*, 130 Ind. 181, 29 N. E. 915; *Justice v. Pennsylvania Co.*, 130 Ind. 321, 30 N. E. 303; *Railway Co. v. McMullen*, 117 Ind. 439, 20 N. E. 287; *Railway Co. v. Dalley*, 110 Ind. 75, 10 N. E. 631; *Railway Co. v. Stupak*, 108 Ind. 1, 8 N. E. 630; *Railway Co. v. Adams*, 105 Ind. 151, 5 N. E. 187; *Car Co. v. Parker*, 100 Ind. 181; *Coal Co. v. Cain*, 98 Ind. 282. What duty of the master is shown by this complaint to have been neglected? One argument of counsel is that the appellee was obliged to supply a safe working place and safe machinery and appliances. True, but that duty was not alleged to have been omitted. "Safe working place and safe machinery and appliances" do not mean that heavy steam-chest covers may not be put in place, because the doing of it involves hazard, from the mere weight required to be lifted. The act alleged to have directly resulted in injury was that of requiring the appellant to lift beyond his strength, and that act is alleged to have been one of the servant Grover. The act did not involve the supplying of a place to work, or the instrumentalities of the service, but consisted in the manner in which several servants employed a proper instrument of the service. Unmistakably, the appellant and Grover were fellow servants, and there was no liability of the appellee without some negligence on its part not consisting alone in the act of Grover.

It is more than doubtful if any negligence is attempted to be alleged against the appellee, since the only charge of negligence is that with which the complaint concludes. If, however, that should be held to characterize as negligent every connection of the appellee with the occurrence as alleged, we should have the single inquiry as to whether a master employing a servant who is a "quick-tempered and passionate man" is liable in damages for the remote consequences of that servant's evil use of his tongue. Counsel for appellant do not seek to affirm any such liability, and such is not the theory of the pleading. Nor do the allegations suggest that Grover was an unskilled or habitually negligent servant, nor that the company had any reason to believe that he was not fully acquainted with and competent to perform all of the duties of his employment. The failure of Grover to lend a helping hand, as he had

promised, was not chargeable as negligence against the appellee, but was an omission by a fellow servant of the appellant. The allegations as to the fear in which Grover placed the appellant by his angry and profane language, even if that condition of mind excused the appellant from doing that which he knew to be dangerous, and that which he had refused to do because of his own judgment that his strength was not equal to it, are a doubtful answer to the requirement of non-contributory negligence on his part. But, if they were a complete answer, the fact would yet remain that the whole occurrence was due to the negligence of a fellow servant in overestimating the physical strength of the appellant, and in failing to assist him in bearing a burden. The fellow-servant rule must be held to defeat the appellant's cause of action. The judgment of the circuit court is affirmed.

(147 Ind. 611)

HARRISON NAT. BANK v. CULBERTSON
et al. 1

(Supreme Court of Indiana. Dec. 23, 1896.)

APPEAL—TIME OF TAKING.

Appeals in actions in the circuit court by nonresidents against heirs and devisees, authorized by Rev. St. 1894, §§ 2597, 2598, 2608 (Rev. St. 1881, §§ 2442, 2443, 2453), in "any court of competent jurisdiction," to subject lands received from the estate to debts of the decedent for which they were originally liable, are controlled by Rev. St. 1894, §§ 2609, 2610 (Rev. St. 1881, §§ 2454, 2455), requiring appeals in proceedings relating to decedents' estates to be perfected within 40 days after judgment, and not by the general provisions for appeals in civil actions (Rev. St. 1894, §§ 644, 645; Rev. St. 1881, §§ 632, 633).

Appeal from circuit court, Floyd county; Jacob Herter, Judge.

Action by the Harrison National Bank against Rebecca K. Culbertson and another. From a judgment for defendants, plaintiff appeals. Dismissed.

F. T. Hord, Lafayette Perkins, S. D. Miller, E. G. Henry, and Stebbins & Evans, for appellant. H. M. & A. Dowling, for appellees.

HACKNEY, J. In the circuit court the appellant sued the appellees, Rebecca K. Culbertson and Samuel A. Culbertson, as the sole residuary devisees and legatees of William S. Culbertson, who died testate in the state of Indiana. The complaint, to which that court sustained the demurrers of the appellees, sought to recover against them upon an alleged liability of said decedent, and by virtue of sections 2597 et seq., Rev. St. 1894 (section 2442 et seq., Rev. St. 1881), which sections declare the liability of, and procedure against, the heirs, devisees, and distributees of a decedent, to the extent of the property received by them from such decedent's estate. The alleged liability of the decedent was upon an indebtedness of \$3,452, reduced to a judgment, against the United

States Savings Bank, a corporation subsisting under the laws of the state of Kansas, in which corporation said decedent was, at the time of his death, a stockholder representing stock of the par value of \$10,000, which said indebtedness, under the constitution and laws of the state of Kansas, was a charge against the individual stockholders of said corporation.

The inquiry at the threshold of the case arises upon the motion of the appellees to dismiss the appeal herein. Neither the appeal bond nor the transcript was filed within 40 days after the decision complained of was rendered, but the appeal was completed within one year from the rendition of said decision, and without an order extending the time beyond 40 days. The theory of the appellees is that the appeal should have been perfected under sections 2609 and 2610, Rev. St. 1894 (sections 2454, 2455, Rev. St. 1881), which provide that any person aggrieved by a "decision * * * growing out of any matter connected with a decedent's estate" may appeal by filing an appeal bond within 10 days after the decision is made, unless otherwise ordered by the court appealed to, and by filing the transcript within 30 days after filing the bond. The theory of the appellant is that the appeal was not required to be taken under sections 2609, 2610 (2454, 2455), *supra*, but that it was properly taken under the Civil Code (Rev. St. 1894, §§ 644, 645, et seq.; Rev. St. 1881, §§ 632, 633), which permits an appeal from the circuit court within one year from the rendition of final judgment. It would seem, therefore, that the question as to whether the appeal was perfected within the proper time must depend upon the meaning of the words "decision * * * growing out of any matter connected with a decedent's estate," as employed in section 2609 (2454), *supra*. While these words have many times been construed by this court, their construction with reference to section 2597 (2442) et seq., *supra*, has never before been sought. Whenever the claim or right presented for recovery has been against the estate of the decedent it has been uniformly held that the practice in appealing was that prescribed in said sections 2609, 2610 (2454, 2455), *supra*, or by provisions of like character in earlier statutes. *Bennett v. Bennett*, 102 Ind. 80. 1 N. E. 199; *Miller v. Carmichael*, 98 Ind. 236; *Browning v. McCracken*, 97 Ind. 279; *Yearley v. Sharp*, 96 Ind. 469; *Bell v. Mousset*, 71 Ind. 347; *Ten Brook v. Maxwell* (Ind. App.) 32 N. E. 106.

On the other hand, it has been held, with like uniformity, that if the cause of action or demand is in favor of the estate, and the procedure for its enforcement is not prescribed by Decedents' Estates Act, c. 6 (Rev. St. 1894, §§ 2365—2621; Rev. St. 1881, §§ 2217—2466), the practice as to appeals is that prescribed by the Civil Code (Rev. St. 1894, §§ 644, 645, et seq.; Rev. St. 1881, §§ 632, 633, et seq.). *Mason v. Roll*, 130 Ind. 260, 29 N.

E. 1135; *Simmons v. Beazel*, 125 Ind. 362, 25 N. E. 344; *Walker v. Steele*, 121 Ind. 436, 22 N. E. 142, and 23 N. E. 271; *Heller v. Clark*, 103 Ind. 591, 3 N. E. 844; *Hillenberg v. Bennett*, 88 Ind. 540; *Willson v. Binford*, 74 Ind. 424; *Rusk v. Gray*, Id. 231; *Merritt v. Straw*, 6 Ind. App. 360, 33 N. E. 657.

There is also a class of cases holding that where, pending an action, the death of a party is suggested, and his administrator is substituted, the appeal from a decision therein is governed by the decedents' estates act. *Wright v. Manns*, 111 Ind. 422, 12 N. E. 160; *May v. Hoover*, 112 Ind. 455, 14 N. E. 472; *Holland v. Holland*, 131 Ind. 196, 30 N. E. 1075; *Railway Co. v. Etzler*, 4 Ind. App. 31, 34 N. E. 669. This class of cases and that last before cited establish conclusively that it is not every "decision * * * growing out of a matter connected with a decedent's estate" which is appealable under the decedents' estates act. And it must be apparent that the literal import of the words quoted would be fatal to the appellant's standing in this court, for it is clear that the decision here "grows out of a matter connected with a decedent's estate." It was upon an alleged liability of the decedent, was sought to be enforced against property held and left by him, and in no respect involved a personal liability of the appellees. If the only reason, sometimes asserted by the cases and that relied upon by the appellant, for limiting the time for appeals to 40 days from the decision, were that it should secure an early settlement of the estate involved, that reason would apply with equal force where the action is by the administrator to collect moneys due the estate as where it is for the recovery of moneys from the estate.

There is still another class of cases which hold that where the remedy is given and the procedure is prescribed by the decedents' estates act the right of appeal given in that act must be pursued. *Galentine v. Wood*, 137 Ind. 532, 35 N. E. 901; *Webb v. Simpson*, 105 Ind. 327, 4 N. E. 900; *Rinehart v. Vail*, 103 Ind. 159, 2 N. E. 330; *Seward v. Clark*, 67 Ind. 289; *Taylor v. Burk*, 91 Ind. 252; *Bake v. Smiley*, 84 Ind. 212; *Koons v. Mellett*, 121 Ind. 585, 23 N. E. 95. In *Galentine v. Wood*, supra, it was said: "It has often been decided by this court that the question as to whether an appeal is governed by the above provisions depends upon whether the proceeding from which the appeal is taken is a proceeding under the decedents' act or a proceeding under the Code. Where it is sought to appeal from any proceeding under the decedents' act, compliance with these provisions must be had, but where the proceeding is not under this act, the appeal is governed by the general provisions upon the subject of appeals,"—citing many of the cases cited by us. In *Mason v. Roll*, supra, it was said of the provision limiting appeals to 40 days: "This procedure is applicable to cases where the probate jurisdiction of the court is involved, but does not govern appeals in actions under the

Code, not involving the exercise of the probate jurisdiction of the court." In *Koons v. Mellett*, supra, it was said: "The rule to be deduced from the decisions upon the subject is that in all proceedings under the law providing for the settlement of decedents' estates, where the exercise of the probate jurisdiction of the court is invoked, the appeal is governed by sections 2454, 2455, Rev. St. 1881," being sections 2609, 2610, Rev. St. 1894. Such are the expressions of many of the cases.

It would now seem necessary only to ascertain whether the proceeding in this case was under the decedents' estates act or not, to determine whether the appeal was in time. The appellant's action in form and effect was to enforce, after the executor was discharged, a claim for which the estate would have been liable and the devisees not liable. It was enforceable against the property of the decedent during administration, without regard to heirs or devisees. It is now enforceable, not as a claim or liability against the heirs or devisees, but as against the property in their hands, which property was subject to the liability before the death of the testator, after his death and during administration, and after his death when administration is closed. The right to enforce the liability of the decedent against his property after his estate is settled is not a right common to all creditors, nor does it exist except by statute. The statute which gives this right (Rev. St. 1894, §§ 2597-2608; Rev. St. 1881, §§ 2442-2453) is relied upon by the appellant, who is alleged to come within its exception by reason of nonresidence. This right is now, and throughout all of the revisions of the statutes since it was given in this state has been, given; and the manner of its enforcement has been prescribed in and by what has been known as the "Decedents' Estates Act," or that division or chapter of the statutes conferring the jurisdiction and prescribing the procedure for the enforcement of rights against the estates of decedents. Rev. St. 1831, pp. 166, 167, §§ 23, 24; Rev. St. 1843, pp. 566-568, §§ 426-443; 2 Rev. St. 1852, pp. 289, 290, §§ 178-188; Rev. St. 1894, §§ 2597-2609 (Rev. St. 1881, §§ 2442, 2453). While the last revision was not by legislative authority, it simply copies with headnotes and citations the act of 1881, entitled "An act providing for the settlement and distribution of decedents' estates." Acts 1881, p. 423. It is by section 216 et seq. of this act that the appellant's right is given and the procedure for its enforcement is prescribed. These provisions are connected, in the orderly arrangement of the statute for the settlement of decedents' estates, with sections relating to the final settlement of administration and the distribution of the property among the heirs or devisees; and, conceding their constitutional validity, they are connected with the subject of the act as expressed in its title. By the provisions of Rev. St. 1831, supra, the rights of nonresidents and those under disability were secured, upon final settlement of administration, by a bond of the distributee and the right

to open the settlement. By the later provisions cited the right was given to such persons for enforcement against the property distributed, without requiring the often impossible thing,—the execution of a bond,—and without withholding indefinitely the settlement by the administrator, or permitting, for this purpose, the opening of the settlement. The security to the class of creditors named is in the property first, and subsequently against the heir if he has parted with the property, but in no event beyond the value of the property. That these provisions were designed to be connected with the general scheme or system of laws for the settlement of decedents' estates is further shown by the fact that in an earlier provision (Rev. St. 1894, § 2465; Rev. St. 1881, § 2310)—that relating to the filing of claims—it is provided that "if not filed at least thirty days before final settlement of the estate, it shall be barred, except as hereinafter provided in case of liabilities of heirs, devisees and legatees." If the rule of the decisions last cited is not to be overturned, it must be held that, the right being given and the procedure prescribed by the decedents' estates act, the appeal is not in time. Against this conclusion it is said by the learned counsel for the appellant that section 2598, Rev. St. 1894 (section 2443, Rev. St. 1881), permits the proceeding to "be instituted in any court of competent jurisdiction," implying that it need not be instituted in the court granting the letters of administration, but may be brought according to the domicile of the heir or the location of the property. Conceding this implication, it does not enforce the conclusion that the "court of competent jurisdiction" does not sit upon the question in the exercise of its probate authority, as conferred by the very statute from which appellant's right is derived. In *Noble v. McGinnis*, 55 Ind. 528, was announced a proposition which all must concede is true: "The circuit courts have now conferred upon them a probate jurisdiction, which is separate and distinct from the general jurisdiction in civil causes; and their methods of proceeding, in the exercise of their probate jurisdiction, are equally separate and distinct from those prescribed by the Civil Code of Procedure in ordinary civil actions. All matters touching decedents' estates, wills, administrators, executors, guardians, and heirs, and all business transacted in relation thereto, in said courts, are required to be kept separate, in proper books prepared for that purpose, in the same manner as when the courts of common pleas had the exclusive original jurisdiction of the probate business of the state, and such probate jurisdiction, since it has been transferred to the circuit courts, is still as much a separate and independent jurisdiction as when it was exercised by the courts of common pleas." But the language of the statute, "any court of competent jurisdiction," carries no more force than to have said "the court of competent jurisdiction," for it does not permit a choice between the probate and civil jurisdictions of the courts, and it was employed rather with reference to the locality of the

court than as to the character of its jurisdiction. The proceeding defined by the statute is "by petition,"—the usual method of invoking the probate jurisdiction of the courts, and an absolute method of invoking their civil jurisdiction. A research of all of the decisions under the statute permitting the decedents' creditors to pursue the property left, after final settlement, discloses that they were instituted in the common pleas courts, where the probate jurisdiction then resided. We conclude, therefore, that the proceeding was under the decedents' estates act, and must be governed, as to the appeal, by that act, and that the transcript was not filed in time. The appeal is dismissed.

(146 Ind. 476)

MULVANE v. RUDE et al.

(Supreme Court of Indiana. Dec. 23, 1896.)

WILLS—GENERAL DEVISE—BEQUESTS—INTENTION OF TESTATOR—LIMITATIONS OVER.

1. The common-law rule, that a general devise gives only a life estate, is in force in Indiana, though it was abolished, by Rev. St. 1843, p. 485, § 5, until 1853.

2. Words of inheritance are not necessary to give absolute title to bequests, and whenever a will purports to dispose of realty and personalty in the same words and in the same connection, and it is manifest that the testator intended both to go together, the instrument will be so construed.

3. Where one item in a will gave the widow the real estate in fee and the absolute title to the personalty, and a subsequent item suggested that the widow might give to testator's heirs that part of the property received under his will which "should not have been expended or otherwise disposed of by her, * * * but, in case my wife should die intestate, whatever part or amount of the real and personal property willed to her which shall remain unexpended or otherwise disposed of by her at her decease, I do will and bequeath to my daughter," the widow took absolute title to the property, and the devise over was void.

Appeal from circuit court, Morgan county; George W. Grubbs, Judge.

Action by Emily J. Mulvane against William L. Rude, executor, and others. A demurrer for want of facts was sustained to each paragraph of the complaint, and judgment was rendered on demurrer in favor of defendants, from which plaintiff appeals. Affirmed.

Willis Hickam, H. E. Shaw, and John C. Robinson, for appellant. Emerson Short, John S. Bays, W. R. Harrison, and David E. Beam, for appellees.

MONKS, J. This action was brought by appellant to recover the possession of certain real estate and personal property and to quiet the title to the real property. A demurrer for want of facts was sustained to each paragraph of the complaint, and judgment was rendered upon demurrer in favor of appellees. The errors assigned call in question the action of the court in sustaining the demurrer to each paragraph of the complaint.

The question to be determined is whether the will of Samuel Folsom gave to Sophia D. Folsom, his second wife, by whom he had no chil-

dren, the absolute title to the real and personal property in question, or whether it gave to her only a life estate, with remainder over to appellant, who was the only child of the testator by a former marriage. The court below held that the widow, Sophia D. Folsom, by the terms of said will, took the absolute title to the real estate and personal property in controversy. The will so far as essential to the determination of this case is as follows:

"First. I give and bequeath to my beloved wife, Sophia D. Folsom, in lieu of her interest in my lands, all my real estate in said town of Worthington, known and designated on the plat of said town as 'Lots 21, 22, and the South Half of Lot 23,' with all the appurtenances thereto belonging, and all the household and kitchen furniture, pictures, ornaments, and all other personal property, of every description whatever, belonging to me at the time of my decease, except money on hand or on deposit, notes, bills, bonds, and judgments of which I may be possessed at said time. Second. I give and devise to my daughter, Emily J. Mulvane, and her heirs, the farm on which the said Emily now resides, or controls, in Edgar county, in the state of Illinois, containing one hundred and fifteen acres, and also all my unsold town lots in the towns of Freedom and Spencer, in Owen county, in the state of Indiana. Third. After paying all my funeral expenses, and all my just debts that may be against me, as well as all expenses of executing this my will, I give and bequeath to my said wife, Sophia D., and my said daughter, Emily J., all the money on deposit or on hand, all United States bonds, judgments, promissory notes, or other evidence of indebtedness belonging to me, or in which I may have any interest at the time of my decease; the same to be equally divided between my said wife and daughter, upon their agreement so to do, so soon after my decease as may be proper and convenient. But any or all of said claims may be left in the hands of my executor, hereinafter named, for collection and division as above directed. Fourth. I do hereby nominate and appoint my wife, Sophia D. Folsom, and my friend, William C. Andrews, executors of this my last will and testament, and do hereby direct that my said executor Sophia D. Folsom shall not be required to give bond and security for the exercise of the trust hereby conferred upon her. I do hereby empower my said executors, or either of them, to collect, or to transfer and assign, any or all claims due or payable to me upon an agreement as specified in item third of this my last will and testament. Fifth. I do hereby revoke and make void all wills by me at any time heretofore made. And now, having full confidence in the judgment of and integrity of my wife, and there being a strong probability that she may survive me for some years, and fearing that some of my heirs may be unworthy of any special bequest before the decease of my said wife, I have therefore made the terms of this will as hereinbefore written, and will add the following suggestions to my said wife: That

whatever part of the legacies hereinbefore made to her, and shall not have been expended or otherwise disposed of by her, may at her decease be given by her to such of my legal heirs as in her judgment shall need and would make good use of the same. But in case my said wife should die intestate, whatever part or amount of the real and personal property hereinbefore willed to her, which shall remain unexpended or otherwise disposed of by her at her decease, I do will and bequeath to my daughter, Emily J. Mulvane, and her heirs."

The purpose, in construing a will, is to ascertain and give effect to the intention of the testator, so far as the same may not interfere with the established rules of law. *Fowler v. Duhme*, 143 Ind. 248, 42 N. E. 623; *Allen v. Craft*, 109 Ind. 476, 9 N. E. 919; *Ross v. Ross*, 135 Ind. 367, 370, 35 N. E. 9. The common-law rule, that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate, which was abolished in England in 1837, is in force in this state, although it was abolished by Rev. St. 1843, p. 485, § 5, until 1853. *Cleveland v. Spilman*, 25 Ind. 95; *Smith v. Melsner*, 51 Ind. 419; *Roy v. Rowe*, 90 Ind. 54; *Mills v. Franklin*, 128 Ind. 444, 28 N. E. 60; *Ross v. Ross*, 135 Ind. 367-370, 35 N. E. 9. In speaking of this rule, it was said by Chancellor Kent (4 Kent, Comm. [13 Ed.] 535 et seq.) that "it does not require the word 'heirs' to convey a fee; but other words denoting an intention to pass the whole interest of the testator, as a devise of 'all my estate,' 'all my interest,' 'all my property,' 'my whole remainder,' 'all I am worth or own,' 'all my right,' 'all my title,' or 'all I shall be possessed of,' and many other expressions of like import, will carry an estate of inheritance, if there is nothing in the other parts of the will to limit or control the operation of the words." It is also provided by section 2737, Rev. St. 1894 (section 2567, Rev. St. 1881; *Id.* *Horner's Rev. St.* 1896), "that every devise in terms denoting the testator's intention to devise his entire interest in all his real or personal property, shall be construed to pass all the estate in such property, including estates for the life of another which he was entitled to devise at his death." In bequests of personal property, words of inheritance were not required at common law, nor are they now to give an absolute title. *Chinn v. Respass*, 1 T. B. Mon. 25; *Bailey v. Duncan's Representatives*, 4 T. B. Mon. 257; *Boyd v. Strahan*, 36 Ill. 355. Whenever a will purports to dispose of real estate and personal property in the same words and in the same connection, and it is manifest that the testator intended both to go together, it is held that the will must be so construed. *Heilman v. Heilman*, 129 Ind. 59, 62, 63, 28 N. E. 310, and authorities cited; *Ross v. Ross*, supra; *Duncan v. Wallace*, 114 Ind. 169, 175, 16 N. E. 137; *Wyatt v. Sadler's Heirs*, 1 Munf. 537; *Johnson v. Johnson*, *Id.* 549; 3 Jarm. Wills (Rand. & T. Ed.) 86, note.

Under these rules, counsel for appellant admit that the first item, considered alone, with-

out, regarding the fifth item, gave to the widow the real estate in fee simple and the absolute title to the personal property; but they insist that, when considered in connection with the fifth item and the surrounding circumstances, the title to the same was only during her life. It is thoroughly settled that a devise in fee, clearly and distinctly made, or necessarily implied, cannot be cut down or modified by subsequent provisions not clearly and distinctly manifesting the testator's intention to limit such devise. *Mitchell v. Mitchell*, 143 Ind. 113, 42 N. E. 465; *Gingrich v. Gingrich* (this term) 45 N. E. 101; *Orth v. Orth* (Ind. Sup.) 42 N. E. 277; *Fowler v. Duhme*, 143 Ind. 248, 42 N. E. 623; *Ross v. Ross*, supra; *O'Boyle v. Thomas*, 116 Ind. 243, 19 N. E. 112; *Bailey v. Sanger*, 108 Ind. 264, 9 N. E. 159; *Hochstedler v. Hochstedler*, 108 Ind. 506, 9 N. E. 467; *Appeal of McKenzie*, 41 Conn. 807; *Jones v. Bacon*, 68 Me. 34; *Moore v. Sanders*, 15 S. C. 440; *Sherburne v. Sischo*, 143 Mass. 439, 9 N. E. 797. When real estate is given absolutely to one person, with a gift over to another of such portion as may remain undisposed of by the first taker at his death, the gift over is void, as repugnant to the absolute property first given; and it is also established law that, where an estate is given to a person generally, or indefinitely, with a power of disposition, it carries a fee, and any limitation over is void for repugnancy. *Wiley v. Gregory*, 135 Ind. 647, 652, 35 N. E. 507; *South v. South*, 91 Ind. 221, 222; *Jackson v. Robins*, 16 Johns. 588, and cases cited; *Helmer v. Shoemaker*, 22 Wend. 137; *Campbell v. Beaumont*, 91 N. Y. 464; *Ide v. Ide*, 5 Mass. 500; *Burbank v. Whitney*, 24 Pick. 146; *Bacon v. Woodward*, 12 Gray, 376; *Bowen v. Dean*, 110 Mass. 438; *Gifford v. Choate*, 100 Mass. 343; *Kelley v. Meins*, 135 Mass. 231, 234; *Williams v. Worthington*, 49 Md. 572; *Combs v. Combs*, 67 Md. 11, 8 Atl. 757; *Stowell v. Hastings*, 59 Vt. 494, 8 Atl. 738; *Chaplin v. Doty*, 60 Vt. 712, 15 Atl. 362; *Judevine's Ex'rs v. Judevine* (Vt.) 7 Lawy. Rep. Ann. 517, and note; s. c. 18 Atl. 778; *Rubey v. Barnett*, 12 Mo. 3, 49 Am. Dec. 112, and note on pages 115-119; *Bean v. Kenmuir*, 86 Mo. 666; *Norris v. Hensley*, 27 Cal. 439; *Smith v. Starr*, 3 Whart. 62, 31 Am. Dec. 498, and note on pages 501, 502; *Jaureche v. Proctor*, 48 Pa. St. 466; *Selbert v. Wise*, 70 Pa. St. 147; *McClellan v. Larchar*, 45 N. J. Eq. 17, 16 Atl. 269; *Hall v. Palmer*, 87 Va. 354, 11 Lawy. Rep. Ann. 610, and note; s. c. 12 S. E. 618; *Rona v. Meier*, 47 Iowa, 607; *Bills v. Bills*, 80 Iowa, 269, 45 N. W. 748, and cases cited; s. c. 20 Am. St. Rep. 418, and note; *Ramsdell v. Ramsdell*, 21 Me. 288; *Jones v. Bacon*, 68 Me. 34, 28 Am. Rep. 1, and note on page 4; *Mitchell v. Morse*, 77 Me. 423, 1 Atl. 141; *Larsen v. Johnson*, 78 Wis. 300, 47 N. W. 615, 23 Am. St. Rep. 404, and note on pages 409, 410; *Howard v. Carusi*, 109 U. S. 725, 3 Sup. Ct. 575; 4 Kent, Comm. (13th Ed.) 535, 536. The only exception to this rule is where the testator gives to the first taker

an estate for life only, by certain and express terms, and annexes to it the power of disposition. In that particular special case the devisee for life will not take an estate in fee, notwithstanding the naked gift of a power of disposition. *Wiley v. Gregory*, supra; *Wood v. Robertson*, 113 Ind. 323, 15 N. E. 457; *Downie v. Buennagel*, 94 Ind. 228; *South v. South*, supra; *Jackson v. Robins*, supra, and cases cited; *Ide v. Ide*, supra; *Rubey v. Barnett*, 12 Mo. 3, 49 Am. Dec. 112, and note on pages 115-119; *Appeal of Hinkle*, 116 Pa. St. 490, 9 Atl. 938; *Burleigh v. Clough*, 52 N. H. 267; *Logue v. Bateman*, 43 N. J. Eq. 434, 11 Atl. 259; *McCullough's Adm'r v. Anderson*, 90 Ky. 126, 7 Lawy. Rep. Ann. 836, and note; s. c. 18 S. W. 353; *Stuart v. Walker*, 72 Me. 146, 39 Am. Rep. 311, and note; note to *Larsen v. Johnson*, 23 Am. St. Rep. 410; 4 Kent, Comm. (13th Ed.) 535, 536.

Considering the fifth item of said will in connection with the first and third, it is clear, we think, that *Sophia D. Folsom* had the power, during her life, to dispose of any or all the property, real and personal, given to her by said will. The suggestion of the testator, in item 5, is not that his wife may, at her decease, give all the property received by her under the will to his heirs, but that she may give that part that shall not have been expended or otherwise disposed of by her. And the testator provides, in said item, that if his wife should die intestate, not that he gave and bequeathed all the property devised to her in said will to his daughter, *Emily J. Mulvane*, and her heirs, but only what shall remain unexpended or otherwise undisposed of. Here is a clear recognition by the testator of her power to dispose of the real and personal property given her by said will. The power of disposition need not be given in express words, even where only a life estate is given by express words, but may be implied. *Silvers v. Canary*, 109 Ind. 267, 9 N. E. 904; *Clark v. Middlesworth*, 82 Ind. 240, and cases cited; *Ramsdell v. Ramsdell*, 21 Me. 288; *Scott v. Perkins*, 28 Me. 22; *Shaw v. Hussey*, 41 Me. 495; *Paine v. Barnes*, 100 Mass. 470; *Harris v. Knapp*, 21 Pick. 412; *Ide v. Ide*, 5 Mass. 500; *Kelley v. Meins*, 135 Mass. 231, 234; *Burbank v. Whitney*, 24 Pick. 146. In *Ide v. Ide*, supra, the court held that, if the limitation over is not of the estate granted to the first devisee, but over of that which remains, it would seem clear there was an unqualified power of disposition implied in the first taker. In *Shaw v. Hussey*, supra, the devise over was, "All my real estate that may remain unexhausted by her,"—the first devisee; and the court held that the first devisee held, by clear implication, the right of disposal of the real estate. If the first and third items, considered alone, are sufficient, as conceded by counsel, to give to the widow an estate of inheritance to the property, real and personal, mentioned therein, the unlimited power of disposition, given in the fifth item by implication, most certainly does not cut

down the estate given by said first and third items. On the contrary, where such power is annexed to an estate given to a person even generally or indefinitely it is held to carry a fee.

The correct test of the effect of provisions apparently at variance with other parts of the will is whether the intent is to give a smaller estate than the words making the gift, standing alone, would import, or only to impose restraints upon the estate given. The former is lawful and effective, because the testator's intention is the controlling consideration in the construction of the will; the latter is rarely, if ever, effective, for the reason that even a clear intention of the testator cannot be permitted to contravene the settled rules of law by depriving any estate of any of its essential legal attributes. Did the devise over to the appellant reduce the fee previously given to a life estate? Such an effect may be produced if the language is so clear and definite as that it unequivocally appears that the testator meant to reduce the estate granted. This, under the settled rules of law, can only be done, where there is a power of disposition, by giving in certain and express terms an estate for life only. *Jackson v. Robins*, supra, and cases cited, supra. If the first and third items of the will gave the widow an absolute title to the property named therein, it is clear, from the authorities cited, that the devise over to the appellant was void. It is not material, however, whether said items, construed alone, gave her an absolute title or not, as it is evident that said will did not in certain and express terms give her an estate for life only, but did, by implication, give her the power during her life to dispose of the same. It follows, therefore, from what we have said and the authorities cited, that *Sophia D. Folsom* took an absolute title to the property in controversy, and that the devise over to the appellant was void. Judgment affirmed.

(146 Ind. 430)

CONNER v. CITIZENS' ST. R. CO.

(Supreme Court of Indiana. Dec. 17, 1896.)

STREET RAILROAD—WILLFUL INJURY TO PASSENGER—INSTRUCTIONS—REVIEW ON APPEAL—HARMLESS ERRORS—WITNESSES—CALLING FOR CONCLUSION—TRIAL—OBJECTION TO EVIDENCE.

1. One cannot recover for an injury, without showing freedom from contributory negligence, unless the act complained of was intentionally done, with a design to injure, or under circumstances showing reckless disregard for the safety of others.

2. Evidence that the driver of a street car slowed up at a signal from plaintiff, who was on the car with a friend; that the friend safely alighted while the car was in motion; and that the driver then started up, by striking the mules with his whip, thereby throwing plaintiff off,—is insufficient to support a charge of willful injury, in the absence of any proof that the driver knew plaintiff was about to alight.

3. A charge that if plaintiff was injured as alleged, and the injury was accidental, defendant would not be liable, is not erroneous if the whole instruction shows that the word "acci-

dental" was used to signify something resulting undesignedly, and without the fault of either party.

4. An instruction that it is for the jury to determine whether the act of defendant's driver, if established, "under all the circumstances, amounted to negligence," the legal definition of which the court had already given, is not objectionable, as authorizing the jury to decide a question of law.

5. An instruction that a street-car company is liable for an injury to a passenger through its failure to exercise the highest degree of care, if the passenger is not himself negligent, is not erroneous because it fails to add an unrequested charge that only ordinary care is required on the part of the passenger to exonerate him from contributory negligence.

6. When there is nothing to show that all the instructions given are in the transcript, possible error in refusing certain requests cannot be considered.

7. A question to plaintiff's witness on cross-examination, whether there had ever been a time in his knowledge of street railroading when the company "had a custom" of stopping on curves to let passengers off, was not objectionable, as calling for a conclusion, instead of a fact.

8. The rejection of admissible evidence which could not have changed the result is harmless error.

9. Error in rejecting a question to a witness is cured by allowing other questions which elicit the same testimony.

Appeal from superior court, Marion county; L. M. Harvey, Judge.

Action by Thomas H. Conner against the Citizens' Street-Railroad Company. From a judgment for defendant, plaintiff appeals. Affirmed.

T. E. Johnson, for appellant. Mason & Latta, for appellee.

MCCABE, J. The appellant sued the appellee to recover damages for personal injuries alleged to have been inflicted on appellant through the negligence of the appellee, as charged in some of the paragraphs of the complaint, and purposely inflicted, as also charged in the third paragraph claiming \$12,000 damages. The issues joined were tried by a jury, resulting in a verdict for the defendant, upon which the court rendered judgment, overruling appellant's motion for a new trial. The only error assigned calls in question the action of the trial court in overruling appellant's motion for a new trial. The giving and refusing of certain instructions are specified as grounds for the motion for a new trial.

The first instruction complained of is No. 1, given by the court on its own motion. It told the jury that "the complaint in this case is in three paragraphs. The third paragraph, which charges a willful injury, is not supported by the evidence, and you are therefore instructed not to consider the third paragraph of the complaint." It is insisted that this was error, because it is claimed that the evidence was sufficient to warrant the jury in drawing the inference that the appellant's injury was purposely and willfully committed. The appellant's testimony shows that he was a passenger on appellee's street car, being drawn by mules, and that he had paid

his fare and the fare of his friend, Mr. Beck, —10 cents; that he signaled the driver, there being no conductor, to stop at a certain point, where he and his companion desired to get off; that the car slowed up, and he and Mr. Beck went out onto the platform to get off, and Mr. Beck stepped off, though the car had not come to a full stop; that, before appellant had reached the platform, Beck had got off. Appellant testifies that he got himself ready to step off, but the car did not come to a standstill; it kept moving very slow, though he thought every instant it would stop, but, instead, the driver struck the mules, and surged it forward; and he said, "I lost my balance, and fell." There is no evidence that the driver knew that appellant had not got off at the time he struck the mules, and started the car faster. It may be justly said that it was the driver's duty to know whether the passenger had got off in safety before starting up the car faster. Indeed, it was his duty to stop the car at the proper place long enough for passengers desiring to do so to alight in safety. Such failures and omissions, however, are nothing more than negligence, unless there was some evidence of knowledge on the part of the driver at the time of striking the mules, and starting up the car, that appellant had not got off the car.

The rule applicable here was stated by Mitchell, J., speaking for the court, in *Gregory v. Railroad Co.*, 112 Ind., at page 387, 14 N. E. 229, thus: "As a rule of evidence, the presumption that every person intends the natural and probable consequence of his wrongful or unlawful acts applies as well in civil as in criminal cases; hence the unlawful intent may be shown by direct evidence, or it may be inferred from conduct which shows a reckless disregard of consequences, and a willingness to inflict injury, by purposely and voluntarily doing an act with knowledge that some one is unconsciously or unavoidably in a situation to be injured thereby. An act which in itself might be lawful becomes unlawful when done in a manner or under circumstances which charge the actor with knowledge that it will result in injury to some one. [Citing *Palmer v. Railroad Co.*, 112 Ind. 250, 14 N. E. 70; *Railway Co. v. Ader*, 110 Ind. 376, 11 N. E. 437; *Railway Co. v. Bryan*, 107 Ind. 51, 7 N. E. 807; *Stock-Yard Co. v. Mann*, 107 Ind. 89, 7 N. E. 893; *Pennsylvania Co. v. Smith*, 98 Ind. 42.] * * * The right of the court to direct a verdict for the defendant in case the plaintiff's evidence, giving it the most favorable construction it will legitimately bear, fails to establish any fact which constitutes an essential element in his right of action is clear. [Citing authority.] The rule which governs in such cases is substantially that which controls where there is a demurrer to the evidence. If all the plaintiff's evidence, with all the legitimate inferences which a jury might reasonably draw from it, is insufficient to sustain a verdict in his fa-

vor, so that a verdict for the plaintiff, if one should be returned, would be set aside, the court may properly direct a verdict for the defendant without submitting the evidence to the jury." That is practically what the instruction in question did. It amounted to directing the jury to find for the defendant as to the third paragraph of the complaint. *Palmer v. Railroad Co.*, 112 Ind. 250, 14 N. E. 70, was a case where a deaf person was walking on the railroad track of the appellee in that case, and his father, who saw the passenger train coming behind his son, ran ahead of the train, waving his hat at his deaf son, and making signals to him to get off the track. But the deaf son's face was not turned, and he failed to see his father or the signals or the train running towards him from the rear. The train ran over and killed him. The engineer in charge of the engine testified that he saw both men, but did not see the father making signals to his son, and did not know that the son or the foremost man was deaf. This evidence was not contradicted, the father testifying that he did not know whether the engineer saw the signals or not. It is there said, on page 260, 112 Ind., and page 75, 14 N. E., that "the fact that signals indicating peril are given and are seen by the engineer plainly distinguishes the case from the class of cases represented by *Railroad Co. v. Graham*, 95 Ind. 286. Proceeding in defiance of such signals creates the constructive intention of which our cases speak, and makes the conduct of the wrongdoer willful. Such an act is not simply negligence; it is a wrong, implying a willingness to inflict the injury. While we agree with appellant's counsel upon the legal proposition as we have stated it, we cannot agree in their inference of fact, for we cannot assent to the conclusion that a jury might have inferred that the engineer saw the signals given by the father of the deceased." And so, here, we do not think that the jury could reasonably and logically draw the conclusion from the evidence above set forth that the street-car driver knew when he started up the car, by striking the mules with his whip, that the appellant had not yet got off the car, and was in a situation making it dangerous to appellant to so start up the car by striking the mules with his whip. To the same effect are *Railway Co. v. Ader*, supra; *Railway Co. v. Bryan*, supra; *Stock-Yard Co. v. Mann*, supra; *Pennsylvania Co. v. Smith*, supra; *Railroad Co. v. Willooby*, 134 Ind. 563, 33 N. E. 627; *Railway Co. v. Hunter*, 33 Ind. 335.

The substance of the rule as established by the cases to which we have referred is that, to entitle one to recover for an injury without showing his own freedom from contributory fault, the injurious act or omission must have been purposely and intentionally committed, with a design to produce injury, or it must have been committed under such circumstances as that its natural and reason-

able consequence would be to produce injury to others, the actor having knowledge of the situation of those others. There must have been an actual or constructive intent to commit the injury. A constructive intent may be established by evidence showing a reckless disregard for the safety of others, and a willingness to inflict the injury complained of. Such action is willfulness. But willfulness implies knowledge on the part of the actor. *Parker v. Pennsylvania Co.*, 134 Ind. 673, 34 N. E. 504; *Evans v. Railway Co.*, 142 Ind. 264, 41 N. E. 537. It is not necessary, however, to show the intention, either actual or constructive, to commit the particular injury which resulted. It is enough to show that some injury to another or others would naturally and probably result from the act complained of. Here the evidence most favorable to appellant shows that he rang the bell, signaling the driver to stop the car at a given point; that the driver accordingly slowed up the car until it was going very slow, so that Mr. Beck alighted from the car without any difficulty before the appellant got onto the platform. There is no evidence that the driver knew that appellant also wished to get off, nor was there any evidence that the driver knew that appellant paid both fares, there being no conductor; and the 10 cents, the two fares, having been put in the box provided for its reception, there was nothing to indicate to the driver that both men wished to get off at the same place. There was no evidence to show that the driver knew that appellant was out on the platform about to get off when he struck the mules with his whip, and started up the car. As before observed, it was his duty to know it, but his failure to observe the appellant's motions, he being 80 years old, may have been negligence, but did not indicate a willingness to inflict an injury upon the appellant. There could be no willfulness on the part of the driver unless he knew the situation of the appellant when he did the act complained of. Nor could the jury legitimately draw the inference from the evidence recited that he did know such fact. Because it was his duty to know the fact affords no just ground for the jury to infer that he did know it. Therefore the trial court did not err in withdrawing the third paragraph from the consideration of the jury.

The next instruction complained of is the fourth, given by the court on its own motion. The instruction is very long, and it is conceded that it states the legal liabilities and rights of the respective parties under the facts detailed in the evidence, up to the last or closing sentence, reading as follows: "If the plaintiff was injured as alleged in his complaint, and the injury was accidental, the defendant would not be liable." We are referred to *Nave v. Flack*, 90 Ind. 205, as authority holding such an instruction erroneous. That case involved an instruction refused touching the question of negligence as

applicable to the facts in that case. It was there said: "It is contended that the word 'accident' qualifies the instruction, and makes it correctly express the law. We do not think so. A pure accident, where there is an absence of negligence, will not supply a cause of action; but, where the accident is attributable to the negligence of the defendant, it is otherwise. *Shear. & R. Neg.* § 5. The poverty of language compels the use of words in different meanings, and this is notably true of the word 'accident.' Strictly speaking, an accident is an occurrence to which human fault does not contribute; but this is a restricted meaning, for accidents are recognized as occurrences arising from the carelessness of men. *Browne, Jud. Interp.* 4. The use of the word 'accident' does not save the instruction before us." There was enough in the instruction in the case now before us preceding the part we have quoted to require the jury to find for the plaintiff if the accident was caused by the defendant's negligence. In its popular sense the term "accident" signifies an event or occurrence which happens unexpectedly, from the uncontrollable operations of nature exclusively, or an event resulting undesignedly and unexpectedly from human agency alone, or an event resulting from the joint operation of both of the foregoing agencies. 1 *Am. & Eng. Enc. Law* (2d Ed.) 277. The whole instruction plainly shows that it was in the latter sense the word was used in the instruction, and not in the sense that the occurrence may have arisen from the carelessness or negligence of the appellee's driver. There was no error in giving the instruction.

It is next complained that the fifth instruction given by the court is erroneous. The part of it objected to reads as follows: "It is for you to determine from the evidence before you if the act charged against the driver has been established by a preponderance of the testimony; and, if you believe that it has been so established, you will then determine if such act, under all the circumstances, amounted to negligence." The objection urged is that the instruction authorized the jury to decide a question of law. The converse almost of the proposition contained in the above instruction was held by this court to have been erroneously given to the jury in *Pennsylvania Co. v. Hensil*, 70 Ind. 569. The instruction there told the jury that "if you find from the evidence that the train that struck the plaintiff, if one did strike her, consisted of two cars and an engine; that the two cars were being backed over the street; that there were no brakes or brakeman on the front car, as it passed over the crossing, and no one in advance of the cars; that no bell was rung as the train was backing over the street; that the crossing was in a populous part of the city, and much frequented by people continually passing over it,—then you should

find the defendant guilty of negligence." It is there said of this instruction, at page 575, that "the facts enumerated in this instruction may or may not have constituted negligence, depending upon other facts which may have had some relation to the alleged injury to the appellee. As an instruction, it confounded that which under the circumstances only tended to prove negligence, with negligence itself. It assumed to make a matter of law out of facts which had been submitted to them. The cases in which the question of negligence can thus be withdrawn from the jury are of comparatively rare occurrence. It is only when the circumstances of a case are such that the standard of duty is fixed and certain, or where the measure of duty is defined by law, and is the same under all circumstances, or when the negligence is so clearly defined and palpable that no verdict could make it otherwise, that the court is authorized to make the question of negligence one of law, and not of fact. *Thomp. Neg.* 1236; *Shear. & R. Neg.* § 11." Another instruction very similar to the one above quoted was held to have been erroneously given to the jury in *Railway Co. v. Wright*, 80 Ind. 236, where it was said: "Upon the hypothesis that the evidence showed the facts stated, and no other facts than those stated in the instruction, the case was not such as to enable the court to say conclusively, as a matter of law, that the plaintiff was entitled to recover. It still remained to be determined by inference from the facts supposed whether the defendant's servants had been guilty of any negligence or want of care, which caused the injury complained of." To the same effect are *City of Franklin v. Harter*, 127 Ind. 448, 26 N. E. 882, and *Evans v. Express Co.*, 122 Ind. 362-365, 23 N. E. 1039. In *Hudson v. Houser*, 123 Ind., at page 320, 24 N. E. 246, it is said: "By the sixth instruction the court was requested to charge the jury that, if the evidence established a certain state of facts, those facts, standing alone, did not constitute such negligence as to render the appellant liable. This instruction was properly refused for two reasons: It ignored the evidence of other facts, and was calculated to mislead the jury. * * * The second reason is that, under the evidence in the case, the question of negligence was a question of fact for the jury. See *Railway Co. v. Lee*, 50 N. J. Law, 435, 14 Atl. 883; *Id.*, 7 Am. St. Rep. 798, and note; *Railway Co. v. Wright*, 80 Ind. 236; *Ramsey v. Gravel-Road Co.*, 81 Ind. 394; *Town of Albion v. Hetrick*, 90 Ind. 545; *Car Co. v. Parker*, 100 Ind. 181; *Railway Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530; *Woolery v. Railway Co.*, 107 Ind. 381, 8 N. E. 226; *Railway Co. v. Harrington*, 82 Ind. 534." Under the rule established by these cases, it was not error to direct the jury to "determine if such act [act of the driver established by the evidence], under all the circumstances,

amounted to negligence." That was the exclusive province of the jury, which the court had no right to invade. The court had already properly defined what it takes to constitute negligence, we presume, the record not showing the contrary. It was therefore the exclusive province of the jury to determine whether, under all the circumstances, the act of the driver amounted to negligence, according to the legal definition of negligence given them by the court.

It is also urged that the superior court erred in the fourth instruction, already mentioned, in another particular. In it the jury were told that the street-car company was a common carrier, and was bound to the use of the highest degree of care for the safety of passengers, from the time they enter the car until they leave it, and that such company was liable for an injury to a passenger caused by a failure to exercise such care, provided that such passenger was not guilty of any fault or negligence on his part which contributed to the injury. The objection to the instruction is that it did not go further, and tell the jury that the care required of the passenger in order to exonerate him from contributory negligence was not of the same high degree required of the carrier, but that the law only required of the passenger ordinary care. The instruction was not erroneous as given, and would not have been erroneous by the addition the absence of which is complained of. If appellant was fearful that the jury would construe the instruction to mean that the same degree of care was required of the passenger as is required of the carrier, as he now insists they may have done, then he should have asked an instruction removing the possibility of mistake in that respect. This he failed to do. He is therefore not in a situation to successfully urge that the court erred because the jury might have made a mistake, and misconstrued the instruction.

It is next urged, at great length, that the superior court erred in refusing to give to the jury a series of eight instructions asked by the appellant. There is nothing in the record to show that the instructions that appear in the transcript as having been given by the court are all the instructions that the court gave to the jury. For aught that appears, the refused instructions may have been refused because the court had already fully instructed the jury upon the points involved in the offered instructions. In that case it would be no error to refuse them, even though they each stated the law correctly as applicable to the case. We are bound to presume in favor of the ruling of the trial court if any legal reason may have existed justifying the action of the court, unless that reason is affirmatively shown by the record not to exist. *Railway Co. v. Buck*, 130 Ind. 300, 30 N. E. 19; *City of New Albany v. McCulloch*, 127 Ind. 500, 26 N. E. 1074; *Lehman v. Hawks*, 121 Ind. 541, 23 N. E. 670; *Musgrave v. State*,

133 Ind. 297, 32 N. E. 885; *Stewart v. State*, 111 Ind. 554, 13 N. E. 59.

The sixth ground of the motion for a new trial is that the court erred in overruling appellant's objection to a question on cross-examination of appellant's witness, George Abbott, as follows: "I will ask you if there has ever been a time in your knowledge of street railroading when the company had a custom of stopping on curves to let passengers get off or on the cars?" A. "No, sir; we would never stop at curves." The only one of the objections made to the question at the time that is now urged in appellant's brief is that a custom is a conclusion from a group of facts; that the question did not call for a fact, but a conclusion. No authority is cited in support of the proposition that a custom or usage is not a fact, but a conclusion, and we know of none. A custom or usage is a fact that may be stated by a witness in the first instance, without stating the incidents or instances within his knowledge by which he became possessed of the knowledge of the custom, the same as he may testify to the general reputation of a witness. 1 Greenl. Ev. (Redf. Ed.) §§ 129, 128; Id. (2d Ed.) 148-152.

The next ruling complained of is made the fourth ground in the motion for a new trial, namely, overruling appellant's objection to a question put to him by his counsel, as follows: "Q. On Thursday before you got hurt, when you rang the bell, as stated by you, state what the party in charge of the car did in reference to slowing up the car, if anything." On sustaining appellee's objection, appellant's counsel stated that "we offer to prove, in response to the question asked, that the driver in charge of the team and car, as soon as the bell was rung, slowed up, and stopped the car, for the plaintiff to alight therefrom, at or about the same point where the plaintiff was thrown from the car on Saturday." This question had reference to the controversy in the case whether, by the rules of the company, cars were allowed to stop at all at the point where appellant attempted to get off, it being maintained by the appellee company that their rules did not permit cars to stop at that point. It is the duty of one about to take passage on cars to learn and ascertain for himself whether the rules of the carrier will permit a stop at a particular point where he may desire to get off. *White v. Railroad Co.*, 133 Ind., at page 487, 33 N. E. 275; and he has no right to rely on the statement of a ticket agent selling him a ticket for passage on such road that the train will stop at a given point, in the absence of any statement by such agent that the rules of the company allowed the train to stop at such point. Therefore, the act of another car driver of appellee, stopping a single time at a point not permitted by the rules of the company, was of very little force, as against the undisputed evidence that the rules of the company as to such stop were posted up in the

car in printed letters large enough to be read by any one across the car, to the effect that that car would stop only at the further crossing, that being a different place than that where appellant attempted to get off. The only ground on which it is claimed by appellant that the evidence ought to have been admitted is that it would tend to show that appellee had been in the habit of stopping at that point to let passengers off. Even if such habit could have any effect in modifying the clearly-established rule of the company on that point, we think the proof of a single act of the company can hardly be said to tend to establish such habit. As was said by Justice Field in *Insurance Co. v. Foley*, 105 U. S. 354: "It would be incorrect to say that a man has a habit of anything from a single act." See *Lynch v. Bates*, 139 Ind. 206, 38 N. E. 806. The word "habit" is defined to be a fixed or established custom; ordinary course of conduct. But conceding, without deciding, that the offered evidence was erroneously excluded, yet, in view of all the evidence, the result must have been the same if it had been admitted. It has often been correctly and justly held by this court that the rejection of admissible evidence, which could not have changed the result, is a harmless error. *Hanlon v. Doherty*, 109 Ind. 37, 9 N. E. 782; *Aufdecamp v. Smith*, 96 Ind. 328; *Bartlett v. Railway Co.*, 94 Ind. 281. Hence the error, if error it was, to exclude it, was harmless.

The fifth ground in the motion for a new trial is sustaining an objection to a certain question put to the witness John Simmons. But, whether right or wrong, the ruling proved harmless, by reason of the fact that other questions were afterwards put to the witness in better form, that elicited all the testimony that the rejected question could have elicited.

We have gone over all the questions raised and presented by the assignment of errors and appellant's brief, and find no available error. Our labors have been unnecessarily increased by the fact that appellee's brief is missing from the files. The judgment is affirmed.

(16 Ind. App. 478)

RHODES v. HILLIGOSS.

(Appellate Court of Indiana. Dec. 17, 1896.)

ACTION BY RECEIVER—LEAVE OF COURT—PLEADING—CURE OF DEFECTS IN COMPLAINT.

1. Under *Horner's Rev. St. 1896, § 1228* (*Burns' Rev. St. 1894, § 1242*), providing that a receiver shall have power "under control of the court or of the judge thereof in vacation to bring and defend actions," a complaint by a receiver of a corporation on a claim due to it must show leave of court obtained before suit brought.

2. A complaint in a suit by a receiver, which alleges his appointment and qualification, and states that he entered on his duties as receiver, "and accordingly he brings this suit," does not sufficiently show that leave of court, as required by *Horner's Rev. St. 1896, § 1228* (*Burns' Rev. St. 1894, § 1242*), was obtained.

3. *Horner's Rev. St. 1896, § 345* (*Burns' Rev.*

St. 1894, § 348), providing that no objection taken by demurrer and overruled shall be sufficient to reverse the judgment if it appears from the whole record that the merits of the case have been fairly determined, and Horner's Rev. St. 1896, §§ 398, 658 (Burns' Rev. St. 1894, §§ 401, 670), providing that technical errors or mere defects in form shall not be ground for reversal, do not cure the error in overruling a demurrer to a complaint by a receiver which fails to show that the leave of court required by Horner's Rev. St. 1896, § 1228 (Burns' Rev. St. 1894, § 1242), was obtained, though the record shows that the case was fairly tried, and the proper result was reached.

Appeal from circuit court, Marion county; E. A. Brown, Judge.

Action by Sullivan M. Hilligoss, receiver, against William A. Rhodes. From an order overruling a demurrer to the complaint, defendant appeals. Reversed.

Elmer B. Stevenson, for appellant. W. V. Rooker, for appellee.

ROSS, J. The only question presented on this appeal is whether or not it is necessary to the statement of a cause of action, in a suit commenced by a receiver upon an obligation due the corporation for which he is acting, that it be alleged that leave of court to institute and prosecute the action was obtained before suit was commenced. Section 1228, Horner's Rev. St. 1896 (section 1242, Burns' Rev. St. 1894), provides that: "The receiver shall have power, under control of the court, or of the judge thereof in vacation to bring and defend actions, to take and keep possession of the property, to receive rents, collect debts, in his own name, and generally to do such acts respecting the property, as the court or the judge thereof may authorize." This section authorizes a receiver to bring an action only when authority to do so has been granted by the court, if in session, or the judge thereof in vacation. In *Garver v. Kent*, 70 Ind. 428, the court says: "There is no averment in the complaint that the court appointing the plaintiff as receiver authorized him to bring this or any action or actions in his own name, in matters concerning his receivership. The objection is fatal to the plaintiff's recovery, as the complaint states no facts showing a right of action in him." In *Moriarity v. Kent*, 71 Ind. 601, Elliott, J., says: "This case turns upon the question whether the receiver of an insolvent corporation has any authority to sue in his own name upon promissory notes executed to the corporation, in cases where there is no authority conferred by statute or by the judgment of a court of competent jurisdiction." In *Keen v. Breckenridge*, 96 Ind. 69, the court, in construing the above section of the statute, and the right thereunder to sue a receiver, says: "As a receiver, in the absence of statutory authority, can neither sue nor be sued without leave of the court by which he was appointed, we think it is essential to aver in the complaint that leave to bring the action had been granted by the proper court." In the case of *Davis v. Creamery Co.*, 128 Ind.

222, 27 N. E. 494, the court, after reviewing the authorities, including *Garver v. Kent*, supra, *Moriarity v. Kent*, supra, and *Keen v. Breckenridge*, supra, says: "Under these authorities a complaint filed by a receiver which fails to allege that leave of the court to institute and prosecute the action has been obtained is fatally defective." In the case of *Wayne Pike Co. v. State*, 134 Ind. 672, 34 N. E. 440, which was an action instituted against the receiver, the court says: "It seems to be settled that a receiver, as a general rule, can neither sue nor be sued, without leave of the court making the appointment is first obtained." In *Pouder v. Catterson*, 127 Ind. 434, 26 N. E. 66, the court says: "It is undoubtedly a correct special proposition that, in the absence of authority derived from the statute, or from the court ordering his appointment, a receiver has no power to sue in his own name; and that, when his authority is derived from the order of the court, that fact must appear by suitable averments in the complaint;" and in support of this proposition is cited *Garver v. Kent*, supra. And, continuing, the court says: "The reason is that the legal title to choses in action, or other property which he is authorized to reduce to possession, is ordinarily not transferred to the receiver, but remains in the owner, in whose name suit must be brought, unless the statute, or the order of the court, authorizes the receiver to proceed in his own name." This proposition is recognized as settled by the text writers. *High*, Rec. § 208; *Beach*, Rec. § 650; *Kerr*, Rec. 192, 193; *Edw. Rec.* 136. It is urged on behalf of the appellee, however, that the allegations of the complaint are sufficient, in that it is alleged that he was appointed as receiver, that he qualified and entered upon his duties as such receiver, "and accordingly he brings this suit." It is not alleged in the complaint what acts the court appointing him had authorized him to do. As heretofore stated, the statute does not authorize a receiver to bring an action; hence the only way such authority can be conferred is by order of the court under whose direction such receiver is acting. The allegations of the complaint before us are not broad enough to show that the appellee was authorized by the court to institute the action.

It is further contended by counsel for the appellee that the cause should not be reversed for the error in overruling the demurrer to the complaint, if it appears from the record that the cause was fairly tried, and a right result reached. In support of this contention counsel cite sections 345, 398, 658, Horner's Rev. St. 1896 (sections 348, 401, 670, Burns' Rev. St. 1894).¹ These statutes may be made the cloak to cover up many irregularities in the judgment and proceedings of the trial court, but

¹ Such sections provide that no objection taken by demurrer and overruled shall be sufficient to reverse the judgment if it appears from the whole record that the merits of the cause have been fairly determined, and that technical defects or defects in form shall not be ground for reversal.

they cannot be made to supply the very foundation upon which the action rests. Without a complaint the appellee had no standing in court, and the court had no power to render a judgment against the appellant. A paper filed as a complaint will not authorize a judgment, especially if attacked by demurrer for want of facts, unless it states a cause of action. But counsel insists that this court can look to the evidence, if it is in the record, and from it determine whether the evidence shows that the appellee was empowered by the court to bring the action; and, if it does so show, that the complaint will be deemed to be amended; and, further, that, inasmuch as the appellant has not filed in this court a complete record containing the evidence, it must be assumed that the evidence shows that appellee did procure the authority of the court to bring this action before it was commenced. This court cannot look to the evidence, and from it determine the sufficiency of a complaint, for the evidence can neither add to nor detract from any of its allegations. In *Johnson v. Breedlove*, 72 Ind. 363, Worden, J., says: "It seems to us to be quite clear that where a demurrer for want of sufficient facts, either to a complaint or answer, has been erroneously overruled, and exception duly preserved, the defect in the pleading demurred to cannot be aided by section 580 of the Code." *Horner's Rev. St. 1896, § 653 (Burns' Rev. St. 1894, § 670)*. "Exception having been saved to the ruling on the demurrer, the pleading cannot be aided by reference either to the evidence or to the verdict," says Woods, J., in *Abell v. Riddle*, 75 Ind. 345. And in the case of *Pennsylvania Co. v. Poor*, 103 Ind. 553, 3 N. E. 253, Elliott, J., says: "Where a complaint is challenged by demurrer, and an exception is reserved, we cannot look into the evidence to ascertain whether injury did or did not result. The sufficiency of the complaint is to be determined from the facts stated in it, and not from what may or may not appear in the evidence. The court cannot examine evidence to determine a question presented by demurrer, for the demurrer presents the question fully, and the question presented must be decided according to the record." "Where a demurrer to a complaint is overruled, the complaint must stand or fall upon its own merits. We cannot look into the evidence, and from that determine whether to reverse or affirm the ruling on the demurrer," says Mitchell, J., in *Pennsylvania Co. v. Marion*, 104 Ind. 239, 243, 3 N. E. 874, 877. In the case of *Stock-Yard Co. v. Mann*, 107 Ind. 89, 7 N. E. 893, Mitchell, J., in speaking of the sections of the statute heretofore referred to, says: "The foregoing sections have often been resorted to, but without success, in aid of complaints which failed to state facts sufficient to constitute a cause of action. Where a demurrer to a complaint which fails to state a cause of action has been overruled, the error in so ruling cannot be cured by resorting to the sections relied on. The reasons have been so often stated that to

state them again would serve no useful purpose." In *Ryan v. Hurley*, 119 Ind. 115, 21 N. E. 463, Olds, J., speaking for the court, says: "It has been repeatedly held by this court that we cannot look into the evidence, and be governed by it in affirming or reversing a judgment for error committed in ruling on a demurrer to a complaint. The complaint must stand on its own merits, and, if there is error in overruling a demurrer to it, the case must be reversed. We cannot look into the evidence to determine whether the injury did or did not result from such error." And this court, by Gavin, J., in the case of *Coal Co. v. Albani*, 12 Ind. App. 497, 40 N. E. 702, says: "We cannot, as requested by appellee, resort to the evidence and the instructions to ascertain whether or not the error in overruling the demurrer was harmless." The rule as announced is that the sections of the statute referred to cannot ordinarily aid an insufficient pleading, and that this court cannot look to the evidence, and from it determine whether or not the ruling on the demurrer to such pleading was harmful. The judgment of the court below is therefore reversed, with instructions to sustain the demurrer to the complaint, with leave to amend.

LOTZ, C. J., concurs in the result.

BOHRER v. DIENHART HARNESS CO.¹
(Appellate Court of Indiana. Dec. 17, 1896.)
NEGLECT—DAMAGES—INDEPENDENT CONTRACTOR—STREET OBSTRUCTIONS.

1. Where a landowner, excavating up to the foundation wall of his adjoining owner, obstructs the street gutter in such a way that the water is cast into the adjoining owner's cellar, with the effect of causing the wall to fall, he is liable therefor, though he did not foresee the result which would follow the obstruction of the gutter, and though the foundation wall was weak, and easily disturbed.

2. Where the owner of a building directs the independent contractor having the contract to tear down the building to place the material in the street, the city having given the owner permission to place the material in the street, provided the gutter was not obstructed, the owner is liable for damages caused by the contractor placing the material so as to obstruct the gutter.

Ross, J., dissenting.

Appeal from superior court, Tippecanoe county; Frank B. Everett, Judge.

Action by the Dienhart Harness Company against George A. Bohrer. There was a judgment for plaintiff, and defendant appeals. Affirmed.

Stuart Bros. & Hammond, for appellant. John H. McHugh and Kumler & Gaylord, for appellee.

GAVIN, J. Appellee sued to recover damages for loss occasioned by the falling of the wall of the building which he occupied as tenant of one Marshall. The north wall of this building was placed upon Marshall's north line, adjacent to the lot of appellant,

¹ Superseded by opinion, 49 N. E. 294.

who, according to the complaint, negligently undermined the Marshall wall, and obstructed the flow of water in the gutter in the street, whereby the soil became loosened, and the wall was caused to fall. The questions presented for our determination arise upon the exceptions to the court's conclusions of law upon the special finding of facts. There is, incident to land in its natural condition, a legal right to support from the adjoining land, and for any injury to his land occasioned by the removal of this support the owner is entitled to recover damages regardless of any question of negligence. According to the adjudications in our own and other states, this right is limited to the land alone, and does not extend to the buildings erected thereon; nor, where the land has been subjected to artificial pressure, is the liability for the removal of this support to be extended to cover greater loss than would have followed had the land not been thus weighted. *Block v. Haseltine*, 3 Ind. App. 491, 29 N. E. 937; *Moellering v. Evans*, 121 Ind. 195, 22 N. E. 989; *Gilmore v. Driscoll*, 122 Mass. 199; *City of Covington v. Geyler*, 93 Ky. 275, 19 S. W. 741; *Schultz v. Bower*, 57 Minn. 493, 59 N. W. 631; *Moody v. McClelland*, 39 Ala. 45; *Tunstall v. Christian*, 80 Va. 1; *Beard v. Murphy*, 37 Vt. 99; *Schultz v. Byers*, 53 N. J. Law, 442, 22 Atl. 514; *Thurston v. Hancock*, 12 Mass. 220. In the case first cited it is said that, where the owner of a lot proposes to improve it by excavating up to the line of the adjoining lot, where stands his neighbor's wall, the adjacent proprietor is entitled to reasonable notice of the proposed action, that he may guard against its evil effects. It is further there held that the authorities do not sustain the position that it is the duty of the excavator to shore up, brace, and support the adjoining wall where such notice has been given. *Ketcham v. Newman*, 141 N. Y. 205, 36 N. E. 197; *Schultz v. Byers*, supra; *Beard v. Murphy*, supra. The work upon such an excavation must, however, be done with due care not to injure the adjoining proprietor by its negligent performance, or a liability for damages to adjacent buildings will be incurred.

In this case the appellee was occupying and using the Marshall building as a harness store. The appellant dug his cellar, and removed the lateral support from most of the Marshall wall. At one place, for a distance of several feet, the excavation was carried two or three inches below the bottom of the wall, causing the soil under the wall, consisting of fine gravel, to slip and roll out for two or three inches back. The wall was 21 or 22 inches thick, composed of rock laid in mortar, but so laid and of such materials as that by reason of its character and age, "while reasonably safe and durable and sufficient" before the removal of appellant's soil, it was insufficient after such removal, and "liable and likely to fall from any slight cause that might reasonably be expected to

occur at any time." But it did stand for several hours, until a heavy rain came up, and a large amount of water ran from a gutter down an inclined roadway leading from the street into appellant's cellar, and thence over and against the wall, thereby loosening the soil under it, weakening the same at the place where the excavation extended below the wall, and causing the same to fall. The flow of water was produced by the obstruction of the gutter, which was caused by piling therein the old brick from a building formerly upon appellant's lot, thus entirely blocking up the gutter. That this water was the immediate cause of the accident is expressly found by the court, and to this finding we must give effect in passing upon the correctness of the conclusions of law. It is true that it is also found that, had the wall been well constructed, and of usual strength, it would not have yielded to the force of the water; yet, be that as it may, and whatever other cause might have produced the same results, it is a fact that it was the water, and not something else, which did produce the disaster in this instance.

Appellant's counsel assert his nonliability upon three grounds:

1. That the water was not the cause of the injury, but its presence was a mere "coincidence." The finding of the court overthrows this position.

2. It is insisted that the results were such as would not naturally follow, and could not reasonably be anticipated. The findings show that appellant knew the brick were thus piled in the street, and made no objection thereto; that he knew the character of the soil, and the fact that the excavation on his ground had gone below the Marshall wall. The natural and usual effect of the obstruction of the gutter was to prevent the flow of the water therein, and turn it into the roadway leading into appellant's cellar. Thence it would necessarily flow against and under the wall, thereby loosening and weakening the soil beneath it. This much appellant could not but know. In this there was an actual wrong, an invasion of the rights of appellee, who was entitled to have his wall remain supported by the soil thereunder, free from any disturbing influences other than those necessarily caused by the mere removal of the lateral support. Granting that the latter was done with due care, and that appellee was bound to bear all the hazard caused by its weakening effect upon his wall, yet appellant did not have the right, by his wrong, to increase this hazard, and transform into an active engine of destruction that which might have remained a passive and harmless condition of weakness. Appellant was bound to know that his act might result in an invasion of and injury to appellee's rights. The fact that he did not anticipate and foresee their seriousness and the extent of the disaster which followed will not excuse him when this was the natural and direct result

of his wrongful act. Nor can he be excused for undermining (with the water) his neighbor's wall, upon the ground that this wall was weak, and easily disturbed, and not so strong as he supposed it to be.

The principle of law here controlling was very fully considered by Judge Elliott in *Railway Co. v. Wood*, 113 Ind. 544, 14 N. E. 572, and 16 N. E. 197, who there said: "It is not necessary that the wrongdoer should apprehend the particular consequences which may proximately result from his act, although the act must be of such a nature as to produce some injurious result. To illustrate: A man ill with consumption, who is wrongfully injured in alighting from a train, and so injured as that a hemorrhage results, has a right to recover, although the servants of the carrier may not have had reason to apprehend such a result. *Railroad Co. v. Riley*, 39 Ind. 568. In no case is it necessary that the particular result which follows should be anticipated. Certainly, no man who strikes a feeble person, and injures him, can be heard to say that he did not anticipate that it would hurt him more than it would have done a robust man. Where a tort is committed, injury may be reasonably anticipated, and the wrongdoer is liable for the proximate results of that injury, although the injury extends further than it would have done had the injured person been in perfect health. It is the general character of the act, and not the particular result, that the law regards.

* * * There is a plain difference between the wrongful act and its consequences, for when a wrongful act is done the wrongdoer must answer for all proximate consequences, although he may not have foreseen or anticipated the particular form or character of the resultant injury." The doctrine of this case is approved in *Clare v. McIntire*, 120 Ind. 262, 22 N. E. 128; *Railway Co. v. Nitsche*, 126 Ind. 229, 26 N. E. 51; *Sewing Mach. Co. v. Richter*, 2 Ind. App. 331, 28 N. E. 446. In the last case cited the court says: "Every rational being is responsible for his careless acts, and the consequences which follow, according to the practical application of the laws of cause and effect, whether he was able to anticipate the particular result or not." Quotation is there made from *Shear. & R. Neg. § 29*: "The practical solution of this question appears to us to be that a person guilty of negligence should be held responsible for all the consequences which a prudent and experienced man, fully acquainted with all the circumstances which in fact existed, whether they could have been ascertained by reasonable diligence or not, would have thought, at the time of the negligent act, reasonably possible to follow, if they had been suggested to his mind."

3. It is further urged that there is no liability upon appellant, because the work was in the hands of and under the control of independent contractors, for whose negligence the employer cannot be called upon to re-

spond. In this case appellant procured from the city council a permit authorizing him to occupy with his building materials the street in front of his property, "but without authority to obstruct any street, alley, or gutter so as to prevent the free passage of persons, vehicles, or water upon or along the same." The contractors, in occupying the street with appellant's materials, were, of course, entitled to the protection of this permit. As was said by Lotz, J., in *Dehority v. Whitcomb*, 13 Ind. App. 558, 41 N. E. 1059: "It is well settled that where one lets a contract to another to do a particular lawful work, reserving to himself no control over such work, except the right to require it to conform to the contract, or to a particular standard when completed, he is not liable for the negligence of the contractor," proper care having been exercised in his selection. It is urged by appellant that the cases of *Zimmerman v. Baur*, 11 Ind. App. 607, 39 N. E. 299, and *Ryan v. Curran*, 64 Ind. 345, establish his nonliability upon this theory. By *Zimmerman v. Baur*, following the *Ryan Case*, this court held that, when an abutting lot owner, by virtue of his rights in the adjoining street, desires to lay a drain in the street, he may lawfully so do; and if he employs another, who is competent, as an independent contractor, to put in the ditch, he is not responsible for the latter's negligent failure to restore the street to its former safe condition. By *Ryan v. Curran* the supreme court decided that a lot owner might employ another, who is competent, to construct a house for him, and as a part of the work to dig a hole in the sidewalk, 15 feet deep; but that the owner was under no obligation to place guards about the hole, and keep the highway safe for public travel during the time of building the entire construction, control of the work having been intrusted to the independent contractor. By this decision the court overruled *Silvers v. Nerdlinger*, 30 Ind. 53, wherein it had been held that where such a hole or area was "dug by permission of the city authorities, who had exclusive control over the streets, it was a special favor granted to Nerdlinger & Oppenheimer alone as the owners of the lot, and the benefits resulting therefrom inured exclusively to them, and it was their duty to use every reasonable care that the privilege thus granted should be so exercised as not to become a nuisance, or produce injury to others; and sound policy, as well as justice, requires that they should be held responsible for any injury caused by a neglect of that duty." The writer, expressing his individual views, is strongly of the opinion that the earlier case is right, and that, while an abutting lot owner is entitled to the reasonable and proper use of a street for the purpose of laying drains therein, or placing building materials thereon (this right being subject to reasonable regulation by the municipal authorities), yet that in the enjoyment of that right, whether under express license or simply by virtue of his owner-

ship, he must exercise it with due regard to the rights of the public, and with due care that they be not unnecessarily and unreasonably injuriously affected thereby. In short, that if a man personally or by his contractor dig up the street for his private benefit, he must use due care to guard his excavation, and restore the highway to its former condition; or, if he causes his building materials to be placed upon the street, he must use due care to prevent mischief being occasioned thereby. As stated in *Wood v. Mears*, 12 Ind. 515, quoting from *O'Linda v. Lothrop*, 21 Pick. 292, the owner is privileged to exercise the right in question, "provided he takes care not improperly to obstruct the street." As declared in *Palmer v. Silverthorn*, 32 Pa. St. 65, "it is a right to be exercised under responsibility for all injury arising from an unreasonable or negligent use of it." Nor can he, in the writer's opinion, avoid the duty by transferring the privilege to another to exercise it for his benefit. The language of the court in *Babbage v. Powers*, 130 N. Y. 231, 29 N. E. 132, is apropos: "The person receiving the license is held to impliedly agree to perform the act permitted with due care for the safety of the public, and is made liable for any violation of duty in this regard." This duty resting upon the owner, he cannot shift the burden to other shoulders. 1 *Shear. & R. Neg.* § 176; *Bower v. Peate*, 35 Law Times (N. S.) 321; *Hughes v. Percival*, 8 App. Cas. 443; *Gray v. Pullen*, 117 E. C. L. 970.

We are, however, of the opinion that, whatever be the rule as to independent contractors' interferences with highways, appellant cannot, under the facts of this case, claim the benefit of it. So much of the finding as bears directly upon this question is as follows: About April 1, 1892, appellant contracted with Green & Demerly, for \$1,095.75, to tear down his old building, and do the brick and stone work for the new one; they to clean and use in the new building all of the old brick suitable therefor, and furnish the requisite new ones. A few days thereafter it was mutually agreed between appellant and Green & Demerly and one Martin that "Martin should have the job of tearing down said old building, cleaning the brick thereof, and removing the worthless rubbish" for \$130, to be paid by appellant, and deducted from said first contract price. Appellant "exercised no control over Martin or his employes in directing how said work was to be done, except that he directed Martin to place and pile on Ferry street, immediately north of appellant's part of said lot, such of the brick as were to be used in said proposed new building, but did not direct him to pile or place any of said brick in the gutter of said street." Martin did pile them in this street, extending from near the middle thereof to the appellant's curbstone, and completely filling up the gutter. It will be observed, that in the contracts there is no specific mention of the disposition to be made of these old brick after being cleaned, other than that

Green & Demerly were to use them in the new building. As a matter of fact, appellant did assume to direct where the brick should be placed, and they were placed there in the street, "immediately" north of his lot, and remained there, with his knowledge, for more than three weeks. It is true, he did not expressly direct them to be put in the gutter, but the gutter was in that part of the street whereon they were to be placed. His directions having been complied with, he is not in position to say that he is not responsible for the wrong. Whenever the wrong results from a compliance with the employer's orders, he must always respond.

Counsel also argue that because neither appellant nor appellee had any notice, expectation, or fear that the building would fall, therefore appellant cannot be charged with negligence without convicting appellee of contributory negligence. The argument might, perhaps, be deemed well founded were we dealing merely with the excavation and its results, as then the same condition which would charge the one with imputed knowledge might be sufficient for the other, their opportunities and obligations to observe being equal. The fallacy in the argument lies in the fact that appellant was undoubtedly guilty of a nuisance in obstructing the gutter with his brick. *Elliott, Roads & S.* 477. The natural tendency of this act was to injure his neighbors, and infringe upon their rights. For this wrong and its consequences, he must answer, even though the latter were not foreseen; but appellee was not required to take steps by shoring up, etc., to protect his property against the unexpected and unforeseen results of appellant's wrong. Even if the contractor's negligence in digging below the bottom of the wall contributed to produce its fall, still that would not relieve appellant from liability for his wrong. Judgment affirmed.

ROSS, J., dissents.

(16 Ind. App. 470)

PAPE v. ROMÉY.

(Appellate Court of Indiana. Dec. 17, 1896.)

Sale—Construction of Contract—Conditions—Verdict—Construction.

1. A contract, procured by a plaintiff for a sale of defendant's patent right and of the privilege of manufacturing the patented article, provided that the purchaser could "withdraw from said business within one year if he so desired"; and plaintiff testified that, at the time the sale was made, he agreed with the purchaser that the latter "could have the privilege of withdrawing his money," with interest at 8 per cent., at any time within a year. Held to be a sale on condition, and not an absolute sale with a privilege of repurchase or resale, though the words "repurchase" and "resale" were used in the instrument.

2. Special findings by the jury, that plaintiff had rendered services as agent of a certain firm; that, before the firm was created, he had rendered services for one who thereafter became a member; and that such firm was not formed until January 1, 1883,—negative a claim that a verdict for a certain sum for services as agent

of the firm was given for services rendered before January 1, 1883.

On rehearing. Denied.

For former opinion, see 44 N. E. 654.

DAVIS, J. On petition for rehearing counsel for appellee contend that the contract between Pape and Pfeiffer, entered into on the 2d of January, 1883, was an absolute sale by Pape to Pfeiffer, with a contract on the part of Pape to repurchase of Pfeiffer, at Pfeiffer's option of selling within one year. Therefore counsel for appellee insist that the contract between Pape and Pfeiffer was a contract to repurchase, and that it was not a contract of conditional sale, or for a rescission of sale. Wright testified that, in the sale made by him for Pape to Pfeiffer on December 30, 1882, it was agreed that Pfeiffer "could have the privilege of withdrawing his money" with interest at 8 per cent. at any time within the year. When the agreement was reduced to writing between Pape and Pfeiffer, it was expressly stipulated therein that "the purpose" of the contract, among other things, was to enable Pfeiffer "to withdraw from said business within one year if he so desires." Strictly speaking, the contract between Pape and Pfeiffer may not be a conditional sale, nor do its terms provide for a rescission of the contract; but it was a contract upon the condition that, if said Pfeiffer was not satisfied with his investment therein at any time within one year, he had the right to withdraw his money, with interest. The use of the words "repurchase" and "resale," in the contract between Pape and Pfeiffer, did not, under the circumstances, change the nature of the transaction. In other words, whatever name may be given to the transaction, there was what may be termed a "string" to the sale made by Pape to Pfeiffer, through Wright, which in the end entirely defeated the sale. The condition which, in the end, defeated the sale, so that no benefit was derived therefrom by Pape, was made by Wright. It is clear that Wright failed to find a purchaser, in accordance with the agreement between him and Pape, who was willing and able to pay Pape unconditionally a sum in excess of \$5,000 for his interest in the latter's patent. In other words, the agreement made between Wright and Pfeiffer for the sale by Pape to Pfeiffer was that Pfeiffer should have the privilege of withdrawing the purchase price paid by him to Pape, with interest, within one year, and when the contract founded upon the agreement was reduced to writing between Pape and Pfeiffer, it was provided therein that "this contract is made * * * to enable said Pfeiffer to withdraw from said business within one year if he so desires." The written contract between Pape and Pfeiffer, when construed as an entirety in the light of the situation and relation of the contracting parties, the object to be accomplished, and the surrounding cir-

cumstances, clearly shows that the sale negotiated by Wright for Pape to Pfeiffer was upon the condition that, if said Pfeiffer was not satisfied therewith at any time within one year, Pape was bound to return to Pfeiffer the money invested by him therein, with interest. *Wood v. Lindley* (Ind. App.) 40 N. E. 283. In other words, the "purpose" of the contract, as expressly written therein, was to protect Pfeiffer by giving him the option of withdrawing the money invested by him, with interest, within one year. The fact that, in some places in the instrument, the transaction is referred to as a sale of an interest in the letters patent by Pape to Pfeiffer, with an agreement to repurchase the same by Pape at the option of Pfeiffer, does not destroy the effect of the clear and explicit language showing that Pfeiffer was only investing his money in the business on the express condition that, at his option, he might withdraw it at any time within one year. It is conceded that, in pursuance of the terms of the contract, he did withdraw the money invested in the business, with interest, within one year.

It is also earnestly insisted by counsel for appellee that "the facts found by the jury establish the ultimate fact that the \$1,250 allowed by the jury were for other sales than the Pfeiffer sale." The contention is that: "The first item of indebtedness was \$500, on account of the purchase made by Wright for Pape, for which Pape agreed to pay Wright \$500. The second item was for a sale made to William Fleming by Pape without condition, for which Pape agreed to pay Wright \$750 for a one-third interest in the Jonathan Fleming road leveler and grader, and for commission upon a sale to William Fleming of a one-third interest in the Bauer swing." In other words, that the \$500 was "on account of the purchase made by Wright from Jonathan Fleming for Mr. Pape of the original road grader patent," and that the \$750 was for the sale of a one-third in the road grader patent to William Fleming "for Mr. Pape by Mr. Wright." As to the first item, the jury expressly find, in answer to interrogatories, that \$500 was for services of Wright in assisting Pape "in purchasing of Jonathan Fleming an interest in his road leveler patent." In answer to another interrogatory, the jury expressly find that said \$500 was for services rendered by Wright "as agent and employé of the Fleming Manufacturing Company." The jury also find that Pape paid Wright something over \$300. It is not found, however, that such payment was made on the services in connection with the purchase of the Jonathan Fleming patent. In answer to another interrogatory, the jury find that Wright performed services "for the defendant in selling graders before January 1, 1883, and while defendant was acting for himself in such business." The inference, therefore, is that the \$300 was paid on services in selling graders before January

1, 1883. Another inference is that, as the Fleming Manufacturing Company, composed of Charles Pape, William Fleming, and Charles Pfeiffer, was not formed and did not begin business until January 1, 1883, the services by Wright as agent and employé of the Fleming Manufacturing Company were rendered after January 1, 1883. As to the second item, the jury expressly find that "the firm of Charles Pape, William Fleming, and Charles Pfeiffer was not formed and did not begin business until January 1, 1883," and that they allow plaintiff \$750 "for services of said Wright as the employé of the Fleming Manufacturing Company, composed of the defendant, William Fleming, and Charles Pfeiffer." It is clear, therefore, that the \$750 was not allowed on account of the sale of the patent to William Fleming prior to January 1, 1883, but that it was allowed for services rendered for William Fleming and his associates after January 1, 1883. The jury also find that suit was brought "by Wright against Pape, Fleming, and Pfeiffer, for the value of services in making the sales of the machines spoken of in the complaint, and the expenses incurred in making such sales," in which action judgment was recovered for \$500, and that the judgment was paid. Whether any other services, except as hereinbefore indicated, were rendered by Wright for said firm, does not appear in the findings of the jury. We cannot concur with the view of counsel that the answers of the jury to the interrogatories clearly and conclusively show that the appellee was entitled to recover \$1,250 from appellant for services rendered in 1881 and 1882, in the purchase made of Jonathan Fleming and in the sale made to William Fleming, and, therefore, that the error for which the judgment of the trial court was reversed was harmless. Petition for rehearing overruled.

(17 Ind. App. 699)

WHITE et al. v. SHEETZ.¹

(Appellate Court of Indiana. Dec. 30, 1896.)

APPEAL—REVIEW—CONFLICTING EVIDENCE.

A verdict based on conflicting evidence will not be disturbed.

Appeal from circuit court, Benton county; U. Z. Wiley, Judge.

Action by Marietta Sheetz against William J. White and another. Judgment for plaintiff, and defendants appeal. Affirmed.

Fraser & Isham, for appellants. Wadsworth, Smith & Gray, for appellee.

REINHARD, J. Appellants' counsel ask us to reverse this case on the evidence. In their original brief they entirely fail to point out wherein the evidence is insufficient. This omission they seek to supply in their reply brief, but counsel should have stated their reasons more explicitly in their opening brief. We have, however, examined the evidence,

45 N.E.—43

and find it sufficient to sustain the verdict. The appellee leased to the appellants certain real estate for the term of one year. After the term expired, the appellants held over, and paid rent to appellee, which was received by her. There is a conflict in the evidence as to whether this holding over was under the original tenancy, or whether a new contract was entered into between the parties for another specified term. The jury found the holding over was under a new agreement. There is evidence to support this finding. Judgment affirmed.

(16 Ind. App. 493)

SIMONS v. BEAVER.

(Appellate Court of Indiana. Dec. 30, 1896.)

APPEAL—INSUFFICIENT SPECIFICATION OF ERROR.

Under the requirement that appellant must state specifically wherein the ruling complained of is erroneous, a point is not made, as to a stipulation, where appellant's counsel, in their brief, say, "We simply call the attention of the court to the statement, and desire it to give full force to our agreement, and express the hope that it will not be necessary to consider this question."

On petition for rehearing. Overruled.

For former report, see 43 N. E. 972.

LOTZ, C. J. The appellant insists that the court failed to dispose of two of his contentions on the former hearing. The appellee's claim was not filed 30 days before the final settlement of the estate, and it is insisted that it was barred under the provisions of section 2465, Burns' Rev. St. 1894 (section 2310, Horner's Rev. St. 1896). See, also, *Roberts v. Spencer*, 112 Ind. 81, 13 N. E. 127; *Schrichte v. Stiles' Estate*, 127 Ind. 472, 26 N. E. 77, 1009. It appears, however, that there were pending exceptions to the confirmation of the report by interested parties, and the appellee had prepared and was ready to show to the court certain reasons why his claim should be allowed, notwithstanding the filing of the report, when it was agreed between the appellant's counsel and appellee's counsel that, if appellee would refrain from and withdraw the showing, and not attempt to prevent the confirmation of the report, appellee's rights to have his claim allowed should not be prejudiced in the least, and that the same might be heard and tried; that, acting upon this agreement, the appellee did not present his showing, and allowed the report to be heard. Whether or not this showing is sufficient to avoid the statute we need not determine. In his original brief the appellant did not discuss the effect of this agreement. This language is used: "We simply call the attention of the court to the statement, and desire it to give full force to our agreement, and express the hope that it will not be necessary to consider this question." A party cannot be regarded as having stated a point when he does no more than assert, in general terms, that a ruling is erroneous. He must point out specifically wherein the ruling complained of is erroneous. ▲

¹ Rehearing denied.

mere general assertion that a ruling is erroneous is not the making of a point. *Railway Co. v. Berry*, 9 Ind. App. 63, 71, 35 N. E. 565, and 36 N. E. 846. We did not dispose of this question on the former hearing for the reason that we did not consider the point made.

On the trial of the cause the appellant offered in evidence a contract of settlement, made between the appellant's decedent and the appellee, in which the appellee made no claim for the services now in controversy. This offer was excluded. The settlement, however, was made by the decedent, as trustee, and the appellee, as manager of the Ft. Wayne Lumber Company, and not by either of them in his individual capacity. There was no error in excluding it. Petition overruled.

(16 Ind. App. 519)

ROUYER v. MILLER.

(Appellate Court of Indiana. Dec. 30, 1896.)

Petition for rehearing. Overruled.

For former decision see 44 N. E. 51.

GAVIN, J. Impressed not only with the ability, but with the earnestness with which counsel for appellee urge their petition for rehearing, we have endeavored to give to the questions involved that further consideration which they demand, but are still unable to accede to the correctness of the positions assumed by counsel. The note in suit was dated in 1878, and was due in 12 months. December 8, 1880, the following indorsement was entered upon it: "Interest on this note reduced to eight per cent. from date, and time extended while the interest is kept paid to the present amount." It is now contended that by virtue of this indorsement the time was so extended that the note was not due until appellee, by his tender, elected no longer to keep the loan, and that consequently no attorney's fees chargeable to him could be incurred prior to such default. It would be sufficient answer to this position to say that upon the original presentation of this cause no claim was advanced that by reason of this indorsement the debt was not due when the note went into the hands of Ayres & Jones, and that it is now too late for such contention to be heard. Passing that question, and any others that might be raised as to the merits of this contention, and assuming that, as claimed by appellee, there was no default upon his part, and no maturing of the note so long as the interest was kept down to the amount then due, the time of the extension had long passed by, and the note matured by reason of his failure to keep the interest down to that sum. According to the computation of appellee's counsel, attached to their original brief, the interest due December 8, 1880, was \$222.44. According to the same calculations, the interest due July 31, 1886, was \$224.17, and the amount due April 15, 1887, was \$230.-

60. Thus there was default in the payment of interest at least twice prior to the death of the decedent.

It is urged that, since the evidence discloses but one subject of dispute prior to the tender, we should assume or infer that this was the only matter then in controversy. One objection to this position is that the evidence introduced does not purport to cover or include all that took place between the parties relative to the note before the tender. It shows, indeed, that there was a dispute about the \$600, but it does not show that the controversy was limited to that point. Moreover, it does affirmatively appear that at the time of the trial there were other matters in dispute, notably as to the rate of interest from its date to the time of the indorsement. So far as is made to appear by the evidence, the attorney's fees may have been specifically demanded at the time of the tender. It may be possible that, such fact, if true, being within the knowledge of the appellant, the jury might, from his failure to so prove, have inferred the nonexistence of the fact; but counsel require of us that we should go much further, and declare as a matter of law that this was the case. We do not feel authorized to so do.

It is further contended that, because the evidence discloses no other disputed matter at that time, we should conclude that no services were rendered save those touching the \$600 payment, and that the employment of the attorneys was limited to the adjustment of that matter alone. As to this proposition, like the other, the utmost which appellee could demand would be that the jury might thus conclude, while, to sustain the appellee's position, we must declare that this is the only inference fairly deducible from all the facts and circumstances of the case. We are, however, of opinion that it was at least fairly inferable that the note was in attorney's hands generally for collection. That under the facts of this case the insufficiency of the amount of the tender was not waived, we still think clear. In each of the cases cited to sustain the opposite contention (where the question involved was one of tender), save *Lambert v. Miller*, 38 N. J. Eq. 117, it was held that some objection to the tender was waived, because the party had placed his refusal to accept it upon some other ground, or had done some act which prevented a formal and proper tender. Here the evidence is wholly silent as to whether or not any reason for the refusal was given. It simply shows that the offer of so much money was made, and the offer declined. Appellant is not shown to have done anything to mislead appellee or throw him off his guard. So far as appears, they were dealing with one another at arm's length, each one upon his guard, and each one standing upon his legal rights. If any different state of facts existed, the evidence has not been produced to establish it. Petition overruled.

(17 Ind. App. 261)

PITTSBURG, C., C. & ST. L. RY. CO. v.
HAYS et al.¹

(Appellate Court of Indiana. Dec. 30, 1896.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT
—CONSTRUCTION OF ORDINANCE—JURISDICTION OF APPELLATE COURT.

1. The contention by a railroad company that its right of way could not be benefited by a proposed improvement in a street, and to charge the costs thereof on the right of way would be taking property without due process of law, goes to the construction and application of a statute, but does not involve its constitutionality.

2. Horner's St. § 6562a, providing that the appellate court "shall not have jurisdiction in any case where the constitutionality of a statute, federal or state, or the validity of an ordinance of a municipal corporation is in question, and such question is duly presented," does not apply to cases involving matters of form in an ordinance, or to irregularities in the proceedings of the municipal authorities.

3. Where the declaratory resolution, and the notice thereof, and the notice to contractors, and the contract itself states that streets to be improved were in the town of D., Ind., it is sufficient, though neither the ordinance nor the judgment in direct terms states that the improvement was within the corporate limits.

On petition for rehearing. Overruled.
For decision on appeal, see 44 N. E. 375.

LOTZ, C. J. The appellant, in its petition for a rehearing, earnestly insists that the statute authorizing the assessment of its right of way is unconstitutional; that for this reason this court had no jurisdiction, and that the cause should have been transferred to the supreme court, as directed by the statute. It is true that on the former hearing appellant's counsel asked that the cause be transferred to the supreme court, with the suggestion that the case of *Railroad Co. v. Hanna*, 68 Ind. 562, be overruled; but we did not understand that the transfer was asked for on the ground that the statute was unconstitutional. It will not be seriously contended that a statute which places or imposes the costs of the improvement of a street on the abutting property is unconstitutional. If we understood appellant's contention, it was that its right of way could not be benefited by the improvement, and that to charge the costs thereof upon the right of way would be taking property without due process of law. This contention goes to the construction and application of the statute, not to its constitutionality. This court has the right to construe and apply the constitution. It is only when the validity of a statute is involved, that jurisdiction is denied it. In our former opinion we held that the right of way of a railway company may be benefited by a street improvement. We know of no good reason for changing our holding in this respect. If the appellant's property was benefited by the improvement, then it was properly assessed. If it was not benefited, then it should not have been assessed. The contention about benefits or no benefits does not involve the constitutionality of the statute. It is also true, as appellant quotes, that in

our former opinion, in stating the contention of counsel, we used the expression that without a benefit to the abutting property there is no constitutional warrant to seek payment elsewhere, for it would be taking property without compensation. This expression does not imply that the constitutionality of the statute was involved. It was used in connection with the contention that no personal judgment could be rendered. It is the process or method of enforcing payment by the court that is questioned; not the constitutionality of the statute.

It is also insisted that this court has no jurisdiction, because the validity of an ordinance of a municipal corporation is necessarily involved in the controversy. On the former hearing the appellant did not question the jurisdiction of this court on this ground. It is true that the validity of the ordinance was questioned, but the objections went to matters of form, and to irregularities in the proceedings, rather than to matters of substance. By section 6562a, Horner's St., it is provided that this court "shall not have jurisdiction in any case where the constitutionality of a statute federal or state, or the validity of an ordinance of municipal corporations is in question and such question is duly presented." The manifest purpose of the statute is to reserve certain grave and important questions to the determination of the supreme court. If an ordinance of a municipal corporation is questioned because it is unconstitutional, or in conflict with the statutes, or is unreasonable, these are questions which concern the public, and it was the legislative intent to reserve them for the determination of the supreme court. But an objection to an ordinance which goes only to matters of form or to irregularities in the proceedings of the municipal authorities is not a question of that grave character and dignity that affect the public, and may properly be passed upon by this court. Accordingly, this court has on former occasions exercised this power, and determined the validity of ordinances when so assailed. *City of Hammond v. New York, C. & St. L. Ry. Co.*, 5 Ind. App. 526, 31 N. E. 817; *Dugger v. Hicks*, 11 Ind. App. 375, 36 N. E. 1085; *New Albany Gaslight & Coal Co. v. Crumb*, 10 Ind. App. 360, 37 N. E. 1062.

It is lastly contended that there is nothing in the complaint, proceedings of the town board, or the findings of the court to show that the appellant's right of way, sought to be made liable, is within the corporate limits of the town of Dunkirk, and that, therefore, there was no authority to assess it with the costs of construction. The declaratory resolution, and the notice thereof, and the notice to contractors, and the contract itself, each states that the streets and sidewalks to be improved were in the town of Dunkirk, Ind. It is true that neither the ordinance nor the judgment in direct terms states that the improvement was within the corporate limits,

¹ Motion to set aside judgment and transfer case denied, 46 N. E. 697.

but it does appear that the appellant's tract or parcel of land abutted upon Railroad street. Originally, the word "street" meant a paved way or road. All streets are highways, but not all highways are streets. The statutes of this state make a clear distinction between common roads or highways and the streets of cities and towns. *Debolt v. Carter*, 31 Ind. 355, 369; *State v. Moriarty*, 74 Ind. 103; "A street is a road or public way in a city, town, or village." *Elliott, Roads & S. p. 12*. The use of the word "street" indicates that it was not an ordinary public highway which was being improved, but a highway within the town.

The ordinance was passed by the town board in the exercise of the statutory authority to make local improvements by special assessments on abutting property. A municipal ordinance is a local law, and the same rules govern in its construction as apply to general statutes. The presumption is in favor of the regularity and validity of official acts. "Prima facie, every statute is confined in its operation to the persons, property rights, or contracts which are within the territorial jurisdiction of the legislature which enacted it. The presumption is always against any intention to attempt giving to the act an extraterritorial operation and effect." *Black, Interp. Laws*, p. 91; *End. Interp. St. § 171*; *Stanton v. City of Chicago* (Ill. Sup.) 39 N. E. 987. The case last cited is very similar to the case at bar on this point, and is directly opposed to appellant's contention. See, also, *Stockwell v. State*, 101 Ind. 1. The petition is overruled.

(18 Ind. App. 108)

DARNELL v. KELLER et al.¹

(Appellate Court of Indiana. Dec. 18, 1896.)

MUNICIPAL ASSESSMENT — ENFORCEMENT — COMPLAINT — COUNTERCLAIM — DEFENSES — FRAUD.

1. A complaint to foreclose a lien for assessment for construction of a sidewalk, alleging that plaintiff "completed the work in accordance with the terms and stipulations of the agreement," and "to the entire satisfaction of the department of public works of said city, and the same was duly accepted by said department," is sufficient, within *Burns' Rev. St. 1894, § 373* (*Horner's Rev. St. 1896, § 370*), providing that, in pleading performance of a condition precedent in a contract, it is enough to allege generally that the "party performed the conditions on his part."

2. In an action to enforce a lien for a municipal assessment, the fact that the work was not done according to the contract is not a matter of counterclaim, but of defense.

3. The board of public works being made sole judges whether work for a municipal improvement has been done according to the contract (*Rev. St. 1894, § 3894*), their acceptance of the work, in the absence of fraud, excludes the defense that the work was not so done, even if the fraud can be availed of as a defense before being first used as a basis for setting aside the acceptance.

4. Fraud, to render void acceptance by a board of public works of work for a municipal improvement, must be on the part of the contractor in connection with the act of the board

in the approval of the work. That the contractor did not do the work in compliance with the contract, or that the abutting owner notified the board that the work was not done according to the contract, and they refused to take notice of the information, does not taint the work with fraud.

Appeal from superior court, Marion county; P. W. Bartholomew, Judge.

Action by Julius Keller and others against Catharine Darnell. Judgment for plaintiffs, and defendant appeals. Affirmed.

Harding & Hovey, for appellant. S. M. Richcreek, for appellees.

REINHARD, J. The appellees, as partners, brought this suit to foreclose a statutory lien for an assessment for the construction of a sidewalk in front of appellant's property, on North Illinois street, in the city of Indianapolis. The complaint is assailed, by demurrer and otherwise, upon the alleged ground "that it is based upon a contract on the part of the appellees to construct a sidewalk according to certain plans and specifications, and contains no proper or sufficient averment that the appellees completed the work and performed all the conditions of said contract on their part to be performed." The objection is not well taken. The complaint avers, among other things, "that said plaintiffs completed said work in accordance with the terms and stipulations of said agreement, to the entire satisfaction of the department of public works of said city, and the same was duly accepted by said department." Granting that performance is a condition precedent, and that the complaint would not be sufficient without an averment thereof, we think the complaint contains such an averment. Under the common-law rule, the plaintiff was required to allege particularly the performance of each separate condition. Our statute has modified this rule by providing that it shall be sufficient to allege, generally, in such cases, that the plaintiff "performed all the conditions on his part." *Burns' Rev. St. 1894, § 373*; *Horner's Rev. St. 1896, § 370*. Hence it is not necessary, under our practice, to state the facts constituting the performance. *Watson v. Deeds*, 3 Ind. App. 75, 29 N. E. 151. Nor is it essential that the party alleging the performance shall use the exact words of the statute. It is sufficient if equivalent language be employed. *Underwriters' Co. v. Durland*, 123 Ind. 544, 24 N. E. 221. If it be true that the appellees "completed the work in accordance with the terms and stipulations of the agreement," and "to the entire satisfaction of the department of public works of said city, and the same was duly accepted by said department," they have performed all the conditions on their part. It is true the averment contained in the complaint is somewhat in the nature of a conclusion, and that conclusions are, as a general rule, obnoxious to the rules of good pleading; but the language here used partakes no more of

¹ Rehearing denied.

the characteristics of a legal conclusion than that employed by the statute itself. It cannot, therefore, be fatally defective on this ground.

It is next insisted that the court erred in sustaining the demurrer of the appellees to the appellant's counterclaim. This pleading proceeds upon the theory that the work was not done according to the plans and specifications, and that the appellant was damaged thereby. We are of opinion that a counterclaim will not lie in such a case. If the failure to do the work according to the stipulations of the contract can at all be inquired into in such a case as this, it will be as an answer in bar of the action to foreclose the lien. The contractor has no personal claim or right of action against the landowner by reason of the construction of the work. He could recover no personal judgment against the owner. The only right he acquires is derived through the act of the city authorities by reason of the public utility of the improvements. The city has no power to improve the property of a citizen simply because it will benefit such owner. This can be done only when the improvement is of public benefit or necessity. The improvement may, and in certain cases must, be of special benefit, also, to the owner; but this must be in addition to the general benefit which such owner will derive as a member of the community. The owner makes no agreement with the contractor out of which any reciprocal rights and liabilities can arise. The property of the owner is only a security by which the city guarantees to the contractor the payment for the work he engages to perform. The contractor's remedy against the owner is exclusively in rem. As he has no personal right of action against the owner by reason of the contract, no reciprocal right growing out of the contract can accrue to the owner against the contractor. If a purchaser at a tax sale who acquires a lien on the real estate of another should sue to foreclose such lien, no one versed in the law would contend, we apprehend, that such lien could be reduced by a counterclaim set up by the owner. In such a case the purchaser acquires a lien by the purchase in lieu of the lien held by the state or county through the power of taxation exercised. Assessments for public improvements are but a system of special taxation. The municipality acquires the lien, and passes it to the contractor, by reason of the exercise of this power of taxation. If the municipal corporation were authorized, and had itself made the improvements as provided in its ordinance, it could enforce the lien. If it had failed to do so, in whole or in part, the claim for such improvement could not be enforced. There could be no recovery *pro tanto*. The city cannot speculate upon the property of the citizen. It may make improvements which are necessary for the public welfare, but it must make them in accordance with

the scheme mapped out and determined upon by the proper authorities. It cannot order a sidewalk, and, in furtherance of such order, construct a sewer, and fasten a lien upon the property of the citizen affected by it. What the municipality itself cannot do, it has no power to authorize another to do. The contractor acquires no greater right than the city itself possesses. If he has not performed the work according to the devised plan and his undertaking, he cannot recover for it. There is no such thing as a recovery *pro tanto*. If he has performed the work which he undertook to perform, and the proper tribunal or authority so determines, he may enforce his remedy, and all of his remedy. If he has failed in this, in whole or in part, it is the duty of the proper authority to reject the work, and he cannot receive any pay for it. There may be a question, of course, as to whether the person or board whose duty it is to accept the work has properly discharged such duty or not, and whether, for a failure to do so, the owner of the property may have some remedy; but, if the work has been properly accepted as completed in accordance with the contract, the claimant is entitled to his full remedy. If he cannot have this, he can have nothing. A counterclaim can have no place in a proceeding for the enforcement of such a remedy. In *Laverty v. State*, 109 Ind. 217, 9 N. E. 774, the supreme court expressly held that, in an action to enforce a lien for a ditch assessment, the defendant cannot set up, as a counterclaim or set-off, damages sustained by him by reason of the failure of the ditch commissioner to complete the work according to his undertaking.

The appellant further complains that the court erred in sustaining the appellees' demurrer to his answer. This pleading contains a statement of substantially the same facts that are set forth in what is denominated the "counterclaim," upon which we have just passed. It attempts to set up these facts as a defense to the appellees' right of enforcing the lien, on the ground that the work was not done according to the contract. The board of public works are by the statute made the sole judges of the question whether the work has been done according to the terms and provisions of the contract or not. *Burns' Rev. St. 1894, § 3849*. It is held by some of the authorities that such acceptance is only *prima facie* evidence of the performance according to the contract. But where the statute gives no appeal, or no right to contest the question of the proper performance of the work, the great weight of authority is that the acceptance is conclusive upon the property owner unless such acceptance was fraudulent. *Elliott, Roads & S. 416; People v. Fidelity & Casualty Ins. Co. (Ill. Sup.) 38 N. E. 752; Board v. Newlin, 132 Ind. 27, 31 N. E. 465*. Says Judge Cooley: "It is no defense to an assessment that the contract for the work was not performed ac-

cording to its terms. The proper authorities must decide upon this, and, if they accept the work, the acceptance, in the absence of fraud, is conclusive." Cooley, *Tax'n*, 468. An attempt is made in the answer to show that the deviation from the terms of the contract by the appellees was fraudulent. But, while the appellant roundly stigmatizes the method of performing the work as fraudulent and vicious, she nowhere attempts to show that the board of public works was in any way imposed upon or deceived by the acts of the appellees in the acceptance of the work. That she notified the board that the work was not done according to contract, and that they refused to take any notice of such information, does not taint the act of the board in the acceptance of the work with fraud. The judgment of the board in passing upon the question of the contractor's compliance with the contract is of a quasi judicial character. Fraud may render such acts void; but, if so, the fraud must be on the part of the contractor in connection with the act of the board in the approval of the work. The mere fact that the work was "fraudulently" done will not, of itself, render the approval void. To characterize the work done and materials furnished as fraudulent means no more than that they did not comply with the contract. To properly charge fraud in the acceptance, the quasi judicial act of approval must be fraudulent, or tainted with fraud. Even then, it is a question whether this may be shown in defense of the action to foreclose, or whether the owner is not compelled to first bring a suit in equity to set aside the acceptance. See, *Haley v. City of Alton* (Ill. Sup.) 38 N. E. 750.

The appellant also attempts to raise, the constitutionality of the statute under which these proceedings were had, because such statute deprives the citizen of his property without "due process of law." But it is not our province to decide such questions, and, as this case was transferred to our docket from that of the supreme court, we must assume that that court has determined that the question was not properly presented. Judgment affirmed.

(17 Ind. App. 524)

STATE v. GAPEN. 1

(Appellate Court of Indiana. Dec. 18, 1896.)

TWICE IN JEOPARDY — SALE WITHOUT LICENSE — SALE TO INFANT.

To try one for selling liquor in quantities less than a quart without a license permitting it, after an acquittal on a prosecution for selling to an infant founded on the same sale, is not putting him twice in jeopardy "for the same offense."

Appeal from circuit court, Hancock county; Charles G. Offutt, Judge.

Loren Gapen, charged with violating the liquor law, interposed a plea of former jeop-

ardy, a demurrer to which was overruled, and the state appeals. Reversed.

Charles Downing, Wm. H. Ketcham, Atty. Gen., and Merrill Moores, for the State. Poulson & McBane and R. E. Grey, for appellee.

LOTZ, C. J. Under the statute of this state it is a misdemeanor for any person to sell intoxicating liquors in quantities less than a quart at a time, when the seller has not procured a license to retail such liquors. Section 7285, Burns' Rev. St. 1894; section 5220, Horner's Rev. St. It is also a misdemeanor for any person to sell intoxicating liquors to any person under the age of 21 years. Section 5223, Horner's Rev. St.; Acts 1895, p. 250, § 6. In the case at bar the defendant, Loren Gapen, is charged with having unlawfully sold to one William Coberly one-half pint of beer, he (Gapen) not then having a license to sell intoxicating liquors in quantities less than a quart at a time. To this charge the defendant filed a special plea in bar, alleging that, on a prior day, the state prosecuted him in a court of competent jurisdiction for having sold intoxicating liquor to William Coberly, a minor; that issue was joined, a trial followed, and he had judgment of acquittal; that the sale to the minor in that case, and the sale without a license in this, were one and the same act, transaction, and offense. The court below overruled a demurrer to this plea, and this ruling is the error assigned.

It is provided by our state constitution that "no person shall be put in jeopardy twice for the same offense." The jeopardy here prohibited is that which grows out of the same offense, not necessarily of the same act or transaction. The same act may constitute an offense under two or more jurisdictions, and it is well settled that jeopardy under one jurisdiction is no bar to jeopardy under another jurisdiction. It frequently occurs that the same act constitutes two or more offenses under the same jurisdiction, as, for instance, a sale of intoxicating liquor, on Sunday, to a minor, in a quantity less than a quart, by a person not having a license, will be a violation of three different statutes of this state, and constitute three distinct offenses. In the case at bar the sale to the minor and the sale without a license were one and the same transaction. The same acts violated two statutes, and constitute two distinct offenses. The question presented by the record is, does the prosecution of one of the offenses to final judgment constitute a bar to a subsequent prosecution for the other offense? Or, in other words, is the defendant placed twice in jeopardy by the second prosecution? There is confusion and conflict in the authorities bearing on this question. In *Wingler v. State*, 13 Ind. 540, it was held that, if an assault and battery was the gravamen or principal act in a riot, a conviction of the assault and battery was a bar to a prosecu-

²Rehearing denied, 47 N. E. 25.

tion for riot. And in *Fritz v. State*, 40 Ind. 18, a conviction of an affray was held to be a bar to a subsequent prosecution for assault and battery growing out of the same transaction. It is also well settled that, if the act constitutes but one offense, although susceptible of division into parts, as in larceny for taking several articles of goods at the same time, the state will not be permitted to split up the offense, but a final judgment for taking one part will bar a prosecution for taking the other part. And if the same act constitute two or more offenses of the grade of felony, and the offenses are of the same character, as robbery and larceny, a final judgment rendered on one will bar the other. So, also, if the same transaction constitute two or more offenses, and the offenses are similar in character, as an assault and battery, and an assault and battery with intent to commit a felony, the charge of the higher offense includes the lesser, and a judgment rendered on the higher will bar the lesser. *State v. Elder*, 65 Ind. 282. But where such offenses are charged in separate indictments, a judgment rendered on the lesser will not necessarily bar the higher offense. A misdemeanor may be merged into a felony, but not a felony into a misdemeanor. The reason for this is that the lesser charge cannot contain the greater, but the greater may the lesser. *State v. Hattabough*, 66 Ind. 223. It would seem that the spirit of the above holdings is that a man shall not be placed twice in jeopardy for the same act under the same jurisdiction. But it will be observed that in the above cases the offenses which spring out of the same act or transaction are of that character that grade or merge one into the other, and that the one offense necessarily involves the whole transaction. Thus, in a charge of assault and battery, and a charge of riot in which the assault and battery is the riotous act, there is an identity in many respects in the charges, as well as in the proof necessary to secure a conviction. The same is true of an affray, and of an assault and battery. The gravamen or principal unlawful act in each is the same. On the other hand, there are many adjudications to the effect that, if the two offenses growing out of the same transaction are severable and distinct, a judgment rendered on one will not bar a prosecution on the other.

A sale of intoxicating liquors is not per se an unlawful act. It can only be made a crime by force of statute. A sale to a minor and a sale without license, although the same sale, are, so far as constituting two offenses, entirely distinct. A simple sale, without more, is not a violation of law. To make it unlawful, it must be accompanied by the conditions which the statute requires to constitute the offense. Let it be admitted that the defendant made the sale to William Coberly. These

facts, standing alone, do not constitute a crime. Something more must be charged, as well as proved, before he can be convicted of a criminal offense. It is not the sale alone that constitutes the offense, but it is the sale coupled with other facts. In the one, it is the sale, coupled with the fact that the vendor had no license. In the other, it is the sale, coupled with the fact that it was made to a minor. The sale, standing alone, is an innocent act. It does not touch the sphere of culpability unless accompanied by other forbidden facts. It is the accompanying facts that make it unlawful. The accompanying fact in each instance is entirely distinct. There is no connection between the fact that the vendor had no license, and the fact that the purchaser was a minor. While it is true that there is an identity in the charges and in the evidence up to a certain point, yet up to that point the sale is an innocent transaction. It is only when the criminal character of the transaction is sought to be made that the two offenses diverge, in the charge and in the evidence necessary to a conviction. The purposes of the two statutes are entirely dissimilar. The one is to raise revenue, and protect those who have obtained license. The other is to guard the young against intemperance. The appellee is in error in assuming that the sale alone constitutes the criminal offense. In so far as the charge and the evidence are identical, the transaction is entirely innocent. The appellee might have been convicted of the charge of selling to a minor, and the fact he had no license be not even alluded to. The fact that he had no license was not an element in that offense. So, on the other hand, he might have been convicted or acquitted of the charge of selling without a license, and the age of the purchaser not have even been referred to, for his age is not an element of that offense. We are of the opinion that the two offenses are entirely distinct, and that the defendant has not been twice in jeopardy. The rule is stated in some of the cases to be as follows: The true test, to determine whether the plea of former conviction or former acquittal is a good bar, is to decide whether the crimes as charged are so far distinct that the evidence which would sustain the one would not sustain the other. If they are so distinct, there has been no former jeopardy. *Davidson v. State*, 99 Ind. 366; *Smith v. State*, 85 Ind. 553; *State v. Elder*, supra; 1 Bish. Cr. Law, § 1052. This rule, however, has met with criticism. *Blair v. State* (Ga.) 7 S. E. 855. We do not find it necessary to rest our judgment on this latter ground, for the unlawful and culpable facts in each offense are entirely distinct and dissimilar. We cite, as supporting our conclusion, *Ruble v. State* (Ark.) 10 S. W. 262. Judgment reversed, with instructions to sustain the demurrer to the plea.

(160 Ill. 477)

JOHNSON v. METROPOLITAN WEST SIDE ELEVATED R. CO.

(Supreme Court of Illinois. March 28, 1896.)

EMINENT DOMAIN—PROCEDURE—RIGHT OF ENTRY PENDING APPEAL.

A railway company, upon appeal from an award in condemnation proceedings, has the right to enter upon the use of the land upon giving bond to pay such damages as may be finally assessed, under Eminent Domain Act, § 13. Following *Railway Co. v. Phelps*, 17 N. E. 769, 125 Ill. 482, and *Railroad Co. v. Schneider*, 20 N. E. 41, 127 Ill. 144.

Appeal from circuit court, Cook county; R. S. Tuthill, Judge.

This was an application by W. T. Johnson for an injunction to restrain the Metropolitan West Side Elevated Railroad Company from entering upon his lands until compensation awarded for the use thereof had been paid. Upon the hearing the injunction was dissolved, and petitioner appealed. Affirmed.

Matz & Fisher, for appellant. E. J. Harkness and Wilson, Moore & McIlvaine, for appellee.

PER CURIAM. Appellee herein filed his petition under the eminent domain act to condemn certain premises of appellant situated in Chicago for its right of way. Johnson, the appellant, was awarded damages to the extent of \$62,915.10, and appellee took its appeal to this court from that judgment.

After the expiration of the term, and after filing its appeal bond, appellee, without paying or tendering the compensation awarded either to appellant or the county treasurer, entered upon the premises, and began to make excavations preparatory to the construction of its road. Johnson filed his bill, and obtained a preliminary order enjoining appellee from proceeding further in constructing its road on the premises in question. Afterwards the injunction was dissolved on bill and answer on a hearing before another chancellor, and Johnson took this appeal from the decree dissolving the injunction. Johnson insists that the company could not lawfully enter upon the property until the compensation awarded had been paid, and that the trial court erred in dissolving the injunction. It is insisted with much force that the construction placed upon the thirteenth section of the eminent domain statute in *Railway Co. v. Phelps*, 125 Ill. 482, 17 N. E. 769, and *Railroad Co. v. Schneider*, 127 Ill. 144, 20 N. E. 41, is, in the first place, an erroneous one, and, in the second place, if warranted by the language of the statute, that the statute is in violation of the constitution, which provides that private property shall not be taken or damaged for public use without just compensation. Many cases decided by this and other courts are cited tending to support the contention that, where the condemning company appeals, it must pay or deposit the compensation awarded, or else await the final determina-

tion of the appeal before taking possession of the property. We are asked to consider the question as one of first impression, and to overrule or qualify the rulings in the two cases above cited so far as they appear to decide the question here involved. Inasmuch, however, as the judgment for damages from which the appeal was taken by the company in this case has been affirmed by this court, there is no longer any ground for contention between the parties over the question of possession. And, whatever conclusion might be reached on further consideration, were such further consideration necessary to a determination of the rights of the parties, we shall, upon the sole authority of the two cases above cited, affirm the decree. Affirmed.

(162 Ill. 625)

DILLMAN et al. v. NADELHOFFER.¹

(Supreme Court of Illinois. June 13, 1896.)

FRAUDULENT CONVEYANCES—ACTION TO SET ASIDE—WHEN WILL LIE—SUFFICIENCY OF EVIDENCE.

1. A bill in equity to set aside a fraudulent conveyance will lie as soon as judgment is rendered, and plaintiff need not wait until return of execution nulla bona. 56 Ill. App. 517, affirmed.

2. In an action to set aside a conveyance by a debtor to his wife, it appeared that during 23 years he received from her several thousand dollars; that no acknowledgment was given by him, no account kept, and no interest promised or paid; that the indebtedness was barred when the deed was made; that she had received from him more than enough to repay her; and that the value of the property conveyed was more than three times the debt claimed to have been paid thereby. Held, that the evidence did not show that she was a creditor whom he had a right to prefer, or that the conveyance was not voluntary. 56 Ill. App. 517, affirmed.

3. The conveyance was made a few months after the grantor guaranteed payment of notes for \$16,000. Besides the property conveyed, worth \$9,000, he owned stock, of uncertain value, in two manufacturing companies, and credits on their books, which he estimated at \$40,000. The capital stock in one company had been only in part paid up, and it had paid no dividends. The other company failed. He had disposed of the stock in the other at a small percentage of its face value, and when judgment for \$6,638 was obtained against him on the guaranty, eight years after the conveyance, he had no property. Held, that it did not appear that he retained sufficient property to meet his obligations. 56 Ill. App. 517, affirmed.

Appeal from appellate court, Second district.

Bill by J. W. Nadelhoffer against L. E. Dillman and others to set aside certain conveyances on the ground that they were fraudulent as to Dillman's creditors. From a judgment for complainant, affirmed in the appellate court (56 Ill. App. 517), defendants appeal. Affirmed.

George S. House, for appellants. Haley & O'Donnell (Hill, Haven & Hill, of counsel), for appellee.

¹ Rehearing denied October 16, 1896.

CARTER, J. This was a bill in equity filed on March 21, 1891, in the circuit court of Will county, to set aside, in aid of an execution, two conveyances—one from appellant to his son, E. Corbin Dillman, and one from the son to Maria E. Dillman, the wife of appellant—to certain premises occupied by appellant and his wife as their homestead, and to subject said premises to levy and sale under the execution. Upon a full hearing in the circuit court a decree was rendered as prayed in the bill, which decree (having been affirmed by the appellate court) appellant now seeks to have reversed by his further appeal to this court. Briefly stated, the facts are these: In April, 1883, appellant, by his indorsement thereon, guarantied the collection of two promissory notes, for \$8,000 each, given by Andrew Dillman and Edward R. Knowlton to appellee. Appellant then owned the premises in controversy, which were of the value of about \$9,000. He also owned capital stock in two manufacturing companies, and credits upon their books in his favor, all of which he estimated to be of the value of \$40,000; but as the capital stock in one of the companies had been only in part paid up, and no dividends had ever been paid upon it, it was of uncertain value, and, as the other company eventually failed, we think it clear, in connection with other facts and circumstances in evidence, that his estimate of the value of his property was entirely too high. In October, 1883, appellant conveyed the premises in controversy to E. Corbin Dillman, for the purported consideration of \$10; and E. Corbin Dillman, for a similar consideration, conveyed the same to appellant's wife, Maria E. Dillman, but nothing was in fact paid for such conveyance. It appears, however, by the testimony of appellant and his wife and son, and it is not disputed, that the wife, Maria E. Dillman, had, prior to and up to 1876, received at different times, from her father, beginning with \$200, "in the fifties," but after 1851, and ending with \$500 in 1876, the total sum of \$2,160, which, as received, was turned over to appellant, with the understanding that it was to go eventually into a home to be conveyed to her; that it was so agreed, also, when the last amount was received, in 1876. No note, receipt, or other memorandum was made or given by appellant, showing his receipt of the money, or his obligation to repay it or to invest it as stated, and no interest was ever paid or agreed to be paid; but, as testified to by them, the conveyance of the property in October, 1883, was made to satisfy this claim of the wife, for the moneys so advanced to her husband, and of his promise to put the same into a home for her benefit. Appellant had owned the property in question, and occupied it as a home, with his family, for many years; and the reason given why it was not sooner conveyed to the wife, and before the liability as guarantor for the collection of the \$16,000 to appellee was cre-

ated, was that the property was incumbered by a mortgage for \$3,000, which was not paid off until March, 1883, and that appellant did not wish to convey to his wife a home so incumbered, but intended to first remove the incumbrance, and that when this was done, in March, 1883, he gave the necessary papers to his attorney, with instructions to prepare the deed to his wife, but that the matter was neglected until the following October. It may have no significance, but it is nevertheless true, that during this delay between March and October his contingent liability upon the two notes for \$16,000 was created. It also appears from the evidence that by certain contracts with his sons, made at different times from 1881 to October, 1883, whereby they were to receive certain portions of the dividends paid by the Lock-Stitch Fence Company on shares of stock which he held, the sons were to pay and did pay their mother, said Maria E. Dillman, \$3,450; and the evidence discloses no consideration for these moneys, moving from Maria E. Dillman, unless it was the moneys previously received from her father and turned over to appellant; and appellant could give no other explanation why the moneys received by his wife from their sons for a consideration moving from himself were not applied to extinguish his wife's demands against him, than that it was the understanding that her moneys should go into a home for her. At a later period, after Mr. Dillman had become deeply involved as indorser for the corporation in which he was interested, and unable to pay his debts, Mrs. Dillman used the means she obtained through her sons from him with which to purchase from him the household furniture and other effects used by the family. His interests in the companies, so far as they continued to be of value, had been disposed of, so that in February, 1891, when his contingent liability, as guarantor, of \$16,000 was reduced to a certain liability by a judgment against him for \$6,638 in favor of appellee, he had no property whatever remaining in his own name out of which any part of it could be collected. Appellee commenced his suit on this guaranty in January, 1888, and in May, 1888, sued out a writ of attachment in aid, and levied upon the property in controversy; but it was not till February, 1891, that he recovered judgment, when judgment was rendered in his favor on both issues against appellant for said amount of \$6,638, and a general and special execution was the following day issued and placed in the hands of the sheriff; and, as above stated, this bill was filed in the following month of March.

It is first contended that this is a creditors' bill, and that it cannot be brought until after the return of an execution nulla bona. It is, however, well settled by the decisions of this court that a bill in equity to remove a fraudulent conveyance out of the way of an execution may be filed as soon as judg-

ment is rendered, and without waiting until execution is returned. *Weightman v. Hatch*, 17 Ill. 286; *Newman v. Willetts*, 52 Ill. 98; *Amick v. Young*, 69 Ill. 542; *Granite Co. v. Gerrity*, 144 Ill. 77, 33 N. E. 31.

Considerable space is devoted in appellants' argument in the endeavor to show that the allegations of the bill and the proofs do not correspond; that the bill alleges fraud in fact, while the proof shows, at most, but a constructive fraud. We shall not undertake to follow counsel in the technical argument made on this branch of the case, but it is sufficient to say that there was evidence in the record tending to prove a fraudulent intent on the part of appellant in making the conveyance in question; and, even if only a constructive fraud is proven, the allegations of the bill are broad enough to cover it. It is insisted, however, that the deed was not voluntary; that Maria E. Dillman was a creditor of her husband, appellant, and that he had the right to prefer her over his other creditors; and that the conveyance must be sustained, even if he did not retain sufficient property at the time with which to pay his other debts. We cannot, upon this record, concur in this view, but must hold that the conveyance was voluntary. The first installment of money set up as the consideration for the conveyance was received upwards of 30 years before the conveyance, and the last upwards of 7 years. No note or other written obligation or acknowledgment had been given, no account kept, no interest promised or paid, and the supposed indebtedness was barred by the statute of limitations. Besides, Mrs. Dillman had, as before shown, received from her husband more than sufficient to repay her, and the value of the property conveyed, without considering his estate of homestead therein, was more than three times the debt thus sought to be paid. It would be a plain invitation to the perpetration of fraud to permit husband and wife to hold in reserve demands of this character, and to bring them forward as a consideration for a preference over other creditors in times of financial distress. What was said in *Frank v. King*, 121 Ill. 250, 12 N. E. 720, seems quite appropriate here: "The claim is that the husband became indebted to the wife in the sum of \$1,000 in 1873. No note was ever given for the alleged indebtedness, nor was any interest ever paid on the debt, nor was it treated as a valid indebtedness until King was in the act of failing. Had King been prosperous in business, it is not probable that this alleged debt would ever have been thought of or heard of. But, however that may be, when the husband undertakes to prefer the wife, to the exclusion of other creditors, the proof should be clear and satisfactory that the wife has a valid, subsisting debt,—one which is to be enforced, and payment exacted, regardless of the fortune or misfortune of the husband. Such was not the character of this debt. A party who has

a valid claim against another does not, as a general rule, suffer the claim to stand for a period of twelve years without even taking a note, without calling for interest, and without security,—doing nothing whatever to collect or secure the claim. Such is not the manner in which business is done where a valid, bona fide debt is in existence."

The next contention is that, even regarding the conveyance as a voluntary settlement upon the wife, appellant was at the time in good circumstances, and had ample property left to pay all of his debts; that in fact he had no indebtedness except the contingent liability to appellee. After a careful consideration of the evidence, we are forced to the same conclusion reached by the trial and appellate courts. The property of appellant consisted in shares of capital stock, of uncertain value, in two incorporated companies, and credits on their books. The stock soon declined in value. His shares in the only one that paid any dividends became worthless by the failure of the company, and the other he disposed of, at a small percentage of its face value, in payment of a debt created after the guaranty of the notes to appellee. Judged by the results, appellant wholly failed to retain in his hands sufficient property to meet his obligations. This is conceded, but counsel insists that the question whether he retained property amply sufficient to pay all of his debts then existing must be determined from the evidence showing what the value of the property was at the time of the transfer, and not from its sufficiency as shown by the final result as ascertained several years afterwards. This is, to a certain extent, true, but the whole evidence bearing upon the question must be considered. It was said in *Harting v. Jockers*, 136 Ill. 627, 27 N. E. 188, that, "while it is ordinarily true that the question of whether sufficient has been retained may be determined by the result, where there is diligent pursuit of legal remedies following shortly after the transfer which is alleged to be fraudulent, it only becomes competent to show such result as tending, as before said, to determine the state and condition of the debtor's estate at the time of the alleged fraudulent transfer of his property." See, also, *Patterson v. McKinney*, 97 Ill. 41. While the question is one not altogether free from doubt, we are inclined to agree with the circuit and appellate courts that the property retained by appellant was of a speculative character and of uncertain value, and that he did not retain property amply sufficient to meet his liabilities. If so eventually proved, and the evidence, fairly considered, does not show the contrary. The conveyance being voluntary, and appellant having become insolvent, the burden of proof devolved on him to disprove the implication of fraud as to pre-existing creditors, arising from the making of the conveyance. *Moritz v. Hoffman*, 35 Ill. 553, *Patterson v. McKinney*, 97 Ill. 41. The judg-

ment of the appellate court will be affirmed.
Judgment affirmed.

CARTWRIGHT, J., took no part.

(164 Ill. 344)

PEOPLE ex rel. McDougall v. O'TOOLE.¹
(Supreme Court of Illinois. June 11, 1896.)

JUSTICES OF THE PEACE IN CHICAGO—APPOINTMENT
—DISCRETION OF GOVERNOR—JUDICIAL INQUIRY
—AUTHORITY OF COUNTY CLERK TO DESIGNATE
SUCCESSORSHIPS.

1. Const. art. 6, § 28, provides that justices of the peace in Chicago shall be appointed by the governor, by consent of the senate (but only upon the recommendation of a majority of the judges of the circuit, superior, and county courts), and hold office for four years, and until their successors are qualified, but that they may be removed by summary proceeding in the circuit or superior court, for malfeasance. *Held*, that though the power to appoint successors to such justices is vested in the governor, by consent of the senate, he can appoint only on the recommendation of a majority of the judges. 60 Ill. App. 534, affirmed.

2. In case of such appointment the executive discretion, and the concurrence of the senate therein, are exempt from judicial inquiry only in case the governor has complied with the recommendation of the judges.

3. Act March 30, 1871 (passed pursuant to the constitution), § 2, providing that justices of the peace, "under this act," shall be commissioned by the governor, and hold their offices for four years, etc., "and shall execute bonds, and be sworn, and be governed by the same rules and regulations as justices of the peace elected," has no reference to the act providing for election and qualification of justices (section 111), and does not empower the county clerk of Cook county to designate the successorships of justices in Chicago appointed by the governor.

4. The method of appointment of justices of the peace in Chicago, and of designating their successorships, provided by the constitution, is unaffected by any practice, if it has existed, of a different method, and of allowing the county clerk of Cook county to designate the successorships of justices appointed by the governor.

Appeal from appellate court, First district.

Information in the nature of a quo warranto, on the relation of Charles C. McDougall, against James J. O'Toole, charging defendant with usurping the office of justice of the peace for the town of Lake, in the city of Chicago, in Cook county. From a judgment of the appellate court (60 Ill. App. 534) affirming a judgment in favor of defendant, relator appeals. Affirmed.

Jacob J. Kern, T. A. Coffey, Sullivan & McArdle, and Darrow, Thomas & Thompson, for appellants. James A. Peterson, for appellee.

CARTWRIGHT, J. An information in the nature of a quo warranto was filed by the state's attorney of Cook county, on the relation of Charles C. McDougall, against James J. O'Toole, the appellee, charging him with usurping the office of justice of the peace for the town of Lake, in Chicago, in said county. By stipulation of the parties, all pleading after the amended information was waived,

and the cause was submitted to the court without a jury, on an agreed statement of facts. The court found appellee not guilty, and entered judgment for costs against the relator. An appeal was taken to the appellate court, where the judgment was affirmed. The case has been argued by counsel for the parties to the record, and we have also been favored with other arguments on the part of appellant, both by counsel representing the interests of other parties claiming to hold the office of justice of the peace in Chicago, and by counsel appearing as amici curiæ, in order that all phases of the questions involved might be fully presented to the court. The defendant, James J. O'Toole, was a justice of the peace for the town of Lake, and, by both the constitution and the statute, was entitled to hold his office until his successor should be appointed and qualified. The ground for the information was that Edwin J. Rhoades had been duly appointed, commissioned, and qualified as his successor, and that the title to the office held by him had passed to said Edwin J. Rhoades. The only question affecting the right of the defendant to the office is whether such successor has been legally appointed, and has acquired title to the office. Prior to the adoption of the present constitution the justices of the peace in Chicago were elected by the people, but the manner of acquiring the office was changed by that constitution from the election by the people at large to the manner specified in section 28 of article 6, by which the judges of the courts of record, the governor, and the senate are made to share the responsibility of the appointment. That section is as follows: "All justices of the peace in the city of Chicago, shall be appointed by the governor, by and with the advice and consent of the senate, (but only upon the recommendation of a majority of the judges of the circuit, superior and county courts,) and for such districts as are now or shall hereafter be provided by law. They shall hold their offices for four years, and until their successors have been commissioned and qualified, but they may be removed by summary proceeding in the circuit or superior court, for extortion or other malfeasance. Existing justices of the peace and police magistrates may hold their offices until the expiration of their respective terms." The legislature, in pursuance of this provision of the constitution, by section 1 of an act in force March 30, 1871, as amended in 1891, provided: "That it shall be the duty of the judges of the circuit, superior and county courts of Cook county, a majority of the judges concurring therein, on or before the first day of June, in the year of our Lord 1891, and every four years thereafter, to recommend to the governor * * * five fit and competent persons to fill the office of justice of the peace of the town of Lake; * * * in the city of Chicago and county of Cook, and the persons thus recommended the governor shall nominate, and by and with

¹ Rehearing denied Jan. 14, 1897.

the advice and consent of the senate (a majority of senators elected concurring by yeas and nays) appoint justices of the peace in and for each of said towns respectively; and in case the governor rejects any person recommended, or the senate refuse to confirm any person nominated, the governor shall give notice of such rejection or refusal to the said judges, who shall, within ten days after the receiving of such notice, recommend some other fit and competent person for such appointment: provided, such persons so recommended shall be electors in the town in and for which they are to be appointed justices of the peace." On April 19, 1895, a majority of the judges of said courts recommended to the governor the following named persons for the office of justice of the peace in said town, to wit: John M. Moore, to succeed himself; John Fitzgerald, to succeed J. J. Hennessy; Henry G. Schulte, to succeed Peter Caldwell; James J. O'Toole, to succeed himself; and Edwin J. Rhoades, to succeed George W. Hotaling. On June 14, 1895, the last day of Thirty-Ninth general assembly, the governor placed before that body the name of Edwin J. Rhoades to succeed the defendant as justice of the peace, and the nomination was confirmed by the senate. After the adjournment of the senate, on or about June 16, 1895, the governor returned the name of the defendant to the judges as rejected. A commission was issued to Rhoades, and he took the oath of office, and furnished a bond approved by the county clerk of Cook county. The county clerk designated Rhoades to succeed George W. Hotaling, and recognized as the justices of the town of Lake the defendant, James J. O'Toole, J. J. Hennessy, John Fitzgerald, Henry G. Schulte, and Edwin J. Rhoades. The only two persons whom the judges thought fit to continue in the office of justice of the peace of the town of Lake, and who were recommended as their own successors, were John M. Moore and the defendant, O'Toole. The governor substituted other persons for these two, and sent their names back, after the adjournment of the senate, as rejected.

It is contended that the governor could appoint, and invest with the title to the office which the defendant held, a person who had not been recommended for that office by the judges, but who had been recommended to succeed some other justice; and this claim was submitted by plaintiff to the trial court, in two propositions of law which that court was asked to hold. The first of these was as follows: "The power to appoint successors to justices of the peace in the city of Chicago is vested in the governor, by and with the advice and consent of the senate." This was modified by the court by adding, "but only upon the recommendation of a majority of the judges." The second proposition, as submitted, was as follows: "That the executive discretion, and the concurrence of the senate therein, cannot be judicially inquired into." This was modified by ad-

ding, "provided the governor has complied with the recommendation of the judges." To the modification of these propositions in the manner stated, the plaintiff excepted. When the term for which the defendant was appointed expired, the governor was authorized to appoint another person as his successor. The method of doing so, as provided in the constitution, was that the judges should recommend the person, and the governor, with the advice and consent of the senate, should appoint him. If there were but one justice of the peace, and one court of that grade, in the town of Lake, there would be no question as to what office the appointee would take. But there are five justices to be appointed for that town, holding five distinct courts, so that there must be a line of succession created in the descent of each of these offices. The fact that there are a number of distinct offices of the same grade in the town should not create any confusion. Justices of the peace are a part of the judicial department of the state provided for in the constitution, and, while known only by the name of the incumbent of the office, yet each justice court is distinct and separate from all others. Writs and processes issued by one justice are issued in his own name, signed and sealed by him, and made returnable before him. The justices of the town of Lake are in no respect like a board or a commission, to act together, nor as the judges of the circuit or superior courts. There is no community of title or office, and they do not act interchangeably, or as representing one court. The only instance in which one justice may act in any matter pending before another is by authority of the statute to continue a case in the absence of the justice before whom it is pending. Whether there were other offices of the same grade, or other vacancies in office, in the town of Lake, or whether the judges recommended, or the governor appointed, or the senate confirmed, persons to fill those offices, are matters of no consequence, so far as this case is concerned. Attention is called to section 10, art. 5, of the constitution, where it is provided that the governor shall nominate, and, by and with the advice and consent of the senate, appoint, all officers whose appointment or election is not otherwise provided for. But that section has nothing to do with the present inquiry, for the reason that another method is specifically provided for with respect to justices of the peace in Chicago. Much stress is laid, also, upon the well-recognized rule that, where a power is given to the executive by the constitution, that department is supreme and independent, within its prescribed duties and powers, and is not subject to control or direction by any other branch of the government, and that a duty or power committed to one branch of the government for its exercise, by the constitution, is not subject to interference, control, or dictation by another branch. We apprehend

that no one will be found to dispute these propositions. But the question here is whether the supreme and independent power of appointment has in this instance been conferred upon the executive. The constitution is to be regarded as a grant of powers to the executive, and that department can exercise no authority or power except such as is clearly granted to it by the constitution. *Field v. People*, 2 Scam. 79. The method of appointment of justices of the peace is prescribed by the constitution, and the grant of the power to the executive is restricted and confined by the same section, every part of which is of equal force. The action of the governor in making the appointment is dependent upon conditions, the first of which is that the person appointed to the office shall be recommended by the judges. It is true that the governor may appoint, but whom may he appoint? The constitution says, the person recommended by the judges, and none other. The theory of the people undoubtedly was that the local judges of Cook county had better means of knowing what persons were qualified for the office of justice of the peace than the governor or the senate. They hear all the appeals from the justices, and, from their knowledge of their proceedings, know better than any one else whether those who are in office are properly discharging their duties, and, if not, are well qualified to recommend other persons to hold the offices of those who should not be reappointed. And by the same section they are given the power of removal. The governor has the power of rejection, and so has the senate. The concurrence of the three agencies of the government is necessary, under the constitution, to appoint a man to the office, and all these agencies must join in the manner provided by the constitution. No person was recommended by the judges to succeed to the office which the defendant held, and we think that it was not within the power of the governor to confer upon Rhoades the title to the office which the defendant held, without such recommendation. In that view, the circuit court was right in its modification of the propositions submitted to it on the part of the plaintiff.

Some of the counsel appearing in the case, representing other interests than those of the parties to the record, have claimed that a portion of the agreed statement of facts in this case is not true, and have presented certified statements from the office of the secretary of state, designed to show what is claimed to be the fact. While, in the exercise of appellate jurisdiction, we can determine this case only upon the facts as they appeared, and were agreed upon in the trial court, and review the judgment of that court upon the agreed statement on which it acted, yet the difference does not, in our judgment, affect the result in any manner, and it is intended to make this decision broad enough to cover the facts as claimed by any of the

parties. The matter of fact which was agreed upon, to which objection was made, is as follows: "Agreed: No judges, no governor, no convention of judges of Cook county, or the senate, same being the three branches of government (executive, legislative, and judicial), have, since the constitution of 1870 up to the present instance, ever recommended, nominated, or appointed in any way whatsoever, thereby designating the successorships of justices of the peace in the city of Chicago; leaving the duty, power, and authority exclusively to the county clerk, under section 111, c. 79, Rev. St. Ill. 1874." The following facts in respect to such designation are shown by the records in the office of the secretary of state: The first appointments were in 1871, and there were then no successorships to be designated. Up to 1887 the judges did not designate whom the persons recommended should succeed. In 1875 the governor designated the successorships. In 1879 he did not. In 1883 he transmitted a supplemental message naming successorships, as he stated, "for the purpose of avoiding confusion, and to designate the order of succession." In 1887 the judges named the succession, and the governor acted upon their recommendation, except in one case, in which he changed the successorship from the one recommended. The recommendation of the judges in 1891 does not appear on the files, so that it cannot be known whether they designated successorships, but in making the nomination the governor did so. The purpose of this showing is to obtain the benefit of contemporaneous construction in support of the appointment of Rhoades. The facts do not show that there has been any uniform contemporaneous construction by the authorities, entitled to act in the matter. There has been no uniformity in that particular. The successorships were sometimes designated by neither power, sometimes by both, and sometimes by only one. In 1879 it was perhaps thought that the county clerk had the power, and in 1883 the governor made the designation for the reason stated. So far as the stipulation of fact that the successorships have always been left to the county clerk to designate is concerned, it is immaterial what the practice was in that regard; for it did not and could not have the sanction of the constitution, which expressly provides that other officers than the one who the stipulation says has exercised the right shall exercise it. Such a practice, if it ever existed, is manifestly wrong, and cannot take the place of the law. The provision from which it is supposed that the county clerk has some power in the matter is contained in section 2 of the act before referred to, which is as follows: "Justices of the peace under this act shall be commissioned by the governor and hold their office for four years, and until their successors have been commissioned and qualified, and shall have the same qualifications for hold-

ing office, the same jurisdiction, power and authority, and be subject to the same liabilities, and shall execute bonds, and be sworn, and be governed by the same rules and regulations as justices of the peace elected." The power claimed for the county clerk must be found, if at all, in the provision that the justices of Chicago are to be governed by the same rules and regulations as justices elected. We think this needs no special effort at construction or interpretation. It has no reference to the provisions of section 111 of the act to provide for the election and qualification of justices of the peace. It cannot be regarded as a grant of power to the county clerk, but relates to the method of transacting business, and has no relation whatever to the method of appointment or the authority under which the justices should act. The office of county clerk is purely clerical, and it was not meant that he should have any authority over the justices of the peace. To give him such power would be to nullify the will of the judges, the governor, and the senate, and destroy the provisions of the constitution. If that section had any such purpose, the enactment would be unconstitutional and void, as the constitution gives the power to the governor, under the limitation that the person shall be recommended by the judges, and confirmed by the senate. If there has been such a practice by the county clerk, or if there has been anything in the method of appointment, as shown by the records in the office of the secretary of state, which can be said to amount to a construction of the constitution different from that provided by its terms, it could not be regarded as binding. The necessary steps to invest a person with the office which the defendant, O'Toole, has held are a recommendation to such office by a majority of the judges, advice and consent by the senate to the appointment, and the appointment by the governor. This method is pointed out by the constitution, and, we think, clearly demonstrates the invalidity of any other. The judgment will be affirmed. Judgment affirmed.

(167 Mass. 287)

YOUNG v. SNOW et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 7, 1897.)

**WILL—DEVISE IN TRUST—VALIDITY—RIGHTS OF
LEGATEES—ASSIGNMENT OF INTEREST.**

1. A will which gives the residue of the testator's estate "to remain and be in the hands of and under the control of my executors, as trustees, for 20 years after my decease, and then the same to go to my heirs at law," is not repugnant to law or contrary to public policy. *Clafflin v. Claffin*, 20 N. E. 454, 149 Mass. 19, followed.

2. While a will creates a trust, the fund to be finally distributed among the heirs at law, it gives them a qualified ownership; and the fact that the interest of one beneficiary has been assigned, or subjected by creditors, does not give the transferee or the other beneficiaries the right

to have the trust terminated, though all parties, with the trustee, would assent to the termination.

3. Where a beneficiary assigns a vested right in a trust fund, the assignee may, by a proper bill, compel the trustee to recognize his right.

Case reserved from supreme judicial court, Suffolk county; *W. A. Field, C. J.*

Bill by one Young against Ellen C. Snow and others to terminate a trust created by the will of David Snow, deceased. All parties consented except the trustees, who submitted whether the trust could be legally terminated. The will gave the residue of the testator's estate "to remain and be in the hands and under the control of my executors, as trustees, for 20 years after my decease, and then the same to go to my heirs at law." The case was reserved for the full court. Bill dismissed.

Edward W. Hutchins, for plaintiff. Henry Wheeler, for defendant Ellen C. Snow. John E. Abbott, for defendants Joseph and Jane S. Cox.

BARKER, J. If the provisions of the will are carried out, the fund will remain in the hands and control of the trustees for 20 years from the testator's death, during which period so much of the income as is needed for that purpose will be used to keep his estate in repair, and during the first 10 years not yet expired there will be an accumulation of part of the income. None of these provisions are repugnant to law or contrary to public policy. The testator, therefore, had the right to make the disposition of his property which he did make, and it is the duty of the court, so far as it has jurisdiction, to carry out the trust. Although the interests created under the trust have all vested, and all the parties interested request that the trust be terminated, and the trustee consents, the objects and purposes of the trust have not been accomplished, nor has their accomplishment been made impossible. If, because of the assignments made by one of the beneficiaries, the payment to her yearly of her share of the income, and the transfer to her, at the end of the 20 years, of her share of the fund, has become impossible, that does not prevent the exact execution of the trust in respect to the shares of the other beneficiaries; and if all the beneficiaries should make similar assignments, or if the rights of all the beneficiaries should be seized by their creditors, that would not make it impossible for the trustee to hold the fund for the 20 years, to keep the estate in repair during that period, and to deal yearly with the income by accumulating it, or paying it over to the persons entitled to receive it. That is what the testator has willed, and it was within his right and power so to direct.

While the will vests the fund in the testator's four children, it does not give them an absolute estate, and then impose restrictions and conditions repugnant to the estate, but

gives an ownership qualified by the directions that the property is to remain for a time in the hands and control of the trustees. Whether the testator made these provisions for one purpose or another is immaterial, since he had the right to order as he did. Under our decisions, such provisions are not void, and are to be carried out. *Clafin v. Clafin*, 149 Mass. 19, 20 N. E. 454.

While the right of each beneficiary is vested, and may be sold, or may be reached and applied in some way by creditors, the fact that the interest of one beneficiary has been assigned does not make it the duty of the court to decree a termination of the trust. If the rights of an assignee are not recognized by the trustee, relief may be given upon a proper bill. This is not such an application. So far as it affects the assignee of one of the beneficiaries, it is an application to give to the assignee a greater right than that given by the will to the beneficiary; and, as to the other beneficiaries, it seeks to give them an unqualified and present possession of a fund which their testator has directed shall remain in the hands and under the control of his trustees for 20 years from his decease.

We are therefore of opinion that the case is governed by the decision in *Clafin v. Clafin*, *ubi supra*, notwithstanding the facts that one of the beneficiaries has made several assignments of her interest in the fund, and that the trustee gives a kind of qualified assent to the request for the termination of the trust. The situation is not like that in *Forbes v. Lothrop*, 137 Mass. 523, or in *Sanford v. Lackland*, 2 Dill. 6, Fed. Cas. No. 12,312, where creditors were entitled to the whole property of the only beneficiary of the trust. Bill dismissed.

(167 Mass. 251)

FROST v. COURTIS et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 6, 1897.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

Testator devised his real estate to his second wife and his children by her, by name, in equal portions. In another clause he named his other children, explaining why they did not share in the estate. *Held*, that the devisees took as tenants in common, and not as a class, with rights of survivorship.

Report from superior court, Essex county; Henry K. Braley, Justice.

Petition by Rebecca C. Frost against Jane Courtis and others for the partition of real estate. There was a verdict for defendants, and, at the request of the parties, the case was reported to the supreme judicial court. Verdict set aside.

Francis Courtis, of Marblehead, died June 15, 1870, leaving a will, and the real estate described in the petition. He had been twice married. His first wife died about 1848. By this marriage he had one son, and no

other children. This son was Francis Courtis, Jr., who died in 1845, intestate, leaving as his children Francis J. Courtis, who died after the testator, and Rebecca C. Courtis, now Rebecca C. Frost, the plaintiff. Francis J. Courtis died in 1870, without issue and unmarried, leaving the plaintiff as sole heir at law. The testator married again in December, 1849. His second wife was Jane Courtis, one of the defendants, and by this marriage he had the following children: Francis M. Courtis and Robert H. Courtis. Robert H. Courtis died before the testator, without issue and unmarried. Francis M. Courtis died in 1883, intestate, without issue and unmarried. The will of the testator provided as follows: "Second. All the rest and residue of my estate, of every name and nature, that I shall die seised of and possessed, or to which I shall be entitled at the time of my decease, I do give, devise, and bequeath to my beloved wife, Jane Courtis, and my two children, Francis M. Courtis and Robert H. Courtis, to have and to hold the same, in equal portions, to them, my said wife, Jane Courtis, and my said two children, Francis M. Courtis and Robert H. Courtis, and their heirs and assigns forever. Third. As to my two grandchildren, Rebecca C. Courtis and Francis J. Courtis, children of my deceased son Francis Courtis, they already have some little property of their own, and I leave them my best wishes, but do not feel it my duty to make any provision for them in this my last will." Nathan R. Morse was admitted as a party defendant, claiming the real estate described in the petition. All the parties claimed under the will of Francis Courtis, Sr., as to the record title. Jane Courtis also claimed title by prescription. At the close of petitioner's case, at the request of counsel for the respondents, the court ruled that the devise in the second clause of the will was to the devisees therein named as a class, and not per capita, and that the interest devised to Robert H. Courtis did not lapse on his death before the testator's death, but went to the survivors named in the second clause.

George C. Abbott and Stephen H. Tyng, for petitioner. H. P. Moulton and T. M. Stimpson, for respondents.

MORTON, J. The question in this case is whether the persons named as legatees in the second clause of the will took as a class (in which event the property in suit would go to the survivor or survivors on the death of one or more members of it before the testator), or whether they took as tenants in common (in which case the share or shares of those so dying would lapse). The respondents contend that they took as a class. The general rule is that, when real property is given, as it was here, to several persons by name, to be equally divided among them, they take as tenants in common, and not as

joint tenants or as a class. *Emerson v. Cutler*, 14 Pick. 108; *Jackson v. Roberts*, 14 Gray, 546; *Workman v. Workman*, 2 Allen, 472; *Claffin v. Tilton*, 141 Mass. 343, 5 N. E. 649; *Wood v. Seaver*, 158 Mass. 411, 33 N. E. 587; *Horton v. Earle*, 162 Mass. 448, 38 N. E. 1135; 2 Jarm. Wills (4th Am. Ed.) 162 et seq. This rule yields to a different construction when it plainly appears from the will that it was the intention of the testator that the survivors should take the whole. *Swallow v. Swallow*, 168 Mass. 241, 44 N. E. 132, and cases cited. The mere fact, however, that the testator gives to some and not to others of those who are equally related to him does not show that he gives to them as a class, or that the doctrine of survivorship is to be applied. *Sohier v. Inches*, 12 Gray, 385. In the present case the testator went a little further, and named the children to whom he did not give anything, and explained why he did not give them anything, but we do not think that that is sufficient to show that he gave to his second wife and her children as a class, or that he intended that, if one of them died before he did, the survivors should take the whole. It is probable that that contingency did not occur to him. We may conjecture that, if it had, he would have provided for it in a manner altogether favorable to his second wife and her children. But that is not enough to justify us in departing from a well-settled rule of construction. Very likely his object in naming his children by his first wife, and explaining why he did not give them anything, was to show that he had not forgotten them; and it would be a forced construction to infer, from that fact, that he intended to constitute one class of them, and another class of his second wife and her children, especially in view of the fact that his children would all naturally constitute one class. We think, therefore, that, in accordance with the report, the verdict should be set aside, and the case should stand for trial on the issue whether the defendant Jane Courtis has acquired a title by prescription. So ordered.

(167 Mass. 254)

LEMERY v. BOSTON & M. R. CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1897.)

INJURY TO EMPLOYE—DEFECTIVE TRACKS—OFFER OF PROOF—NEGLECT—BILL OF EXCEPTIONS—SUFFICIENCY.

1. Plaintiff, an employé, being required to specify the negligence on which he relied, offered to prove that four cars had been detached from a freight train, and were moving down a side track, when the car on which plaintiff was riding jumped the track; that the cars did not run smoothly on such side track; and that, prior to the accident, other cars had been derailed there, but the track had not been fixed. Held, that the statement was a sufficient specification that the negligence relied upon was the existence of a defective road, entitling plaintiff to introduce his evidence.

2. A subsequent statement by the plaintiff that he did not know what caused the accident was not a withdrawal of the contention that it was due to the defective road.

3. Plaintiff, being required to specify the negligence on which he relied, replied that he could not state, more precisely than had been done in the pleadings, the cause of the accident. In his bill of exceptions he set forth that he "submitted the following statement of fact as his offer of proof of the cause of his injury; the following are the facts which the plaintiff offered to prove, and upon which he relies to maintain his action." The commissioner substituted, for the words quoted, that plaintiff "offered to prove the following facts." Held, that the variation was not such as to defeat plaintiff's right to prove his exceptions.

4. A bill of exceptions will not be set aside, on the ground that the statement of facts offered to be proved, as set forth in the bill, varied in phraseology and order from the statement actually made at the trial, when such variation is shown to be unimportant.

Exceptions from superior court, Suffolk county; C. S. Lilley, Judge.

Action by one Lemery against the Boston & Maine Railroad Company. There was a verdict for defendant, and plaintiff excepted. The exceptions not being allowed, plaintiff filed a petition to prove the same. Exceptions sustained.

S. A. Fuller, for plaintiff. Solomon Lincoln, for defendant.

ALLEN, J. At the trial, the plaintiff's counsel read the pleadings and proceeded to open the case to the jury, whereupon, on motion of the defendant, the court directed him to specify the negligence on the part of the defendant on which he relied. The plaintiff thereupon said that he was unable to state with any more precision than he had done in his pleadings the cause of the accident complained of; but, in his bill of exceptions, as presented by him to the court, it is set forth that he "submitted the following statement of fact as his offer of proof of the cause of his injury; the following are the facts which the plaintiff offered to prove, and upon which he relies to maintain his action." The commissioner finds that, in order to conform to the exact truth, the words in quotation marks should be stricken out, and the following inserted in place thereof, viz.: "Offered to prove the following facts." The defendant now contends that the bill of exceptions as presented to the court did not exhibit correctly the manner in which the plaintiff presented his case to the court, in that he did not state that he relied upon these facts to prove the injury. We are of opinion that this variation is not of sufficient importance to defeat the plaintiff's right to prove his exceptions. The plaintiff was in court, seeking to maintain his case. He had read the pleadings. Being directed to specify the negligence relied on, he referred to the pleadings, which he had just read, and offered to prove certain facts, which he proceeded to state. It seems to us quite clear that he offered to prove these facts as sustaining his

case, and as showing the negligence relied on. The commissioner also finds that the statement of facts offered to be proved, as set forth in the bill of exceptions, varied somewhat in phraseology and order from the statement of facts actually made at the trial. It is not, however, contended, on the part of the defendant, that this variation is important; and we think the statement as made in the bill of exceptions conformed in substance to the statement actually made at the trial, and that the plaintiff's bill of exceptions, as presented, should not be defeated on this ground, but might and should have been amended, if the changes were deemed to be of enough importance to require attention. *Morse v. Woodworth*, 155 Mass. 233, 27 N. E. 1010, and 29 N. E. 525.

We proceed, therefore, to consider the case on its merits, and for this purpose we take the bill of exceptions in the commissioner's draft and form which he finds to conform exactly to the truth. The declaration was in two counts,—the first being at common law, and the second under the employer's liability act. The first count alleged that the plaintiff was working in the employ of the defendant, and was riding upon a car which had been switched off the main track onto a track known as the "D'Estey Track," and, while so riding and working, "by reason of the negligence of the defendant, its agents, officers, or servants, who were not the fellow servants of the plaintiff, said car on which he was working jumped the track, to wit, the D'Estey track, near or at a frog," etc. The second count adds an averment "that said car jumped the track as aforesaid by reason of a defect in the ways, works, and machinery of the defendant, which arose from or had not been discovered or remedied, owing to the negligence or carelessness of some person in the employ of the defendant corporation, and intrusted by it with the duty of seeing that the ways, works, and machinery were in a proper condition." The plaintiff was directed to specify the negligence on which he relied; and, having stated that he was unable to state, with any more precision than he had done in his pleadings, the cause of the accident, because he lost his arm, and was immediately removed from the place of the accident, he offered to prove that four cars had been cut off or detached from the rear end of a freight train, and were moving down the D'Estey track, and the car immediately ahead of that upon which he was riding left the D'Estey track, and was derailed, as also the car upon which he was riding, whereby he was thrown to the ground and hurt; that he was in the exercise of due care, and that no fellow servant of his contributed to the car's jumping the track at the frog described in the declaration; that upon the D'Estey track, described in the declaration, the cars did not run so smoothly as they did upon the main tracks; that the train was running at a rate of speed which was not

45 N.E.—44

unusual or improper; that, before the accident, cars had jumped the track at the same place, and the track had not since been fixed and repaired; and that the ballasting or grading of the track was not so good as upon the main track. From this we think it was sufficiently plain that the plaintiff relied on the ground that the railroad was defective at that place. The court required him to specify what negligence of the defendant he relied on. He answered, in substance: A defective road, by reason of which the cars jumped the track. There was then a colloquy between the court and the plaintiff's counsel, in which the court said, "It is an entirely different statement from any that has been heretofore made." And again, "You said repeatedly you did not know what caused the accident." To this the plaintiff's counsel replied, "I say so now, your honor. I don't know what caused the accident; and I said it was not within human possibility to determine, on the part of the plaintiff, what caused the accident, but the accident did happen, and I have merely stated the environment." We do not think this statement ought to be construed as a withdrawal of the plaintiff's contention that the accident happened in consequence of a defect in the road.

We need not consider, at this time, the question whether negligence on the part of the defendant could be inferred merely from the happening of the accident, without more. The plaintiff did not rely solely upon the accident, but offered to prove other facts tending to show a defective road, viz. due care on his own part and on the part of his fellow employes, the want of smoothness in the running of the cars, and the inferiority of this track to the main track in respect to ballasting or grading. In an opening statement, it was not necessary for him to go further in defining how rough the road was, or how poor was the ballasting or the grading. Taking the offer of proof of these other facts in connection with the happening of the accident, in the opinion of a majority of the court, it was enough to entitle the plaintiff to put in his evidence. Exceptions sustained.

(146 Ind. 558)

FISHER v. LOUISVILLE, N. A. & C.
RY. CO.

(Supreme Court of Indiana. Jan. 12, 1897.)

MASTER AND SERVANT—NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. Freedom from contributory negligence is not sufficiently shown to allow a recovery for the death of a section hand of defendant railway company caused by his being struck by a train, where there is no evidence as to what deceased was doing when struck by the train, or whether he looked or listened, or heard the approaching train in time to have avoided it.

2. In the absence of such evidence, a finding that the injuries were willfully inflicted is not warranted, though deceased could have been seen from the cab of the engine for half a mile

before he was struck, and though no signals were given of the approach of the train.

Appeal from circuit court, Newton county; U. Z. Wiley, Judge.

Action by Henry Fisher against the Louisville, New Albany & Chicago Railway Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Thompson & Bro., for appellant. E. C. Field, W. S. Kinnan, and Cummings & Darroch, for appellee.

MONKS, J. Appellant brought this action to recover damages for the death of Benjamin Fisher, an employé of appellee, who was killed by one of appellee's trains. The complaint is in two paragraphs. The first paragraph alleges that the death was caused by the negligence of appellee, and without the fault of the decedent. The second paragraph charges that appellee willfully and purposely killed the decedent. The jury returned a special verdict, and appellant moved for a judgment in his favor, which was overruled, and judgment rendered in favor of appellee. The special verdict, so far as necessary to the determination of the questions presented, is substantially as follows: On July 19, 1895, Benjamin F. Fisher was and had been in the service of appellee, as a section man, for about three months, and while in such service was struck and killed by a locomotive owned and operated by appellee, and which was attached to an extra freight train, not running on any schedule time, and following about one mile behind the regular local freight train, which had passed the decedent about five minutes before he was killed. That a high wind was blowing from the northwest to the southeast at the time. The deceased was killed about halfway between the village of Surrey and the first public highway southeast of said village. The railroad crosses two public highways, about one mile south of said village, one about 80 rods from the other. The track, for a distance of about three-quarters of a mile to the southeast of where the deceased was killed, was straight, and unobstructed in view from the cab of the locomotive as it approached the place where the decedent was killed. Appellee's engineer and fireman could have seen decedent at work upon said railroad, in approaching him, for the distance of at least one-half a mile. The engineer in charge of the locomotive drawing the extra freight train did not give any signal at the highway crossing first south, and about one-half mile from where the decedent was at work, or give any warning as the train approached the decedent. The deceased would not have heard the whistle, if sounded at said highway crossing, but would have heard the danger signal as the extra freight train approached him from the southeast, if it had been sounded. The train was going at about 12 to 15 miles per hour when the decedent was killed. The deceased was a man about 41 years of age, with his eyesight good, and was in the full possession of his faculties. He could have seen the train approaching for

about one mile if he had looked, and could have heard the noise of the approaching train in time to have avoided danger, if he had listened. The special verdict states that there was no evidence as to what the decedent was doing when he was killed,—whether he looked or listened, or as to whether he saw and heard the train approaching in time to avoid it or not.

To entitle appellant to judgment in his favor upon the special verdict, under the issues joined, it is essential that the facts found should show that the death of Fisher was caused by the negligence of the appellee, and without any fault on the part of said decedent, or that he was willfully killed by the appellee. *O'Neal v. Railway Co.*, 132 Ind. 110, 31 N. E. 669. In determining whether the facts found are sufficient to entitle the person having the burden of proof to a judgment, this court can only consider the facts properly found, disregarding evidentiary facts, legal conclusions, and matters not within the issues; and, when any fact material to any issue is not set forth, the presumption is that there was not evidence sufficient to establish such fact, and the same is treated as found against the party having the burden of proof as to such fact. Nothing can be added by inference or intentment. *Railroad Co. v. Bush*, 101 Ind. 582, 584, 585; *Railway Co. v. Barnhart*, 115 Ind. 399, 406, 16 N. E. 121, and cases cited; *Cook v. McNaughton*, 128 Ind. 410, 414, 24 N. E. 361, and 28 N. E. 74, and cases cited; *Town of Freedom v. Norris*, 128 Ind. 377, 384, 27 N. E. 869; *Railway Co. v. Miller*, 141 Ind. 533, 543, 549, 37 N. E. 343. There are no facts showing that the appellant's intestate was in the exercise of ordinary care when he was killed. He could have seen the approaching train for a mile, and could also have heard the noise of the train in time to have avoided danger. There is no finding that he did or did not look or listen, or that he did not see or know the train was approaching in time to have avoided the danger. For all that is shown by the special verdict, he saw and heard the train approaching, and neglected to go from the track until it was too late. Under the authorities cited, therefore, the failure to find facts showing that the decedent was without fault is equivalent to a finding against appellant on this issue. It is evident, therefore, that appellant was not entitled to a judgment in his favor, unless the facts found show that the appellee willfully and purposely killed the decedent, as alleged in the second paragraph of complaint. When any injury is willfully inflicted, it is not necessary to prove that the person injured was free from contributory negligence. *Brannen v. Road Co.*, 15 Ind. 115-119, 17 N. E. 202. Can this court say, as a matter of law, upon the facts found, that appellant willfully caused the death of the intestate? To constitute a willful injury, the act which produced it must have been intentional, or must have been done under such circumstances as evinced a reckless disregard of the safety of others, and a willingness to inflict the injury complained of. *Brannen v. Road Co.*, *supra*, and cases cited;

Pennsylvania Co. v. Meyers, 136 Ind. 242, 258, 36 N. E. 32; *Parker v. Pennsylvania Co.*, 134 Ind. 673, 677, 679, 34 N. E. 504; *Conner v. Railroad Co.* (this term) 45 N. E. 632. The special verdict shows that the engineer and fireman upon the approaching train could have seen the decedent when a half mile from where he was killed, but that no danger signals were given as the train approached him. It is not found or shown that they, or either of them, saw him, or knew that he or any one else was at work on or near the track, before he was killed. Neither does the verdict show what the decedent was doing as the train approached, or when he was killed, or that he was engaged in work, and was so absorbed that he did not know that the train was approaching. It is true that in answer to one interrogatory the jury found that he was working, as appellee's section man, in ballasting the track. But the jury, in answer to other interrogatories, find that there was no evidence showing what he was doing at and before the time he was struck by the train. Considering these interrogatories and the answers together, the jury found that the decedent was, on the day of the injury, an employé of the appellee, and engaged in the line of his duty, as a section hand, in ballasting the railroad track, under the direction of the section foreman, but that at the time he was struck by the train the jury could not find what he was doing, because there was no evidence of what he was doing at that time. For all that appears from the special verdict, the decedent may have been looking at the train as it approached, and appellee's employés did not give the danger signal for the reason that they could see that the decedent was looking at the train, and knew that it was approaching him. Under such circumstances, the failure to give the danger signal would not be negligence. The engineer would have the right to assume that the decedent would step aside in time to avoid the danger. *Railroad Co. v. McClaren*, 62 Ind. 566, 572. If, under such circumstances, appellee's train ran upon the decedent and caused his death, there would be no liability, because appellant would not be guilty of even negligence, and the decedent would be guilty of negligence contributing to his injury. Under the rule that nothing can be added by intendment, it is clear that we cannot say, as a matter of law, upon the facts found, that the death of appellant's intestate was willfully and purposely caused by appellee, nor even by its negligence. The judgment is therefore affirmed.

(147 Ind. 388)

RUSK et al. v. ZUCK et al.¹

(Supreme Court of Indiana. Jan. 7, 1897.)

WILLS—CONSTRUCTION—NATURE OF ESTATE.

One item in a will was: "I will and bequeath to my wife" land described, "also" certain personal property, "also \$1,000 in money, this to be hers during her natural life, and what is left at her death is to go to my heirs." *Held*, that the widow took a life estate only in the land.

¹Rehearing denied, 46 N. E. 674.

Appeal from circuit court, Montgomery county; J. F. Harney, Judge.

Proceeding by John S. Zuck, administrator with the will annexed of the estate of Mary Rusk, deceased, against Squire Rusk and others, to sell real estate to pay debts. From a judgment in favor of the administrator, and directing the land to be sold, Squire Rusk and part of the other defendants appeal. Reversed.

Crane & Anderson and Ristine & Ristine, for appellants. Paul & Yanceleave, for appellees.

MONKS, J. This proceeding was brought by one of the appellees, John S. Zuck, administrator with the will annexed of the estate of Mary Rusk, deceased, to sell certain real estate described in the petition to pay debts. After the issues were joined, the cause was tried, and the court made a special finding of the facts, and stated the conclusion of law thereon in favor of said administrator, and ordered the real estate sold to pay the debts of said deceased. A number of the rulings of the court upon demurrer are assigned as error, but we need not consider them, as the same questions are presented by the conclusions of law which are also called in question by the errors assigned. It appears from the special finding: That David Rusk died, testate, in 1875, the owner in fee simple of the real estate in controversy, leaving Mary B. Rusk, his widow, a second wife, by whom he had no children, and appellants, his children by a former marriage, as his only heirs at law. The part of the will necessary to the determination of the questions involved is as follows: "(2) I will and bequeath to my wife, Mary B. Rusk, 80 acres of land, Wayne township, county and state aforesaid, in section fourteen (14), the west half of the northeast quarter, also one brown mare and a one-horse buggy and one brindle cow, also three white hogs for her meat for the ensuing year, also two hundred bushels of corn, and fifty bushels of wheat, and what hay there is in the barn, also my household and kitchen furniture, also one thousand dollars in money, this to be hers during her natural life, and what is left at her death is to go to my heirs at law. (8) After my death, as soon as convenient, the balance of my real and personal property to be sold, and equally divided among my five children." That afterwards said Mary B. Rusk died, testate, but did not attempt to dispose of said real estate, or refer to the same in any way in her will. Appellee Zuck was appointed administrator with the will annexed, and commenced this proceeding to sell said real estate to pay debts.

The question is: Did Mary B. Rusk take the real estate described in item 2 of said will in fee simple or only during life? If she took a life estate, the court erred in its

conclusions of law, and the cause must be reversed; but, if she took an estate in fee simple, the case must be affirmed. We think it clear that Mary Rusk took a life estate only in the real and personal property mentioned in item 2 of said will. The purpose of construing a will is to ascertain the intention of the testator. It is true that, when a will purports to dispose of real and personal property in the same terms and in the same connection, and it is manifest that the testator intended both to go together, the will should be so construed. *Mulvane v. Rude* (at this term) 45 N. E. 659, and cases cited. While the common-law rule that a general devise of real estate, without defining the interest to be taken by the devisee, gives only a life estate, prevails in this state, yet the rule does not require that the word "heirs" be used to convey a fee. Every devise denoting an intention to devise his entire interest in his real estate will be construed to pass all his estate in such property. *Mulvane v. Rude*, supra.

Counsel for appellees insist that the words limiting the estate for life only apply to the legacy of \$1,000. They say: "If said words have any legal effect at all, they only apply to the one thousand dollars in money. Why say in connection with it, 'This to be hers during her natural lifetime,' in the same sentence with the one thousand dollars? Why did not the testator add said words immediately after the description of the land?" So far as disclosed by the record, item 2 is only composed of one sentence. It is not necessary to repeat the words limiting an estate for life after the description of each piece of property disposed of. It is sufficient if the words are used after all the descriptions, as was done in this case. The property is all given to Mrs. Rusk in one item, and the words, "This to be hers during her natural life," are contained in the same item, and follow immediately after the description of the property, and refer to all the property mentioned in said item. The testator could not have selected words more apt nor of greater power to create a life estate. The descriptions of the different pieces of property are separated by the word "also," which signifies "in like manner." The meaning is precisely the same as if the testator had said: "I will and bequeath to my wife, Mary B. Rusk, to be hers during her natural life, eighty acres of land, etc.; and, in like manner, I will and bequeath to her one brown mare, and a one-horse buggy, and one brindle cow; and in like manner I will and bequeath to her three white hogs for her meat for the ensuing year; and in like manner I will and bequeath to her two hundred bushels of corn, and fifty bushels of wheat, and what hay there is in the barn; and in like manner I will and bequeath to her my household and kitchen furniture; and in like manner I will and bequeath to her one thousand dollars in money." The live stock,

buggy, hay, corn, wheat, and household and kitchen furniture named in said item were liable to be consumed, worn out, or destroyed before the death of the widow, but whatever was left at such time the testator's heirs at law were entitled to. The fact that personal property bequeathed for lifetime may be consumed, worn out, lost or destroyed, does not give an absolute title to the legatee. *Goudie v. Johnson*, 109 Ind. 427, 10 N. E. 296; *Green v. Hewitt*, 97 Ill. 113; *Giles v. Little*, 104 U. S. 291. In *Wood v. Robertson*, 113 Ind. 323, 15 N. E. 457, the will contained the following provisions: "I give and devise to my beloved wife the farm on which I now reside, as well as all my other real estate, of which I may die legally possessed, also all the personal property, of whatever description, of which I may die the owner, to have and to hold during her natural life. There was a devise over of what remained of the real and personal property undisposed of at the death of the wife. The word "also" was used in the same connection as in this case. This court held that the wife took an estate for life in the real estate, as well as the personal property, although the words limiting the estate devised to an estate for life did not follow the devise of the real estate, but the bequest of the personal property. See, also, *Green v. Hewitt*, supra.

It is next urged that the words, "This to be hers during her natural life, and what is left at her death is to go to my heirs at law," are void, for the reason that said words are repugnant to the absolute estate granted. It is settled law that, when an absolute title to real or personal property is clearly and distinctly given to a person, the estate so given cannot be cut down or modified by a subsequent clause of the will, unless the intention to do so is manifest from words as clear and certain as those which gave the absolute title. *Mulvane v. Rude* (this term) 45 N. E. 659, and cases cited. In this case we have shown that an absolute title to the property was not given. On the contrary, an estate for life was clearly given. The words defining the estate given are as much a part of the devise of the real estate and the bequest of the personal property as the words, "I will and bequeath to my wife." The entire clause must be considered together, to determine the testator's intention. There is no question of cutting down or modifying an absolute estate given by a subsequent clause, for the reason that the words are all in the same clause, and the only estate given is a life estate. The correct test of the effect of language apparently at variance with other parts of a devise is whether the intent of the testator was to give a smaller estate than the words making the gift, standing alone, without considering the limiting clause, import, or to impose restraints upon the estate given. The first is lawful and effective, for the reason that the

testator's intention is the controlling consideration in the construction of the will. If the language, however, is used to impose a restraint on the estate granted, it is rarely, if ever, effective, for the reason that even a clear intention cannot be permitted to overthrow the settled rules of law, by depriving an estate of any of its essential legal incidents. *Mulvane v. Rude*, supra. The words "to be hers during her natural life" clearly show that it was the testator's intention to give a smaller estate than would have passed if said words had been omitted, and not to impose a restraint upon an estate already given. It is not material whether appellants took the real estate in controversy under the will or under the law. It is true that in construing a will the presumption is against partial intestacy; but when the testator devises his property for life, and fails to dispose of the fee, this presumption will not enlarge the estate for life, or convert it into a fee simple, but the fee will go where it is cast by the law,—to the heirs of the testator. *Crew v. Dixon*, 129 Ind. 85, 87, 27 N. E. 728; *Thomas v. Thomas*, 108 Ind. 576, 578, 9 N. E. 457; *Schouler, Wills* (2d Ed.) § 490. As the property was only devised to Mary Rusk for life, and not in fee simple, the case must be reversed. Judgment reversed, with instructions to the court below to restate its conclusions of law, and render judgment in favor of appellants.

(146 Ind. 500)

STATE v. RAY.

(Supreme Court of Indiana. Jan. 5, 1897.)

CRIMINAL LAW—APPEAL—REVIEW—INSTRUCTIONS.

An exception to a number of instructions as an entirety cannot be sustained, unless all the instructions are erroneous.

Appeal from circuit court, Noble county; Joseph W. Adair, Judge.

George M. Ray was acquitted of a crime, and the state appeals. Affirmed.

H. C. Peterson, W. H. Glatte, Pros. Atty., H. G. Zimmerman and W. A. Ketcham, Atty. Gen., for the State. L. H. Wrigley, for appellee.

MONKS, J. Appellee was prosecuted and acquitted of the crime of obtaining a bill of exchange by false pretenses. The court gave to the jury 34 instructions at the request of appellee, to the giving of which appellant excepted. The exception was to the instructions given as an entirety, and not to each instruction separately. The giving of these instructions is assigned as error. Under the well-settled rule, unless all of said 34 instructions were erroneous, this appeal cannot be sustained. *Lawrence v. Van Buskirk*, 140 Ind. 481, 482, 40 N. E. 54, and cases cited. It is not claimed by appellant that all of said instructions are erroneous, and objections are only urged against a part of them. Some of

said instructions correctly stated the law, and under the rule we cannot review the action of the trial court in giving the others, however erroneous they may be. The appeal is therefore not sustained.

(148 Ind. 351)

LEWIS et al. v. STANLEY et al. 1

(Supreme Court of Indiana. Jan. 5, 1897.)

HUSBAND AND WIFE—RESULTING TRUST—APPEAL—CHANGE OF THEORY—EQUITY.

1. A wife has no equitable interest in land conveyed to her husband merely because one-half the price is paid by her father as an advancement to her, where he knew the land was to be conveyed to the husband alone.

2. In an action to set aside a deed by a husband to the wife as in fraud of creditors, the wife claimed to own the land in fee simple as grantee. *Held*, that she could not obtain relief on appeal, on the ground that she was the equitable owner of the property, because, when her husband purchased the land, the price was paid by her father as an advancement to her.

3. In a suit to set aside a deed by a husband to his wife as in fraud of creditors, the wife cannot hold two other lots, deeded by her husband as equivalents for an advancement made to her by her father in the shape of one-half of the price paid for the land in controversy, and at the same time claim that she did not agree to accept such lots for the purpose for which her husband deeded them to her, and by a cross complaint invoke equity to quiet her title to the land in controversy.

Appeal from circuit court, Noble county; W. L. Penfield, Judge.

Action by Thomas S. Lewis and others against Comfort E. Stanley, widow and administratrix of Henry L. Stanley, deceased, and another. From a judgment in part for plaintiffs, they appeal, and defendants assign cross errors. Reversed.

L. W. Welker and W. L. Taylor, for appellants. H. C. Peterson and H. G. Zimmerman, for appellees.

HOWARD, J. The appellee Comfort E. Stanley is the widow and also the administratrix of the estate of Henry L. Stanley, deceased. This action was brought by the appellants, as claimants against the estate of said decedent, to set aside as fraudulent two deeds, one given by Henry L. Stanley and wife to the appellee Abe Ackerman, and one from said Ackerman to Henry L. Stanley and Comfort E. Stanley as husband and wife, and to subject the land so conveyed to the payment of said claims. Comfort E. Stanley answered the complaint by general denial, and also by a special plea, to which a demurrer was sustained. She also filed a cross complaint, asserting her ownership of said land in fee simple, and asking to have her title quieted. The facts were found specially by the court, with conclusions of law (1) that the deeds in question should be set aside as fraudulent against creditors, (2) that Comfort E. Stanley was the equitable owner of the undivided one-half of said land, and

¹Rehearing denied, 47 N. E. 677.

(3) that the remaining undivided one-half of the land should be sold in payment of the debts of said estate, subject to the right of the widow to the one-third thereof. The appellants contend that the court erred in its second and third conclusions of law, and also in overruling the motion for a new trial. The appellees assign cross errors as to the first conclusion of law and also as to the action of the court in sustaining the demurrer to the special answer. The cross errors, however, cannot be considered. Appellees took no exception to the conclusion of law, and they have not discussed in their brief the alleged error of the court in sustaining the demurrer to the special paragraph of answer. Moreover, we do not think there was any error in the rulings complained of. See, as to the affirmative answer, *Crow v. Carver*, 133 Ind. 260, 32 N. E. 569.

The facts as found by the court show: (1) That on August 26, 1884, the land in question was conveyed to Henry L. Stanley by his father for \$4,000, of which sum \$2,000 was treated as an advancement by the father of the said Henry L., and the remaining \$2,000 was paid by the father of Comfort E., as an advancement to her husband and herself. She and her husband soon after joined in a receipt showing that her father had advanced her said sum of \$2,000. (2) That the deed for the land was written, signed, and acknowledged in the absence of Henry L. and his wife, and afterwards, on the same day, Henry L. Stanley, together with his father and his wife's father, went to the office of the justice who had written the deed, and where the same was ready for delivery, at which time and place the deed was delivered to Henry L. by his father, his wife's father also then and there paying to Henry L.'s father said \$2,000, the one-half of the purchase price of said land, for and on behalf of his said daughter. (3) That the conveyance so made was executed to and in the name of Henry L. Stanley alone, without the knowledge or consent of his said wife. (4) That the deed so made was accepted by said Henry L. Stanley, and duly recorded. (5) That on December 12, 1887, Henry L. Stanley purchased two lots in the town of Albion for \$1,100, and placed the title thereto in the name of his wife, for the purpose of paying her the amount her father had put in the real estate in question, and thereafter he made improvements on said lots until he considered that he had made good to her the amount her father had advanced to them; that he owed no debts at the time when the title to said lots was so vested in his wife. But there is no evidence that she accepted or agreed to accept, and she did not accept, the title to said lots in lieu of or in satisfaction of any right, title, or interest she had in the lands in question. (6) That on April 16, 1889, Henry L. Stanley purchased a second tract of land, paying part cash and assuming a mortgage debt for the remainder.

This mortgage being foreclosed, he and his wife executed another mortgage on the same land to obtain money to pay off the first mortgage debt. (7) That on October 12, 1893, Henry L. Stanley and his wife conveyed the land in controversy to the appellant Ackerman, and on the same day, and as a part of the same transaction, Ackerman reconveyed the land to Stanley and wife, to be held by them by entireties. (8) That there was no consideration for either of the said conveyances, but they were both made for the purpose of placing the title to said real estate in the joint names of Henry L. Stanley and his wife, with the full knowledge on their part that the land would thus be placed beyond reach of the creditors of Henry L. Stanley, and the further purpose of cheating, hindering, delaying, and defrauding such creditors. (9) That, until several days after her husband's death, Comfort E. Stanley had no knowledge at any time that her husband was indebted to any one, except as to the mortgage debt mentioned in finding 6, and also a debt due to the appellant Walker, which latter debt is likewise secured upon the property for which the indebtedness was incurred. (10) That the land in controversy, on October 12, 1893, when it was conveyed to Henry L. Stanley and wife to be held by entireties, was worth \$3,200. (11) That Henry L. Stanley was then insolvent, and so remained until his death, November 6, 1893. (12) That on November 21, 1893, Comfort E. Stanley was appointed administratrix of her husband's estate, and is claiming to be the owner of the real estate in controversy by reason of the conveyance mentioned in finding seven. (13) That the estate of Henry L. Stanley is insolvent. (14) That the mortgage mentioned in finding 6 has been foreclosed, and there remained a balance of the judgment thereon due and unpaid after the sale of the mortgaged land, which balance is still unpaid. (15) That other claims filed and allowed against said estate, and claims filed but not allowed, all remain unpaid. (16) That appellant's several claims, in the amounts named, are just claims against said estate. (17) That all said indebtedness was contracted and in existence on the 12th day of October, 1893, when the transfers in dispute were made. (18) That the entire personal estate of Henry L. Stanley, over and above the \$500 taken by the widow, is \$125.-80, being but a very small part of the indebtedness aforesaid.

There can be no question about the first conclusion of law, namely, that the conveyances under which Comfort E. Stanley claims title to the land in controversy are fraudulent and void as against the creditors of Henry L. Stanley, deceased, and that they should be set aside as to such claims. The findings show that at the time said conveyances were made Henry L. Stanley was hopelessly insolvent, that he died a few days thereafter, still insolvent, and that his estate is insol-

vent. It is, besides, expressly found that the conveyances were made without consideration, and with the purpose of cheating, hindering, delaying, and defrauding the creditors of Henry L. Stanley. These findings are abundantly supported by the evidence. But, in its second conclusion of law, the court held that Comfort E. Stanley is the owner of the equitable title to the undivided one-half of said land. If this conclusion is correct, it must be by reason of the first four findings made by the court. The first finding shows the making of the deed to Henry L. Stanley by his father. One-half the consideration for this deed was remitted by way of advancement from the father to the son. The other one-half was paid to Henry L. Stanley's father by his wife's father, "as an advancement to him and his wife Comfort E. Stanley," and for which, shortly thereafter, the wife's father took a joint receipt from the young husband and wife, "showing that he had advanced her said sum of \$2,000." A father may make an advancement to his daughter by paying for land, the deed to which is taken by her husband in his own name. *Baker v. Leathers*, 3 Ind. 558. The father may thus make the advancement in the manner he thinks best, and even if the daughter should object, still he might, by will or otherwise, thus fix the portion to be given to her. The property belongs to the father, to do with as he deems best; and it does not follow that, because the advancement is so made, the land does not belong wholly to the husband. There is nothing in the findings or in the evidence to show that any trust in favor of Comfort E. Stanley was created by the deed to her husband. That deed was made to him by his father, and was completed and ready for delivery before his wife's father paid any part of the \$2,000. The matter was wholly arranged by the respective fathers. As a matter of fact, though, the daughter did give her consent that the payment by her father of a part of the purchase price of the land held by her husband should be taken as an advancement to her. By the joint receipt given by her and her husband to her father, she, so far as she had any control over the matter, ratified the act of her father, and thus agreed that the deed should be held by her husband as owner of the land. In *Hileman v. Hileman*, 85 Ind. 1, where a father had made an advancement to his daughter by reducing the price of land conveyed by him to her husband, it was held that the husband, in the absence of any agreement or understanding then had, was not liable to his wife, as trustee or otherwise, for the amount of the advancement. "The transaction," said the court, "amounted to a gift to the husband."

The record also shows, in the case at bar, that the theory upon which the appellee Comfort E. Stanley proceeded during the whole trial was that she was the owner in fee simple of all the land in controversy by virtue of the deeds found by the court to be fraudulent. The

complaint asked, simply, to have these deeds set aside, and that the land be sold to pay the debts of the decedent. She answered to this by a general denial, and by filing a cross complaint asking to have her title quieted as to all the land. Her evidence, as given in the record, shows the same theory, and the court expressly finds this to have been her claim. But it has often been held that a party cannot seek relief by one theory in the pleadings, still less in the pleadings and evidence introduced, and then ask to have relief given on another theory. *Johnson v. Pontious*, 118 Ind. 270, 20 N. E. 792, and cases there cited. In addition, there can be no question that the legal title to the land in controversy was in Henry L. Stanley, under the deed from his father. Even, therefore, if the appellee might, against the appellant's complaint, defend her right to an undivided one-half of said land by an appeal to the equity side of the court, still she then would be required to do equity as well as to ask it. The court finds that she received from her husband the two town lots, with improvements thereon, as an equivalent for the amount paid by her father towards the purchase price of the land held by her husband. This town property she still holds, under the claim that she did not agree to accept it for the purpose for which her husband gave it to her. This is not doing equity, but standing on her legal right. In a court of conscience, she cannot have the legal right to one property, given to her on equitable considerations in relation to the other, and also have the equitable right to the other property against the legal right of its owner, who had given her the equivalent of any possible equitable interest she might have in it. If law prevails over equity as to the deed held by her, so should it also as to the deed held by her husband.

Appellee must therefore fail, whether we consider her legal rights or her equitable claims. It was, of course, competent for the husband and wife to so transfer this property that they might hold it by entireties, whatever reasons they might have for so doing, provided, only, they did not thus prejudice the rights of bona fide creditors. The legal title of the husband, which he retained for over nine years, will be upheld for the protection of such creditors. In the absence of any lien under which she is liable, the widow has, of course, her statutory one-third interest in her husband's lands; but the facts in this case do not disclose any further interest of hers against creditors in the land in controversy. The court, therefore, erred in its second conclusion of law, while, in the third conclusion of law, it should have been found that all, instead of the undivided one-half, of the land in dispute, ought to be sold in payment of the debts of the estate, subject to the widow's rights in the undivided one-third thereof. The judgment is reversed, with instructions to the court to restate its conclusions of law in accordance with this opinion, and to render judgment thereon in favor of the appellants.

(146 Ind. 503)

FAIRMOUNT UNION JOINT-STOCK AGRICULTURAL ASS'N v. DOWNEY.

(Supreme Court of Indiana. Jan. 6, 1897.)

NEGLIGENCE—CONDUCT OF RACE—DUTY OF MANAGEMENT—CONTRIBUTORY NEGLIGENCE—SUFFICIENCY OF FINDINGS.

1. An association under whose management a horse race is being conducted is guilty of negligence in starting a number of horses in a race around a track at a time when another horse is being driven on the track in an opposite direction, and is at a place where the horses must meet within a few feet of the place of starting; and such negligence is the proximate cause of a collision between horses and vehicles, in the race, resulting from such meeting.

2. It is not contributory negligence for the driver of a horse to start in a race, under such circumstances, without knowledge of the fact that a horse is approaching on the track from the opposite direction, as he has a right to rely upon the performance by the association of its duty to see that the track is clear before the signal to start is given.

3. It is not necessary, to support a judgment for a plaintiff on special findings, that all the allegations of the complaint should be found, but it is sufficient if the facts found constitute a cause of action within the allegations.

Appeal from superior court, Madison county; W. L. Diven, Judge.

Action by George C. Downey against the Fairmount Union Joint-Stock Agricultural Association for personal injuries. Judgment for plaintiff, and defendant appeals. Affirmed.

St. John & Charles and Chipman, Keltner & Hendee, for appellant. Moore & Cooper and Goodykoontz & Ballard, for appellee.

HACKNEY, J. The appellee sought and recovered in the lower court a judgment for personal injuries sustained while engaged in a horse race upon the race track of the appellant, and from the alleged negligence of the appellant. The complaint was in two paragraphs, the sufficiency of each of which is here presented. Each paragraph alleged that the appellant had advertised for, and invited participation in, certain races for prizes upon its race track during its fair season of 1894, under its control and direction; that the appellee had entered and his horse had been admitted by the appellant to participate in one of said races, to be held on a day named; that said race had been called by the appellant, and the various participants were upon the track; that the appellant carelessly and negligently started a number of the participants in said race without observing that one entitled to start was not with the number so started, but was going in the opposite direction from that in which the race was started, and occupying a portion of the track over which the horses so started in said race were to pass; that the horses so started by the appellant and the horse so going in the opposite direction met within 60 feet of the starting point, the appellee's horse then traveling at a rapid pace, and the driver of one of the horses so started, that he might

avoid a collision with the horse going in the opposite direction, suddenly swayed his horse to one side of such other horse, but in doing so made it inevitable that the appellee's horse should collide with his horse and sulky; that the appellee's horse did collide with the horse and sulky so swayed from its course, causing the injuries complained of. It is alleged also that the appellee was without fault or negligence in said occurrence, and it was alleged that "by reason of dust and other obstructions, which he is not able to name or state, he did not see said horse and sulky going in the opposite direction, nor the turning or breaking" of the horse with which his horse so collided, "until a few seconds before the collision occurred, nor until it was too late" and "was impossible to prevent a collision." In addition to these facts, the first paragraph alleged that the appellant represented that said races would be conducted according to the rules of the National Association, which rules provided that all horses to participate in any race should be driven to the right of the starter's stand, turned and speeded rapidly in the opposite direction when started in a race, and that no horse should be allowed upon the track excepting those engaged in the race. Each of the paragraphs is attacked by the appellant as disclosing (1) that the alleged collision was the result of contributory negligence; (2) that the appellant owed the appellee no duty, in the occasion in question; and (3) that the injury was not the proximate result of the act of starting the horses in the manner alleged.

As we have seen, there is an express negative of contributory negligence, and this is not overcome by the allegation above quoted. That allegation, it is urged, discloses the same opportunity for the appellee to have seen the approaching horse as the appellant could have had to see it. If it was the duty of the appellant to use ordinary care for the safety of the appellee, that duty would require such assistants, suitably situated, as might reasonably guard the track from intrusion. No corresponding duty rested upon the appellee. It is a matter of common knowledge that the agricultural associations of the state, where they conduct horse races, have starting stands, so constructed as to enable those in charge to see the entire track and observe the conduct of drivers and horses. It is a matter also of common knowledge that the track and its use are subject to the control of the associations, and the starting and stopping of the races are subject to their direction. Contestants have no corresponding opportunities or privileges. When one enters such contests by the invitation, and in obedience to the rules, of the society, he assumes the ordinary risks thereof; but he does not thereby absolve the society from all duty, or assume the hazards of every neglect of duty on its part. We cannot, therefore, agree with the insistence that the quoted allegation discloses equal oppor-

tunities on the part of the parties to know the danger which resulted in injury. That the duty rested upon the appellant to use ordinary care—considering all of the hazards of racing upon its track—to protect the appellee from extraordinary dangers was decided, in effect, in the case of *Association v. Wilcox*, 4 Ind. App. 141, 30 N. E. 202. It was there decided, further, that negligence in failing to keep the track clear while horses are rightfully driven upon it, resulting in injury by collision, constitutes the proximate cause of such injury. The mere starting of the horses, in this instance, did not produce the injury; but starting the horses at a high rate of speed in one direction, while a horse and sulky were approaching from the opposite direction, and when both must meet within a few feet of the starting point,—the society then knowing, actually or constructively, of the approach of the horse,—was the natural and probable cause of the injury. It was an act from which the injury complained of might reasonably have been anticipated. Even if the particular result could not have been anticipated, our cases hold that the wrong which set in motion the cause of the injury was the responsible agency. See *Billman v. Railroad Co.*, 76 Ind. 166; *Pennsylvania Co. v. Congdon*, 134 Ind. 226, 33 N. E. 795; and cases cited in each. See, also, as illustrating those causes which are proximate and those which are remote, *Enochs v. Railway Co.* (present term) 44 N. E. 658. It follows that the appellant owed a duty to the appellee which it neglected to perform, and that the appellee, in consequence thereof, was injured without his fault, and the paragraphs of complaint would both be good without the allegation as to the rules of the National Association.

The trial of the cause resulted in a special verdict by the jury, in the form of answers to interrogatories, and upon this verdict judgment was rendered for the appellee, over the motion of the appellant for judgment in its favor. This ruling is in question upon the assignment of error and briefs of counsel. It is urged that the verdict does not sustain, but departs from, the theory of the complaint, in that it is not found that the appellee could not see the horse approaching and meeting those started in the race, by reason of dust and other obstructions preventing him from seeing. It is not found that there was dust to obstruct the view, but it is found that appellee could not and did not see the approaching horse. This is the essence of the appellee's allegation on the subject. It is the fact, and not the evidence nor the reasons for his inability to see. There are other interrogatories and answers, however, which disclose that there were eleven horses and sulkies in the race, to be started upon a track 37 feet wide; that they were started in tiers,—two of four each, and one of three; that the appellee was in the last tier; that the horses had scored once, and failed to

get started; that they had turned back, and all but one had repeated the score, and were started in the race, there being four horses and sulkies between the appellee and the returning horse; and the collision occurred within 25 feet from the starting point. These facts supply causes sufficient to prevent the appellee from seeing, and they are within the allegation of the complaint. All of the allegations of a complaint are not required to be found. It is enough when facts sufficient to constitute a cause of action, if within the allegations of the complaint, have been found. We may suggest the doubt, without intending to express an opinion upon it, if the allegation in question was not, at most, but an additional allegation of noncontributory negligence, and not requiring affirmation by the appellee. One interrogatory elicits the fact that the appellee, while scoring for the start, could not see the horse approaching, in time to avoid the collision, because his own horse commanded his entire attention. From this finding, appellant's counsel skillfully evolve the argument that appellee's horse was unruly, and occupied him when he should have been on the lookout for the approaching horse, and thus he contributed to the collision. Other findings show that appellee's horse was not unruly, and did not break or swerve from his proper place. Besides, it is not unnatural that a driver of one of ten horses and sulkies, started together upon a 37-foot track, should be fully occupied in avoiding collision with one of the ten, to say nothing of the importance of keeping his horse upon a steady gait, and seeking proper opportunities to pass to the front, without looking for the approach of a horse and sulky from the opposite direction. We do not, therefore, agree with the proposition that the special verdict is upon a theory different from that of the complaint. Having assumed that the complaint disclosed contributory negligence, counsel insist that the verdict should have shown that the injury was inflicted upon the appellee willfully, and that the judgment could not be sustained, because of the absence of such finding. The theory of the complaint is for negligence, and not for a willful act. Upon the theory of negligence, we have held it sufficient. We find no error in the record, and the judgment is affirmed.

(146 Ind. 521.)

**JEFFERSONVILLE WATER-SUPPLY
CO. v. RITTER et al.**

(Supreme Court of Indiana. Jan. 7, 1897.)

APPEAL—LAW OF THE CASE—MECHANICS' LIENS—
NOTICE—APPEAL AND ERROR—REVIEW—
HARMLESS ERROR.

1. On a second appeal, the question of the sufficiency of an amended complaint which is substantially the same, except as improved by the amendment, as the one held sufficient on the former appeal, cannot be considered.

2. The notice of intention to claim a mechanic's lien need not state that the work was done

and material furnished 60 days before filing the notice in the recorder's office; the statute not requiring it to state such fact.

3. The names of claimants of a mechanic's lien may be signed to the notice of intention to claim the lien by their attorney.

4. In an action against a water-supply company to enforce a mechanic's lien for the erection of a standpipe under a contract with one B., the complaint proceeded on the theory that B. owned the land in fee when the contract was made, and that, after plaintiffs commenced the work, he conveyed the land to defendant without the knowledge of plaintiffs. Two paragraphs of the answer alleged that B. was to furnish land for the standpipe; that he purchased the land, and held it in his name in trust for defendant; that, before plaintiffs had done any work or furnished any material, B. conveyed the legal title to defendant; that plaintiffs had notice of its ownership; that plaintiffs were subcontractors, and failed to notify defendant that they were furnishing the material and labor. Two other counts alleged that defendant had let the contract to B. to furnish the ground and erect the pipe, of which plaintiffs had notice. *Held*, that the error, if any, in sustaining a demurrer to each of such four paragraphs was harmless, since the facts set out could be shown under the general denial.

Appeal from circuit court, Floyd county; Jacob Herter, Judge.

Action by Thomas B. Ritter and others against the Jeffersonville Water-Supply Company to enforce a mechanic's lien for labor done and material furnished in the erection of a standpipe. From a judgment and decree in favor of plaintiffs, defendant appeals. *Affirmed*.

A. Dowling, for appellant. S. S. Johnson and Voigt & Stotsenburg, for appellees.

JORDAN, C. J. Appellees brought this action to foreclose a mechanic's lien upon a claim due them for the erection of a standpipe. This is the second appeal to this court. See *Supply Co. v. Ritter*, 138 Ind. 170, 37 N. E. 652. After the cause was remanded to the lower court by the order in the former appeal, appellees filed an amended complaint, and, under the issues joined thereunder, a trial resulted in a finding that there was due to plaintiffs (now appellees) the sum of \$6,000, and over. Judgment foreclosing the lien in controversy was awarded in their favor. The evidence has not been certified to this court, and a reversal of the judgment is sought by the appellant upon alleged errors of the trial court upon its rulings on demurrers to the pleadings.

The amended complaint, *inter alia*, substantially alleges that Samuel R. Bullock, on April 6, 1888, was the owner in fee simple of certain real estate, described in the complaint, situated in the town of Port Fulton, in Clark county, Ind., and that his deed for said realty was, at and prior to said date, of record in the recorder's office of said county; that on said 6th day of April, he and plaintiffs entered into a written contract, whereby they agreed to furnish material for and erect a standpipe on said real estate for the sum of \$7,900, said pipe to be used in connection with the waterworks system then

being built for the city of Jeffersonville. A copy of the contract is filed with the complaint. It further avers: That on April 10, 1888, plaintiffs commenced the work of building and erecting the standpipe, and furnishing material for the same, and on July 30, 1888, had it ready to be placed upon said real estate, and the building of said pipe thereon was completed on December 1, 1888, and on December 4, 1888, within 60 days after the material was furnished and the work thereon completed, the plaintiffs filed in the recorder's office of said county a notice of their intention to hold a lien upon said property for the amount due upon their claim. A copy of this notice is filed with the complaint. That on April 21, 1888, said Bullock and his wife conveyed said real estate to the defendant, the Jeffersonville Water-Supply Company, and that it is now the owner thereof, and is using and operating said standpipe. That plaintiffs had no knowledge of said conveyance by Bullock until after the completion of said work, and that said defendant withheld its said deed from record until August 20, 1888, being long after the plaintiffs had commenced the work of erecting the standpipe. That on the date last mentioned said company caused said deed to be recorded in the recorder's office of said county. Partial payments made by Bullock are averred, and judgment is demanded for a foreclosure of the lien. After unsuccessfully demurring to this complaint, appellant filed its answer in six paragraphs. The first was a general denial. Second, payment. The third alleged that, before the execution of the contract between Bullock and plaintiffs, as alleged in the complaint, it had contracted with said Bullock to construct a system of waterworks at the city of Jeffersonville, in Clark county, Ind., and, as a part of said contract, Bullock was to furnish at his own expense land for the location of the standpipe, etc.; that, in pursuance of said contract, Bullock purchased the real estate mentioned in the complaint, and thereafter caused to be erected thereon the standpipe mentioned; that he held said land in his own name, in trust for said company; that on April 21, 1888, before plaintiffs had performed any labor or furnished any material for the standpipe, Bullock conveyed the legal title of said real estate to defendant. Open possession of the land by defendant is averred, and that plaintiffs thereby had notice that the company was the equitable owner of said real estate. The fourth paragraph is similar to the third, but proceeds more fully and specifically upon the theory that the company had let a contract to Bullock to construct the standpipe, and to purchase and furnish the ground for its location, and that plaintiffs, in furnishing the material and doing the work as alleged in the complaint, were but subcontractors under Bullock, and that, as such, they had failed to notify the defendant that they were furnishing said

material and doing said work as such contractors, and that they would look to it for payment. The fifth and sixth paragraphs, as outlined by the facts, proceed, also, upon the theory that the company had let the contract to Bullock to furnish the ground and erect the standpipe, of which the plaintiffs had notice, and that the latter were only subcontractors, and that they had failed and neglected to give notice to said company that they were furnishing the material and doing the work mentioned in the complaint as such contractors, etc. A demurrer was sustained to the third, fourth, fifth, and sixth paragraphs of the answer.

The first insistence upon the part of appellant is that the complaint is not sufficient to withstand a demurrer. The amended complaint is substantially the same, except as improved by the amendment, as the one held to be sufficient upon the former appeal. Its sufficiency, therefore, must be deemed settled by that decision.

It is further argued, however, that the notice which appellees filed of their intention to hold a lien is insufficient for two reasons: (1) That it does not state that the work was performed and material furnished 60 days prior to filing the notice in the recorder's office; (2) that the names of the appellees appear to be signed to the notice by S. S. Johnson, their attorney. As to the first objection urged, it may be said that the statute does not require the notice to state or specify when the work was done or material furnished, and such omission would not result in rendering the notice deficient. The fact that the name or names of the persons desiring to acquire the mechanic's lien have been signed to the notice filed in the recorder's office through the agency of their attorney will not render such notice invalid, and thereby defeat the lien. The statute does not, in express terms, require that the notice shall be signed by any one. The notice in dispute, however, gave the names of the appellees as the persons seeking to obtain the lien, and in this respect it disclosed to all concerned who were intending to hold a lien upon the property described. Under the statute providing for a mechanic's lien, the notice to be filed in the recorder's office is sufficient when it states the amount due, to whom, from whom, and for what, and describes the premises. *Coburn v. Stephens*, 137 Ind. 683, 38 N. E. 132. The notice in question complied with these requirements, and was, therefore, sufficient.

The next contention of appellant's learned counsel is that the court erred in sustaining appellees' demurrer to the third, fourth, fifth, and sixth paragraphs of the answer. The complaint, as we have seen, under its alleged facts, proceeded upon the theory that Bullock was the owner in fee simple at and prior to the time appellees contracted with him to furnish the material and build the standpipe thereon; that they built the pipe under the

contract for him; that, after they had commenced the work, he conveyed said land to appellant, but that appellees had no knowledge of said conveyance until after the completion of the work. Each of the paragraphs in controversy, by the facts outlined therein, proceeds upon the theory that no such cause of action as the one alleged in the complaint ever existed. There is no attempt to confess the cause of action, and avoid it by new matter. The facts alleged were evidently intended by appellant to negative those set up in the complaint, by showing that Bullock was not the owner in fee of the real estate at the time appellees contracted with him to build the standpipe, and that knowledge must be imputed to them of that fact, and that they were but subcontractors in furnishing the material and erecting the standpipe, and that they had failed to give to appellant the notice, required by the statute, to the effect that they were furnishing the material and performing the work as such subcontractors. The facts averred in these paragraphs, so far as they might be competent as a defense, were admissible under the general denial, which appellant had pleaded, and therefore it was not necessary to affirmatively plead them. A defendant, under the general denial, is not confined to negative proof in denial of the facts stated in the complaint as a cause of action, but may, upon the trial, introduce proof of facts independent of those alleged in the complaint, but which are inconsistent therewith, and tend to meet and break down or defeat the plaintiff's cause of action. 1 Work, Prac. § 579; Pom. Rem. § 644; Bliss, Code Pl. § 321; Boone, Code Pl. (Pony Series) § 65; Code 1881, § 127 (Rev. St. 1881, § 377; Rev. St. 1894, § 380); *Balance v. Sear*, 131 Ind. 301, 28 N. E. 707. As the facts embraced in these several paragraphs, so far as the same were competent, could have been proven under appellant's denial, hence sustaining the demurrer thereto, if erroneous, as urged, would be harmless, and no injury resulted to appellant from such ruling. *Claypool v. Jaqua*, 135 Ind. 499, 35 N. E. 285. No available error appearing, the judgment is affirmed.

(146 Ind. 527)

SMITH et al. v. REISTER.

(Supreme Court of Indiana. Jan. 7, 1897.)

APPEAL AND ERROR—REVIEW—MATTERS NOT APPARENT OF RECORD.

An order of the circuit court, made on appeal to it from a refusal of a county board to grant a liquor license, sustaining a motion to dismiss a remonstrance, cannot be considered by the supreme court where the motion to dismiss is not in the record.

Appeal from circuit court, Posey county; O. M. Welbom, Judge.

Application by Christian Reister to the board of commissioners of Posey county for license to sell liquors, against the granting of which John C. Smith and others filed a

remonstrance. The applicant appealed to the circuit court from a refusal of the board to grant a license. From a judgment granting the license, Smith and others appeal. Affirmed.

Elijah M. Spencer, for appellants. Wm. Reister, for appellee.

HOWARD, J. The appellee made application at the March term, 1896, of the board of commissioners of Posey county, for license to sell intoxicating liquors. The appellants filed a remonstrance against the granting of the license, and the license was refused. On appeal to the circuit court, a motion to dismiss the remonstrance was sustained, and this ruling is the only error complained of. The motion to dismiss, however, is not made a part of the record by bill of exceptions or order of court, and cannot, therefore, be considered. *Crumley v. Hickman*, 92 Ind. 388; *Yost v. Conroy*, Id. 464; *Ice Co. v. Lay*, 103 Ind. 48, 2 N. E. 222; *Commissioners v. Montgomery*, 109 Ind. 69, 9 N. E. 590. Judgment affirmed.

(146 Ind. 527)

STATE ex rel. MAXEY et al. v. SWINDELL, Mayor.

(Supreme Court of Indiana. Jan. 8, 1897.)

MUNICIPAL CORPORATIONS—RULES—REPEAL.

1. Rules for the government of a city council are of the dignity and effect of an ordinance where they are reported in writing by a committee appointed to draft them, and adopted on verbal motion at a regular meeting of the council.

2. Rules for the government of a city council regularly adopted cannot be repealed on a mere verbal and general motion to that effect. *Swindell v. State*, 42 N. E. 528, 143 Ind. 153, followed.

Appeal from circuit court, Marshall county; George W. Burson, Special Judge.

Mandamus by the state, on the relation of James W. Maxey and another, against Joseph Swindell, mayor of the city of Plymouth. From a judgment sustaining a demurrer to the reply, the state appeals. Affirmed.

J. D. McLaren, Saml. Parker, E. C. Martindale, and Chas. P. Drummond, for the State. Charles Kellison, for appellee.

MCCABE, J. Appellant's relators, Maxey and O'Keefe, applied to the circuit court for a writ of mandate against the appellee, as mayor of the city of Plymouth, Ind., to compel him to recognize each of them as members of the city council of said city, and to permit them to exercise the duties of such councilmen; they alleging that they had been legally appointed and qualified as members of said council from the alleged Fourth ward of said city, which ward, they alleged, had been duly and lawfully created by a certain alleged ordinance enacted by the common council of said city, August 27, 1894. Appellee resisted the action, bas-

ing his defense upon two propositions, namely: (1) That the common council was not authorized by law to adopt the ordinance by which said additional or Fourth ward was created, of its own motion, as was done in this case, and without a previous petition being filed therefor by resident citizens of the ward or wards affected, and that, the the ordinance being invalid for this reason, there was no Fourth ward, and no vacancies in the office of councilman to be filled, when relators were appointed, and hence they were not members of the common council, or entitled to be recognized as such. (2) That if the council had authority of law to enact the ordinance creating the additional or Fourth ward without petition, and of its own motion, the ordinance was invalid, and of no force or effect, for the reason that it was passed and adopted contrary to and in violation of the rules of procedure that had long been in force in said council. The issues formed were tried by a jury, the trial court directing the jury to find for the plaintiff, which they did, and a peremptory writ of mandate was awarded against the mayor. From that judgment he appealed to this court, and the judgment was reversed. *Swindell v. State*, 143 Ind. 153, 42 N. E. 528. This court, on that appeal, decided the first proposition above mentioned in favor of the action of the common council, and against the then appellant, the present appellee; and the second proposition or contention was decided in favor of the then appellant, the present appellee. The cause was reversed, both for the error of striking out the second paragraph of the answer or return, setting up the defense involved in said second proposition, and for the error of holding, as appeared from the evidence, that the rule had been repealed in violation of which the ordinance establishing the Fourth ward had been passed. In the order of reversal, leave was given to amend the second paragraph of answer or return. On the return of the cause to the lower court, said answer was amended only in immaterial respects.

The substance of the second paragraph of answer, as amended, is: That on August 27, 1894, the time of the regular meeting of the common council of the city of Plymouth, when said pretended ordinance was passed creating the Fourth ward, and for a long time prior thereto, said common council was, and has been, governed by certain rules enacted by said common council regulating and governing the deliberations and proceedings of the common council of said city, which rules were on August 27, 1894, in full force and effect, section 21 of which reads as follows: "All ordinances shall be read three times before being passed and no ordinance shall pass or be read the third time in the same meeting it was introduced; provided, that the council may suspend this rule by a two-thirds vote and put an ordinance

upon its passage by once reading and at the time it is read." That said rule 21 was adopted by the common council of said city on May 26, 1874, and was a rule to which said council had yielded obedience from the time it was adopted, as aforesaid, until August 27, 1894, when said council attempted to repeal it, as hereinafter set forth. That on said date, at the regular meeting of said council referred to, the ordinance providing for the creation of the pretended additional or Fourth ward was introduced and passed by said council, composed of only six members, without suspending said rules, or either of them, by a two-thirds vote, before the enactment of said ordinance, the same having been read and put upon its passage at said regular meeting. That but three members of said council voted for said ordinance, and three against it; and, there being a tie, the mayor, Charles P. Drummond, cast the deciding vote in favor of said ordinance, and he then and there declared said ordinance duly enacted; and that was all the action ever taken by said council and said mayor in the enactment of said ordinance. And that the only appointment of relators to the offices of councilmen, which they claim to hold, was made under the ordinance creating said Fourth ward, so enacted in violation of said rule, to fill the vacancies supposed to exist by the creation of such new ward. These facts were held on the former appeal to constitute a good return to the writ of mandate, and a complete defense to the proceeding. The facts are more fully set forth in that opinion, and the authorities bearing upon the question thus presented are exhaustively reviewed therein. On the filing of the above, amended, second paragraph, which is not materially different from the original, the relators sought to raise, as they claim, a new question, by filing the reply, the sustaining a demurrer to which is assigned as the only error on this appeal.

The substance of the reply is: That the rules mentioned in defendant's answer were not in force or effect on the day of the passage of the said ordinance. That the common council never prescribed nor adopted by ordinance any rules or regulations for the government of the official conduct of said common council; and that said section 21 of said rules was never adopted by the common council of said city by ordinance or resolution. That the rules, a copy of which is made a part of defendant's answer, were adopted by the common council of said city in the manner and at the time as follows, namely: At a special meeting of the common council held May 19, 1873, on motion of Councilman Johnson, a committee of three was appointed by the mayor to report rules regulating the order of business to govern the council in the transaction of all business that may come before it, said committee consisting of Councilmen Johnson and May-

er, and, by unanimous request of the council, the mayor consented to serve as the third member of the committee; that at a regular meeting of the common council of said city held on May 26, 1873, the said committee so appointed the week before reported to said council a list of rules regulating the order in which the council shall conduct their deliberations, which, after being read, were, on motion of Councilman Mayor, seconded by Brownlee, adopted by unanimous vote of the council. That said list of rules is the identical schedule or list of rules set up in the answer of the defendant; and that said rules were never adopted in any other or different manner; and, as thus adopted, they were recognized by the common council as in full force, and obligatory upon it, until August 27, 1894, when they were repealed by a majority vote of the common council of said city, when in regular session, on a motion duly made and seconded by members of said common council, which repeal was effected before the passage of the ordinance creating said additional or Fourth ward, and at the time of the passage of said ordinance there were no rules whatever in force regulating and governing the council in the transaction of its business.

It is contended by the appellee that the facts set forth in this reply do not present a materially different question than that presented on the former appeal by the answer and the evidence, and we are inclined to think that is so. At least, the relators are very late in presenting the question if the reply does present a different question than that presented and decided against them on the former appeal. They ought to have presented their whole case then, if they did not, and have it decided in the one appeal. The contention is that these rules do not rise to the dignity of ordinances, and hence, in order to effect their appeal, it is only necessary to produce an act of the corporation of equal grade or dignity with them. Webster defines an "ordinance" to be a rule established by authority. Dillon says: "Under the general term of 'ordinance' have sometimes been included all the regulations by which a corporation is governed. * * * Indeed, in general and professional use, the term 'ordinance' is almost, if not quite, equivalent in meaning to the term 'by-law.'" The reply concedes that these rules were duly enacted by the common council, and had been in full force more than 20 years, and that they were in writing, and had been recognized by the council as binding on it for over 20 years. And the reply further concedes that their repeal was attempted to be effected in order to obviate the necessity of a two-thirds vote to suspend rule 21, and that the attempted repeal was by a mere verbal motion.

The precise question arising upon these facts was decided against appellants on the

former appeal, in the following language: "The verbal motion made by this councilman, as recorded by the clerk, by which it was sought to effectually repeal the rules ordained for the government of the council, was, to say the least, somewhat indefinite. * * * If the procedure by which the power of repeal was attempted to be exercised upon the occasion in question could be sustained, then all that would be necessary to accomplish the repeal of all existing ordinances of a city would be the adoption, at any regular meeting by the common council, of a mere verbal and general motion to that effect, without any reference whatever to the title, number, or date of passage of the ordinance or ordinances intended to be repealed. In the case of *Bills v. City of Goshen*, 117 Ind. 221, 20 N. E. 115, it was held by this court that a defect in an ordinance could not be cured or amended by means of a motion subsequently made by a member of the council, and put to vote, and carried." It was adjudged that the attempted repeal of the rules was ineffectual, and that, therefore, the enactment of the ordinance creating the Fourth ward, to fill the supposed vacancy in which the relators were appointed, was void, because passed in violation of rule 21. That decision is the law of the case, and it consequently follows that the reply in question did not state facts sufficient to avoid the answer. Therefore the circuit court did not err in sustaining the demurrer to said reply. Judgment affirmed.

(146 Ind. 509)

JOHNSON v. SCHLOSSER.

(Supreme Court of Indiana. Jan. 6, 1897.)

JUDGMENT—FAILURE TO ENTER—LIABILITY OF CLERK—LIEN—BONA FIDE PURCHASER.

1. Rev. St. 1894, § 594 (Rev. St. 1881, § 585), providing that every clerk who neglects to enter any judgment in the order book and judgment book shall be liable to any person injured, to the extent of the damage sustained thereby, gives a right of action to a bona fide purchaser of real estate, which was subject to a judgment not entered in the judgment docket.

2. Rev. St. 1894, § 588 (Rev. St. 1881, § 579), provides that judgment must be entered in the order book. Section 591 (section 582) requires the clerk to keep a docket, in which he shall enter, within 30 days after each term of court, a statement of each judgment rendered at such term. Section 593 (section 584) provides that such docket shall be a record and open to examination during the usual hours of transacting business. Section 594 (section 585) makes every clerk neglecting to enter any judgment liable to any person injured by his neglect. Section 617 (section 608) provides that a judgment shall be a lien on real estate for 10 years after its rendition. *Held*, that a judgment creditor does not lose his lien by the failure of the clerk to enter the judgment in the docket.

Appeal from circuit court, Ripley county; Williard New, Judge.

Action by George F. Schlosser against Hannah Johnson. There was a judgment

for plaintiff, and defendant appeals. Reversed.

Adam Stockinger and John B. Rebuck, for appellant. Marcius H. Connelly, for appellee.

MCCABE, J. The appellee sued the appellant, Johnson, and Henry Bushing, sheriff of Ripley county, in a complaint of two paragraphs, seeking to enjoin the sale on execution of certain land on a judgment in favor of appellant, Hannah Johnson, and against one John W. Johnson. The circuit court overruled a demurrer for want of sufficient facts to each paragraph of the complaint, and sustained a like demurrer to the second paragraph of the separate answer of Hannah Johnson. A trial of the issues resulted in a finding and judgment in favor of the plaintiff, and against the defendant, perpetually enjoining the sale of said land on said judgment and execution. The errors assigned call in question the rulings above mentioned, and the action of the circuit court in overruling the defendant's motion for a new trial. The last error assigned is waived by the failure of appellant's counsel to discuss the same in their brief. The question of law involved arises on the facts stated in the complaint, as well as those stated in the answer. It appears from the complaint: That on August 8, 1887, one John W. Johnson and Clemency B. Johnson conveyed a certain town lot, particularly described, in the town of Batesville, in Ripley county, Ind., to James W. White; and on April 9, 1892, said James W. White and wife conveyed the same, for a valuable consideration, to the plaintiff, appellee, George F. Schlosser. That on September 13, 1886, in a cause pending in the Ripley circuit court, for divorce, wherein said Hannah Johnson was plaintiff, and said John W. Johnson was defendant, said court rendered judgment awarding her a divorce, and for \$56 alimony, to be paid on September 14, 1886, and the further sum of \$50 each year during the natural life of Clemency B. Johnson. That said John W. Johnson paid the \$56 as ordered, on September 14, 1886, but that said payment was never entered on the order book, judgment docket, or elsewhere. That the only record or entry of said judgment ever placed in the judgment docket of said court by the clerk thereof, or by any other person, is as follows: "Judgment docket F, page 200. Hannah Johnson v. John W. Johnson, Order Book FF, page 462. Judgment against the defendant for costs. Date of rendition, September 13, 1886." That the fee docket of said court, in which the fees and costs accrued in said action were entered, shows that said costs were duly paid by said plaintiff, and on the margin of said fee book, on the same page whereon is entered said fees and costs, the following entry is made, to wit: "It was the agreement between the plaintiff

and the defendant that the plaintiff is to pay this costs, and that, when it is paid by her, it is to be a satisfaction of this judgment, as against the defendant. [Signed] Charles H. Willson, Attorney for Plaintiff." That, at the time plaintiff purchased said real estate, he had no knowledge or notice of any kind that the defendant, Hannah Johnson, had or claimed any judgment against said John W. Johnson, or any other person. That the fee book showed at the time that the abstract hereinafter mentioned was made at the time plaintiff purchased said premises, that the costs aforesaid were paid, and showed the entry of satisfaction of said judgment, signed by Charles H. Willson, as aforesaid. That before purchasing said premises, to wit, on March 23, 1892, plaintiff employed the recorder of Ripley county to make him an abstract of title for said real estate. That said abstract, when so made, did not mention, show, or allude to any judgment against said John W. Johnson in favor of any person. That said recorder, on examining the judgment docket of said court, in preparing said abstract, found the only entry on record of said judgment to be as set forth above. That believing and relying on said abstract, and having no knowledge of the judgment mentioned, the plaintiff purchased said real estate as aforesaid. That on the 15th day of June, 1894, said defendant, Hannah Johnson, caused an execution to issue out of the clerk's office of the Ripley circuit court on said judgment, for the sum of \$406, with interest and costs, directed to the sheriff of said Ripley county, which came to the hands of the defendant sheriff of said Ripley county, and was by him, on August 24, 1894, levied on said real estate. That said defendants are threatening to sell said real estate by virtue of said execution and judgment, unless restrained, and thereby cast a cloud on plaintiff's title to said real estate. Prayer for a temporary restraining order, and on the final hearing a perpetual injunction.

Two reasons are urged by the appellant why the complaint is not good, namely: (1) That the lien of the judgment is not lost as against anybody by the failure of the clerk to enter it on the judgment docket; and (2) if it would be so lost as against a subsequent bona fide purchaser, that there was enough entered on the judgment docket in this case to put an ordinarily prudent man on inquiry which must lead to full knowledge of the judgment.

If the question of law raised by the first reason urged should be decided in favor of appellant, the second would be wholly unimportant. The appellee contends that while the judgment is a lien on all the real estate of the judgment defendant in the county as against him, without being entered on the judgment docket, yet that it is not a lien as against subsequent good-faith purchasers, for value, of any of such real estate, unless such judgment is entered on the judgment

docket; and, further, that the entry here was not such as to put him on inquiry. Several sections of the Code, embraced in article 24, tit. "Judgment," exert a controlling influence in the proper determination of the question. Section 588, Rev. St. 1894 (section 579, Rev. St. 1881), provides that "the judgment must be entered in the order book, and specify clearly the relief granted or other determination of the action." Section 591, Rev. St. 1894 (section 582, Rev. St. 1881), provides that "the clerk of every court of record shall keep a docket, in which he shall enter within thirty days after each term of the court, in alphabetical order, a statement of each judgment rendered at such term, containing: First, the names, at length, of all the parties; second, the amount of the judgment and costs, and the date of its rendition; third, if the judgment be against several persons, the statement shall be repeated under the names of each defendant in alphabetical order." Section 593, Rev. St. 1894 (section 584, Rev. St. 1881), provides that "such docket shall be a record, and open during the usual hours of transacting business, to the examination of any person desiring it." Section 594, Rev. St. 1894 (section 585, Rev. St. 1881), provides that "every clerk neglecting to enter any judgment or recognizance as hereinafter required shall be liable to any person injured for the amount of damages sustained by such neglect to be recovered in an action against the clerk alone, or upon his official bond against him and his sureties." Section 617, Rev. St. 1894 (section 608, Rev. St. 1881), provides that "all final judgments in the supreme and circuit courts for the recovery of money or costs shall be a lien upon real estate and chattels real, liable to execution in the county where judgment is rendered, for the space of ten years after the rendition thereof, and no longer, exclusive of the time during which the party may be restrained from proceeding thereon by an appeal or injunction, or by the death of the defendant, or by agreement of the parties entered of record."

It is conceded on both sides, and we think correctly, that, in solving the question here involved, the several sections of the Code quoted above must be construed together. But the appellant contends that they must be so construed as to hold that the action for damages against the clerk for failure to docket a judgment is intended to be given to the good-faith purchaser, and not to the holder and owner of the judgment; and, on the contrary, the appellee contends that such right of action was intended to be given to the judgment creditor, and not to the bona fide purchaser of the real estate for value. Appellee's learned counsel, in support of the latter position, say: "Now, we hold that, while the judgment docket is not necessary to constitute the judgment a lien, it is necessary to constitute sufficient notice thereof to third parties, and that a subsequent purchaser for a valuable consideration is only bound

to look to the judgment docket for judgment liens; and, * * * in the absence of actual notice, he takes the land discharged from the lien, and the remedy of the judgment plaintiff, if there is no other property, is against the clerk, under section 585, Rev. St. 1881." In support of this contention, appellant's counsel cite *Berry v. Reed*, 73 Ind. 235. While the opinion in that case contains some remarks by the learned judge who delivered it favorable to appellant's contention, yet such remarks were clearly obiter dictum. The questions actually involved, and to a determination of which the opinion strictly confines the decision, do not support the appellee's contention. The judgment lien there involved was sought to be created and established by the filing of a transcript of a judgment rendered in the common pleas court of another county than that in which the transcript was filed. It was there said that "the plain intent of the lawmakers was that the filing and recording provided for in section 528 should be substantially contemporaneous acts, and where, by the next section, it was enacted that the judgment should be a lien from the time of filing, it was meant, as against subsequent purchasers without actual notice, that a judgment filed, recorded, and docketed as required in the previous section should be a lien. * * * But deciding nothing as to the lien of judgments in the counties where rendered, and where in every case there is a record, in some form, which is accessible to every purchaser, and confining our decision to the case before us, we hold that the transcript of a judgment filed in another county, under the provisions of section 528 and 529 of the Code, supra, does not create a lien against subsequent purchasers in good faith, without notice, unless recorded and entered in the judgment docket." This decision proceeds upon the idea that the entry in the judgment docket is as essential to the creation of the lien as the recording of the transcript in the order book. The two acts are said to be intended by the lawmakers to be contemporaneous.

This case falls far short of supporting appellee's contention. It will be observed that the sections of the statute authorizing the creation of a lien in one county, by filing a transcript of a judgment from another county, and causing the same to be recorded, and entered in the judgment docket, do not provide what such transcript is to be recorded in. Rev. St. 1894, §§ 619, 620 (Rev. St. 1881, §§ 610, 611). But they do provide where the judgment, in the county where rendered, is to be entered. The practice is to record the transcript in the order book. The entry is required to be made in the judgment docket. The word "docket" is usually applied to the book or paper in which is entered a brief abstract of all proceedings in court. 5 Am. & Eng. Enc. Law, 849. So that it would seem that there is much reason for holding that the entry in the judgment docket is as much a part of the essential re-

quirement to make a transcript of a judgment from another county a lien as the act of recording the transcript thereof in the order book. But the case of a judgment rendered in the same county presents a different question, as the case cited clearly recognizes. Appellee also cites and relies on *Bell v. Davis*, 75 Ind. 314. But that was the same kind of a case, involving the validity of the supposed lien of a judgment from another county by a transcript. Referring to *Berry v. Reed*, supra, the court, in the former case, says: "It is there expressly held that, in order that the judgment shall constitute a lien, the clerk of the county to which the transcript is transmitted must enter and record it in the judgment docket of the county. * * * Judgment liens are created by statute, and the requirements of the statute giving a lien must be complied with, or none exists. In this case no lien attached until the transcript was filed, entered, and docketed as the statute requires." It will be observed that both of these cases hold that the filing and recording of a transcript of a judgment from another county by the clerk of the county to which it was transmitted creates no lien at all against anybody, unless such judgment is also entered in the judgment docket of the latter court. It is not there held, as counsel suppose, that the lien only fails as to bona fide purchasers for value, without actual notice, but exists as between the parties, and as to those having notice. Another case cited by appellee in support of his contention is *State v. Record*, 80 Ind. 348. That was a suit brought against the clerk by the purchaser of the land involved in *Bell v. Davis*, supra, for failure to enter the judgment in the judgment docket. It was simply adjudged, in accordance with the two previous cases, that the plaintiff could not recover, because the clerk's failure to so enter such judgment did not injure the purchaser, by reason of the fact that no lien attached to the land he purchased by virtue of the recording of the transcript, without also entering the judgment in the judgment docket; in other words, that he received a good title by virtue of his purchase. But it remains to be determined what is the effect of a failure to enter a judgment rendered in the same county in the judgment docket. That question has never yet been decided by this court.

The judgment is required by section 588 (section 579), supra, to be entered in the order book. Section 617 (section 608), above cited, makes all such judgments liens upon the real estate of the judgment defendant in the county for the space of 10 years after the rendition thereof. There is no exception or qualification to this provision, unless it be in the sections above quoted, relative to entering the same in the judgment docket. It is very clear from those sections that the entry in the judgment docket is no part of the judgment, because it is not required to be entered until the 30 days next ensuing after

the term of court at which the judgment is rendered. It is also apparent therefrom that such judgment docket is designed as a sort of index to or convenient means of ascertaining the judgments rendered against any party in such county, whether such party owns real estate in the county or not. It was said in *Berry v. Reed*, supra, that, "under these provisions, the purchaser of real estate for thirty days after the close of the term of court is bound to look to the order books for the judgments rendered at such term; and such may be the rule, even after the expiration of the thirty days." This statement of the law is undoubtedly correct, because the statute makes the judgment a lien on the defendant's real estate in the county for 10 years next after its rendition; and, as the section providing for the entry thereof in the judgment docket allows 30 days after the term to make such entry, it necessarily follows that that provision does not take away the lien created by the other section, at least during such 30 days, for failure to enter the judgment in the judgment docket. If, after the expiration of such 30 days, the judgment is not entered in the judgment docket, and if the lien ceases on account thereof, as against a bona fide purchaser or anybody else, the question arises: By virtue of what law or what provision in the statute does it so cease? It is a well-established rule of construction of statutes that the entire statute must be construed together, and that effect must be given to every part of a statute if it can be done without manifestly violating the intention of the legislature. *Railway Co. v. Backus*, 133 Ind. 527, 33 N. E. 421; *Potter's Dwar. St.* 189. It is contended by the appellee that the section giving the right of action against the clerk for failure to enter the judgment in the judgment docket is to be construed as giving such right to the judgment creditor. If that be correct, then it would necessarily follow that the intent was that the judgment creditor should lose the lien he had acquired by his diligence, through the negligence of the clerk a month after the close of the term. But such a construction of the different sections necessarily renders a part of the statute of no effect. Section 617 (section 608) makes the judgment a lien without qualification for 10 years next after its rendition against the world. The construction contended for renders so much of the section as makes it a lien against bona fide purchasers nugatory and meaningless, or rather qualifies the provision that it is a lien for 10 years after its rendition. This violates a cardinal canon of construction, which affirms that "the court is to give effect to every clause, section, and word if effect can be given to it." *Potter's Dwar. St.* 194. The provision in section 594 (section 585) making the clerk liable personally, and upon his official bond, to any person for the amount of damages

45 N.E.—45

sustained by his neglect to enter a judgment in the judgment docket, in no way points to the judgment creditor as the person who was to be clothed with the right of action therein provided for. Standing alone, its language could as well be applied to a bona fide purchaser of the real estate sought to be subjected to the lien, as to the judgment creditor. To apply it to the latter is to refuse to give full effect to section 617 (section 608), creating and extending judgment liens for 10 years. To apply it to the former gives full effect to every word and every clause of the whole statute, and affords an ample remedy to any bona fide purchaser for all damages sustained by the clerk's failure to enter the judgment in the judgment docket. The well-established rules of construction require us to so apply and construe the statute. The case of *Nichol v. Henry*, 89 Ind. 54, is very analogous, and, in principle, sustains the conclusion stated above. That was a suit to foreclose a mortgage against a subsequent purchaser for value, in good faith, without actual notice of the mortgage. It had been duly recorded in the mortgage record of the county wherein the land was situate within 45 days. But no entry was made by the recorder in the entry book in the recorder's office of such mortgage, and the same was not indexed in the general index of mortgages. The contention was that, by reason of the failure to so enter and index such mortgage, it was not a lien as against such good-faith purchaser. After setting out the statutes providing for the keeping of an entry book and general index in which the recorder was required to enter such mortgage, it was there said: "These are the only acts bearing upon the question under consideration, and it seems to us manifest from the mere reading of them that the entries required to be made in the entry book and general index do not constitute a part of the record of any instrument required to be recorded. The entry required to be made in the fifth column of the entry book, to wit, 'Volume and page where recorded,' not only indicates that this entry is not the record or a part of it, but shows very clearly that the instrument is recorded elsewhere. Nor does the general index constitute a part of the record. * * * The language of the law is that the recorder shall keep up such index as deeds and mortgages shall from time to time be recorded. * * * The purpose, as we think, of requiring entries in an entry book and an index to be made, is to facilitate an examination of the records, and not to protect the interests of those whose conveyances are recorded; and in such case the failure of the officer to make the entries and to make the index, or either of them, will not prejudice the title of the grantee or mortgagee." To the same effect are the cases cited in that opinion, to wit, *Bishop v. Schneider*, 46 Mo. 472, and *Chathan v. Brad-*

ford, 50 Ga. 327. We therefore conclude that the circuit court erred in overruling the demurrer to each paragraph of the complaint. The judgment is reversed, with instructions to sustain the demurrer to each paragraph of the complaint.

(151 Ind. 546)

McFARLAND et al. v. PIERCE et al.¹

(Supreme Court of Indiana. Jan. 8, 1897.)

CORPORATIONS—RECEIVER—APPEAL—PARTY AGGRIEVED.

1. A joint assignment of error by two appellants is not available to either of them where one is not a "party aggrieved," within Rev. St. 1894, § 1245 (Rev. St. 1881, § 1231), giving the right of appeal to aggrieved parties only.

2. "The party aggrieved," within the meaning of Rev. St. 1894, § 1245 (Rev. St. 1881, § 1231), giving such persons the right to appeal, is one whose legal right is infringed by the decree complained of, and whose legal interest may be changed by the result of the appeal.

3. Where a complaint charges a defendant stockholder and officer of a defendant corporation with appropriating its money to his own use, and asks an accounting by him, such stockholder may not appeal from the appointment of a receiver for the corporation, as he is not a "party aggrieved," within Rev. St. 1894, § 1245 (Rev. St. 1881, § 1231), giving such persons the right to appeal.

Appeal from circuit court, Randolph county; A. O. Marsh, Judge.

Action by Charles W. Pierce and others against Abraham W. McFarland and others. From a judgment appointing a receiver, certain defendants appeal. Affirmed.

Engle & Parry, for appellants. Thompson, Canaday & Focht, for appellees.

HACKNEY, J. The appellees sued the appellants Abraham W. McFarland, the Ridgeville Milling Company, a corporation, and two others, seeking an accounting by said McFarland and others, as the officers and managers of said company, and the appointment, without notice, of a receiver, pending the litigation, to take the custody of the property, books, and effects of said milling company. The circuit court, on April 20, 1896, appointed a receiver as prayed; and on the 21st day of April, as shown by the bill of exceptions, but on the 22d day of April, as shown by the order-book entry, said McFarland and said milling company entered a special appearance "for the special purpose of making objections and taking exceptions to the appointment of a receiver." Upon the face of the documents filed by them in entering such appearance, and in the objections, it is recited that the same were filed April 20, 1896, and it is recited also that said receiver had then been appointed. Said objections were overruled; an exception was reserved; and this appeal was perfected. The assignment of error is by "the appellants Abraham W. McFarland and the Ridgeville Milling Company" jointly, and of the numerous specifications of error counsel say they "bring in review before this court

¹Rehearing denied, 47 N. E. 1.

the sufficiency of the complaint to justify the appointment of a receiver ex parte without notice."

Appellees object to a consideration by us of any question assignable by said milling company alone, and they insist that said company alone could complain of the appointment of a receiver, and, since it has not separately assigned error, no question arises for decision. By Rev. St. 1894, § 1245 (Rev. St. 1881, § 1231), the right of appeal from the appointment of a receiver is given only to "the party aggrieved." Our first inquiry, therefore, is as to whether, in a legal sense, McFarland was aggrieved by said appointment, for, if he was not, and the milling company has joined him in the assignment of error, when there is no available error as to him, there can be no joint assignment made available. *Medical College v. Commingore*, 140 Ind. 296, 39 N. E. 744; *Goss v. Wallace*, 140 Ind. 541, 39 N. E. 920; *Armstrong v. Dunn*, 143 Ind. 433, 41 N. E. 540. The allegations of the complaint sought nothing with reference to the separate property of McFarland, and nothing with reference to joint property of McFarland and the milling company. McFarland was a stockholder in the milling company, and was charged with misconducting the affairs of said company, and appropriating its moneys to his own uses. The allegations as to an accounting are not before us to determine McFarland's interest in the suit, inasmuch as that branch of the controversy has not reached this court. As a stockholder, his interest in the company was held in common with the other stockholders; and the interests, as such, of all stockholders, were represented in and by the corporation defendants. He was not a party to the complaint, because he was a stockholder; and, for the purposes of the appointment of a receiver, it cannot be maintained that, as a stockholder, he was a proper or necessary party. He was made a party to respond to the primary allegations of the complaint and cause of action wherein he was charged personally with bad faith, and it was sought to require him to account and pay to the use of the company the funds belonging to and withheld from it. "The word 'aggrieved,' in the statute refers to a substantial grievance, a denial of some personal or property right, or the imposition upon a party of a burden or obligation." *People v. Kent*, 4 N. Y. Wkly. Dig. 62; *Reid v. Vanderheyden*, 5 Cow. 719; *Steele v. White*, 2 Paige, 478; *Colden v. Botts*, 12 Wend. 234; *Kelly v. Israel*, 11 Paige, 147; *Card v. Bird*, 10 Paige, 426; *Bush v. Bank*, 48 N. Y. 659; *Hall v. Brooks*, 89 N. Y. 33; *Grow v. Garlock*, 29 Hun, 598; *People v. Common Council of City of Troy*, 82 N. Y. 575. "To be 'aggrieved' is to have a legal right, the infringement of which by the decree complained of will cause pecuniary injury." *Hewitt's Appeal*, 58 Conn. 226, 20 Atl. 453; *Dickerson's Appeal*, 55 Conn. 223, 10 Atl. 194, and 15

Atl. 99; *Andress v. Andress*, 46 N. J. Eq. 528, 22 Atl. 124; *Swackhamer v. Kline's Adm'r*, 25 N. J. Eq. 503; *Parker v. Reynolds*, 32 N. J. Eq. 293. The appellant must have a legal interest which will be enlarged or diminished by the result of the appeal. *Woodward v. Spear*, 10 Vt. 420; *Hemmenway v. Corey*, 16 Vt. 225; 2 Enc. Pl. & Prac. p. 170; *Wiggin v. Swett*, 6 Metc. (Mass.) 194; *Lewis v. Bolitho*, 6 Gray, 137; *Lawless v. Reagan*, 128 Mass. 592; *Deering v. Adams*, 34 Me. 41. Under any of these definitions, the appellant McFarland has no appealable interest in the one question now in this court,—the appointment of a receiver. If he has any interest to be affected by that action, it is but remote and contingent, and that interest is of a corporate character, and its legal representative is in court. That interest may be protected alone by such legal proceedings as the corporation may employ, and the stockholder cannot, in his individual capacity, dictate the course, nor set up his judgment against the course chosen by the corporation, so long as it does not act *ultra vires*. Having concluded that McFarland had no appealable interest, the joint assignment of himself and the company presented no question in favor of the company alone. The judgment is affirmed.

(55 Ohio St. 555)

STATE v. BOHN.

(Supreme Court of Ohio. Jan. 12, 1897.)

CRIMINAL LAW—REVERSAL OF CONVICTION IN CIRCUIT COURT—PETITION IN ERROR.

Section 7306a, Rev. St. (92 Ohio Laws, p. 187), contemplates the reversal by the supreme court of a judgment of the circuit court reversing a conviction in any court inferior to the circuit court, and requires the filing of a petition in error within the time limited by the general statute.

(Syllabus by the Court.)

Exceptions to circuit court, Cuyahoga county.

J. Bohn was found not guilty of selling cocoa from which the oil had been extracted, and the state brings exceptions. Dismissed.

Thed. Strimple and Clarke & Thompson, for plaintiff. Goulder & Holding, for defendant.

PER CURIAM. Bohn was found guilty, by a justice of the peace of Cuyahoga county, on a charge of violating the law against the sale of cocoa from which a portion of the oil had been abstracted. On error to the court of common pleas the judgment was affirmed, and this judgment was reversed by the circuit court. Exceptions taken to the judgment of the circuit court are brought here, but without the filing of a petition in error in this court. Counsel for the state insist that the proceeding is authorized by section 7306a of the Revised Statutes. 92 Ohio Laws, p. 187. The object of the section is not only to settle the law for the government

of future cases, but, in the cases contemplated, to obtain a reversal of the judgment of the circuit court, if it be erroneous, and to reinstate the judgment which it reversed. No petition in error having been filed as contemplated by the statute, the proceeding is dismissed.

(55 Ohio St. 556)

DAVIS v. COFFMAN et al.

(Supreme Court of Ohio. Jan. 12, 1897.)

CONSTRUCTION OF WILL—ERROR FROM JUDGMENT OF CIRCUIT COURT.

From the construction placed on the provisions of a will, at the suit of a widow, under the provisions of section 5963, Rev. St., as amended May 8, 1894 (91 Ohio Laws, p. 204), error may be prosecuted to this court from the judgment of the circuit court, for the reversal of the same.

(Syllabus by the Court.)

Error from circuit court, Muskingum county.

Bill by Ella Jane Davis against Mary Ann Coffman and others to construe a will. From the judgment, plaintiff brings error. Motion to dismiss denied.

S. W. Winn and O. M. Vanderbark, for plaintiff in error. J. T. Crew and Fred S. Gates, for defendants in error.

PER CURIAM. On June 15, 1894, John W. Davis, of Muskingum county, died testate. By his will, he devised all his property, real and personal, to his wife, "so long as she shall remain unmarried and my widow, but upon her remarriage the residue or part of my estate which is then on hand, after allowing my wife her lawful dower," to be disposed of, to certain of his "heirs or their living children," as therein provided. The will was duly probated. On July 12, 1894, his widow, Ella Jane Davis, not yet having made any election, under the provisions of section 5963, Rev. St., as amended May 8, 1894 (91 Ohio Laws, p. 204), filed her petition in the court of common pleas, making the proper parties, and asking the court to "give such construction of said will and advice to the plaintiff as is authorized by law." The case was heard in the common pleas, and a construction given the will. From this judgment of construction, the plaintiff appealed to the circuit court, where, on the hearing, a similar construction was placed on the will; and the plaintiff now prosecutes error in this court to obtain a reversal of the judgment of the circuit court. The ground of the motion is that this court has no jurisdiction to review the judgment of the circuit court in cases of this kind; as, while the statute as amended provides for an appeal from the common pleas to the circuit court, it makes no provision for the prosecution of error from the common pleas or the circuit court to this court. It is true that the amendment of section 5963 makes no such provision, nor was it necessary. Jurisdiction is conferred on this court by section

6710, Rev. St., to reverse, vacate, or modify any judgment or final order of the circuit court. The construction placed by the circuit court on the will of John W. Davis, deceased, is a judgment, and conclusive of the rights of the plaintiff, should she elect to take under the will as his widow. Hence it was not necessary that the statute as amended should confer the right on either party to prosecute proceedings in error in this court for the reversal of any construction placed on the will by the circuit court or by the common pleas, such jurisdiction being included within the provisions of the section above referred to. Motion overruled.

(55 Ohio St. 517)

WOLF v. LAKE ERIE & W. R. CO.

(Supreme Court of Ohio. Dec. 15, 1896.)

DEATH BY WRONGFUL ACT — ACTIONS — ADMINISTRATOR — DAMAGES FOR SEPARATE BENEFICIARIES — CONTRIBUTORY NEGLIGENCE.

1. In actions in the name of an administrator under sections 6134, 6135, Rev. St., the administrator is a mere nominal party, having no interest in the case for himself or the estate he represents, and such actions are for the exclusive benefit of the beneficiaries in said sections named.

2. In arriving at the total amount of damages in such cases, the jury should consider the pecuniary injury to each separate beneficiary, not found guilty of contributory negligence, but the verdict should be for a gross sum, not exceeding \$10,000.

3. In such actions the defense of contributory negligence is available as against such beneficiaries as, by their negligence, contributed to the death of the deceased, but the contributory negligence of some of the beneficiaries will not defeat the action as to others, who were not guilty of such negligence.

(Syllabus by the Court.)

Error to circuit court, Mercer county.

Action by Amos Wolf, administrator of Tony Meyer, against the Lake Erie & Western Railroad Company.

The deceased, Tony Meyer, aged 14 months, the son of George Meyer and Viola V. Meyer, was killed by a train on the Lake Erie & Western Railroad on the 9th day of September, 1893. Thereupon Amos Wolf was appointed administrator of his estate, and brought an action against the railroad company, seeking to recover the sum of \$1,999 damages for the negligent killing of said Tony Meyer. The railroad company filed its answer, the second defense being as follows: "For second ground of defense the defendant says that George Meyer and Viola V. Meyer are the only next of kin of Tony Meyer, deceased; that they are the sole beneficiaries of this action; that said George Meyer and Viola V. Meyer, at the time of the alleged injury to their infant child, Tony Meyer, lived in and occupied a dwelling house situate upon, in lot No. —, in the village of Celina, which said lot adjoined the right of way of said defendant; that on said lot, and along the line of the right of way of defendant, at the time of the injury com-

plained of, and for a long time prior hereto, was a good and substantial fence; that on the said ninth day of September, 1893, the said George Meyer and Viola V. Meyer, well knowing the location of said defendant's railroad, and defendant's operation of its trains thereon, willfully and carelessly left the gate, situate in said fence, open, and carelessly and negligently permitted their said infant child, Tony Meyer, to wander through said gateway out to and upon the defendant's railroad track, and while said child was so upon said defendant's railroad track, and without fault or negligence of the defendant or its employes, said defendant's locomotive ran upon said child, and caused the injury complained of. The defendant therefore asks to be dismissed with its costs." Counsel for the administrator filed a motion to strike out this second defense, and by agreement of all parties this motion was regarded and treated by the court as a general demurrer to said second defense. The court sustained the demurrer, to which the railroad company excepted. Upon trial to a jury, a verdict was returned for the full amount claimed in the petition. A motion was made for a new trial, and on the hearing thereof the administrator, acting upon the suggestion of the court, remitted all above \$1,500, and thereupon the court overruled the motion and entered judgment for the sum of \$1,500, to all of which the railroad company excepted, and took a bill of exceptions containing all the evidence. The circuit court was of opinion that the court of common pleas erred in sustaining the demurrer to the second defense, and that there was no other error in the record, and for that reason alone reversed the judgment, and, proceeding to render such judgment upon the demurrer as the court of common pleas should have rendered, overruled said demurrer and remanded the case for a new trial. Thereupon the administrator filed his petition in error in this court, seeking to reverse the judgment of reversal of the circuit court. Affirmed.

Touville & Kennedy and E. B. Kinkead, for plaintiff in error. A. D. Marsh, John W. Loree, W. E. Hackedorn, and John B. Cockrum, for defendant in error.

BURKET, J. (after stating the facts). The petition avers that the railroad company wantonly, carelessly, and negligently so operated its train of cars as to cause the death of the child Tony Meyer. This is denied by the answer of the company, and in the said second defense of its answer it charges that the parents of the boy willfully and carelessly left the gate open, and carelessly and negligently permitted the child to wander through the gateway out upon the railroad track, where it was killed without the fault or negligence of the railroad company or its employes. While the answer denies that the company wantonly, carelessly, or negligently killed the child, the demurrer admits

that the parents willfully, carelessly, and negligently left the gate open and permitted the child to wander out upon the railroad track, and thereby contributed towards its death. At the hearing of the cause on demurrer, the allegation in the petition as to the wanton, careless, and negligent conduct of the company stood denied, and for aught that then appeared might never be proven; while the willful, careless, and negligent conduct of the parents stood admitted. At that stage of the case there was, therefore, nothing to prevent the defense of contributory negligence from being made. From aught that appears in the record, the verdict may have been returned as it was for the reason that the jury found the railroad company guilty of only ordinary negligence. The verdict would be in the same form whether the jury regarded the company guilty of mere negligence, or of willful and wanton negligence. There is, therefore, nothing in the record to prevent the defense of contributory negligence from being made, unless it be true that such defense cannot be made in actions for negligently causing death.

The action was brought under sections 6134, 6135, Rev. St. At common law such an action could not be maintained. The action, being the creature of the statute, must be governed by the statute. Section 6134 is as follows: "Whenever the death of a person shall be caused by wrongful act, neglect or default, and the act, neglect or default is such as would (if death had not ensued,) have entitled the party injured to maintain an action and recover damages in respect thereof, then, and in every such case, the person who, or the corporation which would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances, as amount in law to murder in the first or second degree, or manslaughter." By this section it is provided that when death shall be caused by such wrongful act, neglect, or default as would, if death had not ensued, entitle the party injured to maintain an action and recover damages, the person or corporation causing such injury, shall be liable to an action for damages. This section creates the liability of the person or corporation causing the injury, and limits the liability to cases in which the party injured, if living, could maintain an action for damages. Under this section anything that would prevent the party injured, if living, from recovering damages, will prevent a liability for damages from arising against the person or corporation causing the injury. The liability is created by this section, and the liability arises only when the party injured, if living, could maintain an action and recover damages. Contributory negligence of the party injured is usually a defense to an action for damages; but in actions under this section, contributory negligence is not, strictly speaking, a defense, but prevents the liability to an action for damages from arising. The

burden of proving that the liability has arisen, therefore, rests on the plaintiff. Should a liability arise under this section, then the action for the recovery of damages for such liability is given by the next section, which is as follows: "Sec. 6135. Every such action shall be for the exclusive benefit of the wife, or husband, and children, or if there be neither of them, then of the parents and next of kin of the person whose death shall be so caused; and it shall be brought in the name of the personal representative of the deceased person; and in every action the jury may give such damages, not exceeding in any case ten thousand dollars, as they may think, proportioned to the pecuniary injury resulting from such death to the persons, respectively for whose benefit such action shall be brought. Every such action shall be commenced within two years after the death of such deceased person. Such personal representative if he was appointed in this state with the consent of the court making such appointment may at any time before or after the commencement of a suit settle with the defendant the amount to be paid and the amount received by such personal representative whether by settlement or otherwise shall be apportioned among the beneficiaries, unless adjusted between themselves, by the court making appointment in such manner as shall be fair and equitable having reference to the age and condition of such beneficiaries and the laws of descent and distribution of personal estates left by persons dying intestate." The action given by this section is for the exclusive benefit of the wife or husband and children, or, if there be none, then for the parents and next of kin.

The petition in this case avers that the deceased left his two parents as his next of kin surviving him, and further avers that these parents have sustained damages by said wrongful death in the sum of \$1,909. So that this action is brought and prosecuted for the exclusive benefit of the parents of the little boy,—the same persons who admit, by their demurrer, that by their willful, careless, and negligent conduct they contributed towards the death of the little boy. What shall cause a liability for damages to arise is carefully stated in section 6134, but what shall constitute a defense to an action for such liability is not defined in either section, but is left to the same principles as in other like cases. The limitation of two years in which to bring the action is held in *Railway Co. v. Hine*, 25 Ohio St. 629, to be a condition qualifying the right of action, and not a mere limitation on the remedy. It is therefore not a defense in the proper sense, but a necessary condition to the right of action. While the action must be brought in the name of the personal representative of the deceased person, he has no interest in the recovery, and the recovery is not for the estate of the deceased. So held in *Steel v. Kurtz*, 28 Ohio St. 191. The administrator is only a trustee for the beneficiaries, and has no interest in the case for himself or the estate he represents. The statute does not even say that he shall bring the action, but

says that it shall be brought in his name, for the exclusive benefit of the beneficiaries,—in this case the parents.

The great weight of the authorities is to the effect that in actions brought by a parent for the loss of the services of his child by reason of its wrongful or negligent injury by another the contributory negligence of the parent will defeat his recovery. This was clearly held in this state in *Railroad Co. v. Snyder*, 24 Ohio St. 670, and in very many other cases, among which are the following: *Beach, Contrib. Neg.* § 44; *Shear. & R. Neg.* § 71; *Pennsylvania Co. v. James*, 81 Pa. St. 194; *Williams v. Railway Co.*, 60 Tex. 205. As the parent cannot recover for loss of services when he himself contributed to the injury which caused the loss, can the intervention of the personal representative, who is a mere trustee, having no interest either for himself or the estate he represents, shield him from the usual consequences of such negligence? I should say not. The damages for loss of services and those arising from the wrongful death are the same in principle, and should be governed by the same rules as to defenses. The damages for wrongful death are such as are proportioned to the pecuniary injury resulting to the parent from death caused by such injury. Such is the provision of the statute. The damages for loss of services are the same, being the pecuniary loss resulting to the parent from the injury to the child. If the parent, by his negligence, contributes towards the injury which causes the death of the child, he is equally guilty with the other party who, by his negligence, caused the injury; and when both parties, by their combined negligent acts, bring about an injury, neither party can sustain an action for damages against the other. To award damages to a parent guilty of contributory negligence in such cases would permit him to profit by his own wrong, and besides it would be in direct conflict with the universal rule as to contributory negligence. The following authorities show that the administrator is a mere nominal party, and that the action will be defeated by the contributory negligence of the beneficiaries. In *Woodward v. Railway Co.*, 23 Wis. 400, the court say: "The administrator is a mere trustee, so made by statute, with power to sue for the benefit of his cestui que trust, or the person beneficially interested. He has no right, except in virtue of the right of the real party in interest, and if the right of that party is lapsed or lost, so that no recovery can be had upon it, it follows that the action can be no longer maintained." *Booth on Street Railways*, in section 391, says: "If the action is for the benefit of those relatives only who were guilty of negligence their failure of duty should constitute a complete defense; for it would be unreasonable and unjust to permit them, by an action of that kind, to recover

damages for the loss of services of one whose life they had negligently sacrificed. But where there are surviving brothers and sisters, who by statute are made beneficiaries of the judgment jointly with their parents, and they were not at fault, it would seem to be inequitable to impose upon the innocent the penalty which might justly be enforced against the guilty if they alone were interested in the fund. The question was directly presented in a case in Iowa, where an action was brought by a father as the administrator of an infant son. The parents were clearly guilty of negligence directly contributing to his death, but the court held that their negligence would not defeat a recovery although they had a direct pecuniary interest in his estate. But in many other cases decided elsewhere, in which the same question was directly involved, the courts have proceeded upon the theory that negligence of the parents which would defeat a recovery in an action brought by them constitutes an effectual bar to an action brought by an administrator for their benefit." The Iowa case above referred to is *Wymore v. Mahaska County*, 78 Iowa, 396, 43 N. W. 264, hereafter cited. In section 69, in "Death by Wrongful Act," by Tiffany, it is stated that the contributory negligence of the beneficiary is a defense to the action, and many cases are cited in support of the proposition. In *Beach on Contributory Negligence* (section 131) the rule is stated thus: "When an action for the negligent injury of an infant is brought by the parent, or for the parent's own benefit, it is very justly held that the contributory negligence of such parent may be shown in bar of the action. This is only one phase of the general rule of contributory negligence to the effect that the plaintiff's own negligence is a defense to his action." In *Bamberger v. Railroad Co.* (Tenn.) 31 S. W. 163, the fifth syllabus is as follows: "A father who was guilty of contributory negligence in respect to the injuries causing his child's death cannot recover therefor by suing as administrator, if he is the sole beneficiary."

In those states like Virginia, Louisiana, Iowa, and perhaps others, in which the damages arising from the wrongful death survive, and become a part of the estate of the deceased, and are inherited from the estate by the named beneficiaries as heirs, the contributory negligence of such heirs does not constitute a defense to an action brought by an administrator for the recovery of such damages, because the damages are part of the estate, and the estate is cast upon the heirs by operation of law. It was this principle that determined the case of *Wymore v. Mahaska County*, 78 Iowa, 396, 43 N. W. 264, and that case and other cases founded upon the same principle are therefore not applicable to the question here under consideration.

An estate will vest in the heir and be cast

upon him by operation of law, even though the heir wrongfully causes the death of the ancestor for the purpose of obtaining the estate. But it is otherwise as to a recovery for damages under our statute. While the liability is created by the statute, the damages do not become a part of the estate, and are not cast as an estate by operation of law upon the beneficiaries, but must be sued for and recovered by action; and in such action the usual defenses, including contributory negligence, can be interposed, unless otherwise provided by statute. Our statute has no provision on the subject, and hence it would seem to irresistibly follow that the defense of contributory negligence may be made in such actions. Such defense cannot be made as to the negligence of the administrator, because he is a mere nominal party, and has no interest in the damages to be recovered. The contributory negligence of the deceased is not, strictly speaking, a defense, but a condition which prevents the liability from arising. But the contributory negligence of the beneficiaries, who are to receive the damages, and for whose benefit the action is brought, in the name of the administrator, is clearly a defense to the action available to the person or corporation causing the injury. This must be so, unless there is something in the wording of the statute, or in the course of trial of such actions, to require a contrary holding.

As the statute stood when *Railway Co. v. Crawford*, 24 Ohio St. 631, was decided, the damages were assessed by the jury in a lump sum, for all the beneficiaries jointly, and all had to stand or fall together; and therefore it was held that the contributory negligence of one should not defeat the action, because thereby those beneficiaries who were innocent would be made to suffer for the negligent acts of one over whom they had no control, and for whose acts they were not in any manner responsible. A recovery was therefore permitted, even though one who was guilty of contributory negligence should share in the damages, thus bringing the case within the principle that the rights of the innocent must be protected, even though thereby the guilty reap some benefit. This analysis of the question is not very clearly made in 24 Ohio St. 631, but it is the only sound principle upon which that case can stand. The case upon this question is meagerly reported, but the conclusion reached was correct as the statute then stood. Shortly after the report of the *Crawford* Case, the statute was amended so as to require the jury to give such damages as they may think proportioned to the pecuniary injury resulting from such death to the persons, respectively, for whose benefit such action shall be brought. This word "respectively" requires the jury to assess the damages for the beneficiaries distributively; that is, ascertain how much pecuniary injury each beneficiary singly has sustained, and then bring in a verdict

in gross, made up of these single sums combined, the whole not to exceed \$10,000. The *Standard Dictionary* defines the word "respectively" as follows: "As singly or severally considered; singly in the order designated." Webster defines the word, "As relating to each." The statute of Wisconsin gives the damages in such cases to the wife or husband and in their absence to the lineal descendants and ancestors, and the court in construing the statute in *Woodward v. Railway Co.*, 23 Wis. 400, say: "The damages must have been given in reference to the pecuniary injury and loss of the husband alone; and such is the obvious interpretation of the words in the last clause,—'with reference to the injury resulting from such death to the relatives of the deceased specified in this section,'—which are to be understood distributively, and not collectively, as counsel seem to suppose." It therefore seems clear that, in arriving at the total amount of damages to be awarded under the statute as amended, the jury should consider the pecuniary injury to each separate beneficiary (not found guilty of contributory negligence), but return a verdict for a gross sum, which sum should be distributed among the beneficiaries not found guilty of contributory negligence. As to beneficiaries found guilty of contributory negligence, no damages should be awarded on their account, and the jury should find in its verdict which, if any, of the beneficiaries were guilty of such contributory negligence. This would no more complicate the trial than is usual in trials for torts, in which it often occurs that some are discharged, and others held liable.

Take the case at bar, it may be that on the trial when the case gets back into the common pleas it shall appear that the father of the little boy was free from all fault or negligence, and that the mother was guilty of negligence which contributed directly to the death. In such case the jury should assess the damages, if any, which the father has sustained, and return a verdict for that amount only, and award no damages whatever for the benefit of the negligent mother. This construction of the statute is borne out by the latter part of section 6135, as to the distribution of the damages recovered. The damages are to be distributed "by the court making the appointment in such manner as shall be fair and equitable, having reference to the age and condition of such beneficiaries, and the laws of descent and distribution of personal estates." It can easily be seen that a young child in a helpless condition would sustain a much greater pecuniary loss from the death of a parent than its brother or sister of mature years, and settled in an ample and comfortable condition in life; and the jury in making up its verdict should assess more damages as to such child than to its matured brother or sister. The court also would regard it as fair and equitable to dis-

tribute to such child a sum proportioned to the loss by it sustained, having reference to its age and condition, as compared with the age and condition of the other beneficiaries. It is therefore clear that the statute throughout is distributive in its character, and that the damage should be assessed only for the benefit of those who are not guilty of contributory negligence, and that when recovered the damages should be distributed by the court only among such as the verdict of the jury shall show to be entitled thereto. This throws no clog in the way of the prosecution of the action by the administrator, and awards damages to those who are without fault, and does not reward those who contributed to the injury.

It is urged that the case of *Davis v. Guarneri*, 45 Ohio St. 470, 15 N. E. 350, arose under the statute as amended, and that in that case a recovery was sustained, notwithstanding the negligence of the husband, who was one of the beneficiaries, contributed directly to cause the death. From the case as reported, it would seem that the question of contributory negligence of one of the beneficiaries lurked in the record, but upon examining the record in that case it clearly appears that no such question was made in the pleadings. An attempt was made in the answer to impute the negligence of the husband to the wife, and thereby defeat any recovery whatever, instead of reducing the recovery by withholding damages from the husband, and awarding them only to the children, who did not contribute to the death of their mother. The case was reported as one in which an attempt was made to impute the negligence of the husband to the wife, and nothing whatever was said as to whether the contributory negligence of the husband should serve to prevent damages being assessed for the pecuniary loss to him, caused by the wrongful death of his wife. The case is, therefore, not an authority upon the question presented in the case at bar, and not in conflict with this opinion. Judgment affirmed.

(55 Ohio St. 370)

PITTSBURGH, C. C. & ST. L. RY. CO. v.
REYNOLDS.

(Supreme Court of Ohio. Dec. 8, 1896.)

RIGHTS OF PASSENGER — EJECTION FROM TRAIN —
RECOVERY FOR TORT.

Where a person who has a ticket, purchased from a company engaged in the business of a common carrier of passengers, entitling him to be carried from a certain station to another on the line of its road, which is good only on trains stopping at his destination, is, by the fault of the company's station agent, induced to take a train that does not, under the schedule, stop at such place, and, as a consequence, is ejected by the conductor on calling for his ticket, and before reaching his destination, such facts show a right in the passenger against the company to recover as for a tort, and not merely for a breach of contract.

(Syllabus by the Court.)

Error to circuit court, Warren county.

Action by James G. Reynolds against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant brings error. Affirmed.

The action below was a suit brought by the plaintiff to recover damages of the defendant for wrongfully ejecting him from one of its trains. The issues having been made up, the case was tried to the court, on an agreed statement of the facts. The statement is as follows: "On the 4th day of July, 1891, the plaintiff and his son, aged 12 years, at South Lebanon, purchased at reduced rates, of the ticket agent of the defendant, two round-trip excursion tickets from South Lebanon to Loveland, Ohio, and return, the distance between said points being nine miles. That the going portions of said tickets bore upon their face the following: 'Good for a continuous trip, South Lebanon to Loveland, until July 6, 1891, if stamped by agent and presented on trains stopping at points named before expiration of time limit;' and the return coupons bore the same, except that they read: 'From Loveland to South Lebanon, Ohio.' The plaintiff and his son went to Loveland on the 4th day of July, 1891, on one of the defendant's trains. That on the 5th day of July, as they went to the station of the defendant in Loveland for the purpose of returning to South Lebanon, they saw a train approaching the station, and the plaintiff went to the window of the ticket office of the defendant, and asked a man in the ticket office if that train just coming in would stop at South Lebanon, to which the man replied: 'Yes; and the only one that will stop there to-day.' That thereupon the plaintiff and his son got upon the train without making further inquiry or being stopped by the trainmen, and, when a short distance out from Loveland, the conductor of the train asked the plaintiff and his son for their fare. That the plaintiff tendered the two returning coupons, described as aforesaid, which the conductor declined to accept, stating that his train did not stop at South Lebanon, but stated that his first stop was at Morrow, the first station immediately east of South Lebanon, and he would accept the returning coupons in part payment of their fare, and they could pay him the fare from South Lebanon to Morrow in cash, amounting to 25 cents for the two. That plaintiff replied he had no money, and that the ticket agent at Loveland had told him that that train stopped at South Lebanon, and was the only one that would that day. Thereupon the train was stopped about two miles from Loveland, between 5 and 6 o'clock in the afternoon; and, upon the demand of the conductor, the plaintiff and his son were compelled to leave the train, at a place where there was no station, and where there was a fill and

steep bank; but that no force was used in their removal from the train, and from there they walked to their home, in Lebanon. It is agreed that the ticket agent at Loveland had no power to change the terms of the tickets, or to order the train to stop at South Lebanon, and that the train was one which did not stop at that station. One of said return coupons is hereto attached, marked 'Exhibit A.'"

The following is the exhibit:

Pittsburg, Cincinnati & St. Louis Ry. Co. Good for a Continuous Trip. LOVELAND TO SOUTH LEBANON, OHIO, Until July 6th, 1891. If stamped by Agent and presented on trains stopping at points named, before expiration of time limit.	Return Ex. Ticket. E. A. Ford, General Passenger Agent.

It is agreed that the coupons were stamped on the back by the agent at South Lebanon.

The court, on the agreed statement, found for the defendant, and dismissed the plaintiff's petition. A motion for a new trial was made and overruled, and exceptions taken. The agreed statement of facts is made a part of the record by a bill of exceptions. On error to the circuit court, the judgment was reversed, on the ground that "the court erred in finding that the plaintiff had not stated a cause of action which was sustained by the agreed statement of facts." This is the question presented here on error. In his petition the plaintiff averred that the defendant is a common carrier of passengers in this state; that on July 4, 1891, he purchased of the defendant's agent at South Lebanon two round-trip tickets, to be valid until July 6th, one for himself and one for his son, who was about eleven years of age, entitling him to ride from South Lebanon to Loveland and return on trains of the company; and that on the 4th day of July, 1891, he boarded one of defendant's trains at South Lebanon, and went to Loveland, as he had a right to do on said ticket; and on the 5th day of July, desiring to return to South Lebanon, the plaintiff entered the defendant's office at Loveland, and inquired of defendant's agent there if the train then approaching was the one for him to take

to South Lebanon, said agent replied that it was, and that it was the only train that would stop there that night. Thereupon the plaintiff and his said son boarded said train, and while riding on said train, at a point about two miles from Loveland, defendant, by its agent, the conductor then in charge of said train, assaulted plaintiff, and ejected him and his said son, without cause or fault on his part, from said train of said company, and before the end of plaintiff's said journey, and before the arrival of said train at any station. And plaintiff further states that he tendered the tickets purchased as aforesaid, for return passage to South Lebanon, Ohio, to the conductor of said train, which he refused to accept, and ejected plaintiff from said train, to his damage in the sum of \$1,000. "Wherefore plaintiff prays judgment against defendant in the sum of one thousand dollars." The case is here on error to reverse the judgment of the circuit court; and the only question presented is whether, on the facts, the case made in the petition was sustained.

Charles Darlington, for plaintiff in error.
William McDonald and W. F. Eltzroth, for defendant in error.

MINSHALL, J. (after stating the facts). We think there can be no question but that the petition states a cause of action founded on tort,—the wrong of the defendant by its agent in ejecting the plaintiff and his son from the train. Then do the facts contained in the agreed statement support the complaint? We think they do. The plaintiff and his son were at Loveland, and each had a ticket which required the company to carry them to South Lebanon that day, on any train stopping at that place. He inquired of the agent at the station if a train then approaching was the train for him to take. The agent said it was, and that it was the only train that would stop at his destination that afternoon. He then, with his son, boarded the train. It proved to be a wrong one. This was the fault of the company; and he and his son were afterwards, and before reaching their destination, ejected, because, under the instructions the conductor had from the company, it was his duty to do so. The argument in support of the company's claim is that the agent, under the circumstances, had the right to eject them, as the tickets did not authorize the plaintiff and his son to ride on that train, because it did not, under the schedule, stop at the plaintiff's destination; and therefore the plaintiff's remedy was for a breach of the contract, and a different measure of damages would apply in such case. It may be observed that, under the Code, this was not a sufficient reason for the judgment of the common pleas dismissing the action; for, if the agreed statement showed the plaintiff entitled to any relief upon the averments of his petition, the court should have awarded

it. It makes no difference what the plaintiff may regard the nature of the wrong of which he complains, if the facts stated show that it is a wrong for which he should be compensated in damages, and the proof supports his petition. But this is not material here, as we regard the facts disclosed by the agreed statement as constituting a tort, and for which damages should have been assessed him by the court under the case made in his petition.

There are some cases which seem to support the contention of the plaintiff in error, but they, as does the reasoning of the plaintiff in error, depend upon what seems to be an evident fallacy. They assume as a premise that the act of the conductor in putting the plaintiff off was rightful, and therefore the company cannot be held guilty of a tort. But the act of the conductor is immaterial, except as it affects the liability of the company. The suit is not against him, but against the company. As between the conductor and the company, the latter may have no right to complain of him. He violated no duty he owed to the company. He simply obeyed his instructions as received from the company, applicable to such a case. Therefore it may well be said that, as between him and the company, the conduct of the conductor was rightful. But, as between the company and the passenger, the question is wholly a different one. When a company, by the act of a proper agent, causes a passenger, as in this case, to take the wrong train,—one that does not stop at his station,—it must be held to have contemplated that, under the instruction given its conductor, the passenger would be put off the train as soon as the error should be discovered by the conductor, unless he should, as demanded, pay additional fare, and be carried beyond his station. The act of the first agent of the company, misdirecting the passenger, is the wrongful act for which the company becomes liable in tort; and the act of the conductor in ejecting him is a consequence of the first wrongful act,—is the proximate cause of the passenger being ejected; and, as against the passenger, the act of the conductor in ejecting him, being the act of the company, is wrongful. The fallacy, as before stated, arises out of the mistaken assumption that the act of the conductor is rightful as against the passenger. This can in no instance be the case where the company is responsible for the mistake of the passenger in taking the wrong train. All the cases cited in support of the contention of the plaintiff in error that in any way do so are based on the fallacy that the conductor had the right to eject the passenger, when, as a matter of law, the real question is whether the act of the company done by its agent is rightful as against the ejected party. The question may be simplified by eliminating the fact of agency in each instance; that is, by supposing that the common carrier in each instance acts for himself or itself. Here no mind would doubt but that the carrier, having instructed the passenger to take one of his trains, with knowledge of his destina-

tion, would be a wrongdoer should he, on discovering his own mistake, eject him from the train, on the ground that he has taken the wrong train. But the intervention of an agent, by whom the act is done in each instance does not change the case; for each act of the agent done in the scope of his agency must be imputed to the principal,—is, in law, the act of the principal. To use the language of Chief Justice Ryan in *Craker v. Railway Co.*, 36 Wis. 674: "Quoad this contract and this passenger, the corporation was present on this train to care for her [the passenger], represented by the officers of the train, who possessed pro hac vice the whole power and authority, and were the living embodiment, of the real ideal entity which made the contract, was bound to keep it, and is appellant here to contend that it has no responsibility for the flagrant violation of the contract, which the respondent paid it to make and to keep, as its sole present representative appointed to keep it on its behalf."

The plaintiff in error claims that the case of *Shelton v. Railway Co.*, 29 Ohio St. 214, is decisive of this. There the plaintiff, on a commutation ticket, had gone on the train from his home to Cleveland. For some claimed irregularity in the ticket, it was taken up by the conductor of that train, and returned to the general agent of the company, of which he notified the plaintiff. "In the afternoon of the same day," as stated in the report of the case, "the plaintiff, not having recovered the commutation ticket, nor provided himself with a ticket, entered the defendant's cars at Cleveland, which were then in charge of another conductor, to return to Vermillion, and was put off the cars at Berea, a regular station on the line of defendant's railway, by the conductor then in charge of the train, for refusing to pay the fare prescribed by the defendant for a passage from Cleveland to Vermillion, for which last-mentioned injury the action was brought." The court held that the plaintiff could not, under these circumstances, maintain an action for being put off the train; and that his remedy was for the wrongful taking up of the ticket by the first conductor. When he took the train at Cleveland, he knew his ticket had been taken up, and must have known that he would be put off before reaching his home. He took the train to return with this knowledge, and his ejection was the result of his own fault. He should either, in this case, have purchased a ticket to return on, or have paid fare when demanded. A party cannot, as a rule, recover damages for the aggravation of an injury caused by his own fault. In the case before us, the plaintiff, when he took the train at Loveland, did so by the fault of the company, and could not then have anticipated that he would be put off before reaching his destination. His right of action, then, is for the wrongful expulsion.

The case of *Railroad Co. v. Gants*, 38 Kan. 608, 17 Pac. 54, cited by the plaintiff in error, and quoted from, is not in point, for the reason that there it was by his own fault that the

passenger took the wrong train, and was ejected. He made no inquiries as to the train he should have taken.

Most of the cited cases are, for like reasons, not in point. They go no further than to require the passenger to submit to the enforcement of the reasonable rules of the company, and deny to him the right to resist expulsion, and recover for such injuries as he may receive thereby, yet allow a recovery for all other damages resulting from his expulsion, where wrongful on the part of the company. Thus, in *Connell v. Railroad Co.*, 112 Ill. 295, it is said: "We entertain no doubt that appellee was entitled to recover the amount of the cost of a ticket from the place where he was ejected from the cars to New York. He was also entitled to recover such damages as he sustained on account of the delay occasioned by the expulsion and all additional expenses necessarily occasioned thereby, as well as reasonable damages for the indignity in being expelled from the train; but we perceive no ground upon which he can recover for the personal injuries received unless the expulsion was malicious or wanton."

Not only the better reason, but the greater weight of authority, is to the effect that, when a passenger is ejected in a case like the present, he may recover damages as for a tort; for, though the relation of the parties had its origin in contract, the ejection is in the nature of a tort, and he is not limited to such damages as would be proper in a mere breach of contract. In such cases it can make no difference to the passenger, so far as his injury is concerned, whether the wrong resulted from the breach of an obligation imposed by contract, or from the breach of a duty imposed by the law; the loss, inconvenience, delay, and humiliation will be the same to him, and his damages should be measured by a like rule in either case.

On the question of the character of the plaintiff's right of action and the measure of damages, and also on the liability of a company to a passenger ejected from one of its trains, where, by the fault of its agent, he took the wrong train, we refer to the following cases: *Banking Co. v. Roberts*, 91 Ga. 513, 18 S. E. 315; *McGinnis v. Railway Co.*, 21 Mo. App. 399; *Gorman v. Railway Co.*, 97 Cal. 1, 31 Pac. 1112; *Railway Co. v. Hennigh*, 39 Ind. 509; *Hufford v. Railway Co.*, 64 Mich. 631, 31 N. W. 544; *Railway Co. v. Pauson*, 17 C. C. A. 670, 70 Fed. 585. In the last case the decisions are pretty fully collected and reviewed. *Pennsylvania Co. v. Bray*, 125 Ind. 229, 25 N. E. 439.

The general principle derived from the cases is that where, by the fault of an agent of the company, a passenger takes the wrong train, or is without a ticket, or one imperfectly or erroneously stamped, or for any similar reason, and is ejected by the conductor of the train, in pursuance of the rules of the com-

pany, it is liable to him as for a tort. The rule concedes to the company the right to make reasonable rules for the conduct of its business, and to require their enforcement by its agents. The contingency that in certain cases the company will be made liable by the act of its conductor in following its rules, where the appearances on which he acted were created by the fault of another agent, of which he had no knowledge, is a risk incident to the privilege enjoyed of making rules; and it should suffer for the fault of the agent that caused the mistake, rather than an innocent person. Judgment affirmed.

(55 Ohio St. 386)

STATE ex rel. FITZSIMMONS v. TAYLOR,
Secretary of State.

(Supreme Court of Ohio. Dec. 8, 1896.)

STATE SUPERVISOR OF ELECTIONS — OMISSION OF
NAMES OF CANDIDATE FROM TICKET.

1. It is the imperative duty of the secretary of state, as state supervisor of elections, to send to the deputy supervisors the form of ballot to be used at an approaching election immediately upon the expiration of the time allowed for correcting certificates of nomination.

2. The secretary, having rightly performed that duty, properly refused to instruct the deputy supervisors to omit from the ticket the name of a candidate who subsequently withdrew, there being no nomination to fill the vacancy.

(Syllabus by the Court.)

Application by the state, on the relation of Thomas G. Fitzsimmons, for a writ of mandamus against Samuel G. Taylor secretary of state. Denied.

This application for a writ of mandamus was made before the election of November 3, 1896, and the writ was refused. It was submitted on the petition, with the stipulation that its allegations should be taken as true for the purposes of final judgment. The relator alleged, in substance: That he was a citizen and elector and chairman of the executive committee of the People's party of the state. That the defendant is by law the state supervisor of elections, charged with the duty of furnishing to the deputy supervisors of elections, for their guidance, forms of all the blanks, cards of instruction, poll books, tally sheets, certificates of nominations, and designs provided for the conduct of elections in the state, including a form of ballot to be followed by such deputy supervisors, who are required to print the ballots to be used by the voters at the election. That on the 8th of September, 1896, a certificate was duly filed with the defendant, certifying that on the 12th of August, 1896, one William F. Barr had been nominated for the office of presidential elector by the People's party of the Twelfth congressional district. That on the 14th of October the defendant, acting as such state supervisor, sent out to the deputy supervisors a form of ballot on which was printed, in a column headed "People's Party

Ticket" the name of said William F. Barr, for the office of presidential elector. That on October 22, 1896, said Barr delivered to the defendant the following notice: "Columbus, Ohio, Oct. 22, 1896. Samuel Taylor, Secretary of State—Dear sir: I hereby withdraw my name as presidential elector for the Twelfth Ohio district, on the People's party ticket in order to prevent any complication or confusion that might result from my remaining on the same. Yours, truly, William F. Barr." The petition also alleged that, notwithstanding the withdrawal of said Barr, the defendant refused to instruct the deputy supervisors to omit his name from the ticket, and that he would persist in such refusal unless compelled by the order of this court to direct such omission. The petition also contained the following allegation: "It is the intention of the representatives of said People's party in said Twelfth congressional district not to fill the vacancy occasioned by the withdrawal of said Barr, and that there are no candidates for presidential electors in any other congressional district of the state, nor at large, of said People's party." The relator prayed for a peremptory writ of mandamus, commanding the defendant to instruct all the deputy supervisors to so print the ballots for said election that the name of said Barr should not appear thereon as a candidate of the People's party for presidential elector. This petition was filed October 24, 1896.

George B. Okey and George A. Fairbanks, for relator. J. K. Richards, for defendant.

SHAUCK, J. (after stating the facts). Counsel for the relator do not insist that this writ should issue unless the act whose compulsory performance is sought is by law specially enjoined upon the defendant as a duty resulting from his office. Nor are they of the opinion that the act in question is enjoined by any express provision of the statutes which define the duties of the secretary of state as state supervisor of elections. They invoke the unchallenged rules of interpretation that statutes should be so construed as to give effect to the intention of the legislature, and so as to avoid absurd consequences and great inconvenience. The statute upon this subject should be so construed, if there is any occasion for construction. Its evident object is to secure entire freedom in the exercise of the elective franchise, and entire accuracy in the ascertainment of the results of elections. That these purposes are intended is shown by the nature of the subject, the history of elections in the state just prior to this legislation, and the care taken to define the duties imposed upon all officers concerned in the conduct of elections.

Applying these rules of interpretation to the statute in question, counsel say: "The

act, in so far as it imposes upon the state supervisor of elections the duty of furnishing forms to his deputies, is imperative. Its time limitations are directory." If this proposition were sound, it would not reach a conclusion favorable to the relator. If a public officer performs a duty in accordance with the directory provisions of a statute, mandamus will not lie to compel him to perform it in a different manner or at another time. It is true that the provisions of a statute as to the time for the performance of an official act will not usually be regarded as imperative, if, from the nature of the act and its relation to the purpose in view, one time will answer as well as another. But the purpose of this act and some of its express provisions require that the time at which the chief supervisor shall furnish the form of ballot to the deputies be regarded as imperative. Section 15 of the act (90 Ohio Laws p. 272) requires that the deputy supervisors shall let the printing of the ballot, according to the form furnished by the chief supervisor, to the lowest bidder upon 10 days' notice, published not more than three times in two newspapers. Section 16 requires the deputy supervisors to deliver the ballots to the judges of the election not less than 8 days before the election. When to the time so required for the performance of the duties of the deputies there is added the time necessary for the printing of the ballots, it becomes manifest that the defendant would have been remiss in the performance of his duties if he had not furnished the form to the deputies before he received Barr's withdrawal, which was but 12 days before the election.

Other provisions of the statute not only support this conclusion, but fix with reasonable certainty the time when the state supervisor shall furnish the form to the deputies. Section 9 provides that certificates of nomination shall be filed with him not less than 30 days before the election; section 10, that all certificates of nomination shall be open to public inspection, and that objection thereto may be made in writing within 5 days after the filing thereof, his decision on such objection being final. The provisions of section 11 affecting this question are, in substance, that should any candidate die or decline, or should any certificate of nomination be insufficient, the vacancy may be filled or the certificate corrected; but the certificate of such nomination to fill a vacancy or to correct a former certificate must be filed 20 days before the election. The statute contemplates no further time preliminary to the sending of the form of ballot to the deputy supervisors, for it provides for no further nominations, nor for other duties by him, except nominations that may be made after the tickets are printed, and for his duties with respect to nominations so made. When, therefore, the time allowed for filing of nominations to fill vacancies or to correct

former certificates has elapsed,—that is, 20 days before the election,—it is the imperative duty of the secretary to send the form of ballot to the deputy supervisors. No discretion in this respect could be exercised by him in furtherance of the objects of the statute. It might be exercised to defeat it.

But it is said that the form of ballot must represent the truth as to candidates, and that this form, though correct when sent, no longer meets that requirement, in view of Barr's subsequent withdrawal. And in this connection we are asked to consider a supposed form in which the names of candidates for presidential electors should be printed in the wrong ticket. The obvious and sufficient answer to all this is that such erroneous performance of a duty of this character would be no performance, while its proper performance is the end of official duty. Attention is called to the provisions of section 11, that "a vacancy occurring after the printing of the ballots may be filled by filling the proper certificate with the secretary of state, at least ten days * * * prior to the election, and the name, office and party of the candidate so nominated shall be printed on adhesive slips or pasters by the deputy state supervisors, which shall be delivered to the judges in each precinct," etc. The information upon which the deputy supervisors are to act in such case is to be furnished by the secretary of state in obedience to the requirement that, "immediately upon the expiration of the time within which certificates of nomination may be filed with him, the secretary of state shall certify copies of all the certificates so filed to the deputy state supervisors." Not only does the statute contain no provision requiring or authorizing the secretary of state to give the direction sought by this petition, but its express provisions for correcting tickets by means of adhesive slips after they are printed, where there are nominations to fill vacancies, indicate that, after a proper form of ballot is sent at the proper time, the deputy supervisors are to proceed without interruption to have tickets printed according to such form. All the supervisors are charged with important and clearly-defined duties with respect to the filling of vacancies. It is not their duty to aid in the creation of vacancies that are not to be filled.

A sinister aspect of this case deserves enough notice to prevent an improper inference which might be drawn from our silence. Barr's withdrawal, according to its terms, was "in order to prevent any complication or confusion that might result" from his name remaining on the ticket. The relator alleges "that it is the intention of the representatives of the People's party in said Twelfth congressional district not to fill the vacancy occasioned by the withdrawal of said Barr." Such representatives are recognized by the statute, and authorized to make nominations to fill vacancies. By the common under-

standing they are to aid in carrying out the purposes of their party as they were expressed in the convention at which Barr was nominated, and they were constituted such representatives. What confusion could result if Barr's name should remain on the ticket, thus giving the electors an opportunity to vote for him if they desired to do so, we do not perceive. Nor do we know from what source the representatives of the party that nominated Barr derived authority to determine that there would be no candidate for elector, contrary to the declaration of those whom they represent. Though there may be no mode of compelling such representatives to perform their duty, neither election officers nor courts should encourage their dereliction. In considering this aspect of the case, it is important to remember that the statute is designed to promote the purity of elections.

The defendant has fully and rightly performed his duty in the premises, and the writ is refused.

WILLIAMS, C. J., not sitting.

(55 Ohio St. 491)

WEAVER v. COLUMBUS, S. & H. V. RY. CO.

(Supreme Court of Ohio. Dec. 15, 1896.)

TRIAL—CASE ARRESTED AND DISCHARGED BY DEFENDANT'S MOTION—NEW TRIAL—BILL OF EXCEPTIONS MAY BE TAKEN, WHEN.

1. Where, on the trial of an action in a court of common pleas, the court, upon the motion of the defendant, arrests the evidence of plaintiff from the jury, discharges the jury, and renders judgment for the defendant, the plaintiff may make such action of the court the subject of a motion for a new trial.

2. If, in such case, the motion for a new trial should be overruled, the period of time within which a bill of exceptions may be taken should be computed from the day that the motion for a new trial was overruled.

(Syllabus by the Court.)

Error to circuit court, Franklin county.

Action by Charles J. Weaver against the Columbus Shawnee & Hocking Valley Railway Company. Judgment for defendant, and plaintiff brought error to the circuit court, which struck the bill of exceptions from the files, and plaintiff brings error. Reversed.

J. L. Hampton and L. G. Addison, for plaintiff in error. John Ferguson, W. O. Henderson, and R. F. Guerin, for defendant in error.

BRADBURY, J. The plaintiff in error brought an action in the court of common pleas of Franklin county against the defendant in error to recover for injuries sustained by him in his person and property on account of the negligence of the railway company in running one of its trains. The action was twice tried. The first trial resulted in a verdict and judgment for the

plaintiff, which judgment was reversed by the circuit court on error, and a new trial of the cause awarded; one ground of the reversal being that the verdict was not sustained by sufficient evidence, in this: that the evidence did not establish negligence on the part of the railway company, but did establish that the injury was the result of the negligence of the plaintiff. The cause was remanded to the court of common pleas for further proceeding. Upon the second trial of the action in the latter court, to a jury, the plaintiff introduced the same evidence that he had submitted to the former jury. Thereupon the defendant moved the court "to arrest the testimony from the jury, and to render a judgment for the defendant, for the reason, that admitting all that the testimony and evidence in behalf of the plaintiff tends to prove, the testimony and evidence are not sufficient to entitle the plaintiff to a verdict. * * *" This motion was sustained, the evidence of the plaintiff withdrawn from the jury, the jury discharged, and a final judgment entered for costs, and dismissing the defendant without day. This was done on the 2d day of May, 1895. The plaintiff in due time filed a motion for a new trial, on the ground that the court had erred in withdrawing his evidence from the consideration of the jury, and directing a verdict for the defendant. On July 1, 1895, this motion was overruled, and exceptions noted. And on the 6th of August, following, the plaintiff's bill of exceptions, setting forth this action of the court, was duly allowed. The plaintiff took the case to the circuit court on error, and the latter court, upon motion of defendant, struck the bills of exceptions from the files, on the ground that it had not been allowed within the period of time prescribed by statute.

The correctness of this action of the circuit court depends upon the answer to be given to the question, from what act of the court of common pleas did the period of time begin to run? If from the day on which the court withdrew the evidence from the jury, then the bill of exceptions was not allowed within the statutory period of 50 days. If the computation should be made from the day the motion for a new trial was overruled, the 50 days had not elapsed when the bill of exceptions was allowed and filed. Section 5301, Rev. St., as amended March 22, 1892 (89 Ohio Laws, 124), in force when the bill of exceptions which is the subject of the present controversy was taken, provides: "Sec. 5301. When the decision is not entered on the record or the grounds of the objection do not sufficiently appear in the entry or the exception is to a decision of the court on a motion to direct a non-suit, or to arrest the testimony from the jury, or for a new trial for misdirection by the court to the jury, or because the verdict, or if a jury is waived, the finding of the court, is against the law and the evidence or in the admission or rejection of evidence the party excepting must reduce his exceptions to

writing and present the same to the trial judge or judges for allowance within fifty days after overruling of the motion for a new trial, or the decision of the court where a motion for a new trial is not necessary. * * *" The difficulty encountered in determining the question before the court arises out of the language of section 5301, Rev. St., above quoted, and similar language in section 5298, which seems to require a bill of exceptions to be allowed within 50 days from the time a decision was made, where a motion for a new trial is not necessary. A consideration of these two sections alone would lead to that conclusion. There are, however, other statutory provisions that bear upon the question. The statutes of the state do not expressly prescribe the conditions under which a motion for a new trial is or is not necessary to bring a particular question on the record. The question depends upon a judicial interpretation and construction of a number of statutory provisions, as well as of a consideration of common-law principles. This court held in *Earp v. Railroad Co.*, 12 Ohio St. 621, that a motion for a new trial was not necessary where the exception was to a ruling of the trial court upon the admission of evidence, or to its charge to the jury. This court has also held that a motion for a new trial was necessary to enable a reviewing court to review the evidence where claim is made that the verdict or decision is against its weight. *Westfall v. Dungan*, 14 Ohio St. 276; *Randall v. Turner*, 17 Ohio St. 262. In respect to a number of other grounds of error, this court has not yet determined whether or not a motion for a new trial is necessary to bring them into the record. Doubtless, the inferences to be drawn from sections 5307, 5308, and 5309, Rev. St., as well as the nature of the grounds for a new trial contained in subdivisions 2, 3, and 7 of section 5305, Rev. St., indicate clearly that a motion for a new trial is necessary in respect of each of them. The sixth subdivision of section 5305 prescribes that a new trial may be had on the ground "that the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law." The statutes of the state do not provide in express terms that a new trial may be had because a "verdict, report or decision" is contrary to or against "the weight of the evidence." A verdict, report or decision, however, should be regarded as against the weight of the evidence whenever the evidence is not sufficient to sustain it. A reviewing court, therefore, by force of the provision above noticed, that a new trial may be granted where the verdict, report, or decision is not sustained by sufficient evidence, may grant a new trial because the verdict, etc., is "against or contrary to the weight of the evidence." This subdivision (6) of section 5305 not only authorizes a new trial upon the ground that the verdict, etc., is not sustained by sufficient evidence, but, in equally explicit terms, authorizes a new trial whenever the "verdict, report or decision is contrary to law." This ground—that the "verdict, report or decision is contrary

to law"—is broad and comprehensive. It would seem to include any error of law committed by the trial court in the course of a trial prejudicial to the losing party. Section 5307, Rev. St., prescribes the time within which an application for a new trial must be made. Section 5308 prescribes that "the application must be made by motion, upon written grounds"; certain grounds, those specified in subdivisions 2, 3, and 7 of section 5305, must be sustained by proof. This plainly implies that there are other grounds for a new trial mentioned in that section (5305) which may be embodied in the motion without proof to support them. What are they? It is not practicable to select one or more of these grounds, and affirm that they may be included in the written motion for a new trial, and that the others shall not. The fair construction of these sections of the Code of Civil Procedure relating to new trials is that any ground of error comprehended within the provisions of any one or all of the subdivisions of section 5305, Rev. St., may be included in the written motion for a new trial.

It may be true that some of the rulings of the trial court do not require a motion for new trial to bring them into the record. If, as to them, none is made, the period within which a bill of exceptions must be filed begins to run from the ruling complained of. It is to this condition of those questions that this limitation applies. Where, however, the party excepting chooses to avail himself of the right granted by sections 5305, 5307, and 5308, Rev. St., to include the ground of error in a motion for a new trial, he resubmits the question, and the error should be regarded as arising out of the action of the court in overruling the motion for a new trial. This construction of the sections of the statute is necessary, or the party excepting in many instances will be debarred from the exercise of the valuable privilege by the provisions of sections 5305, 5307, and 5308, Rev. St., of a rehearing of the question in the trial court under circumstances more favorable to its deliberate consideration than attended the first investigation. This is the prime object to be obtained by a motion for a new trial, and we think this object should not be defeated by placing a strict construction on the section of the statute that relates primarily to the time and manner of taking bills of exceptions. These views are in harmony with the conclusions reached in the case of *Railway Co. v. Wright*; *supra*. Judgment reversed, and cause remanded to the circuit court for further proceedings.

(55 Ohio St. 553)

BALTIMORE & O. R. CO. v. AMBACH.

(Supreme Court of Ohio. Dec. 19, 1896.)

PETITION IN ERROR—ISSUING OF SUMMONS.

To bring a case within the saving provisions of section 4988, Rev. St., a summons must be caused to be issued before the expiration of the statute of limitations governing the cause of action.

(Syllabus by the Court.)

Error to circuit court, Franklin county.

Action by David S. Ambach against the Baltimore & Ohio Railroad Company. Judgment for plaintiff. Defendant brings error. Affirmed.

The plaintiff in error filed its petition in error and præcipe for summons in error in the circuit court within six months after the rendition of the judgment in the court of common pleas, but the clerk did not issue the summons in error until some days after the expiration of the six months. The defendant in error made a motion in the circuit court to dismiss the petition in error for the reason that the proceeding in error was not commenced within the six months limited by statute. The circuit court sustained the motion, and dismissed the petition in error, to which plaintiff in error excepted, and filed its petition in this court, seeking to reverse the judgment of the circuit court.

J. H. Collins and Frank A. Davis, for plaintiff in error. Powell & Minahan, for defendant in error.

PER CURIAM. That sections 4987, 4988, Rev. St., apply to proceedings in error, was held by this court in *Ross v. Willet*, 54 Ohio St. —, 42 N. E. 697. In that case a summons in error had been issued within the six months, and served by an officer not qualified to make the service, and upon motion the service was set aside, and on the next day another summons was issued and properly served; but this last summons was issued and served after the expiration of the six-months limitation, but within sixty days after the attempt to commence the action by the issuing and service of the first summons. In the case at bar the summons was not caused to be issued within the six months allowed by section 6723, Rev. St., but the petition in error and the præcipe were filed within such six months. The question, therefore, is whether the filing of the petition in error and præcipe for a summons is an attempt to commence an action, and whether the party, by such filing of petition and præcipe, can be said to have diligently endeavored to procure a service. It is the diligent endeavor to procure a service that brings the case within the saving provisions of section 4988, and it cannot be said that there is diligent endeavor to procure service when no summons has been issued to be served upon any one. If a summons has been caused to be issued, there can be an endeavor to procure service of such summons; but where no summons has been caused to be issued, there can be no endeavor to procure a service. The burden of causing a summons to be issued is cast upon the plaintiff in error, and, as no summons was caused to be issued in this case, there was no endeavor to procure the service of summons; and therefore the plaintiff in error does not bring itself within the saving provisions of section 4988, and the circuit court was right in dismissing the petition in error. Judgment affirmed.

(55 Ohio St. 478)

PHILLIPS et al. v. HERRON et al.

(Supreme Court of Ohio. Dec. 15, 1896.)

WILL—CONSTRUCTION—ENTAILMENT OF REAL ESTATE—EXTENT OF INHIBITION.

1. The act to restrict the entailment of real estate (Rev. St. § 4200) supersedes the rule of the common law upon the subject.

2. It inhibits only devises to persons who are in fact more remote than the immediate issue of persons in being at the death of the testator.

3. Within the meaning of the act, a child in utero at the testator's death is in being.

(Syllabus by the Court.)

Error to superior court of Cincinnati.

Action by Ovid P. Phillips and others against John W. Herron and others to construe a will. From the judgment, plaintiffs bring error. Affirmed.

This suit concerns real estate only, and involves the right and duty of the trustees under the will of Thomas Phillips, deceased, to carry out all of its terms, including the following: "(3) My said trustees shall, from time to time, pay over one-third of the net income arising from the said two-thirds of my estate to my son, George, during his natural life, and at his death to his children, or the survivors of them, in equal shares during the natural life of each of them. In the case of the death of either of the children of my son, George, without lawful issue, the share of such child shall go to his brothers and sisters during their lives, and to the issue, if any, in fee, of any that may be dead; and, in case of the death of all of said children without lawful issue, then the said shares shall be held by said trustees in trust for the same purposes as hereinafter provided for the remaining two-thirds; but in case of the death of either of the children of my son, George, leaving issue, such issue shall receive, as owner in fee, the share of said trust fund of which said children had the income." The testator died in March, 1870. His son, George, died in March, 1873, leaving, surviving him, five children the youngest of whom, Maurice Dudley Phillips, was born in September, 1870. A statement of other facts would only impose the duty of showing that they are immaterial.

Thomas McDougall and Alfred Cassatt, for plaintiffs in error. W. C. Herron and Wm. Worthington, for defendants in error.

SHAUCK, J. (after stating the facts). It is admitted by all concerned that the trustees are seeking to pursue strictly the terms of their trust, as defined in the will of Thomas Phillips, if the foregoing provision of that will is valid in all respects. But the plaintiffs in error contend that, in so far as it attempts to devise an estate to the great grandchildren of the testator, it is void, because in violation of the laws of the state to restrict the entailment of real estate, and that, in consequence thereof, the estate remains absolute in the issue of the first donee in tail. Our statute

upon the subject (Rev. St. § 4200), passed December 17, 1811 (Swan & C. 550), is as follows: "No estate in fee simple, fee tail, or any lesser estate in lands or tenements lying within this state, shall be given or granted by deed or will to any person or persons but such as are in being, or to the immediate issue or descendants of such as are in being at the time of making such deed or will; and all estates given in tail shall be and remain an absolute estate in fee simple to the issue of the first donee in tail." While it is true that this is not an enabling act, it is a limitation upon the general authority to devise "at will and pleasure * * * all estates in lands, tenements," etc., conferred by the act of February 18, 1808 (Chase's St. 571; Rev. St. § 5914). If the devise in question is not within the limitation, it is valid under the general authority. This supersedes inquiry as to the scope of the rule of the common law upon the subject. The statute does not contemplate mere possibilities. It forbids devises to persons who are in fact more remote than the immediate issue of persons in being at the time of the testator's death. That further issue of the first donee in tail might come into being is immaterial. In this view, it is clear that the will contemplates no contingency in which the fee should vest in any one more remote than the immediate issue of a person in being at the time of the testator's death, if the youngest son of George was then in being.

Maurice Dudley, at the time of the testator's death, was en ventre sa mere. To say that he was "in being" is only to give unrestricted significance to a term used in the statute without restricting qualifications. Fetal existence, in statutes upon this general subject, is regarded as being. Gray, Perp. § 220; Starling's Ex'r v. Price, 16 Ohio St. 29; Turley v. Turley, 11 Ohio St. 173; McArthur v. Scott, 113 U. S. 340, 5 Sup. Ct. 652.

Since all the great grandchildren of the testator may take according to the terms of the devise, it is not necessary to consider the proposition that they take as a class. Judgment affirmed.

(164 Ill. 354)

VIDER v. CITY OF CHICAGO.¹

(Supreme Court of Illinois. May 12, 1896.)

INTEREST—WHEN RECOVERABLE AGAINST MUNICIPAL CORPORATION—DELAYING COLLECTION OF ASSESSMENTS.

1. A contract for street improvement provided that the contractor should make no claim against the city in any event except for the collection of the special assessments, and that the city would not be liable in any event because of their invalidity, or failure to collect the same. After the work was done, the city council, by resolution, directed all proceedings for the collection of the assessment stayed, and the assessment was not collected for at least one year after it should have been collected. *Held*, that the contractor was not entitled to collect from the city interest on the assessments for the time

¹ Rehearing denied January 14, 1897.

their collection was delayed, under the statute providing for interest where money is withheld by an unreasonable and vexatious delay of payment. 60 Ill. App. 595, affirmed.

2. The conduct of the city in directing the collection of assessment to be stayed was not so far tortious as to render the city liable for interest on the assessments during the time their collection was delayed.

3. A municipal corporation is not liable for interest on claims, in the absence of a contract providing therefor, except where money is wrongfully obtained and illegally withheld by it. 60 Ill. App. 595, affirmed.

Error to appellate court, First district.

Action by Olaf Vider against the city of Chicago to collect interest on special assessments levied to pay for a street improvement made by plaintiff as contractor with defendant. There was a judgment of the appellate court (60 Ill. App. 595) affirming a judgment in favor of defendant, and plaintiff brings error. Affirmed.

H. H. Anderson, for plaintiff in error.
Wm. G. Beale, Geo. A. Du Puy, and Wm. H. Arthur, for defendant in error.

CRAIG, C. J. The record contains an agreed statement of facts upon which the action is predicated, from which it appears that in May, 1887, special assessment proceedings were instituted in Cook county by the city to pay for the improvement of a certain avenue. By the assessment roll it appeared that the benefits to private property by the improvement amounted to the sum of \$23,948.86, and public benefits \$10,793.26. In January, 1889, the roll was confirmed, and on November 7, 1889, certified to the city collector for collection. On the 26th of November, plaintiff entered into a written contract with the city to do the work required by the ordinance for \$16,855.41. The contract provided that the money should be paid out of the proceeds of the special assessment; the party of the first part, the plaintiff, "agreeing hereby to make no claim against the city in any event, except from the collection of the special assessment made or to be made for the said improvement, and to take all risk of the invalidity of any such special assessments, and the said party of the second part, city of Chicago, not to be liable in any event by reason of the invalidity of special assessments, or any of them, or of the proceedings therein, or for failure to collect the same." It also appears, from the agreed statement of facts, that in April, 1890, the city council, by resolution, directed all proceedings for the collection of the assessment stayed, which was accordingly done by the city authorities, so that the assessment was not collected, so as to be available for the payment of the plaintiff's claim under the contract, for at least one year after it should have been collected, and the plaintiff was thereby deprived of the use of the amount so due him for one year from the time it should have been paid him, and his loss thereby was equal to 6 per cent. of the sum

45 N.E.—46

so withheld. The plaintiff has been paid the contract price, but no interest or other compensation for the use of the money due him during the period he was so deprived thereof or his consequent loss. On a trial of the cause in the circuit court without a jury, judgment was rendered in favor of the defendant, which, on appeal, was affirmed in the appellate court.

It is first claimed, as plaintiff was deprived of the use of the money due under his contract with the city for one year by the action of the city council of Chicago, he may recover the amount of his loss as interest under that clause of the statute providing for interest where money is withheld by an unreasonable and vexatious delay of payment. In order to recover under this statute, money must be withheld by an unreasonable and vexatious delay of payment after it becomes due. Here there was no agreement to pay interest. The money under the contract was payable out of the special assessments, and could not be due until collected by the tax collectors. Under the special assessment proceedings, and, as appears, as soon as collected, the money was paid over. Under such circumstances, we perceive no ground upon which it can be held that there was such an unreasonable and vexatious delay of payment as would authorize payment of interest. The payment may have been delayed for the reason the special assessments were not collected as soon as they should have been, but that has no bearing on the question of plaintiff's right to recover interest under the statute. But, aside from this position, a municipal corporation, under the uniform ruling of this court, is not liable to pay interest, in the absence of an express agreement. *City of Pekin v. Reynolds*, 31 Ill. 529; *City of Chicago v. People*, 56 Ill. 327. In the latter case it is said: "There is no express agreement on the part of appellant to pay interest. In such case appellant, being a municipal corporation, is not liable to pay interest. *City of Pekin v. Reynolds*, 31 Ill. 530. The clause of the contract providing that contractors should receive damages, which the city might collect of the property owners, to a certain extent, is not equivalent to an agreement to pay interest." The same doctrine has been declared in other states. *Friend v. City of Pittsburg*, 131 Pa. St. 305, 18 Atl. 1060; *Donnelly v. City of Brooklyn*, 121 N. Y. 9, 24 N. E. 17.

But it is claimed, in the argument, if plaintiff is precluded from recovering his loss as interest, the conduct of the city of Chicago was so far tortious as to render the city liable for all damages sustained for being deprived of his money for one year. Where money has been wrongfully obtained and illegally withheld by a municipal corporation, the party entitled may recover the money, and interest in the way of damages. *La Salle Co. v. Simmons*, 5 Gilman, 520. So, in *Bourland v. Peoria Co.*, 16 Ill. 539, where the

county sold certain lands to one person, received payment, but did not convey, and subsequently sold and conveyed the lands to another, the county was held liable to refund the money received, and interest, as for a breach of trust. In *Pike Co. v. Hosford*, 11 Ill. 170, the question arose whether the county was liable for interest on money due on a contract, and it was held that counties are not liable to pay interest on those contracts, except in pursuance of an express agreement to do so. In the decision of the case the court referred to *La Salle Co. v. Simmons*, 5 Gillman, 520, where the county was held liable for interest when it had obtained money without authority of law or color of right, and, after distinguishing the two cases, said: "The conclusion to be drawn from these decisions is that counties do not pay interest on their contracts, except in pursuance of an express agreement to do so, but that, in actions originating in torts, they are liable to the same extent as private persons."

It was, no doubt, the duty of the city of Chicago, after entering into the contract with plaintiff in error, to proceed with reasonable diligence in the collection of the special assessments from which he was to derive pay for the improvement he had agreed to construct for the city. But was the passage of a resolution by the city council, directing all proceedings for the collection of the assessment stayed, such a wrongful act, or such an act of tort, as to render the city liable for interest? The passage of the resolution by the city was a clear violation of duty which the city owed to plaintiff in error, but the action was not fraudulent, nor did it render the city guilty of a tort. The plaintiff in error did not lose the amount of money he was to receive under the contract, or any part of it. Through the action of the city he was delayed, as shown by the stipulation, about one year in obtaining his money. In *City of Chicago v. People*, 48 Ill. 416, where there was a failure to collect a portion of the assessment, causing a greater delay in payment of the contractor than in this case, it was held that the delay did not render the city liable to pay the deficiency, and a mandamus to compel the city to make payment was denied. If there was no breach of duty in that case, upon what ground, it may be asked, can the city in this case be held guilty of a tort? In *City of Chicago v. People*, 56 Ill. 327, where a proceeding by mandamus was instituted by a contractor to compel the city to pay a balance due on an assessment which it had failed to collect from property assessed, the court held the city personally liable to pay the contractor the deficiency which arose from the failure of the city to collect; but at the same time the court held that interest could not be collected from the city, and reversed the judgment solely on the ground that interest had been allowed in the superior court. The principle which underlies the decision in that case applies here.

While we do not regard the city free from blame in the adoption of the resolution which delayed the collection of the assessment, at the same time its action did not amount to a tort, and it cannot be held liable for damages in the form of interest. The judgment of the appellate court will be affirmed. Affirmed.

(164 Ill. 388)

ANGELO et al. v. ALDRIDGE.¹

(Supreme Court of Illinois. Nov. 10, 1896.)

EQUITY—PLEADINGS—AMENDMENT AS TO RELIEF
DEMANDED—RES JUDICATA.

1. Where a decree for plaintiff in a suit against a cotenant for an accounting, and against another person to set aside a tax deed as a cloud on the title, is reversed, and the cause remanded, with leave to amend the pleadings, plaintiff may add to her amended bill a prayer for partition on the same allegations of title set out in the original bill.

2. In a suit against a co-tenant for an accounting and for partition, and against another person to set aside a tax deed as a cloud on the title, a valid decree in a former action by plaintiff against her co-tenant for an accounting, awarding the former a certain sum as her share of the rents and profits, is conclusive against the latter, if properly pleaded.

Appeal from circuit court, Morgan county; George W. Herdman, Judge.

Bill by Charlotte Aldridge against William H. Angelo, Sr., and others, for partition, and for other relief. From a decree for plaintiff, defendants appeal. Affirmed.

Wm. A. Crawley, for appellants. Morrison & Worthington, for appellee.

CARTWRIGHT, J. A decree in favor of appellee was reversed by this court, and the cause was remanded to the circuit court, with leave to the parties to amend their pleadings. *Angelo v. Angelo*, 146 Ill. 629, 35 N. E. 229. The cause having been reinstated in the circuit court, appellee filed an amended bill, making the same averments concerning title as before, and asking for a partition of the life estate of which she and her former husband, William H. Angelo, Sr., one of the appellants, were tenants in common. An accounting of rents and profits was also asked for, and it was alleged that she had filed a bill and obtained a decree against said William H. Angelo, Sr., June 25, 1890, for \$846.48, as her share of said rents and profits, and that he had continued to occupy the premises after the entry of said decree, and was liable to her for one-half of the rents and profits after such decree, in addition to the amount of the decree. The amended bill also charged that the tax title of the appellant Mary Stewart was invalid, and prayed to have it declared null and void on equitable terms. The bill was answered, and the cause was heard on proofs taken before the master. The court decreed a partition according to the prayer of the amended bill, and allowed to complainant the amount of her former recovery, by the decree of June 25,

¹ Rehearing denied January 15, 1897.

1890, for her share of the rents and profits, which was a lien on the interest of her co-tenant, but made no further allowance for rents or profits. The tax title was ordered set aside upon payment of \$194.07, to the defendant Mary Stewart, and the decree in that respect is conceded to be right. The commissioners having reported that the premises were not susceptible of division, and having valued the life estate at \$1,000, a decree for sale was entered, and the master was ordered to pay out of the proceeds—First, the costs; second, the amount due the defendant Mary Stewart for her tax title; third, to complainant one-half the balance, and out of the other half the amount of said decree and interest, and, if anything should remain, to pay it to defendant William H. Angelo, Sr.

It is first contended that the leave given to amend pleadings in the order of this court remanding the cause did not authorize the addition, by way of amendment to the bill, of a prayer for partition. The original bill set out the titles of the parties, and prayed for an accounting and the removal of the cloud upon the title. The addition of the prayer for partition upon the same facts alleged as to title was clearly within the leave granted.

It is further contended that the defendant William H. Angelo, Sr., was not bound to account to the complainant, as his co-tenant, for rents and profits. The court allowed only the amount of the decree of June 25, 1890, and seems to have agreed with the contention, by denying the claim for rents since that time. That decree was entered by a court of competent jurisdiction, upon personal service and appearance in a contested suit between the parties, and was binding upon them and the court in this suit. It was properly pleaded, and there was no ground on which it could be disallowed. With its correctness, neither that court nor this has anything to do, but must enforce it as made.

An objection is made because the court, in this decree, did not allow to William H. Angelo, Sr., a homestead. If he claimed a homestead, it was necessary for him to aver in his answer such facts as would show his right to it. This he did not do, and the averments do not raise the question whether he could assert a right of homestead in the common property against his former wife and co-tenant, but are inconsistent with such a claim. Moreover, the evidence did not prove the facts necessary to the existence of a homestead in other cases.

It is also objected that the court failed to allow William H. Angelo, Sr., for improvements, taxes, and repairs. This claim is answered by the former decree, up to the date of its entry. The amount of that decree was found due after deducting all claims of that character. Since that decree the taxes were paid by Mary Stewart, and were allowed to her, and there is no evidence of any improvements or repairs by him since that time.

Whatever of hardship there may be in the case, the court is powerless to relieve against.

The former decree has never been set aside or annulled, and its binding force cannot be questioned. The decree will be affirmed. Affirmed.

(184 Ill. 412)

PEOPLE v. WEBER.¹

(Supreme Court of Illinois. May 12, 1896.)

DRAINAGE ASSESSMENTS—FORECLOSURE OF LIEN—PARTIES—INSTALLMENTS—INTEREST—JUDGMENT OF FORFEITURE—COLLATERAL ATTACK.

1. Rev. St. 1889, c. 120, § 253, authorizing foreclosure of liens for taxes by suit in equity in the name of the people, is applicable to liens for drainage taxes incurred under Drainage Act May 29, 1879.

2. An action to foreclose a lien for drainage taxes incurred under Drainage Act May 29, 1879, is properly brought in the name of the people alone, and not in their name for the use of the drainage district, since section 34 made them, and not the drainage district, responsible for the collection and distribution of such taxes.

3. Under Rev. St. c. 120, § 253, authorizing foreclosure of tax liens when taxes for two or more years on the same land have been forfeited to the state, does not require separate judgments of forfeiture for each year, but a single judgment forfeiting the taxes for two previous years is sufficient.

4. The wife is not a necessary party to an action to foreclose a lien against the homestead for taxes.

5. Mortgagees are not necessary parties to an action to foreclose a lien for taxes against the homestead.

6. Where drainage commissioners, the owners of the land, and the holders of bonds issued on a drainage assessment agreed to a compromise order for the issuance of new bonds on a reassessment, the bondholders to surrender the old bonds at 65 per cent. of their face value, and to extend the time for their payment, a landowner, who was also a commissioner, was estopped, as against the bondholders, from claiming that the assessment was irregular.

7. Under Drainage Act 1879, § 31, as amended by Act 1885, making assessments for benefits payable in installments, which shall draw interest from confirmation until paid, where an assessment is made, payable in installments, interest on all installments may be allowed from the date of confirmation of the assessment.

8. A judgment of the county court forfeiting land for taxes is not subject to collateral attack in an action to enforce the lien therefor.

9. In an action to foreclose a lien for taxes forfeited by judgment of the county court, the amount for which judgment of forfeiture was entered is conclusive as to the amount for which the lien must be foreclosed.

Appeal from circuit court, Adams county; Oscar P. Bonney, Judge.

Action by the people against Charles W. Weber. From a judgment of foreclosure, all parties appeal. Modified.

Albert Akers and Geo. Edmunds, for the People. Sprigg & Anderson, for appellee.

CARTWRIGHT, J. Appellants, by Albert Akers, state's attorney of Adams county, filed a bill, under section 253, c. 120, of the Revised Statutes, to foreclose a lien against lands of appellee for drainage taxes in the Indian Grave drainage district, in said county. The amount claimed by the bill, for which it was alleged the lands had been for-

¹ Rehearing denied January 14, 1897.

feited to the state, was \$298.32. On a hearing the court entered a decree of foreclosure for the sum of \$158.67, and both parties assigned errors. It is claimed on the part of appellants that the circuit court erred in allowing only a portion of the judgment of the county court against the lands, while the cross errors questioned the right to a decree of foreclosure for any sum. The cross errors will be first noticed, since they attack the whole claim made under the bill.

The first claim made by appellee is that section 253 of chapter 120 does not authorize a foreclosure for drainage taxes. The Indian Grave drainage district was organized under the act of 1879, providing for the construction, reparation, and protection of drains, ditches, and levees; and, under that act, it has been held that a foreclosure may be had under section 253. The bill was therefore properly filed under that section. *Gauen v. Drainage Dist.* 131 Ill. 446, 23 N. E. 633; *People v. Henckler*, 137 Ill. 580, 27 N. E. 602; *Sennott v. Drainage Dist.*, 155 Ill. 96, 39 N. E. 567.

The right to file the bill in the name of the people alone is also questioned, on the ground that the county had no interest in the taxes, and that the bill should have been for the use of the drainage district. The county was interested in the foreclosure, to the extent of the costs of the judgment in the county court; and, as to the tax, section 34 of the drainage act provides for the return of delinquent lands to the county collector, and for like proceedings for the collection of delinquent assessments as in ordinary collections of state and county taxes by county collectors. The people have assumed the burden of collecting and distributing taxes of this character. Section 253 of chapter 120, providing for the foreclosure, requires the lien to be foreclosed in the name of the people of the state of Illinois, and, when taxes are collected by such foreclosure proceedings, they are required to be paid to the county collector, to be distributed by him to the respective authorities entitled thereto. The bill was filed in the manner required by these sections of the statute.

A further claim is made that the bill could not be filed until there had been forfeitures in two separate years. But this claim is not sustained by the statute, which requires that taxes for two or more years upon the same description of property shall have been forfeited to the state. The taxes must be for two or more years, but it is not required that there shall be forfeitures occurring in different years. There was a judgment in the county court, and a forfeiture, in 1893, which were in some respects irregular, and perhaps insufficient; but in 1894 there was a valid judgment for the sum of \$298.32, under which the premises of appellee were forfeited to the state for the taxes of the two previous years. This was all that was required.

Appellee testified at the hearing that he was married, and resided with his wife on the premises in question, and that there were two mortgages on the property. He insists that his wife was a necessary party, on account of the homestead right, and that the mortgagees should also have been made parties defendant. The homestead is not exempt from the lien for taxes, and that lien is superior to all others. The interest of the wife or the mortgagees could not, under any circumstances, or by any proof, be made superior to the lien for taxes; and, as that question could not be made the subject of litigation, we see no reason for making any person defendant, except the owner in possession of the land, who is liable for the taxes, any more than in any other form of proceeding for the collection of such taxes. Every person interested in the premises must, at his peril, see that the lien for taxes is discharged.

Appellee contests the claim made by the bill on the merits, on several grounds. It would be a sufficient answer, as to most, and perhaps all, of them, to say that he was concluded by the judgment of the county court against his land. This is undoubtedly true as to the claims that the aggregate of the assessments would produce more money than the debt of the district which they were needed to pay, and that a part of the assessments had been abated by operation of law. If such defenses existed, they should have been made in the county court. The judgment of that court, acting within its jurisdiction, cannot be collaterally attacked when a bill is filed to collect it. *Riebling v. People*, 145 Ill. 120, 33 N. E. 1090, and cases there cited. If, however, the judgment of the county court against the lands could be attacked for any of the reasons alleged, we are of the opinion that such supposed reasons are without merit. They are that the assessment rolls of benefits returned by the juries were defective, in not indicating that the figures given refer to dollars and cents; that the county court, in reviewing the reports of commissioners appointed to estimate the expenses of the improvement, illegally increased the amount so estimated; and that interest not authorized by law was included in the taxes. Appellee, in his answer to the bill, stated that the assessment rolls were for certain sums of money, in dollars and cents, of which certain stated sums were charged against the lands in question. The evidence also showed that the district was organized in 1879, and that Frederick Weber, the father of appellee, who owned the lands in question up to his death, July 18, 1890, was one of the petitioners participating in the proceedings had. In 1888 an order was entered in the county court, by consent and agreement of the commissioners of the drainage district, the trustee for holders of bonds issued by the district, and owners of lands therein, in which proceeding appellee ap-

peared, as he testified, by the order and direction of his father. In this order were recited the assessments, the issue of bonds, the time when the installments of the assessments were to be due, and the amount remaining unpaid; and, for the purpose of compromising existing differences, it was ordered that the sale of certain lands for taxes should be set aside; that the unpaid installments of said assessments for benefits against the lands in said drainage district should be extended, and become due and payable in installments of 5 per cent., commencing September 1, 1900, ending September 1, 1918; and the bondholders surrendered 35 per cent. of the bonds. Appellee is also one of the commissioners of the drainage district. Having recognized the validity of the assessments, and the differences concerning them having been compromised by an arrangement under which the bondholders gave up substantial rights, we think that appellee is now estopped to dispute the validity of such assessments.

Upon the organization of the drainage district, in 1879, the commissioners appointed to examine the lands reported the probable cost of the work at \$80,000, and the probable annual cost of keeping the same in repair at \$3,500. The court modified the report by fixing the probable cost at \$100,000, and the probable annual cost at \$5,000. In 1881 commissioners appointed to examine and report upon an application for a second assessment estimated the probable cost of the additional work at \$100,000, and the court modified it by raising the amount to \$190,000. The assessments of benefits were based upon the amounts fixed by the court in modification of the original reports, and appellee claims that they were invalid for that reason. What has been said with reference to the recognition of the validity of the assessments applies with equal force to this objection, if it should be considered that the statute did not contemplate an increase of the assessment, which question is not considered.

It is argued that interest was illegally allowed on installments of the assessments not due. Section 31 of the act of 1879, under which the district was originally organized, provided that, in case the assessment for benefits should be payable in installments, they should draw interest at the rate of 8 per cent. per annum from the time they should become payable. This section was amended in 1885 so as to read as follows: "In case the assessments for benefits shall be payable in installments, such installments shall draw interest at the rate of six per cent. per annum from the time of confirmation of the assessment until they are paid; and such interest may be collected and enforced as part of the assessment." At the time of the order before referred to, entered by consent in 1888, the original division was set aside, and a new division into installments was made as before stated, with the provision in the or-

der that the installments should bear and draw interest at the rate of 6 per cent. per annum, to be due and payable each year, on the 1st day of September, commencing September, 1889, and said interest to be assessed and collected each year, the same as if an installment. The amendatory act of 1885 was then in force, and we think there was no error in the assessment for interest.

The complaint of appellants is that the court allowed only part of the judgment rendered by the county court. There was no want of jurisdiction in the county court to pronounce that judgment, and it was conclusive against appellee. It could not be reduced in amount by the circuit court in a collateral proceeding to foreclose the lien, and the decree should have been for the amount of the judgment. The decree is reversed, and the cause remanded, with directions to the circuit court to enter a decree of foreclosure for \$298.32, the amount of the judgment in the county court, against the lands of appellee, and for costs. Reversed and remanded.

CARTER, J., took no part in the decision of this cause.

(164 Ill. 420)

HEWITT et al. v. GENERAL ELECTRIC CO.¹

(Supreme Court of Illinois. June 11, 1896.)

FIXTURES — LESSOR AND MORTGAGEE — CHATTEL MORTGAGES — ACKNOWLEDGMENT — ATTACHING CREDITORS.

1. A lessee of a coal mine purchased an electric mining plant, giving the vendor a chattel mortgage thereon to secure the purchase price before it was attached to the realty. The lease gave the lessee the option of purchasing the mine, and the lessor attached as personalty part of the plant. *Held* that, as between the lessor and mortgagee, the property was personalty. 61 Ill. App. 168, affirmed.

2. A chattel mortgage by a foreign corporation on personalty within the state is properly acknowledged at its home office, under Rev. St. c. 95, § 2, providing that, if the mortgagor is a nonresident, the mortgage may be acknowledged by any officer authorized to take acknowledgments.

3. Where mortgaged personalty is seized, under attachment against the mortgagor, after the mortgage debt was due, the mortgagee cannot replevin the property, without payment of the judgment in the attachment proceedings.

Appeal from appellate court, Third district.

Action by the General Electric Company against William B. Hewitt and others. There was a judgment of the appellate court (61 Ill. App. 168) reversing a judgment for plaintiff. Defendants appeal, and plaintiff assigns cross errors. Reversed.

Williams & Capen, for appellants. A. E. Demange, for appellee.

CRAIG, C. J. This was an action of replevin, brought by the General Electric Com-

¹ Rehearing denied January 14, 1897.

pany, on the 15th day of August, 1894, against William B. Hewitt and the Davies Coal Company, to recover the following property: "One long wall undercutter for mining coal; twenty-four 16 C. P. incandescent lamps; two thousand feet of weatherproof wire; six hundred feet of lead-covered cable; one switch board; one lot of station instruments; one dynamo of 20,000 Watt capacity." To the declaration William B. Hewitt pleaded—First, non detinet; second, non cepit; third, property in defendant; fourth and fifth, property of the Davies Coal Company; sixth, nul tiel corporation; seventh, that the property was in the possession of Constable Thurber under writ of attachment. The Davies Coal Company pleaded—First, non detinet; second, non cepit; third, property in defendant; fourth, property in possession of Constable Thurber under writ of attachment; fifth, property in William B. Hewitt; sixth, property in Davies Coal Company; seventh, nul tiel corporation. Issue having been taken on the pleas, a trial was had before a jury, resulting in a verdict for the plaintiff for the property claimed in the action. The court overruled a motion for new trial, and entered judgment on the verdict. The defendants Hewitt and Davies Coal Company appealed to the appellate court, where the judgment was reversed and the cause remanded, the court entering a judgment as follows: "The judgment must be reversed as to both appellants, and the cause remanded, with directions to enter judgment for return of the property to the Davies Coal Company, unless, within a short day, to be fixed by the court, the appellee pay to the Davies Coal Company the amount of its judgment, and interest thereon, and cost in said attachment proceeding, in which case the appellee may retain the property, and that, in either case, the appellee pay the cost." To reverse this judgment Hewitt and the Davies Coal Company took this appeal, and the plaintiff, the Electric Company, has assigned cross errors.

It appears, from the record, that in the spring of 1893 the Davies Coal Company, of which William B. Hewitt was president and general manager, owned a coal mine at Chenoa, Ill. On the 2d day of April of that year it leased the mine to one C. O. Godfrey, of St. Louis, for nine months. The lease contained a provision that the lessee, at the end of the term, might purchase the property on certain terms, therein specified. Godfrey went into the possession of the mine under the lease and assigned the lease to the Benton Coal Company, a corporation organized under the laws of Missouri, of which he was president and a stockholder. The Benton Coal Company purchased, on credit, of the General Electric Company, one "long wall undercutter for mining or undercutting coal, twenty-four 16 C. P. incandescent lamps, two thousand feet of lead-covered cable, one switch board, one lot of station in-

struments, and one dynamo of 20,000 Watt capacity,"—the property involved in this action. To secure the deferred payments of the purchase money, amounting to \$3,000, the Benton Coal Company executed and delivered to the General Electric Company a chattel mortgage on the property above mentioned. The chattel mortgage contained this clause, viz.: "It being expressly understood that none of the apparatus, appliances, or supplies above mentioned are to become part of the realty, by reason of being attached thereto,—all of which property is situated and being used by the party of the first part in the coal mine at Chenoa, Ill." This mortgage was acknowledged before a notary public in the city of St. Louis, Mo., under his official seal, by C. O. Godfrey, president, and H. R. Godfrey, secretary, of the Benton Coal Company. The property purchased was placed in the mine. The Benton Coal Company became insolvent, and ceased to operate the mine in December, 1893, or January, 1894, leaving \$3,000 unpaid on the chattel mortgage. In the early part of January, 1894, Hewitt and the Davies Coal Company took forcible possession of the mine and the mortgaged property which had been placed therein by the Benton Coal Company.

It is insisted by the appellants that the property in the chattel mortgage, having been attached to the real estate (the mine), passed to the owner of the fee, the Davies Coal Company, upon the termination of the lease, and that the chattel mortgage is void as against the company. In *Sword v. Low*, 122 Ill. 487, 13 N. E. 826, it was held that, where an article personal in its nature is so attached to the realty that it can be removed without material injury to it or to the realty, the intention with which it is attached will govern; and if there is an express agreement that it shall remain personal property, or if, from the attendant circumstances, it is evident, or may be presumed, that such was the intention of the parties, such article will be held to have retained its personal character. The Benton Coal Company, when it placed the property in the mine, occupied as a lessee; and it is unreasonable to suppose that it would add a large amount of property to the mine, to be turned over to the lessor when the lease expired. Moreover, the mortgage contained a provision that no part of the property should become a part of the realty by reason of being attached. This shows a clear and manifest intention on behalf of both mortgagor and mortgagee that the property should remain personal property. In addition to these facts, appellants sued out an attachment before a justice of the peace against the Benton Coal Company, and levied on the mortgaged property as personal property. This act of the lessor may be regarded as strong evidence against it that the property was not real estate. *Long v. Cockern*, 128 Ill. 30, 21 N. E. 201, seems to be in point on this

question. It was there held that the institution of a replevin suit by the vendor, if it did not estop him to claim the property as a part of the realty, afforded very strong evidence against him that the property was not real estate. So here the levy upon the property by the lessor as personal property may be regarded as strong evidence that it regarded the property as personal and not real estate. There is other evidence tending to show an intention that the property should not become a part of real estate where it was placed, and we find no evidence manifesting the intention of lessor or lessee or mortgagee that the property should be regarded as a part of the realty. We think, therefore, that the holding of the appellate court that the property involved was personal property was correct.

It is next claimed that the chattel mortgage was invalid because acknowledged in St. Louis, while the mortgagor resided in Chenoa, in this state. The mortgage was acknowledged in St. Louis before a notary public, and the evidence was that St. Louis is the home office of the mortgagor. The acknowledgment, therefore, conformed to section 2 of the chattel mortgage act (Rev. St. c. 95). We find nothing in the record to show that the chattel mortgage was invalid, and, if the mortgagee, the Electric Company, had proceeded at once, upon the maturity of the mortgage debt, to take possession of the mortgaged property, we see no reason why it would not be entitled to hold the property, and dispose of it in satisfaction of the mortgage indebtedness. This was not, however, done, but on the 8th day of June, 1894, the appellant Hewitt, as president of the Davies Coal Company, instituted suit by attachment against the Benton Coal Company to recover the sum of \$102.92 due the Davies Coal Company. A writ was issued, and placed in the hands of a constable, and levied on a part of the property described in the mortgage, to wit, one dynamo, 2,000 feet copper wire rope, and one coal digger. On the 15th day of June judgment was rendered before the justice, and an order entered for a sale of the property attached for the payment of the judgment and costs. This property, found in the possession of the Benton Coal Company, having been taken under an attachment some time after the mortgage was due, could not subsequently be taken and held under the mortgage, as against the attachment, unless the lien of the attachment was discharged by the payment of the judgment rendered in the attachment proceedings; and if the Electric Company had no other title to the property, except what it derived through the mortgage, it could not recover that portion of the property attached by the appellants. But, as to the dynamo, the Electric Company claimed through another source. Nels Harrison commenced an action of attachment against the Benton Coal Company for wages

due him, and obtained a judgment on the 13th day of March, 1894. An execution was issued on the judgment, and levied on the dynamo, and on the 17th day of June the property was sold to Demange, who transferred his title to the General Electric Company. In this mode the Electric Company having obtained title to the dynamo, it had the right to recover the property in an action of replevin.

Our conclusion, then, is that the plaintiff, the General Electric Company, was entitled to recover the dynamo under the title obtained by Demange and transferred to it, and under the mortgage it was entitled to recover 600 feet of lead-covered cable, one switch board, and one lot of station instruments; and that the appellants were entitled to judgment, under their attachment against the Benton Coal Company, for two articles of property replevied, to wit, one long wall undercutter for mining coal, and 2,000 feet of weatherproof wire. The judgment of the appellate and circuit courts will be reversed, and the cause remanded to the circuit court, with directions to enter judgment for the return to the appellants, Davies Coal Company and William B. Hewitt, one long wall undercutter for mining coal and 2,000 feet of weatherproof wire, unless, within a short day, to be fixed by the court, the appellee pay to the Davies Coal Company the amount of its judgment, and interest thereon, and costs in said attachment proceeding, in which case the appellee may retain the property; and appellants to pay all costs in the circuit court; costs in appellate and this court to be equally divided between appellants and appellee. Reversed and remanded.

(184 Ill. 410)

MOORE v. PEOPLE ex rel. DUNNE.¹

(Supreme Court of Illinois. June 11, 1896.)

Appeal from appellate court, First district. Information in the nature of a quo warranto, on the relation of Patrick J. Dunne, against John M. Moore, charging defendant with usurping the office of justice of the peace of the town of Lake, in the city of Chicago, Cook county, Illinois. From a judgment of the appellate court (80 Ill. App. 547) reversing a judgment in favor of defendant, the latter appeals. Reversed.

P. T. Kelly and F. H. Atwood, for appellant. Jacob J. Kern and T. A. Coffey, for appellee.

CARTWRIGHT, J. An information in the nature of a quo warranto was filed by the state's attorney of Cook county, on the relation of Patrick J. Dunne, against the appellant, charging that he had usurped and intruded himself into the office of justice of the peace of the Town of Lake, in Chicago, Cook county. The circuit court found the defendant not guilty. That judgment was reversed by the appellate court, and the case was remanded, with directions to enter a judgment of ouster against appellant, with a nominal fine. The questions involved in this case are the same as in the case of *People v. O'Toole* (Ill.) 45 N. E. 683. The appellant was recommended by the judges of the courts of record of Cook county to succeed himself in

¹ Rehearing denied January 14, 1897.

the office of justice of the peace. The governor appointed and commissioned as the successor of appellant one John Fitzgerald, who had not been recommended as such successor, but who was recommended to succeed one J. J. Hennessey, and said Fitzgerald was designated by the county clerk to succeed appellant. We have held in the case of *People v. O'Toole* that the governor has no power to appoint to the office of justice of the peace any person other than the one recommended by a majority of the judges, and that the county clerk has no power to designate what office the person appointed shall hold. The decision in that case will control the judgment in this, and the judgment of the appellate court will therefore be reversed, and that of the circuit court affirmed. Judgment reversed.

(164 Ill. 379)

SAMUEL v. PEOPLE.¹

(Supreme Court of Illinois. Nov. 10, 1896.)

**WITNESSES—RIGHT TO CLAIM PRIVILEGE—WAIVER
—ERROR IN COMPELLING WITNESS TO
TESTIFY—TO WHOM AVAILABLE.**

1. The fact that a witness in a criminal trial has signed an affidavit indorsed on the information, presented and signed by the state's attorney, stating that the charges therein made are true, does not constitute a waiver by him of the right to claim his privilege of refusing to answer a question, on the ground that his answer will criminate him, or expose him to a penal liability. 61 Ill. App. 186, reversed.

2. An erroneous ruling of a trial court in compelling a witness to testify, over his claim of privilege, cannot be taken advantage of by the defendant, where the testimony given was competent; the claim of privilege being personal to the witness, and one which neither of the parties can insist upon.

Error to appellate court, Third district.

Wilkin Samuel was convicted in the county court of De Witt county of keeping a gaming house, and appealed to the appellate court, where the judgment was affirmed (61 Ill. App. 186), and he brings error. Affirmed.

R. A. Lemon, for plaintiff in error. Maurice T. Moloney, Atty. Gen., John Fuller, State's Atty., T. J. Scofield, and M. L. Newell, for the People.

MAGRUDER, C. J. This was a proceeding under an information by the state's attorney against the defendant, filed in the county court, on the 14th day of December, 1894, containing six counts, charging the defendant with gaming, keeping a gaming house, and, in the first count of said information, that he "did permit persons unlawfully to come together, and play at a game with cards, and sport for money and other valuable things, to wit, chips of the value of ten cents each, at and in a house then and there unlawfully kept, used, and occupied by him," etc. And at the common-law term of the said court, on January 21, 1895, a trial was had before the court, a jury having been waived; and the court found the defendant guilty under the first count of the information, being the one quoted from above, and sentenced him to pay a fine of \$150 and costs of suit, which judgment has been affirmed by the appellate

court; and the present writ of error is sued out to review such judgment of affirmance.

On the trial of the case, a witness who testified was one Oscar King, who had previously signed an affidavit upon the back of the information to the effect that the allegations therein contained were true. There was an ordinance in force in the city of Clinton making it a penal offense for any person to frequent or visit or be found in any room or house or place used for the purposes of gaming, or to bet on any such game when played by others. This witness, when placed upon the stand, and interrogated by the state's attorney, claimed his privilege to decline answering each and every question propounded to him by the state's attorney touching the question of his being in any gaming house or room or place used for that purpose, or playing at any game, or giving a description of the room or place wherein any such gaming occurred, etc., on the ground that the answers which the truth would compel him to give would tend to criminate himself, or render him liable to the penalty prescribed by said ordinance. The court refused to entertain his claim of privilege, and compelled him to testify to all that he knew concerning said matters, notwithstanding his claim of privilege, upon the ground that, he having voluntarily and at his own request caused the prosecution to be commenced, his privilege was waived. One other witness testified that the plaintiff ran a gambling house within the required time prescribed by law. The third witness claimed his privilege, and refused to answer on the ground that a truthful answer would tend to incriminate himself. There was no evidence offered by the defense.

Two questions are presented for our consideration by this record.

1. Where a witness in a criminal prosecution claims his privilege of refusing to answer a question upon the ground that the answer will criminate him or expose him to a penal liability, is the court justified in disallowing such claim, if it appears that the witness has previously made an affidavit, indorsed upon the back of the information filed by the district attorney, stating that the matters and things set out in the information are true? It is contended in this case that the witness claiming the privilege caused the prosecution to be commenced by his voluntary act of swearing to the truth of the information, and that he thereby waived his right to insist upon his privilege, when called upon to testify at the trial subsequently taking place. It is urged in support of this contention that a man ought not to be permitted to set the machinery of the law in motion, and then afterwards turn the prosecution into naught by withholding his evidence. The privilege in question is a constitutional right, of which the citizen cannot be deprived by either legislatures or courts. Section 10 of the bill of rights says: "No person shall be compelled in any criminal case to give evidence against himself." 1 Starr & C. Ann. St. p. 104. The privilege, which a witness has, of refusing

¹ Rehearing denied January 15, 1897.

to give evidence which will criminate himself, is granted to him upon grounds of public policy, and as one of the safeguards of his personal liberty. It cannot be regarded as released or waived by some disclosure, which he may have made elsewhere, and under other circumstances. If the answer to a question put to him as a witness upon the stand might tend to criminate him, it would not tend any the less to do so because he had elsewhere made a statement having such a tendency. The question is not as to what he may have previously said in an affidavit, but the question is whether the disclosure he is asked to make as a witness upon the trial of the case will have a tendency to expose him to criminal charge or penalty. We are of the opinion that his constitutional right in this regard is not abridged or waived by the fact of making the ex parte affidavit indorsed upon the back of the information filed by the prosecuting attorney. *Minters v. People*, 139 Ill. 363, 29 N. E. 45; *Lamson v. Boyden*, 160 Ill. 613, 43 N. E. 781. Reliance is placed upon the doctrine, announced in a number of cases, that a witness who voluntarily and understandingly discloses part of a transaction exposing him to a criminal prosecution, without claiming his privilege, is ordinarily obliged to go forward, and complete the narrative, by stating the whole of the transaction. *Whart. Cr. Ev. (9th Ed.)* § 470; 29 Am. & Eng. Enc. Law, p. 844. This doctrine, however, can have no application here, unless the statements made in the affidavit indorsed upon the information and the statements made in the testimony elicited upon the trial may be regarded as parts of one continuous account. We do not think, however, that, under the doctrine thus invoked, the affidavit and the evidence on the trial can be thus run together, so as to be considered one statement. The doctrine applies only to a case where the witness, while testifying upon the trial, states a fact, and afterwards refuses to give the details, or discloses a part of a transaction in which he was criminally concerned, without claiming his privilege, and then refuses to go forward, and state the whole; it does not apply to a case where some admission made long prior to the trial is sought to be brought forward and joined to the answers given on the trial. *State v. Foster*, 23 N. H. 348; *People v. Freshour*, 55 Cal. 375; *Town of Norfolk v. Gaylord*, 28 Conn. 309.

The information in this case is presented by the state's attorney. It so states in the beginning, and is signed by him. Under the statute, all offenses cognizable in county courts must be prosecuted by information of the state's attorney, attorney general, or some other person; and the statute provides that, when an information is presented by any person other than the state's attorney or attorney general, it shall be verified by affidavit of such person that the same is true. 1 Starr & C. Ann. St. p. 727, par. 235; Rev. St. c. 37, § 117. Hence, the affidavit here indorsed upon the information cannot be treated as a part thereof. "No verification is necessary except when the

information is by a person other than the state's attorney or attorney general." *Long v. People*, 135 Ill. 435, 25 N. E. 851; *Gallagher v. People*, 120 Ill. 179, 11 N. E. 335. The case of *Temple v. Com.*, 75 Va. 892, is an instructive one upon the subject now under consideration. There, in a prosecution for managing and conducting a lottery, it was held that a witness could not be required to testify if he would thereby criminate himself; and it was also held that "the fact that the witness testified before the grand jury, and that it was on his testimony that the indictment was found, will not deprive him of his privilege to decline to testify on the trial of the party indicted." The witness in that case, who testified before the grand jury, was as much the moving cause of the prosecution as the witness here, who made the affidavit indorsed upon the information; and, if testifying before the grand jury does not waive the right to claim the privilege, there is no good reason why the making of the affidavit upon the information should operate as such waiver. In what is here said we merely hold that, if the witness was entitled to claim his privilege in this case, he did not waive his right to claim such privilege by reason of having made the affidavit upon the information.

2. The next question which the record presents is whether the plaintiff in error can assign as error that the court below compelled the witness to testify, not withholding his claim of his privilege. It will be noted that the witness here was not Wilkin Samuel, the party indicted, and the present plaintiff in error; but it was Oscar King, a third person, not connected with the prosecution, or involved in it. The witness King did not persist in his refusal to testify after the court decided against him upon the question of his right to claim his privilege, but, after such decision, he proceeded to answer the questions addressed to him. He might have refused to answer notwithstanding the adverse ruling, and might have chosen to submit to punishment, as for a contempt. There were such refusal and punishment in the cases of *Minters v. People*, supra, and *Temple v. Com.*, supra. "The refusal of a witness to answer any question which he may be lawfully required to answer is a contempt of court, and, if he persists in his refusal, he may be punished accordingly." 29 Am. & Eng. Enc. Law, p. 846.

It is not contended that the evidence given by the witness King was not competent evidence under the issues involved, but it is claimed that the defendant below is entitled to complain, because King was compelled to testify, although claiming his privilege. This is a matter of which the witness alone can complain, and of which the plaintiff in error can take no advantage, as being error committed against himself. The privilege is that of the witness, and not of

the party; and counsel will not be allowed to make the objection. The privilege cannot be interposed by either party to the action, nor can either party raise the objection on behalf of the witness. It must be claimed by the witness in order to be available, and it lies with him to claim it or not, as he may choose. As the privilege is personal to the witness, he may waive it, and elect to testify. *Mackin v. People*, 115 Ill. 312, 3 N. E. 222; *Moline Wagon Co. v. Preston*, 35 Ill. App. 358; *State v. Foster*, supra; 1 Greenl. Ev. § 451; *Whart. Cr. Ev.* (9th Ed.) § 465; 29 Am. & Eng. Enc. Law, p. 843. This being so, the evidence is equally good where the witness, instead of giving it voluntarily, is compelled to give it. In *Reg. v. Kinglake*, 11 Cox, Cr. Cas. 499, where a witness called on behalf of the crown refused to give evidence, on the ground that it would tend to criminate himself, but, the objection being overruled by the judge, gave his evidence, it was held that the defendant could not object that such evidence was improperly received; that the privilege of refusing to answer questions on the ground that they tend to criminate is that of the witness alone; and that neither party to the suit can take any advantage therefrom. *Cockburn, C. J.*, said: "By refusing to be examined, the witness may have exposed himself to imprisonment for contempt, or to a fine. But that merely concerns the witness himself. If he chooses to give his evidence voluntarily, it would be perfectly good evidence, and it would not be illegal evidence in any sense whatever, and there could be no cause of complaint. If so, what difference does it make that he has given his evidence in consequence of some coercion which has been put upon him? I can see no reason for saying that when the witness is compelled to answer, although he might have objected, that is a ground of objection on the part of either of the litigants." *Blackburn, J.*, said: "The privilege is that of the witness, and, if he waives it, it is his own affair. But if, instead of giving his evidence voluntarily, he gives it under compulsion, what is the difference? The party in the suit is not injured." *Mellor, J.*, said: "It is clear that, if Mr. Lovibond [the witness] had made no objection, his evidence would have been receivable, and it really can make no difference that he objected, and was compelled to give his evidence." So, also, in *Cloyes v. Thayer*, 3 Hill, 564, it was said by *Nelson, C. J.*: "The court erred, also, in compelling the payer of the note to answer questions tending to criminate himself. * * * But the error is not available to the plaintiff. The privilege belongs exclusively to the witness, who may take advantage of it or not, at his pleasure. * * * If ordered to testify in a case where he is privileged, it is a matter exclusively between the court and the witness. The latter may stand out, and be committed for

contempt, or he may submit; but the party has no right to interfere or complain of the error." So, also, in *Morgan v. Halberstadt*, 9 C. C. A. 147, 60 Fed. 592, it was said: "Such privilege belongs exclusively to the witness. The party to the suit has no right to insist upon it, except when he is himself the witness. And if the witness waives his privilege, or the court disregards it, and requires him to answer, the party has no right to interfere or complain of the error."

In view of the authorities thus referred to and quoted from, we hold that the plaintiff in error, *Wilkin Samuel*, has no right to complain of the ruling of the trial court as error. We regard the evidence as sufficient to warrant a conviction. Accordingly, the judgment of the appellate court is affirmed. Affirmed.

(167 Mass. 248)

TISDALE v. TOWN OF BRIDGEWATER
(three cases). **CLARK v. SAME.**

GILLESPIE v. SAME.

(Supreme Judicial Court of Massachusetts.
Plymouth, Jan. 6, 1897.)

**MUNICIPAL CORPORATIONS—DEFECTIVE STREETS—
NEGLECT.**

It is a question for the jury whether a town was negligent in failing to protect, with a barrier, an excavation in the sidewalk from two to eight feet from the curb line (the sidewalk being only slightly above the street, and without curbing), so as to render it liable for injuries to persons driving on the street caused by the horses becoming frightened and backing into the excavation.

Exceptions from superior court, Plymouth county; *Henry N. Sheldon, Judge.*

Actions by *Marion K. Tisdale*, by *Alice L. Tisdale*, by *Julia Clark*, by *Helen P. Gillespie*, and by *Charles E. Tisdale* against the town of Bridgewater. Verdicts were rendered for plaintiffs, and defendant excepts. Overruled.

The report of the evidence was as follows: "At the trial there was evidence tending to show that at the place where the accident happened there was a good, hard, smooth, gravel roadbed, 37 feet wide, from the inner edge of the sidewalk; that the sidewalk on the west side of said street was between 7 and 8 feet wide, and made of gravel or coal ashes, slightly raised above the gutter; that between the roadbed and sidewalk there was no curbing, but a little bank of grass had grown up between the traveled portion of the sidewalk and the gutter; that west of the west line of that sidewalk, and at a distance therefrom varying from nearly 2 feet to 8 feet, was a cellar hole, upon land of one *Nathan Willis*, from 3½ feet to 4 feet 4 inches deep, measuring from the level of the sidewalk; that the surface of the land from the west line of the sidewalk to said cellar hole was grassed over, and in places was slightly higher than the sidewalk, perhaps an inch or two; that the place where the accident occurred was about 200 feet from and north of Central Square, which is the business center

of the town,—the buildings in the vicinity of the square, especially on the north side, being compact; that on the 22d day of January, A. D. 1894, the female plaintiffs were riding in a carriage, drawn by a horse (which said horse and carriage were the property of the male plaintiff), along said street, traveling north; that the horse was trotting along near the middle part of the street wrought for team travel, and nearly opposite said cellar hole; that another team passed them at that moment, and, just as it passed, the driver struck his horse with a whip; that immediately plaintiff's horse began to back, and backed rapidly into this cellar hole, at a place about 4 feet from the street line, being a steep slope; that, when the plaintiffs were assisted from the team, the rear end of the carriage was in the hole, the forward wheels just west of the outside edge of the sidewalk, the horse standing across the sidewalk, and the plaintiff, Mrs. Alice Tisdale, the driver, holding the horse with the reins tight; that the female plaintiffs were injured, and the carriage and horse belonging to the male plaintiff damaged. There was also evidence tending to show that there was no fence or other barrier along the westerly line of said sidewalk against said cellar hole."

L. E. Chamberlain, for plaintiffs. Hosea Klingman, for defendant.

BARKER, J. The cellar hole, where the rear end of the carriage went into it, was only 4 feet from the line of the street, and only 12 feet from the carriage path, while a part of the hole was still nearer,—less than 2 feet from the street line. The horse, startled by a whip with which the driver of a passing team struck his own horse, backed suddenly, but was stopped with the rear end of the carriage in the hole, the forward wheels just outside the edge of the sidewalk, and the horse standing across the sidewalk. It was not an instance of straying from the highway; and, as the instructions given were not objected to, we must assume that the jury found that the occurrence was one which might reasonably be expected to happen with a horse fit to drive, but momentarily frightened, that there was but momentary loss of control, that the cellar hole exposed to danger a team properly traveling over the part of the road wrought for carriage travel, and that the accident would have been prevented by a suitable railing. There is no doubt as to the test to be applied, which is whether there was a dangerous place so near the line of travel that travelers were likely to be injured by it while using the way for travel. None of our decisions have held an excavation or sharp descent so near a street not sufficiently near to permit a finding that the absence of a railing was a defect. In *Logan v. City of New Bedford*, 157 Mass. 534, 32 N. E. 910, the bank wall was between 5 and 6 feet from the street line and connected two houses 20 or 25 feet apart, while there were steps projecting from

the houses to the street line, and the wall itself was back of the house fronts. In the present cases, in the opinion of a majority of the court, it cannot be said, as matter of law, that, in the view of the evidence most favorable to the plaintiff, the risk was so small that it would be unreasonable to require the town to provide a railing. *Scannal v. City of Cambridge*, 163 Mass. 91, 39 N. E. 790. Exceptions overruled.

(167 Mass. 276)

OGDEN et al. v. McHUGH et al.

(Supreme Judicial Court of Massachusetts.
Bristol, Jan. 7, 1897.)

DEED—CONSIDERATION OF MARRIAGE—MISTAKE OF FACTS.

A deed made in accordance with an antenuptial contract is supported by a sufficient consideration where the grantor and grantee had the ceremony of marriage performed, and lived as husband and wife up to the time of grantor's death in the belief that the husband of the grantee was dead, he having deserted her 12 years before, even though such former husband was living during the period of the supposed second marriage.

Report from superior court, Bristol county; J. B. Richardson, Judge.

Bill by James H. Ogden and others against Margaret McHugh and another for the recovery of real estate. Decree dismissing the bill. Report to supreme court. Affirmed.

This was a bill in equity, brought originally in the superior court by the heirs at law of Henry Ogden for the recovery of certain real estate alleged to be acquired by the defendant through conveyance from Henry Ogden. In 1868 the defendant Margaret McHugh married James McHugh. Henry Ogden, the father of the plaintiffs, who were his children by a deceased wife, knew said Margaret and James, and knew of their said marriage, was present at their marriage, and knew of their living together as husband and wife for short intervals until 1873. In that year (1873) said James deserted said Margaret. He left Fall River, she remaining there. She saw him once in 1875 or 1876, but after that soon lost all knowledge of him; and, believing him to be dead, in 1888 became engaged to marry Henry Ogden, then a widower. She and the said Henry Ogden executed an antenuptial contract, whereby Henry agreed to settle property on Margaret. The ceremony of marriage between the said Margaret and the said Henry Ogden was thereafter had on 4th January, 1888, and they thereafter openly lived together as husband and wife in Fall River until the death of said Henry, March 7, 1893. When the antenuptial contract was executed, and when the ceremony of marriage between said Margaret and said Henry Ogden was performed, they both believed that said James McHugh was dead, and they both remained in that belief down to the time of the death of said Henry, though in fact said James was and is now living, and no divorce between said

Margaret and said James was ever had. Before the ceremony of marriage between said Margaret and said Henry was had, the question of whether said James was then living was discussed by them and by their friends, and they sought the opinion or advice of a priest about it. Margaret made no fraudulent, nor intentionally made any false, statements to said Henry Ogden, nor concealed anything which she knew in respect to whether said James was living or not, to induce him to marry her. Henry knew about said James' desertion of Margaret, and of his disappearance from Fall River, and had, in a general way, a knowledge of all the same facts that she had in respect to his disappearance and supposed death. Henry Ogden owned and was in possession of certain property other than that conveyed to Margaret in accordance with the antenuptial contract at the time the ceremony of marriage between the said Margaret and said Henry was performed, and he gave said other property to his children, all of whom are plaintiffs in this suit. Pursuant to said antenuptial contract the said Henry Ogden caused said estate, which was the estate which he then and down to the time of his death occupied, but which he acquired after said January 4, 1888, to be conveyed by mesne conveyances, through Christopher Hughes as intermediary merely, to said Margaret. There was no consideration to said Henry for said conveyance other than the desire to fulfill his said antenuptial contract, and his belief that she was his lawful wife, and, laboring under this mistake, he made this conveyance. The bill was dismissed, with costs.

Jennings & Morton, for petitioners. J. W. Cummings, for respondents.

BARKER, J. The decree dismissing the bill was right. If the plaintiffs, as heirs at law of their deceased father, could, under any circumstances, maintain a bill to set aside a deed which he had made in performance of a contract into which he had entered under a mistake, they have no better right than he would have if living. When he made the contract, and when he performed it by causing the land to be conveyed to the defendant, he knew of the fact that the only evidence of the death of the defendant's former husband was his absence from the year 1876 until the time of the marriage, in 1888. He took the chance that the former husband was yet alive, and he was equally responsible with the defendant for all the consequences to her and to himself resulting from the marriage ceremony, and his living with her as his wife from that time until his death, in 1893. While there was no marriage, there was during the years from the ceremony in 1888 to his death, in 1893, the exact condition of things which, in view of the possibility that the husband was alive, he must have contemplated when he made the

contract. This situation gave him for years the companionship and services of the defendant, with no obligation to compensate her therefor. *Cooper v. Cooper*, 147 Mass. 370, 17 N. E. 892. It gave him the possibility of having by her legitimate issue. *Pub. St. c. 145, § 14; Glass v. Glass*, 114 Mass. 563. On the other hand, it is impossible to place the defendant in the condition in which she would have been but for her acts done in performance of her part of the contract. Neither the supposed husband nor his administrators or heirs have lost the benefit which he expected to derive,—that the defendant should have from his estate nothing except such property as he should see fit to give her in his lifetime. She can get nothing from his estate, either by way of compensation for her years of service or of a distributive share. While there was a mutual mistake, in that both parties believed that the husband was dead, both knew fully upon what that belief rested, and what the consequences would be if a marriage ceremony, followed by cohabitation as husband and wife, should occur, and it should appear that the husband was in fact alive. It would be unjust, under such circumstances, to take from the defendant what she received in return for acts which were of value to the other contracting party, which were a detriment to herself, and which only failed of being complete performance on her part through the operation of a rule of law which all parties had in mind, and which they all had good reason to suppose was not applicable, because of facts which each knew and relied upon equally with the other. Decree affirmed.

(167 Mass. 258)

BREUCK v. CITY OF HOLYOKE.

(Supreme Judicial Court of Massachusetts.
Hampden. Jan. 7, 1897.)

MUNICIPAL CORPORATIONS—DEFECTIVE SEWERS—
DAMAGES—CONTRIBUTORY NEGLIGENCE.

1. Plaintiff cannot recover against a city for injury to his houses caused by the setback of sewage through the alleged negligence of the city, where he connected his houses with the sewer in such a way as to be in violation of city ordinances.

2. Pumping water from plaintiff's cellar by a city is not a waiver of plaintiff's infraction of a city ordinance relative to sewer connections, that will enable him to recover for injuries to his houses caused by the setback of sewage through the alleged negligence of the city.

3. Plaintiff cannot recover for injury to his building through the setback of sewage where the damage caused by water which found its way to the building through the house connections with the sewer, made by plaintiff in violation of city ordinances, cannot be distinguished from damages caused by water thrown from catch-basins, or forced through the walls of the sewer and soil of the street, on plaintiff's premises.

Exceptions from superior court, Hampden county; Elisha B. Maynard, Judge.

Action by Otto Breuck against the city of Holyoke for damages received by the set-

back of sewage on the property of plaintiff, caused by the neglect of defendant. Exceptions by plaintiff to a verdict for defendant, directed by the court. Verdict to stand.

A. L. Green, for plaintiff. Arthur B. Chapin, City Sol., and E. W. Chapin, for defendant.

BARKER, J. The writ is dated August 3, 1895, and the trial was in March, 1896. The declaration had three counts. The first alleged that the defendant negligently failed to keep a sewer in repair, whereby the plaintiff, who was in the exercise of due care, suffered injury to his property; the second, that the sewer was negligently suffered by the defendant to be out of repair, whereby the plaintiff's real estate was damaged, he being in the exercise of due care; and the third count, that the defendant ought to have built the sewer upon such a plan and in such a manner as was suitable to carry off the sewage, but negligently failed to do so, and, instead, built the sewer of insufficient capacity, and of such a plan and in such a manner as to be insufficient to carry off the sewage, which forced the sewage back into the plaintiff's buildings, whereby they were undermined and injured, he being in the exercise of due care. The defendant's answer was a general denial. The case was tried before a jury in the superior court, and, after verdict, was reported by the presiding justice for the determination of this court. The report, after reciting a few facts as to which we assume there was no dispute, states that the jury took a view, and that material evidence was introduced by both parties, and then recites the testimony of five witnesses called by the plaintiff, and of three called by the defendant, as all that is material to the issue. The report there states that, after this evidence was in, the defendant asked the court to rule that the plaintiff could not recover, and further offered in evidence certain city ordinances for the purpose of showing that the plaintiff was not legally connected with the sewer, and for any other purpose for which they might be competent. The plaintiff objected to the admission of this line of defense, because it was not specifically set out in the answer. The presiding justice excluded evidence of the ordinances, and required the jury to find whether a want of due care on the part of the plaintiff contributed to the overflow into his cellars, and whether the want of due care by the defendant in the construction or maintenance of its sewer was the sole cause of the overflow, and the amount of damage, if any, which the plaintiff suffered in his property as the direct result of the overflow. The jury then found that the plaintiff's injury came in no wise from his neglect, but did result from the negligence of the defendant, and that the plaintiff's damages were \$700. After these special findings, the court admitted in evidence the city ordinances, and directed a

verdict for the defendant, to which the plaintiff excepted, with the agreement that the case should be reported to this court, and that if, under all the evidence, the plaintiff was entitled to have his case submitted to the jury, the verdict should be for him for \$700, and that otherwise the verdict for the defendant should stand. The question for our decision is, therefore, whether there is any view of the whole evidence upon which the plaintiff was entitled to have the case submitted to the jury.

Upon an examination of the reported evidence, we are of opinion that the plaintiff was not entitled to have the case submitted to the jury. Upon his land, at the corner of Jackson and Summer streets, the plaintiff had built two brick tenement houses. The one upon the corner of the lot upon the two streets was built in the year 1881, and the other, on Jackson street, and in the rear of the first, was built in 1887. Running from Jackson street behind the rear block was an alleyway. In the front block, besides apartments for dwellings, there was also a shop. In Jackson street was a city sewer, built between the years 1876 and 1880, designed to collect and transmit to the river both ordinary sewage and the surface water, the sewage being admitted by house connections, and the surface water by catch-basins placed in the streets. As originally built, this sewer descended Jackson street, past the plaintiff's blocks, crossed Summer street, following Jackson street to Canal street, and turning to the left at the corner of Jackson and Canal streets, was continued down Canal street, past the foot of Adams street and of Sargent street, which were streets parallel with Jackson street, to a point in Canal street opposite the overflow of the Holyoke Water-Power Company's third-level canal, where the sewer turned to the right, and was led into the river under the overflow. In Canal street there was a well hole in the sewer between Jackson and Adams streets. In Jackson street and in Canal street, to the well hole, this sewer was of brick, 26 inches high, and about 20 inches wide. From the well hole, to its lower end, at the river, it was of iron, 5 feet in diameter; and this part of the sewer served as the discharge of another sewer in Adams street. In July, 1888, a tubular iron conduit was put in at the well hole in Canal street, leading under the bottom of the third-level canal, which runs next to and parallel with Canal street, and at right angles to the course of the canal, and a sewer leading directly to the river was built from the lower end of the conduit. In that year the Jackson street sewer was cut off from its original outlet, and made to discharge into the conduit built under the canal. In June, 1893, this conduit caved in or collapsed, and became obstructed by sand, which came into it from the adjacent soil, through openings in the tube thus caused, and it remained thus obstructed until it was replaced by another iron tube, in July, 1895. During the work

of replacement, which lasted for 10 or 12 days, the Jackson street sewer was cut off from that outlet, and was inadequately discharged through its old outlet. The Holyoke Water-Power Company empties its canals yearly during the first week in July, to allow work to be done in and about them, and keeps the canals filled during the rest of the time, except sometimes on Sundays, for a day. The conduit, which collapsed in June, 1893, was put in when the water was out of the canal in July, 1888; and the work of replacing it was done when the water was out in July, 1895, when the water-power company extended for a week or 10 days the period during which the water was out of the canal. The evidence tended to show that the cause of the collapse of the conduit in 1893 was that there was not time to properly rivet it when it was put in, before the water was let into the canal. Both of the plaintiff's blocks had house connections with the Jackson street sewer, and the plaintiff testified that both blocks had always been connected with that sewer. Besides the making of these original connections with the sewer when the blocks were built, the plaintiff testified that he put a pipe from the shop in the front block into the sewer in October, 1891, and that he made changes in the plumbing of the rear block by taking a sink and a bathtub out from the cellar of the rear block, which had been laid out for a washroom; he testifying that he took out the sink and bathtub "two or three years ago," and, again, that he took out the sink "about four or five years ago," so that it appeared that he made changes in the draining system of the blocks from 1891 to 1894.

Looking at the evidence with respect to the effect of the city ordinances upon the plaintiff's rights, the case is in a peculiarly unsatisfactory situation. We find no direct testimony that any person other than the superintendent of streets dug up the street or opened the sewer to connect the plaintiff's blocks with it, and none that his particular drains which entered the sewer or the plumbing upon his own premises was not of the required materials or grade. Nor was there any direct testimony to the effect that the particular drains were put in by the superintendent of streets, or under the directions of the mayor and aldermen, or that the plumbing of the blocks conformed to the requirements of the ordinances as to materials, grade, and other particulars. Two of the ordinances were in force from October 27, 1875, and three from June 30, 1885. None of them required, in terms, an application to the city authorities on the part of a person intending to connect his premises with a sewer; but the last ordinance of June 30, 1885, requires that before proceeding to construct any portion of the drainage system of a building, or to make any changes in the existing drainage system, the owner shall file with the city engineer a plan showing the whole drainage system, from its connection

with the sewer to its terminus in the house, together with the location and size of all branches, traps, ventilating pipes, and fixtures, which plan must be in accordance with the ordinances, and indorsed with the word "Approved," signed by the city engineer, and kept on file in his office. The city engineer, who had held that office for one year, testified: "I looked for an application by Mr. Breuck for the entry of the pipe into the sewer in the city, and could not find it. If there had been one, I think I should have been likely to find it. There is usually a record. I found no record of it." We have now referred to all the testimony bearing upon the question whether the plaintiff had been guilty of a breach of any of the ordinances, save that the city engineer testified that he had visited the front house, and had seen where one sewer entered, the one in the front house, and that it seemed to him that the sewer was built before the house was; and the plaintiff testified that the only sewer pipe of the rear house was the same with that of the front house, the pipe going through both houses. If, upon this testimony, the jury had found that there had been no breach of the ordinances by the plaintiff, we should be slow to disturb the finding. But, bearing in mind the terms of the report, we feel compelled to assume that the plaintiff had connected the rear house with the sewer when he built that house, in 1887, without filing with the city engineer the plan required by the last ordinance of June 30, 1885; that from 1891 to 1894 he made changes in the drainage systems of both blocks without filing such a plan; and that he himself made a new and direct connection between the shop in the front block and the sewer, in October, 1891, causing the sewer to be opened for that purpose by persons other than the superintendent of sewers or his employes, and causing the particular drain which entered the sewer to be laid, not under the direction of the mayor and aldermen, nor of a size, materials, or grade which they had directed; so that the plaintiff's houses were both connected with the sewer in violation of the provisions of the two ordinances of October 27, 1895, and of the last ordinance of June 30, 1885.

It is contended by the plaintiff that the jury might find that any infractions by him of these ordinances were waived by the city authorities. We find, however, no evidence from which such a waiver can fairly be inferred. The ordinances do not require a consent on the part of the city authorities, as was required by the ordinances considered in *Livingstone v. City of Taunton*, 155 Mass. 363, 29 N. E. 635, in *Sheridan v. City of Salem*, 148 Mass. 196, 19 N. E. 172, and in *Ranlett v. City of Lowell*, 126 Mass. 431. These ordinances in the present case prescribed by whom and how the work should be done, and made the act of the owner in filing a plan a condition precedent. In *Sheri-*

dan v. City of Salem there was evidence that the permission which the ordinance required to be in writing was given orally, and was reported to the mayor and aldermen. In the present case we note, in addition to the fact that the houses were in fact connected with the sewer from the time when they were erected, no evidence of any fact from which it is contended that a waiver can be inferred, except the testimony that on several occasions the city pumped the water out of the plaintiff's cellars. Such assistance is granted to persons where cellars may have been flooded for any cause, and would not justify a finding that the plaintiff's breaches of the sewer ordinances were waived by the city. These infractions of the ordinances would be conclusive against the plaintiff's right to recover if the flooding of his premises was caused by the connections with the sewer. See *Ranlett v. Lowell*, 126 Mass. 431. But the plaintiff contends that the evidence would justify a finding that the flooding of his premises with sewer water, and the undermining and settling of his blocks, were caused by water which came from the sewer, not through his particular drains, nor in consequence of the connections between the blocks and the sewer, but which, by the faulty condition of the sewer, was forced back into and upon the soil of his land, and came into his cellars, and injured his buildings, by percolating from the sewer into and upon his land, or running there from the catch-basins. There was testimony that there was, especially during rains, great back pressure upon the water in the sewer, so that it would back up in pipes in the house as high as 14 feet above the cellar, and would spout up 3 or 4 feet from the catch-basin on Jackson street, and that there was a place where it came from the sewer through the back alley, and that it used to spout out of the manhole like a fountain, and other testimony, from all of which the jury might find that water was forced from the sewer onto the plaintiff's premises in other ways than through the sewer connections with the blocks. But the plaintiff's own testimony, and that of other witnesses whom he called, and who had occupied tenements in his blocks, was that water also came from the sewer upon his premises through the pipes connecting them with the sewer. The only damages which the evidence tended to show were due to the mechanical effect of the water in causing the buildings to crack and settle. The damage so caused by water which found its way to the premises through or in consequence of the house connections with the sewer cannot be separated or distinguished from the damage caused by water thrown from the catch-basins or manholes, or forced through the walls of the sewer and the soil of the street upon the plaintiff's premises. The evidence, therefore, tended to show no damage which was not caused in part by the connections with the

sewer, made and maintained by the plaintiff contrary to the city ordinances; and this brings the case within the ordinary rule that a plaintiff cannot recover damages which are in part caused by his own negligence or wrong. It is not an answer to say that the jury found specially that the want of due care by the defendant in the construction or maintenance of the sewer was the sole cause of the overflow, for the reason that the city ordinances were not before the jury. The greatest possible effect which, under the circumstances, can be given to the special findings, is that the overflow was due to faulty construction or maintenance of the sewer, and was not at all caused by any faulty construction of the plaintiff's connections with the sewer. The findings are not inconsistent with the defendant's contention that the connections themselves were made in contravention of the ordinances; and because, upon the evidence, all the damage which it tended to show was due in part to water which came into the premises through those connections, the plaintiff was not entitled to have the case submitted to the jury. Verdict for defendant to stand.

(167 Mass. 242)

BOYDEN v. MASSACHUSETTS MASONIC LIFE ASS'N.

(Supreme Judicial Court of Massachusetts.
Hampden. Jan. 6, 1897.)

LIFE INSURANCE—BY-LAWS OF ASSOCIATION—CONSTRUCTION OF CONTRACT—FAILURE OF BENEFICIARY.

1. Under St. 1890, c. 421, § 21, relating to life associations, and providing that all policies or certificates which contain reference to the constitution or by-laws of the association as forming part of the contract shall also have attached thereto a correct copy of such by-laws, etc., a provision in a policy that "the member agrees to be bound by the by-laws of this association, now in force," etc., does not render the policy subject to a by-law not contained therein or attached thereto.

2. Where a policy provides that the insurance shall be paid to the beneficiary named therein if living, or to the person named in the last designation by the member, and recorded in the books of the association, on the death of the beneficiary named in the policy, and the failure to designate another, the insurance is payable to the representative of the insured.

Appeal from superior court, Hampden county.

Action by Frances E. Boyden against the Massachusetts Masonic Life Association to recover upon a policy of insurance issued upon the life of Henry N. Boyden, plaintiff's husband. The defendant admitted its liability, paid the amount due on the policy into court, and asked that Rosa A. White, daughter of the insured by a former wife; F. P. Lincoln, administrator de bonis non of the estate of Sally Boyden, the former wife of the insured, and designated as beneficiary in the policy; and H. W. Bosworth, administrator of the estate of Henry N. Boyden,—be made parties defendant as claimants of the

fund. From a judgment directing the payment of the fund to H. W. Bosworth, administrator of the estate of the insured, plaintiff appeals. Affirmed.

Edwin F. Lyford, for appellant. Charles W. Bosworth, for appellee administrator of estate of Henry N. Boyden. Edmund P. Kendrick, for appellees Rosa A. White and Frank P. Lincoln, administrator de bonis non of estate of Sally Boyden.

BARKER, J. The question is whether the provision of the policy, "that said member agrees to be bound by the by-laws and rules of this association now in force, or as hereinafter altered or amended," makes operative, in ascertaining the disposition of the fund, the following by-law: "Or if he [meaning the member] leaves no such designated parties alive, it shall be paid as follows: (1) To his widow and his minor children, to be apportioned to them as follows: If there be but one minor child, one-half to the widow and one-half to the minor child; if more than one, one-third to the widow and two-thirds to the minor children, in equal shares; if there be no minor children, the whole to the widow; if there be no widow, the whole to the minor children in equal shares. Or (2) if he leaves no widow and no minor child, then in equal shares to his adult children. Or (3) if he leaves no widow and no child, then to his mother. Or (4) if he leaves no widow and no minor child, then to his father." The association was organized and the policy was issued under, and is governed by, St. 1890, c. 421, section 21 of which is as follows: "All policies or certificates hereafter issued to persons within the commonwealth by corporations transacting business therein under this act, which policies or certificates contain any reference to the application or the insured, or the constitution, by-laws or other rules of the corporation, either as forming part of the policy or contract between the parties thereto, or having any bearing on said contract, shall contain or have attached to said policy or certificate a correct copy of the application as signed by the applicant, and the portions of the constitution, by-laws or other rules referred to; and unless so attached and accompanying the policy, no such application, constitution, by-laws or other rules shall be received as evidence in any controversy between the parties to or interested in said policy or certificate, and shall not be considered a part of the policy or of the contract between such parties. The said policy or certificate, application, constitution, by-laws or other rules shall be plainly printed and no portion thereof shall be in type smaller than brevier: Provided, however, that nothing in this section shall be construed as applying to health certificates or contributory receipts or other evidences used in reinstatement of a pol-

icy or certificate." No copy of the by-law above quoted was contained in, attached to, or accompanied the policy. Therefore the by-law cannot be considered a part of the policy or contract, nor can it be received in evidence in this cause, which is a controversy between parties claiming to be interested in the policy; and the rights of the parties to the fund must be determined as if there were no such by-law. See *Considine v. Insurance Co.*, 165 Mass. 462, 43 N. E. 201. The policy stipulates that the insurance shall be paid "to Sally Boyden, if living, unless such member [Henry N. Boyden] shall have designated that it be otherwise paid, in which case it shall be paid to the person or persons named in his last designation as recorded upon the book of the association." The application, a copy of which is attached to the policy, contains this clause: "I direct that, after my decease, the moneys to which I may be entitled as such member shall be paid to the person or persons now of record as my last designation on the books of said * * * association." The person so designated on the books was the Sally Boyden named in the clause quoted from the policy. She had been the wife of Henry N. Boyden, but had died before the application and policy were made. She left one child, Rosa A. White, one of the parties to the cause, who was and is the only child of herself and of Henry N. Boyden. The administrator of the estate of Sally Boyden and Rosa A. White both contend that the fund belongs to Rosa A. White, and that, if it is payable to the administrator of Henry N. Boyden, then it should be paid to him for the sole benefit of Rosa A. White. But the clauses quoted from the application and the policy are to be taken together, and so the designation of Sally Boyden is conditional upon her being alive, and is void because she was dead. If she had been living, the policy would have been payable to her only in case of her surviving Henry N. Boyden, and upon her death before him there would have been a resulting trust in his favor. *Haskins v. Kendall*, 158 Mass. 224, 33 N. E. 495, and cases cited. He knew all the circumstances, and, if he had intended to have the policy payable to Rosa A. White, he could have designated her as the beneficiary at any time. It is therefore impossible to construe the policy as in effect payable to her. Because there is in the policy no designation of Frances E. Boyden, the second wife and the widow, as beneficiary, and the by-laws cannot be taken into account in determining to whom the fund is to go, her claim to have the fund paid to herself must be denied. The result is that, as no beneficiary is effectually designated, the administrator of the estate of Henry N. Boyden is entitled to the fund. *Clarke v. Schwarzenberg*, 162 Mass. 98, 101, 38 N. E. 17, and cases cited. Judgment affirmed.

(167 Mass. 245)

OTIS v. OTIS et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Jan. 6, 1897.)TRUSTS—MISAPPROPRIATION BY TRUSTEE—LIABILITY
OF PERSONS RECEIVING TRUST FUND.

1. Where an agent misappropriates a fund of his principal by gift, the principal may recover the funds in the hands of the person receiving it as a gift, or in the hands of others to whom it is afterwards given.

2. Where a trust fund is misappropriated by persons receiving it as a gift, they are liable to the principal for the amount misappropriated by each.

Appeal from superior court, Hampden county; Francis A. Gaskill, Judge.

Bill by Cornelia L. Otis against Samuel F. Otis and others. There was a decree for plaintiff, and defendants appeal. Affirmed.

William H. Brooks and Walter S. Robinson, for appellants. Jonathan Barnes, for appellee.

HOLMES, J. The master finds that the fund in question belonged to the plaintiff, that it was received by the defendant Samuel F. Otis as a gift from the plaintiff's husband, who received it as her agent or trustee, and that it was distributed by Samuel F. Otis among his four daughters, the other defendants, also as a gift. These findings were not excepted to, and are not discussed in the defendants' argument, and therefore we assume them to be correct, as we see no reason to doubt that they are. They are sufficient to establish the plaintiff's right to recover without regard to her exceptions or to the judge's additional findings. A person to whose hands a trust fund comes by conveyance from the original trustee is chargeable as a trustee in his turn if he takes it without consideration, whether he has notice of the trust or not. This has been settled for 300 years,—since the time of uses. "If the feoffees enfeof one without consideration it is to the first use although it be without notice." Y. B. 14 Hen. VIII. p. 9, pl. 5; Chudleigh's Case, 1 Coke, 120, 122b; Mansell v. Mansell, 2 P. Wms. 678, 681; Clark v. Flint, 23 Pick. 231, 243; Atlantic Cotton Mills v. Indian Orchard Mills, 147 Mass. 268, 272, 273, 17 N. E. 496; Lewin, Trusts (9th Ed.) 976; 1 Perry, Trusts (4th Ed.) §§ 217, 220.

By the bill as originally filed the plaintiff sought to recover an identified fund supposed to be deposited in a trust company subject to the order of the defendant Samuel F. Otis. When it appeared that before the bill was filed he had withdrawn the fund, a prayer was added that he might be ordered "to pay over said moneys to the plaintiff." And when it appeared further that he had transferred the fund to his daughters, a further amendment joined them and prayed that they might "be ordered to transfer said funds to the plaintiff." These prayers look,

primarily perhaps, to the recovery of an identified fund, wherever it may be found. It turns out, however, that the fund is gone, and has been misappropriated by the concurrent action of all the defendants. Under these circumstances the plaintiff has a right to compensation as alternative relief, and is entitled to a decree against all the parties concerned, to the extent of their respective misappropriations. Trull v. Trull, 13 Allen, 407; Loring v. Brodie, 134 Mass. 453; Wilson v. Moore, 1 Mylne & K. 126, 143, 337; Duncan v. Jaudon, 15 Wall. 165; Swift v. Williams, 68 Md. 236, 11 Atl. 835. It hardly is worth while to consider whether an amendment of the prayers is technically proper, as undoubtedly it would be allowed, without costs.

The decree may be modified so far as to make it clear that the plaintiff recovers but one bill of costs, which we presume is all that it means in its present form.

Decree for plaintiff.

(167 Mass. 211)

POLSON v. STEWART.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1897.)HUSBAND AND WIFE — NONRESIDENTS — LOCAL
LANDS—CONTRACT—VALIDITY—FORBEARANCE
TO SUE FOR DIVORCE—CONSIDERATIONS.

1. While a husband and wife were domiciled in North Carolina, the wife took steps which, under the North Carolina statutes, gave her the right to contract as a feme sole, with her husband as well as with others, and she afterwards released her dower in her husband's lands. In consideration of this release, and for other adequate considerations, the husband executed a covenant to her to surrender all his marital rights in certain lands owned by her in Massachusetts. Held, that the validity of the contract, and the competency of the wife to receive the covenant, were to be determined by the law of North Carolina.

2. A husband's covenant "to surrender, convey, and transfer to said [wife] and her heirs all the rights of him, the said [husband], in and to lands, * * * which he may have acquired by reason of the aforesaid marriage, and the said [wife] is to have the full and absolute control and possession of all of said property, free and discharged of all the rights, claims, or demands of every nature whatsoever of the said [husband]," bound him not to disturb his wife's enjoyment while she kept her property, to execute whatever instrument was necessary in order to release his rights if she conveyed, and to claim no rights on her death, but to then do whatever was necessary to clear the title from such rights.

3. To forbear bringing a well-founded suit for divorce is a sufficient and legal consideration for a covenant.

4. Where a release of dower is one of several considerations for a covenant executed by the husband, and the release is void on its face as a matter of law, the husband must be taken to have known it, and it may be disregarded, leaving the covenant to be supported by the other considerations.

Field, C. J., dissenting.

Bill by one Polson, administrator, against Henry Stewart, Jr., to enforce a covenant. The defendant demurs. Overruled.

Jabex Fos, for plaintiff. George Upham, for defendant.

HOLMES, J. This is a bill to enforce a covenant made by the defendant to his wife, the plaintiff's intestate, in North Carolina, to surrender all his marital rights in certain land of hers. The land is in Massachusetts. The parties to the covenant were domiciled in North Carolina. According to the bill, the wife took steps which, under the North Carolina statutes, gave her the right to contract as a feme sole with her husband as well as with others, and afterwards released her dower in the defendant's lands. In consideration of this release, and to induce his wife to forbear suing for divorce, for which she had just cause, and for other adequate considerations, the defendant executed the covenant. The defendant demurs.

The argument in support of the demurrer goes a little further than is open on the allegations of the bill. It suggests that the instrument which made the wife a "free trader," in the language of the statute, did not go into effect until after the execution of the release of dower and of the defendant's covenant. But the allegation is that the last-mentioned two deeds were executed after the wife became a free trader, as they probably were in fact, notwithstanding their bearing date earlier than the registration of the free trader instrument. We must assume that at the date of their dealings together the defendant and his wife had as large a freedom to contract together as the laws of their domicile could give them.

But it is said that the laws of the parties' domicile could not authorize a contract between them as to lands in Massachusetts. Obviously, this is not true. It is true that the laws of other states cannot render valid conveyances of property within our borders which our laws say are void, for the plain reason that we have exclusive power over the res. *Ross v. Ross*, 129 Mass. 243, 246; *Hallgarten v. Oldham*, 135 Mass. 1, 7, 8. But the same reason inverted establishes that the *lex rei sitæ* cannot control personal covenants not purporting to be conveyances, between persons outside the jurisdiction, although concerning a thing within it. Whatever the covenant, the laws of North Carolina could subject the defendant's property to seizure on execution, and his person to imprisonment, for a failure to perform it. Therefore, on principle, the law of North Carolina determines the validity of the contract. Such precedents as there are, are on the same side. The most important intimations to the contrary which we have seen are a brief note in *Story, Conf. Laws*, § 436, and the doubts expressed in *Mr. Dicey's* very able and valuable book. Lord Cottenham stated and enforced the rule in the clearest way in *Ex parte Pollard*, 4 Deac. 27, 40, et seq.; *Id.*, *Mont. & C.* 239, 250. So Lord Romilly, in *Cood v. Cood*, 33 Beav. 314, 322. So in Scotland, in a case like the present, where the contract enforced was the wife's. *Findlater v. Seafield* (Feb. 8, 1814)

17 Fac. Col. 553. See, also, *Cuninghame v. Semple*, 6 Mor. Dict. 4462; *Ersk. Inst. bk. 3*, tit. 2, § 40; *Westl. Priv. Int. Law* (3d Ed.) § 172; *Ror. Int. St. Law* (2d Ed.) 289.

If valid by the law of North Carolina, there is no reason why the contract should not be enforced here. The general principle is familiar. Without considering the argument addressed to us that such a contract would have been good in equity if made here (*Holmes v. Winchester*, 133 Mass. 140; *Jones v. Clifton*, 101 U. S. 225; *Bean v. Patterson*, 122 U. S. 496, 499, 7 Sup. Ct. 1298), we see no ground of policy for an exception. The statutory limits which have been found to the power of a wife to release dower (*Mason v. Mason*, 140 Mass. 63, 3 N. E. 19; *Peaslee v. Peaslee*, 147 Mass. 171, 181, 17 N. E. 506), do not prevent a husband from making a valid covenant that he will not claim marital rights with any person competent to receive a covenant from him (*Charles v. Charles*, 8 Grat. 486; *Logan v. Birkett*, 1 Mylne & K. 220; *Marshall v. Beall*, 6 How. 70). The competency of the wife to receive the covenant is established by the law of her domicile, and of the place of the contract. The laws of Massachusetts do not make it impossible for him specifically to perform his undertaking. He can give a release which will be good by Massachusetts law. If it be said that the rights of the administrator are only derivative from the wife, we agree, and we do not for a moment regard any one as privy to the contract except as representing the wife. But, if then it be asked whether she could have enforced the contract during her life, an answer in the affirmative is made easy by considering exactly what the defendant undertook to do. So far as occurs to us, he undertook three things: First, not to disturb his wife's enjoyment while she kept her property; second, to execute whatever instrument was necessary in order to release his right if she conveyed; and third, to claim no rights on her death, but to do whatever was necessary to clear the title from such rights then. All these things were as capable of performance in Massachusetts as they would have been in North Carolina. Indeed, all the purposes of the covenant could have been secured at once in the lifetime of the wife by a joint conveyance of the property to a trustee upon trusts properly limited.

It will be seen that the case does not raise the question as to what the common law and the presumed law of North Carolina would be as to a North Carolina contract calling for acts in Massachusetts, or concerning property in Massachusetts, which could not be done consistently with Massachusetts law.

With regard to the construction of the defendant's covenant we have no doubt. It is "to surrender, convey, and transfer to said Kitty T. Polson Stewart, Jr., and her heirs, all the rights of him, the said Henry Stewart, Jr., in and to the lands and property above described which he may have acquired by reason of the aforesaid marriage; and the said Kitty T. Polson Stewart, Jr., is to have the full and absolute

control and possession of all of said property free and discharged of all the rights, claims, or demands of every nature whatsoever of the said Henry Stewart, Jr." Notwithstanding the decision of the majority in *Rochon v. Lecatt*, 2 *Stew.* (Ala.) 429, we think that it would be quibbling with the manifest intent to put an end to all claims of the defendant, if we were to distinguish between vested rights which had and those which had not yet become estates in the land, or between claims during the life of the wife and claims after her death. It is plain, too, that the words import a covenant for such further assurance as may be necessary to carry out the manifest object of the deed. See *Marshall v. Beall*, 6 How. 70; *Ward v. Thompson*, 6 Gill & J. 349; *Hutchins v. Dixon*, 11 Md. 29; *Hamrico v. Laird*, 10 Yerg. 222; *Mason v. Deese*, 30 Ga. 308; *McLeod v. Board*, 30 Tex. 238.

Objections are urged against the consideration. The instrument is alleged to have been a covenant. It is set forth, and mentions one dollar as the consideration. But the bill alleges others, to which we have referred. It is argued that one of them—forbearance to bring a well-founded suit for divorce—was illegal. The judgment of the majority in *Merrill v. Peaslee*, 146 Mass. 460, 463, 16 N. E. 271, expressly guarded itself against sanctioning such a notion, and decisions of the greatest weight referred to in that case show that such a consideration is both sufficient and legal. *Newsome v. Newsome*, L. R. 2 Prob. & Div. 306, 312; *Wilson v. Wilson*, 1 H. L. Cas. 538, 574; *Besant v. Wood*, 12 Ch. Div. 605, 622; *Hart v. Hart*, 18 Ch. Div. 670, 685; *Adams v. Adams*, 91 N. Y. 381; *Sterling v. Sterling*, 12 Ga. 201. Then it is said that the wife's agreement in bar of her dower was invalid, because it had not the certificate that she had been examined, etc., as required by the North Carolina statutes annexed to the bill. Whether it was invalid or not, the defendant was content with it, and accepted the execution of it as a consideration. This being so, it would be hard to say that it was not one, even if without legal effect. Whether void or not, it is alleged to have been performed; and, finally, if it was void, it was void on its face as matter of law, and the husband must be taken to have known it; so that the most that could be done would be to disregard it. If that were done, the other considerations would be sufficient. See *Jones v. Waite*, 5 Blng. N. C. 341, 351.

Demurrer overruled.

FIELD, C. J. (dissenting). I cannot assent to the opinion of a majority of the court. By out law, husband and wife are under a general disability or incapacity to make contracts with each other. The decision in *Whitney v. Closson*, 138 Mass. 49, shows, I think, that the contract sued on would not be enforced if the husband and wife had been domiciled in Massachusetts when it

was made. As a conveyance made directly between husband and wife of an interest in Massachusetts land would be void although the parties were domiciled in North Carolina when it was made, and by the laws of North Carolina were authorized to make such a conveyance, so I think that a contract for such a conveyance between the same persons also would be void. It seems to me illogical to say that we will not permit a conveyance of Massachusetts land directly between husband and wife, wherever they may have their domicile, and yet say that they may make a contract to convey such land from one to the other, which our courts will enforce. It is possible to abandon the rule of *lex rei sitæ*, but to keep it for conveyances of land and to abandon it for contracts to convey land seems to me unwarrantable.

The question of the validity of a mortgage of land in this commonwealth is to be decided by the law here, although the mortgage was executed elsewhere, where the parties resided, and would have been void if upon land there situated. *Goddard v. Sawyer*, 9 Allen, 78. "It is a settled principle that 'the title to and disposition of real estate must be exclusively regulated by the law of the place in which it is situated.'" *Cutter v. Davenport*, 1 Pick. 81; *Osborn v. Adams*, 18 Pick. 245. The testamentary execution of a power of appointment given by will in relation to land is governed by the *lex situs*, or the law of the domicile of the donor of the power. *Sewall v. Wilmer*, 132 Mass. 131.

The plaintiff's bill seems to me to proceed on the ground that Mrs. Henry Stewart, Jr., acquired by the instruments executed in North Carolina the right to have conveyed or released to her and her heirs by her husband all the interest he had as her husband in her lands in Massachusetts; that this right descended on her death to her heirs, according to the law of Massachusetts; and that the plaintiff, being an heir, has acquired the interest of the other heirs, and therefore brings the bill as owner of this right. The plaintiff, as heir, claims by descent from Mrs. Stewart, and, if the contract sued on is void as to her, it is void as to him. It is only on the ground that the contract conveyed an equitable title that the plaintiff, as heir, has any standing in court. His counsel founds his argument on the distinction between a conveyance of the legal title to land and a contract to convey it. If the instrument relied on purported to convey the legal title, his counsel in effect admits that it would be void by our law. He accepts the doctrine stated in *Ross v. Ross*, 129 Mass. 243, 246, as follows: "And the validity of any transfer of real estate by act of the owner, whether *inter vivos* or by will, is to be determined, even as regards the capacity of the grantor or testator, by the law of the state in which the land is situated." As a contract purporting to convey a right in equity to obtain the legal title to land, he contends that it is

valid. I do not dispute the cases cited with reference to contracts concerning personal property; but the rule at common law in regard to the capacity of parties to make contracts concerning real property, as I read the cases and text-books, is that the *lex situs* governs. *Cochran v. Benton*, 126 Ind. 58, 25 N. E. 870; *Doyle v. McGuire*, 38 Iowa, 410; *Sell v. Miller*, 11 Ohio St. 331; *Johnston v. Gawtry*, 11 Mo. App. 322; *Frierson v. Williams*, 57 Miss. 451. *Dicey on the Conflict of Laws* is the latest text-book on the subject. He states the rule in many places as follows:

Page lxxxix: "(B) Validity of Contract.

(i) Capacity. Rule 146. Subject to the exceptions hereinafter mentioned, a person's capacity to enter into a contract is governed by the law of his domicile (*lex domicilii*) at the time of the making of the contract: (1) If he has such capacity by that law, the contract is, in so far as its validity depends upon his capacity, valid. (2) If he has not such capacity by that law, the contract is invalid. Exception 1: A person's capacity to bind himself by an ordinary mercantile contract is (probably) governed by the law of the country where the contract is made (*lex loco contractus*) (?). Exception 2: A person's capacity to contract in respect of an immovable (land) is governed by the *lex situs*."

Page xcii: "(A) Contracts with Regard to Immovables. Rule 151. The effect of a contract with regard to an immovable is governed by the proper law of the contract (?). The proper law of such contract is, in general, the law of the country where the immovable is situate (*lex situs*)."

On page 517 et seq. he states the law in the same way, with numerous illustrations, but with some hesitation as to the law governing the forms of contracts to convey immovables. See page xc., rule 147, exception 1. For American notes with cases, see page 527 et seq. In the Appendix (page 769, note B) he discusses the subject at length, and with the same result. Some of the cases there cited are the following: *Succession of Larendon*, 39 La. Ann. 952, 3 South. 219; *Besse v. Pellochoux*, 73 Ill. 285; *Fuss v. Fuss*, 24 Wis. 256; *Moore v. Church*, 70 Iowa, 208, 30 N. W. 855; *Heine v. Insurance Co.*, 45 La. Ann. 770, 13 South. 1; *Bank v. Hughes*, 10 Mo. App. 7; *Ordroneaux v. Rey*, 2 Sandf. Ch. 33; *Adams v. Clutterbuck*, 10 Q. B. Div. 403; *Chapman v. Robertson*, 6 Paige, 627, 630.

Phillimore states the law as follows (4 *Phillim. Int. Law*, 3d Ed., p. 596):

"DCCXXXV. (1) The case of a contract respecting the transfer of immovable property illustrates the variety of the rules which the foreign writers upon private international law consider applicable to a contract to which a foreigner is a party. (i.) The capacity of the obligor to enter into the contract is determined by reference to the law of his domicile (b). (ii.) The like capacity of the obligee by the law of his domicile. (iii.) The mode of alienation or acquisition of the im-

movable property is to be governed by the law of the situation of that property (c). (iv.) The external form of the contract is to be governed by the law of the place in which the contract is made. It is even suggested by Feelix that sometimes the interpretation of the contract may require the application of a fifth law.

"DCCXXXVI. The law of England and the law of the North American United States require the application of the *lex rei sitæ* to all the four predicaments mentioned in the last section.

"DCCXXXVII. But a distinction is to be taken between contracts to transfer property and the contracts by which it is transferred. The former are valid if executed according to the *lex loci contractus*; the latter require for their validity a compliance with the forms prescribed by the *lex rei sitæ*. Without this compliance, the dominum in the property will not pass."

To the same effect as to the capacity of the parties are *Nels. Priv. Int. Law*, 147, 260; *Ratt. Priv. Int. Law*, 128; *Whart. Conf. Laws* (2d Ed.) §§ 424, 428-431, 435; *Ror. Int. St. Law*, 263. See *Westl. Priv. Int. Law* (3d Ed.) §§ 156, 167, et seq.

On reason and authority I think it cannot be held that, although a deed between a husband and his wife domiciled in North Carolina, of the rights of each in the lands of the other in Massachusetts, is void as a conveyance by reason of the incapacity of the parties to make and receive such a conveyance to and from each other, yet, if there are covenants in the deed to make a good title, the covenants can be specifically enforced by our courts, and a conveyance compelled, which, if voluntarily made between the parties, would be held void. I doubt if all of the instruments relied on have been executed in accordance with the statutes of North Carolina. By section 1828 of the Code of that state, set out in the papers, the wife became a free trader from the time of registration. This, I understand, is January 7, 1893. Exhibit B purports to have been executed before that time, to wit, January 4, 1893. There does not appear to have been any examination of the wife separate and apart from her husband, as required by section 1835. If Exhibit B fails, there is at least a partial failure of consideration for Exhibit C. It is said that an additional consideration is alleged, viz. the wife's forbearing to bring a suit for divorce. Whether this last is a sufficient consideration for a contract, I do not consider. It is plain enough that there was an attempt on the part of the husband and wife to continue to live separate and apart from each other without divorce, and to release to each other all the property rights each had in the property of the other. If the release of one fails, I think that this court should not specifically enforce the release of the other. Mutuality in this respect is of the essence of the transaction. If the husband

owned lands in Massachusetts, and had died before his wife, I do not think that Exhibit B, even if it were executed according to the statutes of North Carolina, and the wife duly examined, and a certificate thereof duly made, would bar her of her dower. Our statutes provide how dower may be barred. Pub. St. c. 124, §§ 6-9. Exhibit B is not within the statute. See *Mason v. Mason*, 140 Mass. 63, 3 N. E. 19. Antenuptial contracts have been enforced here in equity so as to operate as a bar of dower, even if they did not constitute a legal bar. *Jenkins v. Holt*, 109 Mass. 261. But postnuptial contracts, so far as I am aware, never have been enforced here so as to bar dower, unless they conform to the statutes. *Whitney v. Closson*, supra. Whatever may be true of contracts between husband and wife made in or when they are domiciled in other jurisdictions, so far as personal property or personal liability is concerned, I think that contracts affecting the title to real property situate within the commonwealth should be such as are authorized by our laws. I am of opinion that the bill should be dismissed.

(187 Mass. 415)

DRENNAN v. GRADY.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 11, 1897.)

NEGLIGENCE — INJURY TO CUSTOMER — EVIDENCE.

The questions of plaintiff's due care and defendant's negligence are for the jury, on testimony of plaintiff, who was quite deaf, that, after going into defendant's saloon, and buying a glass of beer of M. who was behind the bar, he went to the water closet provided for customers; that, during his absence, M. opened a trapdoor, over which he had to pass, and went into the cellar; and that, on his way back, he fell into the opening, not seeing it because of light shining in his eyes, and obstruction, by his body and the bar, of light which would have fallen on the floor,—though F., a bartender, testified that plaintiff did not ask for or receive any liquor, and that he warned plaintiff in a loud tone that the door was open, but he paid no attention thereto.

Exceptions from superior court, Suffolk county; Caleb Blodgett, Judge.

Action by one Drennan against one Grady for personal injuries received by plaintiff on defendant's premises. The court refused to rule, on all the evidence, that plaintiff could not recover, and defendant excepts. Exceptions overruled.

The facts, as recited in the bill of exceptions, are as follows:

"The defendant is the proprietor of a liquor store situated at Maverick street, in that part of Boston called East Boston, and said Maverick street runs almost east and west, the store being on the southerly side of said street. In the front of the store is the entrance, there being a large double door with two windows, the front of the store being almost entirely of glass. On the right of the door, upon entering, is an office,

and running towards the rear of the store is a bar, which runs at right angles with said Maverick street. Almost opposite the end of the bar, in the rear of the store, and on the opposite side from the bar, is a 'screen,' or 'cage,' so called, it being a portion of the floor inclosed with a wire fence about 6 feet high, which is used for the purpose of keeping liquors, cigars, and other merchandise in. At the end of the bar, near the inclosure, and about 2½ feet from it, is an opening into the cellar, and this is covered by a trapdoor, which has a ring in it, and which, when open, swings backward towards the wall on the westerly side of the store, but not near enough to clear it. This trapdoor is about 30 inches in width, and about 4 feet in length. Between the wall of the store and the wired inclosure is an open space, and at the end of the store is a window, opposite which window is a water closet and urinal. There is also a window in the opposite side of the room opening into this wire inclosure, and a window in front of the bar. It appeared in evidence that only the space in front of the bar is used by the general public and customers of the defendant when they come in there, and this trapdoor is in a part of the store not frequented or used by customers,—only those going towards said water closet or urinal. There was evidence tending to show that the water closet and urinal were provided and adapted for use by customers of the defendant who came to his store, and that the urinal, at least, was generally and frequently used by the different customers, with the consent of the defendant. The defendant's evidence tended to show that the water closet was kept locked, and that the customers could use it only upon application for the key, which was left in charge of the bartender; but the testimony of the plaintiff was that on the day in question it was unlocked, and one other witness for the plaintiff also testified that he had, at another time, visited the water closet, and found it unlocked. The trapdoor in question was located at the end of the counter or bar, and directly in the course of a person going to or from the water closet or urinal. On the easterly side of the store is an alley or narrow street, about 25 or 30 feet wide, and in the rear of the store is considerable space through which the light comes unobstructed to the windows above mentioned. It appeared that, on or about the 4th day of April, 1894, the plaintiff, who was then a man of about 65 years of age, and had been for years employed as a boiler maker, and had grown quite deaf, went into said premises of the defendant. The plaintiff testified that he went into the place about the middle of the forenoon, for the purpose of attending to a call of nature, and that, a short time after he entered, he bought and paid for a glass of beer from one of the servants of the defendant, named Moran,

who was standing behind the bar; that there was another man, named Flanagan, who was behind the bar, also, in the capacity of bartender, and who was waiting on some other customers; that, after purchasing the beer from Moran, he then proceeded to the rear of the store, to the water closet that was there, giving no notice to any one that he was going there; and that, during his absence, the man Moran lifted the trapdoor, and swung it back against the westerly wall, and went down into the cellar for some coal. The plaintiff, in walking back to the front part of the store, did not notice that the trapdoor had been raised, and fell into the opening. He did not fall into the cellar, as the other bartender, Flanagan, and a bystander, took hold of him by the coat and arm, and kept him from going clear through to the cellar; but, as he fell, he fell in such a way that three of his ribs were broken, one in two places, and he received certain other injuries and bruises, and was taken to the hospital afterwards for treatment. The plaintiff testified as to the location of the bar, the storeroom, the windows, the closet, and the trapdoor, and said that he had been in the premises before, and had on other occasions used the urinal and water closet, and, with reference to his knowledge of the trapdoor, testified as follows: 'Q. How big is that trapdoor? A. It is pretty long. I suppose it takes— There is one beam, I guess, cut out— Q. I asked you how large it is. A. As near as I could come to it,—I never measured,—but as near as I can come to it, it might be 30 inches wide, might be 4 feet long, might be 5 feet long. Q. How far is it from the water closet? A. From the water closet it is about the third step that you take. Q. From the water closet? A. Yes. Q. Now, as a man comes out of the water closet, to go around the front end of the bar, how near is this trapdoor in the course that you took? A. I have got to walk across that door going in and coming out. Q. Now, was the trapdoor up when you went into the water closet? A. No, sir; I walked on the door. When I went into the water closet, that door was down.' The plaintiff testified, in both direct and cross examination, that he did not see that the trapdoor was open, and gave as reasons therefor that the day was somewhat cloudy; that his person, as he came away from the water closet, obstructed the light from the window in the rear, and that the counter or bar obstructed the light from the window in front, and that the light from the windows in front, over the top of the bar, on a level with his chest, somewhat dazzled his eyes. Flanagan, one of the bartenders, a witness for defendant, testified that the plaintiff had been in the habit of going into the defendant's place of business, and had been seen there by him several times; that, on the morning in question, he (Flanagan) was behind the bar, and was

the only one in the store who was selling or dispensing any kind of liquor; that the plaintiff did not ask for, and did not receive, any liquor of any kind while there. Flanagan further testified that the man who worked with him, Moran, was cleaning up about the store, and had gone down into the cellar, by means of a trapdoor and ladder, for the purpose of getting some coal; that, while he was there, and while the trapdoor was open, he (Flanagan) stood by the trapdoor, nearest the bar, and he did not see the plaintiff until he had advanced to within four or five feet of the opening, and that he called out in a loud voice to the plaintiff, and warned him that the trapdoor was open; but that the plaintiff paid no attention to what he (Flanagan) said, but walked into the opening; and that the witness reached forward and caught him by the arm while the plaintiff was in the act of falling. Flanagan testified, on cross-examination, that while the plaintiff was in the store he waited on probably as many as 30 different customers; that he did not know that the plaintiff was at the urinal, and therefore was not watching to warn him; that he did not see him until he was four or five feet from the urinal; that he himself was within a foot of the trapdoor when he saw the plaintiff four or five feet from the opening; that he could have saved the plaintiff falling into the opening, if he had stepped across the opening, and stood between the plaintiff and the opening, but did not think it was necessary to do so. This was all the evidence in the case on the question of defendant's liability, other than the testimony of one or two witnesses as to the general use of the urinal by the customers of the defendant's store."

Sherman L. Whipple and George A. Saltmarsh, for plaintiff. Owen A. Galvin and James F. Sweeney, for defendant.

FIELD, C. J. There was evidence for the jury that the plaintiff was more than a mere licensee. There was evidence that the water closet and urinal were provided for the use of the customers of the defendant, and that the plaintiff was a customer. On the evidence, the questions of the due care of the plaintiff and of the negligence of the defendant were rightly left to the jury. *Hendricken v. Meadows*, 154 Mass. 599, 28 N. E. 1054. Exceptions overruled.

(167 Mass. 274)

DOLAN v. ATWATER et al.

(Supreme Judicial Court of Massachusetts.
Bristol. Jan. 7, 1897.)

INJURY TO SERVANT—DEFECTIVE APPLIANCES.

1. In an action for injuries sustained while unloading coal, by one of the tubs while being raised, filled with coal, emptying its contents, through the looseness of the latch which fastened the tub to its ball, plaintiff testified that the

latch was looser than others they were using, but that latches as loose were in common use. The looseness was from the original condition of the latch. The only other witness for plaintiff testified that a bucket would tip with a tight latch the same as with a loose latch. *Held*, no negligence shown.

2. An experienced coal shoveler, who knows that tubs used in unloading coal are liable to strike against the bulkhead of the wharf, and dump their contents, if the catch latch of the bucket is loose, assumes the risk of injury where he works in the hold of a barge where there is not room to get from beneath the buckets as they go up, without examining the catches on the buckets.

Exceptions from superior court, Bristol county; Robert R. Bishop, Judge.

Action by James Dolan against William O. Atwater and others for personal injuries. There was a verdict for defendants, and plaintiff excepts. Exceptions overruled.

Plaintiff was employed by defendants at their coal yard, and at the time of the accident was engaged in shoveling coal into a tub in the hold of a coal barge lying next to defendants' wharf. This tub was to be hoisted up out of the hold when filled, and, while so employed, another tub filled with coal, which had just been hoisted out of the same barge, struck against a projecting bulkhead or apron over defendants' wharf, and emptied itself of its contents, which fell upon plaintiff's head, causing the injuries complained of. The tub which emptied the coal is a large bucket or coal hod, made of iron, but so hung from its handle or bail that it will tip forward unless held in place by a catch or "side latch," which automatically fastens the tub to its bail whenever the tub is placed in an upright position.

J. W. Cummings and E. Higginson, for plaintiff. Jackson, Slade & Borden, for defendants.

BARKER, J. The only thing which the plaintiff contended was a defect was that the latch on the tub was a little looser than the latches on the other tubs in the yard. But he testified that tubs with latches as loose were in common use, and it did not appear that the looseness of the latch which he contended was defective came from wear or breakage, but, on the contrary, that it had long been in use in the same condition as on the day of the accident. While the plaintiff testified that tubs with tight latches would not dump on striking a bulkhead, and a tub with a loose latch would, the only other witness called by him testified that it made no difference that one latch worked with him just the same as the other, and that a tight latch would dump the same as a loose latch, and, upon still further questioning by the plaintiff's attorney, said that he did not know whether a tub with a loose latch would dump quicker or not. In our opinion, there was no sufficient evidence to justify a finding that the defendants were at fault.

The plaintiff had been a coal shoveler for

15 years, and was entirely familiar with the fact that the tubs, by striking the bulkhead or apron, were liable to be unlatched, and to dump the coal back into the hatchways of the vessel, and testified that tubs with latches like those on this one were used in other yards only when the coal had been so far removed from the hold that workmen in it could get out of the way. There were but two tubs in use on the morning of the accident. They were where he could examine them without interfering with his work; and their condition, and the fact that the hold was so full of coal that, if a tub should strike and dump, he could not get out of the way, were obvious, and must have enabled him, with due care, to have fully appreciated the risk that the tub which was in use on the other side of the hold, and which had gone up and down 40 or 50 times while he was at work, might dump coal upon him while the hold was so full that he could not get out of the way. Exceptions overruled.

(167 Mass. 406)

REAGAN v. BOSTON ELECTRIC LIGHT CO.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 11, 1897.)

NEGLIGENCE—CONTRIBUTORY NEGLIGENCE—INJURY FROM ELECTRIC WIRE—GROUNDS OF LIABILITY.

1. Plaintiff, while making repairs on the edge of a roof, came in contact with a live electric light wire of defendant, attached to a support fastened to the roof, and received a shock which caused him to fall, and he was injured. He knew of the position of the wires, and that they might be charged. *Held*, that the question of contributory negligence was one for the jury.

2. The fact that an electric light company, having its wires attached to the roof of a building by permission of the owner, has contracted to make all needed repairs to the roof, does not deprive the owner of the right to send men on the roof to make repairs; and the company is liable for an injury resulting to a workman so employed, and in the exercise of ordinary care, from the negligent attachment of its wires, or its failure to keep them properly insulated.

Exceptions from superior court, Suffolk county; Caleb Blodgett, Judge.

Action of tort by William A. Reagan against the Boston Electric Light Company for personal injuries resulting to complainant from coming in contact with a live wire of defendant's system while on the roof of a building, making repairs, by reason of which he was caused to fall from the building. Defendant's wires were attached to a support fastened to the roof of the building with permission of the owner. Plaintiff alleged that the injury resulted from the negligent attachment of one of such wires, and its being allowed to remain insufficiently covered or insulated. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled.

M. W. Brick and Bordman Hall, for plaintiff. Everett W. Burdett and Charles A. Snow, for defendant.

FIELD, C. J. It is somewhat doubtful whether there was sufficient evidence of due care on the part of the plaintiff, but, on the whole, we think that this question, on the evidence, was for the jury. *Griffin v. Electric Light Co.*, 164 Mass. 492, 41 N. E. 675; *Illingsworth v. Electric Light Co.*, 161 Mass. 583, 37 N. E. 778. There was abundant evidence that the plaintiff was on the roof for the purpose of doing work for the owners of the building. He was in the employ of Smith & Howard, who were employed by one McLaughlin, who had a contract with the owners to make alterations and repairs upon the building, including the roof. If the work the plaintiff was doing was not within the contract, there was evidence that the agent of the owners had requested McLaughlin to have this work done. This was evidence that the plaintiff was rightfully on the roof, by an invitation which came mediately from the owners, and was engaged in work on the building for their benefit and at their request. *Griffin v. Electric Light Co.*, *ubi supra*.

It is contended by the defendant that the effect of the contract of the Brush Electric Light Company, to whose obligations the defendant had succeeded, was such that the defendant was bound to repair the roof. If this be so, still the owners of the building could repair the roof if they chose. The defendant was not the lessee or the occupant of the roof. It had the right, undoubtedly, while the contract continued in force, to enter upon the roof for the purpose of doing everything which it was required to do by the contract, but this right did not exclude the owners from making such repairs upon the roof as they thought necessary. Whether the repair of the gutter which the plaintiff was engaged in making was a repair of the roof, within the meaning of the contract, need not be determined. If it be so regarded, still the charge of the presiding justice upon the effect of the contract upon the duty of the defendant towards the plaintiff was sufficiently favorable to the defendant.

The court admitted, against the objection of the defendant, a bill for work done on the building, rendered by McLaughlin to the agent of the owners, and paid by the owners or their agent. This bill contained items of work done by the plaintiff and others, employees of Smith & Howard, and included the work of repairing the gutter, which the plaintiff was doing when he was injured. The ground of the defendant's objection is stated in the exceptions to be "that no connection had been shown, or was offered to be shown, between Hezekiah McLaughlin and Smith & Howard, the plaintiff's employers, or the plaintiff." But the testimony of Fessenden, the agent of the owners, was evidence that these men were employed to repair the edge of the roof at his request. A part of this testimony is set out in the margin: "Q. Did you have a contract with Smith & Howard

to do any work upon the roof of this building? A. No contract. * * * Q. Did you employ them to do any work upon the roof? A. Not directly. Q. Did you through anybody? A. Yes. Q. And through whom? A. Through Mr. McLaughlin. Q. Do you say you don't remember whether these men were employed by you, or the firm was employed by you? Do you say you can't remember whether you employed Smith & Howard? A. I didn't see Smith & Howard directly, and employ them. I asked Mr. McLaughlin to have some work done which was not in the regular contract. Q. In consequence of that, were these men employed? A. Yes. Q. To repair the roof and stop the leaks? A. Yes. Q. Do you remember at all about this work being done? A. I do. Q. Do you remember about this tin work being done on the edge of the roof? A. Yes, sir. Q. You knew of that personally? A. I did." We find no error in the exceptions. Exceptions overruled.

(167 Mass. 280)

Appeal of GLOVER.

McKIM, Judge, v. GLOVER.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1897.)

TRUSTS—SETTLEMENT OF TRUSTEE—COLLATERAL
ATTACK—SUIT ON PROBATE BOND.

1. Where the trustee of an estate invested trust funds in a mortgage owned by himself, on property worth much less than the amount invested, and the cestui que trust authorized the property to be bought in, but, on discovery of the fraud, repudiated the transaction, and demanded that the trustee take the property back, they may object to the allowance of the investment in the accounts of the trustee, on his settlement in the probate court, without first going into a court of equity to have the same set aside. Appeal of Nichols, 31 N. E. 683, 157 Mass. 20, and *McKim v. Glover*, 37 N. E. 443, 161 Mass. 422, reaffirmed.

2. In a suit on a probate bond, founded on the failure of a trustee to pay over the amount found due from him on his settlement in the probate court, it is not competent for either the principal or his sureties to attack collaterally the decree making such finding.

Appeal from probate court, Suffolk county, and exceptions to master's report.

Two cases,—The first being an appeal by Washington Glover from the denial of a petition to open a trustee's final account in the probate court, and the second on exceptions to a master's report in the action of John W. McKim, judge, against Glover, as administrator of a surety on the trustee's bond. Affirmed on appeal, and exceptions overruled.

Felix Rackemann and William F. Dana, for appellant. J. Brown Lord, for appellee.

KNOWLTON, J. As these two cases relate to the same controversy, and depend for the most part on the same facts, they were argued together, and they may both be considered in the same opinion.

The first of them is a petition to open a trustee's final account for the correction of

an alleged error in it. The decisions of this court in Appeal of Nichols, 157 Mass. 20, 31 N. E. 683, and in McKim v. Glover, 161 Mass. 422, 37 N. E. 443, which were made upon the facts now before us, go far towards settling the questions raised in this new phase of the controversy. In Appeal of Nichols, *ubi supra*, it was held that the decree of the probate court disallowing the item which the petitioner now seeks to have allowed was correct, and the petitioner's argument is virtually, although not in terms, a request that we reconsider the grounds of the decision in that case and overrule it. We see no reason for dissatisfaction with the result then reached. We assume that the probate court has power to open an account, for the correction of a manifest error, upon the application of a surety on the probate bond of the accountant. *Waters v. Stickney*, 12 Allen, 1; *Pierce v. Prescott*, 128 Mass. 140, 145; *Cleveland v. Quilty*, Id. 578. But the appellant's contention that the disallowance of the item was erroneous is not well founded. The accountant was chargeable with the funds which came into his hands as trustee. He asked to be allowed for an investment in a mortgage which he owned, and which he assigned through a third person to himself as trustee. The mortgaged property was not worth nearly so much as the money loaned upon it, and its assignment was a fraud upon the cestuis que trust. As they objected to it when his account was presented for allowance, it is clear that it was rightly disallowed, unless by their conduct they had lost the right to object to it. In ignorance of the fraud practiced upon them in making the investment, and relying upon the fraudulent representation of the trustee, they had authorized him to buy the property for them at a foreclosure sale under the mortgage. After taking the title, they acted under the advice of the trustee in regard to the management of the property, until, coming from New Jersey to Boston, and seeing it for the first time, they began to think that they had been misled. After trying for a while to sell the property, they became aware of the extent of the fraud practiced upon them, demanded of him that he should take it back, and not long afterwards tendered him a deed of it. In the two decisions first referred to it was held that the cestuis que trust acted with proper diligence to preserve their rights after the discovery of the fraud. A further consideration of the facts leaves us still of the same opinion. The petitioner's contention that the cestuis que trust could not put themselves in a position to have this investment disallowed, and the trustee held for the money which it represented, without first seeking the aid of a court of equity, is not sound. If they offered to restore that which they were induced by his fraud to receive, and held themselves in readiness to perform their

offer, it was enough. Upon their objection the investment of the fund in the mortgage was to be treated as void from the beginning, and, if they were willing to deal fairly with the trustee in regard to their holding of the property, which was all the time equitably his, their rights in regard to the accounting in the probate court were not to be prejudiced by his neglect or refusal to take back the title when it was offered him. We are of opinion that the decree of the probate court denying the prayer of the petition should be affirmed.

The second suit is an action on the probate bond, founded on the failure of the trustee to pay over the balance found due by the probate court on the accounts. In *McKim v. Glover*, 161 Mass. 418, 37 N. E. 443, it was held that the conduct of the cestuis que trust in regard to the property was not an exoneration of the sureties on the probate bond, and judgment was rendered for the penal sum. At the hearing before the master appointed to determine for how much justice and equity require that execution should issue, the defendant raised certain questions, which were not considered in detail in the former decision, but which must be decided adversely to the defendant on grounds already stated in this opinion. The evidence taken by the master does not change the legal aspect of the case. If the defendant, as surety, pays the amount due on the account, he will be subrogated to the right of the principal to the mortgaged property. There is also another ground which leads to the same result. In a suit upon a probate bond, founded on the failure of a trustee to pay over the estate remaining in his hands, or due from him on the settlement of his account in the probate court, it is not competent either for the principal or the sureties to attack collaterally the decree of the probate court fixing the amount due on the account. *Heard v. Lodge*, 20 Pick. 53; *White v. Weatherbee*, 126 Mass. 452; *Stovall v. Banks*, 10 Wall. 553; *Bralden v. Mercer*, 44 Ohio St. 339, 7 N. E. 155; *Holden v. Lathrop*, 65 Mich. 652, 32 N. W. 879. See, also, *Tracy v. Goodwin*, 5 Allen, 409; *Way v. Lewis*, 115 Mass. 26; *Tracy v. Maloney*, 105 Mass. 90; *Cutter v. Evans*, 115 Mass. 27. On this ground, as well as the other, the exceptions to the master's report must be overruled, and execution must be issued for the amount found due by the master. So ordered.

(167 Mass. 311)

TOWNE v. CITY OF NEWTON.

(Supreme Judicial Court of Massachusetts, Middlesex. Jan. 8, 1897.)

MUNICIPAL CORPORATIONS — LAND TAKEN FOR A PUBLIC STREET—ABUTTING OWNER'S RIGHTS.

Where a city, in taking land for a street, appropriates a strip on each side of it for slopes

for banks, abutting property owners have no right to erect a retaining wall on any portion of the land reserved for slopes, without the city's consent.

Exceptions from superior court, Middlesex county; James R. Dunbar, Judge.

Petition by one Towne against the city of Newton to recover damages for land taken for a street. From a verdict in his favor, plaintiff brings exceptions. Overruled.

James E. Cotter and Richard M. Saltonstall, for petitioner. Winfield S. Slocum, City Sol., for defendant.

KNOWLTON, J. The respondent city laid out a street or boulevard 120 feet wide through the petitioner's land. On each side of the street, in addition to the land taken for this use, it took a strip 18 feet in width "to be used for sloping the bank for said street or public way so far as necessary therefor." On the petitioner's land was a house about 54 feet from the outside line of the 18-foot strip. There was evidence that the land on each side of the street was suitable for building lots. Opposite the dwelling house the grade of the street was about 17 feet below the grade of the land at the house. There was evidence tending to show that, in the use of the petitioner's land, it would be desirable to construct a retaining wall between the street and the remaining land, and there was conflicting evidence as to the probable expense of such a wall. The only exception relied on by the respondent is to the instruction of the presiding judge that the petitioner would have no right to construct a retaining wall either on the 120-foot strip, or on any portion of the 18-foot strip, without making some arrangement with the authorities of the city. The judge gave very full and plain instructions in regard to the rights of each of the parties to use the 18-foot strip, to which no exceptions were taken. These were, in substance, omitting the illustrations and explanations, that the city could use it in any reasonable way for the sloping of the bank, and that the petitioner could make any use of it that would not interfere with the exercise of this right. *Clark v. City of Worcester*, 125 Mass. 226; *Morton v. Moore*, 15 Gray, 573-576; *Com. v. King*, 13 Metc. (Mass.) 115-119; *Allen v. City of Boston*, 159 Mass. 324, 34 N. E. 519. He went further,—and this is the only part of the instruction that is objected to,—and told the jury that the building of a retaining wall on the 18-foot strip, or on the line between that and the traveled part of the street, would be an encroachment upon the city's rights that would interfere with possible methods of using the land for sloping the bank which the city might choose to adopt. It is argued that the jury should have been left to decide, as a question of fact, whether the building of such a wall would interfere with any possible use of the land that the city could lawfully make. If, considered as a practical question, there is rea-

sonable doubt about the answer to it, it should have been left to the jury. The counsel for the respondent has not questioned the absolute right of the city to use the land for sloping the bank as it may choose, and he has not pointed out any way in which a retaining wall could be built without interfering with possible methods of sloping and finishing the bank that the city might select. Having reference to the beauty as well as the security of the bank, it might slope the land at a certain grade, and cover it with turf. Having finished the slope at one grade, it might desire to change it to another. We are unable to see how the petitioner could construct a retaining wall that might not be an obstruction in the way of work which the city might wish to do. We understand from the bill of exceptions that the retaining wall referred to in the evidence was one that would come to the surface of the ground, and in the absence of anything to show that a different kind of wall was meant, or that such a wall could be built without interfering with some method of sloping the bank that the city might at some time adopt, we are of opinion that the instruction was right. Exceptions overruled.

(187 Mass. 341)

LEXINGTON PRINT WORKS v. INHABITANTS OF CANTON et al.

(Supreme Judicial Court of Massachusetts.
Norfolk. Jan. 8, 1897.)

TOWN—WATER SUPPLY—APPROPRIATION—VALIDITY—IDENTIFICATION OF PROPERTY TAKEN.

1. Where an act to supply a town with water provides that the description of water rights and water sources filed in the registry of deeds shall be sufficiently accurate for identification, the paper so filed stands in the place of a deed, to show what property has passed from the former owners to the town, and both parties are bound by the description contained in it.
2. Under St. 1885, c. 95, § 11 (An act to supply the town of C. with water), which provides that the said town may by a vote declare the quantity of water it proposes to take daily, and from what source, "and the quantity of water so declared shall be held to be the measure and limit of the right of said town to take or divert the waters of such sources," where the vote declares that the quantity so taken "shall not exceed one-half a million gallons daily," and the water commissioners of C. file an instrument in the registry of deeds defining the taking merely as "the waters of Y. pond and its tributaries, and B. brook and its tributaries," the instrument is void, because the description is not limited to the quantity which they were authorized by the vote to transfer to the town.

Appeal from supreme judicial court, Norfolk county.

Bill by the Lexington Print Works against the inhabitants of Canton and others to enjoin defendants' alleged unlawful interference with plaintiff's water power. From a decree in favor of defendants, plaintiff appeals. Reversed.

B. N. Johnson and W. N. Buffum, for appellant. T. E. Grover and M. F. Ward, for appellees.

KNOWLTON, J. This is a bill brought to enjoin the defendants from an alleged unlawful interference with the plaintiff's water power, used in running its mills and factories. The case comes before us on the plaintiff's appeal from a decree sustaining the defendants' demurrer, and dismissing the bill. Under the authority of the statute of 1885 (chapter 95) and the statute of 1886 (chapter 168), the town of Canton could take all the waters of Beaver brook, on which the plaintiff's mills were situated, and the waters of several other sources of supply, for the use of the inhabitants of the town. The town duly accepted these acts of the legislature, and afterwards, on August 10, 1887, elected a board of water commissioners. It then had full power and authority to take the whole or any part of the waters of Beaver brook, in accordance with the provisions of the statutes. On October 12, 1894, the water commissioners filed in the registry of deeds for the county of Norfolk a paper of which the parts material to this case are as follows: "Commonwealth of Massachusetts, Norfolk—ss.: Whereas, by virtue of chapter 95 of the Acts of said commonwealth passed in the year 1885, being an act to supply the town of Canton with water, and chapter 168 of the Acts of said commonwealth passed in the year 1886, being an act in addition to an act to supply the town of Canton with water, the said town of Canton is authorized to take, by purchase or otherwise, and hold, the waters of York pond and its tributaries, and Beaver brook and its tributaries, in the towns of Canton and Stoughton, in said county, and the water rights connected with said water sources; * * * and whereas, said acts were duly accepted by a two-thirds vote of the voters of said town present and voting thereon, at a legal meeting called for the purpose within three years from the passage of the first of the aforesaid acts, to wit, on the 27th day of July, A. D. 1887; and whereas, by force of the provisions of said acts, and of the votes of said town duly passed at a legal meeting held for that purpose under the authority of said acts, the water commissioners were vested with all authority granted to the said town of Canton by said acts, and not otherwise specially provided for; and whereas, said town has been unable to purchase land and water herein taken and hereinafter described: Now, therefore, know all men by these presents, that the town of Canton, aforesaid, by its board of water commissioners, namely, Robert Bird, Michael F. Ward, and Thomas E. Grover, who, respectively, were elected by ballot by the inhabitants of said town as members of the board aforesaid, by virtue of the power and authority above recited, and all other powers and rights thereto enabling and in part execution thereof, has within sixty days last past, to wit, on the 14th day of August, A. D. 1894, entered upon and taken, and deemed it necessary to take, and does hereby take and hold, for the use of said town of Canton, the waters of York pond and its tributaries, and of Beaver

brook and its tributaries, in the towns of Canton and Stoughton, in said county. In witness whereof, the said town of Canton has caused its name and common seal to be hereto affixed by the board of water commissioners; and we, Robert Bird, Michael F. Ward, and Thomas E. Grover, the board of water commissioners of said town, acting in its behalf and by the authority of the statutes, and of the votes above recited, have hereto severally signed our names, this tenth day of October, A. D. 1894. The Inhabitants of the Town of Canton, by Robert Bird, Michael F. Ward, Thomas E. Grover, Water Commissioners. [Corporate Seal.]"

The question is whether the town has lawfully taken the whole or any part of the waters of Beaver brook. The statute of 1885 (chapter 95, § 11) provides that "the said town may, at a legal town meeting called for that purpose, by a vote of said town, declare the quantity of water it proposes to take daily and from what source, and the quantity of water so declared shall be held to be the measure and limit of the right of said town to take or divert the waters of such sources under this act." At a meeting of the town held on September 14, 1887, it was voted to take the waters of Beaver Hole, Meadow brook, and York pond and its tributaries, and of Beaver brook and its tributaries, and the board of water commissioners were instructed to take such action as was necessary for that purpose. The vote ended with these words: "Provided, and it is intended by this vote to declare, that the quantity of water so taken shall not exceed one-half a million gallons daily." The taking filed in the registry of deeds purported to include all the waters of Beaver brook. The town originally had a right to take all of these waters. The recitals in the written act of taking implied that the town and the water commissioners still had this right. Looking to this paper alone, no one would doubt that all the waters of the brook had been taken. But the right of the town and of the water commissioners had been limited by vote of the town, declaring the quantity of water it proposed to take daily, and the act of the water commissioners, if interpreted according to its plain language, was unauthorized and illegal.

It is settled by many cases that the recorded act of taking fixes the rights of the parties. It is of the highest importance to one whose real estate is taken that the record show exactly the measure of the interference with his ownership. In *Glover v. City of Boston*, 14 Gray, 282-288, is this language: "The appropriation of private property to the public use, which is one of the highest acts of sovereign power, should not be accomplished by the use of ambiguous or uncertain language. The presumption is in favor of the owner of the land, and every act done by public authority which interferes with his rights should be, as it always may be, clear and intelligible." By St. 1885, c. 95, § 3, it is provided that the description of water rights and water sources, filed in

the registry of deeds, shall be sufficiently accurate for identification. The paper so filed stands in the place of a deed, to show what property has passed from the former owner to the town. Both parties are bound by the description contained in it. *Ham v. City of Salem*, 100 Mass. 350; *Wilson v. City of Lynn*, 119 Mass. 174; *Wameist Power Co. v. Allen*, 120 Mass. 352; *Warren v. Water Co.*, 143 Mass. 9, 8 N. E. 603; *Kenison v. Arlington*, 144 Mass. 456, 11 N. E. 705; *Woodbury v. Water Co.*, 145 Mass. 109, 15 N. E. 232; *Hollingsworth & Vose Co. v. Foxborough Water-Supply Dist.*, 165 Mass. 183, 42 N. E. 574.

It is contended by the defendants that this act of taking, which is confessedly invalid, as a taking of all the property which it purports to take, should be held good as to that part of the water which the town and the water commissioners then had authority to take. This contention, if upheld, would deprive the plaintiff of his right to look solely to the record of taking for a description of the property taken, and would require him to search the record of votes of the town to see whether it had ever limited its authority by its own act. If such limitation was found, the landowner would be obliged to determine its extent, and apply it to the description contained in the registry of deeds, and take from the property therein described all in excess of that which could lawfully be taken under the limitation. There would be no instrument truly defining the property transferred to the town, and nothing of record to show the state of the title in the place where titles to real estate are expected to be exhibited for the information of all who are interested in them. We are of opinion that the owners of water rights upon the brook are not required to search the records of the town to see whether the terms of the taking are to be changed by a limitation imposed by the town upon its own authority, under the statute. The water commissioners having assumed to take that which they were not authorized to take, their taking was void. Decree reversed. Demurrer overruled.

(167 Mass. 307)

PETTENGILL v. ABBOT, et al.

(Supreme Judicial Court of Massachusetts,
Middlesex. Jan. 8, 1897.)

SPECIAL ADMINISTRATOR—PURCHASE OF BURIAL LOT BY WIDOW—LIABILITY FOR CONVERSION.

Under Pub. St. c. 130, § 1, which entitles the widow, by preference, to the administration of her deceased husband's estate; Id. c. 132, § 18, which allows an executor de son tort to retain funeral expenses actually paid; and Id. c. 144, § 6, which makes a reasonable sum expended for a burial lot a part of the funeral expenses, —a widow who, before letters are granted, pays from the estate the ordinary funeral expenses of her intestate husband, and the reasonable price of a burial lot, is not liable for thus converting the assets of the estate.

Report from superior court, Middlesex county; Braley, Judge.

This was an action of tort by one Petten-gill, as special administrator of the estate of L. A. Abbott, to recover of defendants certain property of said Abbott, alleged to have been wrongfully converted. When Abbott died, his wife, who for some time had not been living with him, took \$500 that was found upon him, and, in good faith, spent the whole for funeral expenses and expenses of his last sickness, and for a burial lot, for which latter she paid \$307. As the deceased left no other property, there were not sufficient assets with which to pay his debts. The superior court found that the expenditure for the lot was reasonable, and ordered judgment for the defendants, and reported the case to the supreme judicial court. Judgment affirmed.

A. V. Lynde and W. P. Harding, for plaintiff. C. W. Bartlett and E. R. Anderson, for defendants.

ALLEN, J. The plaintiff contends that the widow's expenditure for the burial lot and its perpetual care was not, in a proper construction of the statutes, reasonable, proper, or necessary, and that this is a question of law. The deceased, we infer, died intestate; and the widow was entitled, by preference, to administration. Pub. St. c. 130, § 1. She was therefore a proper person to intermeddle with his estate, and to attend to such things as must be done before letters of administration could be taken out. *Perkins v. Ladd*, 114 Mass. 420. Providing a suitable place of burial was a matter of this sort, and as was said in *Sweeney v. Muldoon*, 139 Mass. 304, 31 N. E. 720, the law pledges the credit of the estate for the payment of such reasonable sums of money as are expended for that purpose. By Pub. St. c. 144, § 6, a reasonable sum expended for a burial lot is treated as part of the funeral expenses. If she was an executor in her own wrong, she might be allowed to retain funeral expenses actually paid by her. Pub. St. c. 132, § 18. What would be a reasonable sum to pay for a burial lot would depend on the circumstances. If a suitable lot in another suitable cemetery could have been got at a moderate price, the sum paid by the defendant would seem to be high. But this, after all, is a question which is not for us. The judge who heard the case found that her expenditure was made in good faith, and that, under the circumstances, it was reasonable and proper. If, under any circumstances, we could review this finding, not enough facts are reported to enable us to do so, or to determine what sum would be reasonable for that purpose. Judgment affirmed.

(167 Mass. 309)

PIKE v. McINTOSH.(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 8, 1897.)**EVIDENCE—PAROL AGREEMENT TO VARY WRITING.**

Under a written agreement, signed by defendant and accepted by plaintiff, providing that, "if I conclude to build more of your kilns, I will pay you \$1,000 for the right to use them," defendant cannot show that a kiln subsequently built by him was for experiment, and, by oral agreement made at the same time, was not to be considered as within the contract to pay the royalty.

Exceptions from superior court, Middlesex county; Bishop, Judge.

Action by Pike against McIntosh on contract. Verdict for plaintiff, and defendant brings exceptions. Overruled.

This was an action of contract, to recover \$1,000, upon the following memorandum or agreement signed by the defendant: "I will pay the bill for kiln built at Revere, but will not pay the \$250 for right to use it. If I conclude to build more of your kilns, I will pay you \$1,000 for the right to use them, providing you give me a plan of your kilns plain enough to work by. [Signed] David McIntosh." The plaintiff built a patented kiln in the defendant's yard in Revere, with the understanding that, if it proved satisfactory, the defendant should pay the cost of it, and \$250 for the right to use it. The kiln was a failure. It did not produce the results represented, and the defendant refused to pay for it. The plaintiff said the failure was because the walls were too thin, and after some discussion the defendant told the plaintiff that he would pay the cost of the kiln, but not the royalty, and would build another kiln, at his own expense, as a test kiln, and then, if he concluded to adopt the system in his yard, he would pay \$1,000 for the right. The plaintiff requested him to put it in writing, and the defendant wrote the paper declared on. The defendant built another kiln, as a test of the machine, according to his offer. The plaintiff claims that the defendant is liable for the \$1,000 specified in the paper. The contention of the defendant is that the second kiln was a test kiln built according to the oral agreement. The court ruled that the oral testimony was inadmissible.

Wiggin & Fernald, for plaintiff. D. C. Linscott, for defendant.

ALLEN, J. So far as the construction of the written agreement declared on is concerned, the case falls within the general rule that it could not be varied by parol evidence. According to the testimony of both parties, their talk resulted in the written agreement, which is clear in its terms, and must be taken to express the result then arrived at. The first kiln was not satisfactory to the defendant, and he declined to pay for it. The plaintiff's bill was \$1,650 for the cost of the kiln, and \$250 more for the right to use it.

The parties had a discussion about it, and finally the defendant drew up and signed the written agreement, for the purpose of showing distinctly what his proposition was. This proposition was afterwards accepted by the plaintiff. The defendant afterwards built another kiln, according to plans furnished by the plaintiff, and he paid the \$1,650. The question is as to his liability to pay the further sum of \$1,000. The construction put upon the terms of this agreement was clearly right, and it could not be varied by oral evidence that at the time of making it the defendant was to have the right to build another kiln experimentally, without paying anything unless it should prove successful. *Doyle v. Dixon*, 12 Allen, 576. The instructions given to the jury as to the alleged later oral agreement were full and sufficient. Exceptions overruled.

(167 Mass. 298)

MOGE v. SOCIETE DE BIENFAISANCE ST. JEAN BAPTISTE.(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 8, 1897.)**BENEFIT INSURANCE—INCAPACITY TO WORK—RESULT OF SICKNESS OR ACCIDENT.**

Under a by-law of a society providing that "a member who shall find himself incapable of working by reason of sickness or accident shall receive the sum of \$5 per week," a member who becomes totally blind as the result of a disease produced by an accidental injury to one of his eyes is entitled to the weekly benefits.

Report from superior court, Middlesex county; C. S. Lilley, Judge.

Action by one Mogé against Société de Bienfaisance St. Jean Baptiste to recover benefits. Finding for plaintiff, and case reported. Judgment on finding.

This was an action to recover a benefit claimed to be due to plaintiff from defendant society by reason of disability to perform work owing to illness. The question before the court was whether, under the defendant's by-laws, plaintiff was "incapable of working by reason of sickness or accident"; plaintiff's disability consisting of total blindness.

W. S. B. Hopkins, Frank B. Smith, and John F. Jandron, for defendant. J. H. Guillet and J. J. Harvey, for plaintiff.

KNOWLTON, J. The plaintiff has been totally blind for many years. There seems to be no doubt, upon the evidence, that his blindness was caused by an accidental injury to one of his eyes, the effects of which gradually extended to the other. The judge found that his disability arises from total blindness, the result of an injury received about 20 years ago. The exception to the finding as not warranted by the evidence has not been argued, and the only other exception is to the refusal to rule that upon the evidence the plaintiff could not recover.

It is contended that the plaintiff's condition of total blindness, although the result of an injury which produced the disease in the eyes that finally left them sightless, does not entitle him to relief under the contract; and the argument, in substance, is that the contract gives the plaintiff a right to receive relief only so long as sickness continues, or as he is suffering the direct, primary effects of an accident. It is also contended that his blindness is not sickness, within the meaning of the contract. We think the argument is not sound. The stipulation of the contract is, according to the translation agreed to by the parties, that "a member who shall find himself incapable of working, by reason of sickness or accident, shall receive the sum of five dollars per week," etc. It is not denied that the plaintiff is a member who is incapable of working. He is in a condition of incapacity by reason of sickness or accident. Whether the diseased condition of the eyes caused by the accident be called "sickness," or not, is immaterial; for his condition of total blindness, which is a condition of incapacity to work, is by reason of an accident which injured one of his eyes, and through that injury deprived him of sight. The words "by reason of" refer to the active, efficient, procuring cause, of which the incapacity to work is the consequence. In *Freeman v. Association*, 156 Mass. 351-353, 30 N. E. 1013, which was an action on a policy insuring against death from accident, it is said that "an injury which might naturally produce death in a person of a certain temperament or state of health is the cause of his death if he dies by reason of it, even if he would not have died if his temperament or previous health had been different, and this is so as well when death comes through the medium of a disease directly induced by the injury as when the injury immediately interrupts the vital processes." So in *Lynn Gas & Electric Co. v. Meriden Ins. Co.*, 158 Mass. 570-575, 33 N. E. 690, 691, it is said that "the active, efficient cause that sets in motion a train of events which brings about a result, without the intervention of any cause starting and working actively from a new and independent source, is the 'direct and proximate cause' referred to in the cases." We are of opinion that the ruling was correct. Judgment on the finding.

(167 Mass. 313)

SCITUATE WATER CO. v. SIMMONS.

(Supreme Judicial Court of Massachusetts.
Plymouth. Jan. 8, 1897.)

WRIT OF REVIEW — DISCRETION OF TRIAL COURT.

It is within the discretion of the trial court to refuse a writ of review, in an action in which judgment by default was rendered, where there is evidence that the default was the result of the negligence of the officers of the defendant corporation, or its attorney.

Petition by the Scituate Water Company against Moyses R. Simmons for a writ of review. The writ was denied, and petitioner excepts. Overruled.

H. J. Jaquith and W. R. Bigelow, for petitioner. Edward E. Avery, for respondent.

KNOWLTON, J. This is a petition for a writ of review of an action in which judgment was rendered against the petitioner on its default. At the hearing the petitioner asked the court to rule as follows: "Upon all the evidence in the case, there is no evidence, as a matter of law, to warrant a finding for the respondent, and the court is bound to find for the petitioner, and to grant the writ of review prayed for." The petitioner's exception to the refusal of the judge so to rule presents the only question in the case. A petition for a writ of review is ordinarily addressed to the discretion of the court, or, to state the principle more accurately, in accordance with the reason of the rule, it is ordinarily, in such cases, a question of fact whether, under the rules of law and the established principles of practice, having regard to the rights and interests of all parties, justice and equity require a review of the action. There was evidence at the hearing which would have well warranted the issuing of a writ of review, but there were possible views of the testimony which might make it the duty of the judge to refuse to grant a writ. He might have thought that the default resulted from the negligence of the petitioner's attorney, and that it was best to leave the petitioner to look to him for its remedy. See *Amherst College v. Allen*, 165 Mass. 178, 42 N. E. 570; *Sylvester v. Hubley*, 157 Mass. 306, 32 N. E. 166. He might have thought that there was negligence on the part of the officers of the corporation which resulted in the default, and that justice did not require a review of the action. It appeared that, of the five directors of the corporation, only two acted in bringing and prosecuting the petition, and that two opposed it; the other took no action for or against it. The respondent, who was the treasurer and one of the directors of the corporation, testified that no stock had ever been issued by the corporation; that no meeting of the directors or owners had been held since November, 1894, which was 10 months before the bringing of the petition; that the other original corporators of the company had resigned; and that he owned a very large interest in the company. There was also evidence of differences and negotiations between the contending directors in regard to the respondent's claim, which well might be considered by the judge in determining whether a writ of review should issue. It was plainly a question addressed to the discretion of the court, whether it was just and equitable, having regard to the interests of all parties, to is-

sue a writ of review. *Insurance Co. v. Winslow*, 3 Gray, 415; *City of Boston v. Robbins*, 116 Mass. 313; *Hayes v. Collins*, 114 Mass. 54; *Stillman v. Whittemore*, 165 Mass. 234, 42 N. E. 1126. Exceptions overruled.

(167 Mass. 371)

DAY v. CITY OF LAWRENCE.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 8, 1897.)

CONSTITUTIONAL LAW—TAXATION—EXEMPTIONS— HOUSEHOLD FURNITURE.

1. Pub. St. c. 11, § 5, cl. 6, exempting from taxation wearing apparel, farming utensils, and household furniture not exceeding \$1,000 in value, and tools of a mechanic not exceeding \$300 in value, is constitutional.

2. Furniture of a householder used in the sleeping rooms of his boarders or guests is "household furniture," within Pub. St. c. 11, § 5, cl. 6, exempting from taxation household furniture not to exceed a certain value.

Report from superior court, Essex county.

Action by Charles A. Day against the city of Lawrence to recover taxes paid under protest. Judgment for plaintiff. Modified.

Chas. A. De Courcy and Walter Coulson, for plaintiff. Chas. U. Bell, for defendant.

BARKER, J. The plaintiff sues to recover the amount of taxes which he has paid, assessed upon household furniture which he contends was exempt, under the provisions of Pub. St. c. 11, § 5, cl. 6, which enact that "the following property and polls shall be exempt from taxation: * * * Sixth. The wearing apparel and farming utensils of every person; his household furniture, not exceeding one thousand dollars in value; and the necessary tools, not exceeding three hundred dollars in value, of a mechanic." An exemption of this character is constitutional. Such exemptions have long existed, and it is too late to question the power of the legislature to make them. See *Minot v. Winthrop*, 12 Mass. 113, 38 N. E. 512. The exemption of the kinds of property dealt with in the clause is a very old feature of our scheme of taxation. Looking to the first annual tax act passed after the adoption of the constitution (St. 1780, c. 13), the assessors are directed to assess the inhabitants "according to the proportion and value of their whole personal estate, * * * excepting household furniture, wearing apparel, farming utensils, and the tools of mechanics." These were kinds of property which every taxpayer might have, and the complete exemption of which would have little effect upon the incidence of the whole tax, but would leave it substantially equal and proportionate; and the exemption was granted notwithstanding two of the classes of property—farming utensils and mechanics' tools—were used in getting a living.

The limitation of the exemption of household furniture to an amount less than \$1,000

in value was first made in the annual tax act of June 12, 1829, and that in respect of mechanics' tools by St. 1865, c. 206; and the exemption has remained unlimited in respect to wearing apparel and farming utensils. See Rev. St. c. 7, § 5, cl. 4; Gen. St. c. 11, § 5, cl. 6; Pub. St. c. 11, § 5, cl. 6. The changes indicate no departure from the general theory of the exemption, but tend to make its operation more equal in changed conditions of society. The uniform exemption of all wearing apparel, notwithstanding the great diversity between taxpayers in respect of their ownership of it, points to another consideration which the legislature would not lose sight of in dealing with the question of exempting household furniture, namely, that minute inquiries by officials into personal and domestic affairs are vexatious and unprofitable, and to be avoided. The statute gives the exemption explicitly in plain terms to "every person," and the only qualification written in the statute is that of value. Every person's household furniture not exceeding \$1,000 in value is declared to be exempt. The words "household furniture" have been long in use in our tax acts, in statutes concerning attachments and executions, in testamentary writings, and in common speech. The only room for construction in arriving at the meaning of the statute is in ascertaining the sense to be given to these words. That, as there used, they do not mean necessary furniture only, is shown by the provisions of the Public Statutes relating to the collection of taxes by distress or seizure and sale of goods, and to property exempt from execution. See Pub. St. c. 12, § 8; Id. c. 171, § 34. In common speech the words include all the furniture, furnishings, and utensils of the dwelling, and in the construction of a will they have been held to include bronzes, statuary, and pictures used to adorn a home, if in accord with the means and style of living of the householder. See *Richardson v. Hall*, 124 Mass. 228, 237. There is no room for holding that the statute exempts the furniture of the kitchen, the dining room, or the living room, any more than that of the drawing room, used only on formal occasions, or of the spare rooms, used only to entertain temporary guests; nor that the utensils used by the housewife in making cheese or butter for sale, or in doing sewing for hire, lose the exemption because of their use.

We are of opinion that the words as used in this statute mean all furniture appertaining to a dwelling house, and bought and kept for use in the household, and that the limitation of \$1,000 in value was intended by the legislature to be the only limitation of the exemption, and that the fact that a large portion of the furniture is kept and used in sleeping rooms used solely by occasional guests or permanent boarders does not take it out of the exemption. Indeed, permanent boarders are, under our decisions, part of

the householder's family, and entitled to the protection of the house as their castle, as part of the family. See *Oystead v. Shed*, 13 Mass. 520, 523; *Dodge v. Railroad Corp.*, 154 Mass. 299, 301, 28 N.E. 243. So, too, the householder retains the possession of the rooms occupied by his lodgers, and of the furniture in them; and a mere lodger in the house of another is not a tenant or an occupier of a house. See *White v. Maynard*, 111 Mass. 250, and cases cited. The construction contended for by the defendant would make the exemption more unequal in its operation if it were limited both in value and by use, and the administration of the law would be difficult and vexatious if it were necessary to ascertain the use of household furniture, or anything more than its aggregate value, in fixing the tax. In our opinion, the plaintiff's furniture used in the sleeping rooms of his boarders, and all his furniture up to the value of \$1,000, was exempt from taxation; and, upon the agreed statement of facts, he is entitled to judgment in the sum of \$16. Judgment for plaintiff for sum of \$10 set aside. Judgment to be entered for plaintiff for the sum of \$16.

(167 Mass. 292)

WINN v. BARTLETT et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 8, 1897.)

WILL—CONSTRUCTION—BEQUEST OF INTEREST.

Under a bequest to executors of money, to be invested, and "the income only" paid over semiannually to W., he is entitled only to the income for life.

Appeal from superior court, Essex county.

Action by Margaret J. Winn, administratrix of William Wynn, deceased, against Nelson S. Bartlett and others, executors of Samuel E. Sawyer, deceased, to recover a legacy. Judgment for defendants, and plaintiff appeals. Affirmed.

The clause of the will under which plaintiff claimed was as follows: "(41) I give and bequeath to my executors and trustees, the survivors and survivor of them, the sum of four thousand dollars, to be safely invested, and the income only paid over semiannually to my coachman, William Wynn, of Gloucester."

J. J. Flaherty, for plaintiff. C. A. Russell, for defendant.

ALLEN, J. In *Re Bartlett*, 163 Mass. 509, 521, 40 N. E. 899, it was said by the court, with reference to this bequest: "Wynn having since died, the interest up to the time of his death is payable to his estate. The principal of this trust fund belongs to the residue of the testator's estate." The plaintiff now says that she had no notice of that suit, and did not appear, and is not bound by what was there declared. It is, however, obvious that it was right. The language of the bequest

was that "the income only" should be paid to Wynn, and there was a general residuary clause. There is nothing to show an intention that anything should be paid to him except the income during his life. In *re Grove's Trusts*, 28 Law J. Ch. 536; In *re Morgan* [1893] 3 Ch. 222. Judgment for defendant affirmed.

(167 Mass. 363)

TAFT v. STOW.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1897.)

TRUSTS—PAROL DECLARATIONS—SUFFICIENCY.

In an action against an executor to establish and recover a trust fund, a declaration alleging that the trust fund was deposited by the testatrix on parol declarations, communicated to plaintiff, that it, with the interest accruing thereon, was to be held in trust for plaintiff till the death of the testatrix, and then paid over to her, is insufficient, since it fails to name any trustee, or show that the fund was so left that defendant had any control over it, or could lawfully interfere with it.

Appeal from superior court, Suffolk county.

Action by Ellen A. Taft against Abner M. Stow, executor, to establish and recover a trust fund. From a judgment for defendant, plaintiff appeals. Affirmed.

Nason & Proctor, for plaintiff. S. H. Dudley, for defendant.

KNOWLTON, J. It may be assumed, in favor of the plaintiff, that the allegations of the declaration, if proved, would show the creation of a valid trust. *Gerrish v. Institution*, 128 Mass. 159. A trust in personal property may be created and proved by parol. *Chase v. Perley*, 148 Mass. 289, 19 N. E. 398. It is alleged that the money in question was set apart and deposited as a trust fund for the benefit of the plaintiff; that the defendant's testatrix made a declaration of trust whereby it was declared that this fund was to be kept in its place of deposit, and interest accruing on it to be held for the use of the plaintiff, although not to be payable until after the testatrix's death, and then the whole fund—both interest and principal—to be paid to the plaintiff. It is also alleged that the testatrix communicated to the plaintiff this declaration of trust, with all its terms and conditions. It is not averred that the declaration states who was to be trustee, or whether it was to be the testatrix, or the depository of the fund, or some third person, and there is no allegation that the fund was so left that the defendant could have any control of it, or ever lawfully interfere with it. So far as appears from the declaration, the money may now be in the hands of a trustee other than the defendant, whose duty it is to transfer it to the plaintiff, or it may be that the defendant's testatrix was the trustee, and that the money was so deposited that since her death the plaintiff has a remedy in equity against the depository. It is not al-

leged that the defendant's testatrix was ever under any liability at law to the plaintiff, or that the defendant has, or ever had, in his hands any money belonging to the plaintiff. Judgment affirmed.

(167 Mass. 345)

MOSELEY v. WASHBURN (two cases).

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1897.)

FRAUD OF GARNISHEE—EVIDENCE—INSTRUCTIONS.

1. In an action for alleged false answers made by defendant as trustee, it appeared that he, as attorney, had recovered a certain judgment for one B.; that he took a paper in the form of an assignment of the judgment from B.; that afterwards defendant negotiated a sale of the judgment, and B. assigned it to one T.; and that defendant received the money paid by T. for the assignment, and had the money when served with trustee process. The testimony was conflicting as to the relations of defendant to B., and the capacity in which he was acting when the payment was made by T. There was evidence that the assignment to defendant was a mere device to be used to deceive any creditor of B. who might attempt to obtain the money, and that the payment was made to defendant, as B.'s counsel, to discharge the judgment which was an incumbrance on land T. had bought. *Held*, that the court properly refused to rule that there was no evidence to warrant a verdict for plaintiffs.

2. Instructions as to the effect to be given to certain parts of the evidence are properly refused, where there is such evidence of other important facts that singling out particular subjects for comment would be likely to mislead the jury.

Exceptions from superior court, Suffolk county; John Hopkins, Judge.

Two actions, tried together,—one by Sarah L. Moseley against Charles E. Washburn, and one by Herbert Moseley against the same defendant,—to recover damages for alleged false answers made by defendant, as trustee, in separate cases by plaintiffs against John N. Brion and such trustee. There was a verdict for plaintiff in each case, and defendant excepts. Exceptions overruled.

It appeared that Brion executed a paper in the form of an assignment to defendant of a certain judgment he had obtained against plaintiff Sarah L. Moseley; that defendant was Brion's attorney in the case in which the judgment was recovered; that defendant afterwards negotiated a sale of the same to one Tisdale, and Brion then made an assignment to Tisdale; and that defendant received the money paid by Tisdale for the assignment, and had it at the time the trustee's process was served on him. Plaintiffs claimed there was no consideration for the assignment to defendant, and that the money he received for the assignment to Tisdale was Brion's. Defendant requested the court to rule and instruct the jury as follows: "(1) The action cannot be maintained as the testimony of one witness only to the falsity of defendant's answers, but the same amount of evidence is required

as would be necessary to convict the defendant of perjury. (2) If the answer of defendant was based on facts, and is a conclusion drawn from those facts, the plaintiff cannot maintain his action by proof that the conclusion was erroneous; but he must go further, and prove that the defendant knew that the facts would not warrant his conclusion, and that, having such knowledge, he willfully made a false answer. (3) If the alleged false answer relates to a matter which, upon the whole examination, appears to be and is immaterial, and so does not cause the trustee to be discharged, the plaintiff is not damaged by such answer, and cannot maintain this action on account of such answer. (4) If defendant's answers, or any of them, may have more than one construction put upon them, they should be construed *mutiori sensu*, consistently with the presumption of defendant's innocence. (5) There is no evidence in the case that would warrant a verdict for the plaintiff. (6) Upon all the evidence in the case, the jury should render their verdict for the defendant. (7) There is no evidence in the cases that would warrant the jury in finding that the defendant knowingly and willfully answered falsely upon his examination. (8) If the purpose of the parties, on April 25, 1890, was to transfer all rights of Washburn and Brion to Tisdale, that purpose might be effected with or without a written assignment. The payment of the price demanded would operate to transfer all such rights to Tisdale, or to Henry F. May, who furnished the money, and for whom he was acting. (9) Even if said assignment was made with fraudulent intent as against other creditors, yet the assignment would be valid between the parties. It would not be void, and is not voidable in this proceeding. (10) Even if the assignment from Brion to Washburn, dated March 25, 1890, was without adequate consideration, title would pass to Washburn by the assignment, and he would have a right to rely upon it. It would not be void, and is not voidable in this proceeding. He would not be accountable to Brion for the money received by him from Tisdale. (11) The discharge of attachment is not to be regarded as a discharge of the payment, judgment, or execution. (12) As to answer to first interrogatory, if the discharge of the attachment was signed by Washburn by virtue of the power of attorney in the assignment to Washburn, then the fact that Washburn so signed the discharge is no evidence that the answer is false." The court gave the first three instructions requested, but refused to give the others.

Henry E. Fales and Stephen H. Tyng, for plaintiffs. Hosea Kingman, for defendant.

KNOWLTON, J. In each of these cases the defendant asked the court to rule that there was no evidence to warrant a verdict

for the plaintiff. This ruling was rightly refused. Although there was little dispute in regard to the papers in evidence, there was a great conflict of testimony in regard to the relations of the defendant to Brion, and the capacity in which he was acting at the time when the payment was made. There was evidence from which the jury might find that the paper in the form of an assignment from Brion to the defendant was never intended by the parties to be delivered, or to take effect as a contract, but was a mere device to be used to deceive any creditor who might attempt to obtain the money for the payment of a debt due him. There was also evidence which would well warrant the jury in finding that the payment was made to the counsel to discharge the judgment which was an incumbrance on the land that Tisdale had bought for his client. In view of this evidence, the judge rightly refused the fifth, sixth, seventh, ninth, and tenth requests for rulings. The first, second, and third rulings were given substantially as requested. The fourth, eighth, eleventh, and twelfth rulings were to instruct in regard to the effect to be given to different parts of the evidence, upon which the judge was not obliged to give instructions. *Com. v. Este*, 140 Mass. 279, 2 N. E. 769; *Com. v. Gavin*, 148 Mass. 449, 18 N. E. 675, and 19 N. E. 554; *Neff v. Inhabitants of Wellesley*, 148 Mass. 487, 20 N. E. 111. There was such evidence of other important facts in the case that the specific instructions requested, singling out these particular subjects for comment, would have been likely to mislead the jury. The general instructions given presented the issues in such a way as to enable the jury properly to deal with the evidence, according to the view which they took of the conflicting theories of the opposing parties. Under *Pub. St. c. 153, § 5*, the judge might state the testimony for the purpose of aiding the jury in comprehending the issues and applying the instructions in matters of law. We do not discover any material errors in his statements, or any charge upon the facts, within the meaning of the statute. Exceptions overruled.

(167 Mass. 327)

DRISCOLL v. HURLBURT et al.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1897.)**RECOGNIZANCE OF POOR DEBTOR—BREACH.**

Failure of a debtor to appear on the day fixed for his examination in poor debtor proceedings will be a breach of his recognizance, though the creditor had agreed to a continuance, where the debtor's counsel was, by the terms of the agreement, required to have it filed, and the order for continuance made, but failed to do so.

Appeal from superior court, Suffolk county.

Action by Cornelius A. Driscoll against James J. Hurlburt and the surety on his recognizance in poor debtor proceedings. From a judgment for plaintiff, defendants appeal. Affirmed.

The debtor gave notice of his intention to take the oath for the relief of poor debtors, and a partial examination took place, and a continuance had to May 31, 1895; and afterwards, but before the arrival of said date, a written agreement for a further continuance was made at the creditor's request, by the parties out of court, and left by the attorney for the creditor with the counsel for the debtor to file with the court, before said date, which he inadvertently failed to do. The case was called, and, neither party being present, and the agreement being unknown to the court, the case was dismissed, and record thereof made.

James L. Powers, for plaintiff. O. B. Loud, for defendant Bell. Charles F. Eddy, for defendant Hurlburt.

ALLEN, J. It is plain that the recognizance was broken unless its provisions were waived by the plaintiff. *Glass Works v. Allen*, 121 Mass. 283. The defendants contend that it was waived by the agreement for a continuance. No copy of the agreement is before us, but, by the true construction of its terms as set forth in the amended answer of the defendants, it was the debtor's duty to see to it that a proper order of continuance was duly entered by the court. This the debtor failed to do, and, as a consequence, the proceedings were dismissed. The defendants contend that, in undertaking to file the agreement with the court, the debtor's counsel was acting for the plaintiff as well as for the debtor, and that his neglect was therefore the neglect of the plaintiff. But the general duty of keeping alive the proceedings in court rested upon the debtor, and no part of this duty was assumed by the plaintiff under the agreement. The judgment for the plaintiff was, therefore, right. Judgment affirmed.

(167 Mass. 390)

AGO v. CANNER.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1897.)**CONVERSION—DEFENSES—WIFE'S PERSONAL PROPERTY—POSSESSION BY HUSBAND.**

1. In an action by a wife for conversion of her personal property, it is no defense that her husband reduced it to his possession, and sold it to defendant.

2. A wife's personal property does not become her husband's on his reducing it to his possession.

3. The fact that a husband, in his wife's absence, reduces her personal property to his possession, and sells it to one who does not know of her existence, does not prevent her from maintaining an action to enforce her title.

Exceptions from superior court, Suffolk county; Albert Mason, Judge.

Action by one Ago against Israel Canner for the conversion of plaintiff's personal property. There was a finding in favor of plaintiff, and defendant excepts. Exceptions overruled.

Defendant's exceptions are as follows: "This was an action of tort, for the conversion of certain household goods, claimed to be the property of plaintiff. Trial before Mason, C. J., without jury; it being admitted at the trial that the property alleged to have been converted by defendant was the property of the plaintiff, and came into the possession of the defendant as follows: The plaintiff being away on a visit, and the property in question being left on the premises hired by the plaintiff's husband, and while she being away, and the husband being in sole possession of said premises, the husband goes to the defendant, tells defendant that his wife is dead, and has been for three months, and wishes to sell his household property; takes the defendant to the premises; shows him the property; sells and delivers the same to the defendant. Defendant takes possession, moves the property to his store in Boston, and sells it, defendant having no knowledge of the wife's existence until a week afterwards, and after a part of the goods so purchased had been sold. Defendant offered to show that the husband of plaintiff had reduced the personal property sued for to his own possession, and sold the same to defendant. Such evidence was excluded, the court ruling that this would constitute no defense to the action, to which defendant excepted. Defendant also requested the court to rule that a husband has a right to reduce the personal property of the wife to his possession, and the property then becomes the property of the husband; that the act of the husband in selling and delivering the property to the defendant was a reduction to his possession, and conveyed a good title to the defendant. The court declined so to rule, and defendant excepted. Defendant further requested the court to rule that, the husband having sold the personal property, and delivered it to the defendant, the defendant acquired a good title, and the plaintiff cannot maintain this action. The court declined so to rule, and the defendant excepted. To which rulings and refusals to rule, the defendant, feeling aggrieved, excepted, and prays that his exceptions may be allowed."

C. F. Appleton Smith, for plaintiff. Dana B. Gove & Sons and Frederick W. Fancher, for defendant.

ALLEN, J. The property belonged to the plaintiff. Her title to it was never lost. In this commonwealth, a husband no longer has a right to make his wife's personal property his own, by reducing it to his own possession. Her husband's acts did not deprive her of her

title, or of her right to maintain an action to enforce her title. Pub. St. c. 147, § 1; McCowan v. Donaldson, 128 Mass. 169; Bank v. Windram, 133 Mass. 175; Butler v. Ives, 139 Mass. 202, 29 N. E. 654; Harmon v. Railroad Co., 165 Mass. 100, 42 N. E. 505. Exceptions overruled, with double costs.

(167 Mass. 374)

COMMONWEALTH v. BURNS.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 9, 1897.)

INTOXICATING LIQUORS—CRIMINAL PROSECUTION— INSTRUCTIONS—READING STATUTE TO JURY.

1. On a prosecution for maintaining a liquor nuisance, an instruction that defendant could be convicted if she participated, co-operated, or was interested in maintaining the nuisance, was not erroneous, where there was no claim that defendant was acting as a servant, and the context showed that the court had reference to an interest, participation, and co-operation as joint proprietor.

2. The court need not repeat a charge already given.

3. The court need not read or state to the jury the substance of the statute under which defendant is being tried.

Exceptions from superior court, Middlesex county; James B. Richardson, Judge.

One Burns was convicted of keeping and maintaining a common nuisance, and excepts. Exceptions overruled.

Fred N. Wier, Dist. Atty., for the Commonwealth. Francis P. Curran, for defendant.

LATHROP, J. The defendant conceded that the tenement referred to in the evidence was used as a place where intoxicating liquors were illegally sold during the time covered by the complaint. The issue for the jury was whether the defendant kept and maintained the tenement. While there was evidence that the defendant's mother then owned and occupied the tenement, and had sold intoxicating liquors there for several years, and that the furnishings of the house were the same after the defendant went to live with her mother as before, and no change in the conditions about the premises appeared, there was also evidence which would authorize the jury in finding that during the time covered by the complaint the defendant exercised control of the tenement, either alone or jointly with her mother. The conduct of the defendant when the police officers made the first raid, and her failure to answer when her mother, in her presence, said, "If I was running the house, you would not take the pitcher from me that way," tend to show control on the defendant's part. Moreover, the evidence did not stop here; it also showed a direct admission made by the defendant that she was in exclusive possession of the tenement. On January 23d the mother said, in the presence of the defendant, "I am not running this house," and the defendant said:

"I do not want you to make out warrants against my mother. The 2d of January I took possession here. Make out your warrants to me." The defendant offered no evidence, and the only exceptions are to the refusal of the court to give certain requests for instructions, and to the instructions given. The first and second requests, if not defective for omitting the element of joint control, were fully covered by the instructions given.

The principal question relates to the charge. The judge began by saying, in substance, that the question was who had control of the business, and ended by saying that it was not necessary to show that the defendant had sole control; but, if she carried on the business jointly with her mother, she could be found guilty. This was a correct statement of the law. The difficulty comes from the intervening portion of the charge. If this is to be construed as stating the law to be that one who aids and abets the keeper of such a nuisance as is set forth in the complaint in the case at bar may be convicted, the instruction was clearly wrong. *Com. v. Churchill*, 136 Mass. 148; *Com. v. Galligan*, 144 Mass. 171, 10 N. E. 788; *Com. v. Murphy*, 145 Mass. 250, 13 N. E. 892; *Com. v. Ryan*, 160 Mass. 172, 35 N. E. 673. But it seems to us that this is not the fair meaning of the language used. The context shows that, when the judge used the words complained of, he had reference to an interest, a participation, and a co-operation as a joint proprietor. See *Com. v. Jennings*, 107 Mass. 488. There was nothing in the case to show that the defendant made any contention that she acted as the servant of her mother. There was no evidence to this effect, nor did she ask for any instruction based upon this theory. On the contrary, the evidence showed acts and declarations on her part indicating that she was in control of the premises. *Com. v. Merriam*, 148 Mass. 425, 19 N. E. 405.

The remaining exceptions may be briefly disposed of. After the charge was given the judge was asked to limit the meaning of the words "interest," "participate," and "co-operate." The defendant did not state how she wished them to be limited. Under the construction we have given to the charge no further limitation was necessary.

The next exception relates to a request for a ruling which had already been given. When a ruling has once been given, the judge is not bound to repeat it.

The defendant then asked the judge to read or state to the jury the substance of sections 6, 7, c. 101, Pub. St. The refusal of the judge to comply with this request affords the defendant no ground of exception. The nature of the offense was sufficiently stated in the charge. Whether a judge shall read or state the substance of a statute is a matter which must be left to his discretion. *Com. v. Austin*, 7 Gray, 51; *Com. v. Tay*, 146 Mass. 146, 15 N. E. 503. Section 7, which the defendant wished to have read or stated, in substance

relates merely to the punishment of the offense,—a matter with which the jury had no concern. Exceptions overruled.

(167 Mass. 390)

INHABITANTS OF BROOKLINE v. HATCH.

(Supreme Judicial Court of Massachusetts, Norfolk. Jan. 8, 1897.)

KEEPING HORSES—LICENSE.

Under St. 1890, c. 230, providing that the officers of a city may license persons to keep more than four horses in certain specified buildings or places therein, and whoever, not being licensed, uses "any building or place for a stable for more than four horses" may be enjoined, one cannot, unlicensed, keep four horses in each of several buildings on the same lot.

Report from supreme judicial court, Norfolk county; James M. Morton, Judge.

Suit by the inhabitants of Brookline against Henry S. Hatch. Decree for plaintiff, and case reported. Affirmed.

M. & C. A. Williams, for plaintiff. Emery B. Gibbs, for defendant.

LATHROP, J. This is a bill in equity to restrain the defendant from using or occupying certain premises and the buildings thereon, situated on Aspinwall avenue, in Brookline, for a stable for more than four horses. The case was heard by a single justice of this court, who granted an injunction as prayed for, and reported the case for our consideration. There was evidence that the defendant occupied a lot of land on said avenue, containing about 6,880 square feet, on which were two buildings. One was used by him as a livery stable, and in carrying on his business as an undertaker, and was of a permanent character. The other was a temporary structure, built of rough boards resting on the ground, with no cellar under it. The defendant applied in writing to the selectmen of Brookline for a license to keep more than four horses in his stable on his premises. After a public hearing on this application, the selectmen refused to grant the license. The defendant thereupon divided the temporary building into two portions, in one of which were four stalls, and in the other three, and kept upon the premises 11 horses; 4 of them being kept in the main building, 4 in one of the temporary buildings, and 3 in the other. The carriages, harnesses, etc., were kept in the main building. St. 1890, c. 230, amends Pub. St. c. 102, § 39, so that it reads as follows: "The mayor and aldermen of any city except Boston, the police commissioners of Boston, and the selectmen of any town, may license suitable persons to keep more than four horses in certain specified buildings or places within their respective cities and towns, and may revoke such license at pleasure. Whoever, not being licensed as aforesaid, occupies or uses any building or place for a stable for more than four horses,

shall forfeit a sum not exceeding fifty dollars for every month he so occupies or uses such building or place, and in like proportion for a longer or shorter time. And the supreme judicial court, or a justice thereof, in term time or vacation, may issue an injunction to prevent such occupancy or use without such license."

The contention of the defendant is that, as he does not keep more than four horses in any one of the three buildings on his premises, the statute does not apply to him; but we are of opinion that the statute cannot be evaded in this manner. The language of the statute is "Any building or place for a stable for more than four horses." The word "place" has a broad signification. It applies, not only to a building, but also to any inclosure, whether covered or not. The statute is aimed at the nuisance which may be caused by the keeping of a number of horses, and it can make no difference whether they are kept in one building or in several, or are kept in the open air or in an inclosure. In *Com. v. Jones*, 142 Mass. 573, 8 N. E. 603, where a license was granted for the sale of intoxicating liquors in a certain room of a building, it was held that the location of the whole building was to be considered in determining whether it was within the "four hundred feet" of a public school-house on the same street. The statute there in question provided: "No license * * * shall be granted for the sale of intoxicating liquors in any building or place on the same street within four hundred feet of any building occupied in whole or in part by a public school." It was in answer to the defendant's contention "that the language of the statute, 'building or place,' should be construed to mean that, if a license limits the sale to a particular room in a building, that room is a 'place,' and its location is to be considered without regard to the rest of the building," that the court said: "The word 'place' is intended to cover the case where there is no building, but where a tent, booth, excavation in the ground, or something similar is used for the purpose of selling liquor." But the meaning of the word "place" is not confined to the examples cited above. In *Com. v. Patterson*, 153 Mass. 5, 26 N. E. 136, where the defendant was charged with keeping a common nuisance, to wit, a tenement used for the illegal sale and keeping for sale of intoxicating liquors, there was evidence that the defendant had the possession and control of certain land, and certain detached buildings thereon, and used the land and buildings for the illegal keeping and sale of intoxicating liquors; and it was held that, as they were used as one tenement, they constituted one nuisance, the keeping of which was one offense. In *Com. v. Purcell*, 154 Mass. 388, 28 N. E. 288, where the defendant was charged with keeping a certain place, to wit, an hotel, used for the illegal sale and

illegal keeping of intoxicating liquors, it was contended that an hotel or other building could not be considered as a "place"; but it was held that the word "place" included an hotel, though it might also include what might not properly be described as a building or tenement. In *Eastwood v. Miller*, L. R. 9 Q. B. 440, under a statute which provided that no house, office, room, or other place should be used for a certain purpose, it was held that open grounds were included within the word "place"; and this decision was affirmed in *Haigh v. Town Council of Sheffield*, L. R. 10 Q. B. 102.

We have no doubt, therefore, that the decree of the single justice should be affirmed. So ordered.

(167 Mass. 402)

DE WHIRST v. BOSTON & M. R. R.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 11, 1897.)

MASTER AND SERVANT—PERSONAL INJURY—NEG-
LIGENCE.

A plaintiff cannot recover from a railroad company for the death of his intestate by falling from the car on which he was working as brakeman, on the ground that the engineer negligently shut off the steam, and commenced to stop the train, without waiting for the customary signal, where there is no evidence that such act caused the accident, or as to what, in fact, caused the deceased to fall.

Exceptions from superior court, Essex county; Edgar J. Sherman, Judge.

Action of tort by Samuel De Whirst, administrator, against the Boston & Maine Railroad, to recover for the death of his intestate. Verdict for defendant, by direction of the court, and plaintiff brings exceptions. Exceptions overruled.

B. B. Jones, T. F. Carney, and B. F. Brickett, for plaintiff. Lincoln & Badger, for defendant.

MORTON, J. The plaintiff contends that the accident to his intestate was due to the negligence of the engineer in stopping the train before he had received the motion to do so. The only evidence bearing on the matter comes from the man who stood on the car next to the engine, for the purpose of repeating to the engineer (who guided his action thereby), signals given from the rear end of the train, by the plaintiff's intestate and another man for that purpose. He testified in part as follows: "Q. At the time that you gave the down motion,—i. e. the stop motion,—had the steam been shut off? A. Well, I felt a jar. I think it was shut off. Q. What makes you think it was shut off? A. Because it jarred me just as I was giving the motion before I gave it. Q. What jarred you? A. The stopping of the train like." There was no direct evidence that the steam was shut off, or if it had been it would have resulted in such a motion as the witness attempted to describe. Neither the engineer, nor the fireman, nor the conductor,

who was in the cab of the engine, was called as a witness. But, if we assume that the engineer had begun to stop the train before the motion was given, the evidence fails to connect the accident to the plaintiff's intestate, with this conduct on the part of the engineer. The same witness who testified to what has already been quoted also testified, on cross-examination, that he got the stop motion from the plaintiff's intestate after he had felt the jostling, and that it was given at about the same time as the other man gave it who stood on top of the car which was being kicked onto the side track. Whether, therefore, the accident was due to the action of the engineer, or to some other cause, was a matter of conjecture; and the plaintiff failed to sustain the burden of showing that it came from the negligence of the engineer, even if we assume that he had begun to stop the train before he received the motion to do so. Exceptions overruled.

(167 Mass. 388)

O'NEAL v. O'CONNELL.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 9, 1897.)

MASTER AND SERVANT—PERSONAL INJURY—PRIMA FACIE EVIDENCE OF NEGLIGENCE.

On a trial for personal injuries received by plaintiff as a laborer in defendant's sewer trench, it is not error to refuse to rule that the falling in of a small quantity of earth from the side of the trench, the day before the accident, is prima facie evidence of defendant's negligence, where all the facts leading up to and attending the caving in which injured plaintiff are before the jury.

Exceptions from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action of tort by Cornelius O'Neal against Dennis O'Connell to recover damages for personal injuries received by plaintiff as a laborer in defendant's sewer trench. From a judgment in favor of defendant, plaintiff brings exceptions. Overruled.

On the trial it appeared: That on January 5th, in the afternoon, a small portion of the side of the trench fell in, and that the plaintiff refused to work longer in the trench, and went and made complaint to the defendant, who was not at the trench. That on the morning of the 6th of January, before going into the trench, he had a conversation with the defendant. That the defendant said to the plaintiff, "Was the ditch in that condition the night before?" That the plaintiff told him that it was not. That the foreman put in uprights between in the morning. That the uprights were about 16 feet apart the first night, and then he came and put uprights in between those to make them 8 feet apart. That the defendant told the plaintiff that the ditch was safe to go down to lay pipe in, but the plaintiff told him he was afraid that the sewer was not safe without being sheeted. The defendant said it was safe, and could not be made any safer. That the plaintiff went into the trench. And that

at about half past 12 o'clock on that day, while engaged in the work of pipe laying, about one-half of a cart load of dirt fell from the lower part of the trench upon the legs of the plaintiff, and injured him while so engaged in his duties.

Arthur H. Russell and Wilfred Bolster, for plaintiff. John F. Cronan, for defendant.

LATHROP, J. This is not a case where the only evidence before the jury was the fact that an accident had taken place, and we have no occasion to consider to what extent the rule of *res ipsa loquitur* is applicable to the case of an injury to a servant while engaged in the digging of a trench. This court has gone no further in a case of this kind than to say that, where the accident is of a kind that is commonly preventable by the exercise of ordinary care, "the accident itself, in connection with the circumstances shown in regard to the depth of the trench, and the slope of its sides, and the distance of the braces from each other, furnishes evidence from which the jury might have found negligence on the part of the foreman in charge of the work." *Hennessy v. City of Boston*, 161 Mass. 502, 37 N. E. 668. In the case at bar all the facts were before the jury. At the close of the charge, the request was made that the fact that earth fell out was some evidence of negligence. We are of opinion that the judge was not bound to single out one fact, and give that a prominence, which might have misled the jury, and that he was right in submitting the case to the jury on all the evidence. *Carmody v. Gaslight Co.*, 162 Mass. 539, 39 N. E. 184. Exceptions overruled.

(167 Mass. 392)

KANE et al. v. SHIELDS et al.

(Supreme Judicial Court of Massachusetts.
Hampden. Jan. 11, 1897.)

APPEAL—WHO MAY QUESTION JUDGMENT—VOLUNTARY ASSOCIATIONS—APPROPRIATION OF MONEY.

1. Where evidence is taken and the case reported at the request of defendants, the case will be treated as though they alone had appealed, and plaintiff cannot ask for a modification of the decree.

2. A local division of a voluntary association, in the absence of anything in the constitution or by-laws of the order permitting such action, cannot, by majority vote of its members voting, authorize its officers to pay to certain members, who are allowed to secede and set up another organization, their pro rata share of the association's property.

Report from superior court, Hampden county; Justin Dewey, Judge.

Bill by D. J. Kane and others against James B. Shields and others to recover money, in behalf of Court Abraham Lincoln, No. 6,525, Ancient Order of Foresters of America, a voluntary association, and for other relief. There was a decree for plaintiffs against certain of the defendants, and the case was reported to the supreme judicial court. Affirmed.

J. B. Carroll and W. H. McClintock, for plaintiffs. Daniel E. Leary and Edward H. Lathrop, for defendants.

FIELD, C. J. This case was heard by a justice of the superior court upon the pleadings and evidence, and a decree entered for the plaintiffs against certain of the defendants, and the bill dismissed, without costs, as to certain other of the defendants. The evidence was taken by a commissioner appointed by the court at the request of the defendants, presumably under rule 35. The case was reported to this court, and the conclusion of the report is as follows: "At the request of the defendants, I report this case for the determination of the supreme judicial court, such disposition to be made thereof as to the court shall seem proper."

The plaintiffs' counsel contends that the decree should be affirmed against the defendants held liable by the superior court, and also that it should be modified so as to include among those held liable some of the defendants as to whom the bill was ordered to be dismissed. We are of opinion that this last contention is not open to the plaintiffs. The plaintiffs have not appealed from the decree, and it does not appear that they asked to have the case reported. It appears that the evidence was taken and the case reported at the request of the defendants. Although it does not appear that the defendants have in form appealed from the decree, yet we think that the case, as reported, should be treated as if the defendants had appealed and the plaintiffs had not. *Moors v. Washburn*, 159 Mass. 172, 176, 34 N. E. 182.

The principal question in the case is whether such an association as is described in the bill and shown by the evidence can, by a vote of a majority of its members voting on the question, lawfully authorize its officers to pay, out of the money and funds of the association, to certain members, who are permitted to secede from it and set up another and a different organization, their pro rata share of the property of the association. The constitution and by-laws of the association put in evidence contain no provisions which seem to us to authorize such an appropriation of the property of the association. The association was not dissolved by the vote, but continued to exist the same as before. The case, on the evidence, seems to fall within the decision in *McFadden v. Murphy*, 149 Mass. 341, 21 N. E. 868. See *Altmann v. Benz*, 27 N. J. Eq. 331. We are of opinion that the decree should be affirmed. So ordered.

(167 Mass. 408)

PERKINS v. FURNESS et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 11, 1897.)

NEGLIGENCE—PERSONAL INJURY—SUFFICIENCY OF EVIDENCE—DUE CARE.

1. Plaintiff was in the employ of an ice company under contract to store defendant's ship

with ice. The hatch to which the ice was lowered was always prepared by putting across it certain covers, and then covering the hatch with a tarpaulin. It was the duty of the ship's crew to put the hatch in condition, and the ice men had nothing to do with its preparation. The hatch was apparently in this condition when plaintiff went to work at 6 o'clock p. m. During the afternoon some of the crew had gone down, through the hatch, into the hold, and had come out about the same time. One of the covers had been left out, and the tarpaulin put back on the opening. The hatch appeared to plaintiff to be ready for use, and he stepped on it, and fell through the opening. *Held*, that it was not an unwarrantable inference that the condition in which the hatch was left was due to negligence on the part of the crew of defendant's ship.

2. Plaintiff was not bound, in the exercise of due care, to examine the hatch for the purpose of ascertaining whether all of the hatch covers were in place.

Exceptions from superior court, Suffolk county; Edgar J. Sherman, Judge.

Action of tort by Hollis M. Perkins against Furness, Withy & Co. for personal injuries. From a judgment in favor of plaintiff, defendants bring exceptions. Overruled.

Chas. W. Bartlett and Elbridge R. Anderson, for plaintiff. John Lowell, Jr., and Samuel H. Smith, for defendants.

MORTON, J. At the time of the accident the plaintiff was at work on a steamer, owned and run by the defendants, getting ready to take in ice to be used for refrigerating purposes in connection with the cargo, which consisted largely of fresh beef. He was there by the implied invitation or permission of the defendants, though not in any way in their service, but in the employ of other parties. He was injured by falling through a hatchway which had been left insecure. There are two questions: First, whether there was any evidence which fairly warranted the jury in finding that the insecurity of the hatchway was due to negligence on the part of the officers or crew of the steamer; and, secondly, whether the plaintiff was in the exercise of due care.

The ice was put into the ship by an ice gang, of which the plaintiff was one. It was hoisted from the wharf, and lowered through the upper No. 1 hatch into the lower No. 1 hatch, and was taken from there to the refrigerators. The lower hatch was prepared for this use by putting across it planks or hatch covers, provided for the purpose, and each about 18 inches wide, and then covering the whole with a tarpaulin, which came down over the combings of the hatch. The tarpaulin was for the purpose of preventing water from the ice from dripping through into the hold. This was the usual way of fixing the hatch for the "icing of the ship," as it was termed. There was testimony tending to show that the hatch was apparently in this condition when the plaintiff went there to work, about 6 o'clock, and continued so till the accident, about an hour and a half later. The accident was due to the fact that one of the planks or hatch covers had been taken out, and the tarpaulin put back

on the opening thus left, without anything to show that the plank had been removed. The plaintiff stepped on the hatch, and fell through this opening. It appeared that, earlier in the day, stevedores had been discharging cargo through this hatchway; but they had finished about 2 o'clock, and the hatch covers had all been put back, and a tarpaulin spread over them, and after that the stevedores had nothing to do with the hatch. After the stevedores got through, and before the ice gang came, some of the crew and some carpenters went down into the hold, the former to sweep it and the latter to repair the sheathing and ceiling, and one of the hatch covers was taken up, and the tarpaulin rolled back. The carpenters were not in the defendants' employ, but in that of independent contractors. There was testimony tending to show that the crew came up a little before the carpenters, and that the carpenters were the last persons in the hold, and when they came up they all went away together, and that none of them did anything to the tarpaulin. The captain testified, among other things, that the crew had put on all the hatch covers the afternoon before the accident, except that where the plaintiff fell, and that on that day his men had put the tarpaulin on the hatch. Another witness testified that he saw the chief officer of the ship standing near the No. 1 hatch about 5 o'clock, and that the ship's men were putting the hatch covers on the No. 1 hatch on the upper deck, and that he "saw a tarpaulin covering the covers and combings of the hatch on the lower deck." The jury might have found that he was mistaken as to the time of day, if that was material, and that it was in fact later than he supposed. Witnesses who had iced the ship on former trips testified that the tarpaulin had always been over the hatch, and they had never seen the hatch bare; and the plaintiff further testified that the ice man had nothing to do with arranging the covers, and that "the hatch was on, and all right for work, as far as could be seen,—that is, down, and a piece of tarpaulin spread over it." We think that, on this evidence, it was not an unwarrantable inference that the condition in which the hatchway was left was due to negligence on the part of the officers, men, or crew belonging to the ship.

Although the plaintiff had had a great deal of experience as a seafaring man, and had iced this and other vessels several hundred times in all, and "was as familiar with the hatches as any one could be," there was nothing to show that he had any reason to suppose, from the appearance of the hatch, or from anything else, that one of the hatch covers had been removed. The nature of his occupation required him to be about and on the hatch. The captain testified that he knew that the ice men were coming at 6 o'clock, and we think that the plaintiff was justified in assuming that the hatch would be in a safe condition for him to work upon, and was not bound, in the exercise of due care, to examine it for the purpose of ascertaining whether all of the hatch covers

were in place. It was for the jury to say whether the plaintiff knew, or ought to have known, that the plank which he took for the runway was one of the hatch covers, and therefore ought to have been upon his guard respecting the hatch. There being evidence of negligence on the part of the servants of the defendants, and of due care on the part of the plaintiff, the weight to be given to it was, of course, for the jury. Exceptions overruled.

(167 Mass. 322)

MOORS et al. v. READING et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1897.)

CHATTEL MORTGAGE — DELIVERY AND RETENTION OF PROPERTY — PLEDGE.

1. A debtor mortgaged to plaintiffs from time to time his entire stock, possession being soon afterwards taken by the mortgagor's bookkeeper, whom the mortgagees appointed their agent for that purpose; but the goods were not separated from those added to the stock between the dates the several mortgages were given and possession taken. As new mortgages were executed, the mortgagees gave to the bookkeeper written orders to deliver to the mortgagor portions of the goods included in former mortgages, to enable him to make current sales, the proceeds of which went to the mortgagor; but the goods so released were not set apart from the rest, and such sales were, with the bookkeeper's consent, made from the general stock indiscriminately. *Held*, that the mortgagees acquired no lien, by their unrecorded mortgages, as against the mortgagor's assignee in insolvency, there being no retention of the mortgaged property, as required by St. 1883, c. 73, § 2.

2. A pledgee acquires no title to chattels not delivered to and retained by him.

Report from superior court, Suffolk county; Caleb Blodgett, Judge.

Replevin by Moors and others against Reading and others. The court directed a verdict for defendants, and reported the case to the supreme judicial court. Judgment on the verdict.

Robert M. Morse and John Duff, for plaintiffs. Sherman L. Whipple and William R. Sears, for defendants.

ALLEN, J. The question in this case is whether there was any evidence for the jury that the plaintiffs took and retained possession, so as to give them a valid title to the goods replevied. If they were mortgagees, their title would not be valid unless the mortgaged property was delivered to and retained by them; no record of the mortgages having been made. St. 1883, c. 73, § 2. If, however, they were pledgees, their title would also fall unless the property was delivered to and retained by them. So that it makes no difference, in the determination of the case, whether they were mortgagees or pledgees. *Blanchard v. Cooke*, 144 Mass. 207, 225, 11 N. E. 83. The facts upon which the decision must depend are not now in dispute. Those which were proved, or which the plaintiffs' evidence tended to prove, may be summed up as follows: One Houdlette

was a dealer in iron, carrying a stock of goods in his store in Boston. In 1889, he borrowed money of the plaintiffs, which has never been repaid, and which the plaintiffs sought to secure in the following manner: Houdlette executed to the plaintiffs a "general collateral agreement," so called, setting forth that all the merchandise transferred or to be thereafter transferred by him to them should be held only as security for his present or future indebtedness to them. He also from time to time, usually about once a month, executed to them a bill of sale of goods in his store. In some instances, but not always, upon receiving the bills of sale, they executed and delivered to him a special instrument of defeasance. These bills of sale were intended to cover all of the stock of goods in store from time to time, and did so cover it, except so far as new goods may have come in between the dates of two transactions, or as goods may have been released on orders, as hereinafter stated. Soon after the date of each bill of sale, the plaintiffs took possession by going to Houdlette's store, where statements were made by or in behalf of Houdlette that possession of the goods was given, and on behalf of the plaintiffs that possession was taken, by touching some of them, by appointment of Houdlette's bookkeeper as agent of the plaintiffs to take and hold possession of the goods for them, and by his acceptance of such agency. From time to time, as new bills of sale were received, the plaintiffs gave written orders to the bookkeeper to deliver to Houdlette portions of the goods included in former bills of sale. These orders were usually for round amounts, as called for by Houdlette's bookkeeper, being about the same in amount as the amounts of the new bills of sale; the amount being fixed by what the bookkeeper thought would be sufficient to cover the deliveries by Houdlette for the next month. The quantities in these orders were expressed in gross, as, for example, 75,000 pounds sheet-plate iron and steel, 50,000 pounds angle iron, 200 kegs rivets. It was not intended to make sales of goods in excess of the amounts covered by these orders; but Houdlette made sales from all the goods in store, without regard to whether they had or had not been released by the plaintiffs, and this was permitted by the bookkeeper. Whenever the bookkeeper thought the amount of an order had been fully drawn, he would get a new one. No setting apart or separation of the goods covered by these orders was made, and new goods, as they came in, were mingled with the old, and there was nothing to distinguish them. Sales were made from the general stock of goods on hand, without discrimination; and the proceeds of the sales went to Houdlette. The bookkeeper was paid by Houdlette, and the plaintiffs did not pay or agree to pay him anything. Since the plaintiffs did not take

possession on the day of the date of each bill of sale, there were usually some goods in the store which had come in between the date of the bill of sale and the day of taking possession, and which, therefore, were not covered by the bills of sale. No attempt was made to keep such goods separate. The above methods were pursued for nearly four years, at the end of which time Houdlette went into insolvency, and his assignees took possession of the goods.

If it be assumed that there was from time to time a sufficient taking of possession by the plaintiffs at the outset, the facts effectually negative the plaintiffs' view that there was any such retention of possession by them as to meet the requirements of the law. The obvious purpose of the statutory provision as to unrecorded mortgages, and of the rule of law as to the retention of possession by pledgees, is to prevent mortgagors or pledgors, by means of their possession of the property, from misleading people into the belief that they are its real owners. Accordingly the rule is general that if mortgagors whose mortgages are unrecorded and pledgors are allowed to remain in possession of the mortgaged or pledged property, the mortgagees or pledgees will lose their lien. Possession or control of the property may be given to a mortgagor or pledgor for certain special purposes, without producing this effect; e. g., to make sale thereof for the sole benefit of the mortgagee or pledgee, or to keep the property specifically for him for a time as his bailee or agent. There are numerous cases in which the question has arisen, and been determined, whether, under the particular facts there shown, the lien of a mortgagee or pledgee has been lost by reason of permitting the mortgagor or pledgor to be in possession of the property. *Kellogg v. Thompson*, 142 Mass. 76, 6 N. E. 860; *Moors v. Wyman*, 146 Mass. 60, 15 N. E. 104; *Thacher v. Moors*, 134 Mass. 156; *Thompson v. Dolliver*, 132 Mass. 103; *Thayer v. Dwight*, 104 Mass. 254; *Wright v. Tetlow*, 99 Mass. 397; *Carpenter v. Snelling*, 97 Mass. 452; *Walker v. Staples*, 5 Allen, 34; *Way v. Davidson*, 12 Gray, 465; *Casey v. Cavaroc*, 96 U. S. 467; *Bank v. Hunt*, 11 Wall. 391; *Steele v. Benham*, 84 N. Y. 634; *Button v. Rathbone*, 126 N. Y. 187, 27 N. E. 206; *Doyle v. Stevens*, 4 Mich. 86; *Bank v. Summers*, 75 Mich. 107, 42 N. W. 536; *Menzies v. Dodd*, 19 Wis. 343; *Hage v. Campbell*, 78 Wis. 572, 47 N. W. 179; *Swiggett v. Dodson*, 38 Kan. 702, 17 Pac. 594; *Brunswick v. McClay*, 7 Neb. 137; *Pickard v. Marriage*, 1 Exch. Div. 364; *Bank v. Poynter* [1895] App. Cas. 56. No one of these cases presents facts exactly like those now before us. But the rule to be deduced from them, which is applicable to the present case, appears to be clear. The plaintiffs appointed Houdlette's bookkeeper as their agent, so that there was no apparent change of pos-

session. The goods which were at any time covered by the bills of sale were not set apart, and kept separate and free from intermixture with other goods not covered by the bills of sale. Whenever new goods were bought by Houdlette, they were added to the general stock on hand. Whenever the plaintiff gave orders for the delivery or release of goods to Houdlette, in order to enable him to make current sales, no separation was made of the goods embraced in such orders. The arrangement was made with the obvious purpose, or at any rate with the effect, of enabling Houdlette to carry on his business in the usual manner, and without exciting suspicion; and there never was a day, so far as appears, when he might not have sold any particular piece or parcel of goods in his store without violating his understanding with the plaintiffs. From month to month, the plaintiffs signed orders for the release of goods in gross amounts from their lien, and of such quantities as would probably be sufficient to supply Houdlette's customers; and new orders of the same kind were signed as often as was necessary. There was no attempt to keep distinct and separate any specific portions of the stock of goods, as those which were subject to the plaintiffs' lien. This was the habitual and universal method adopted by the plaintiffs or by their agent. This course of business is inconsistent with the view that the plaintiffs retained possession of any specific part of the goods. There was, at best, a confusion and intermixture of mortgaged with unmortgaged, or of pledged with unpledged, goods, so that the two classes were indistinguishable; and this was done by the permission or through the neglect of the plaintiffs or of their agent. The plaintiffs no longer retained the sole possession of the mortgaged goods. They either lost the possession entirely, or were merely tenants in common with Houdlette. *Ryder v. Hathaway*, 21 Pick. 298; *Forbes v. Railroad Co.*, 133 Mass. 154, 180; 2 Kent, Comm. (14th Ed.) *365, note, and cases cited; *Story*, Ballm. § 40; *Willard v. Rice*, 11 Metc. (Mass.) 493; *Adams v. Wildes*, 107 Mass. 125; *Stearns v. Herrick*, 132 Mass. 114; *The Idaho*, 93 U. S. 575. Upon the undisputed facts, the plaintiffs failed to retain such possession as the law requires in order to maintain their lien. To hold otherwise would enable parties to practice the very frauds which the statute as to unrecorded mortgages of personal property, and the rule of law as to the duty of pledgees to retain possession of the pledged property, seek to prevent. The title of the defendants as assignees in insolvency of Houdlette must accordingly prevail. *Bingham v. Jordan*, 1 Allen, 373; *Low v. Welch*, 139 Mass. 33, 29 N. E. 216; *Blanchard v. Cooke*, 144 Mass. 207, 218, 226, 11 N. E. 83; *Casey v. Cavaroc*, 96 U. S. 467. Judgment on the verdict for the defendants.

(167 Mass. 454)

HILTZ v. WILLIAMS.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 13, 1897.)**BROKERS — COMPENSATION — SUFFICIENCY OF EVIDENCE.**

In an action by a real-estate agent for commissions on a sale of land to F., there was evidence that defendant employed plaintiff to sell the land, and that plaintiff, pursuant to such employment, called F.'s attention to it. *Held*, that the evidence supported a judgment for plaintiff.

Exceptions from supreme judicial court, Suffolk county.

Action by one Hiltz against one Williams to recover commissions claimed by plaintiff for the sale of certain land belonging to defendant, to one Foster. There was a finding for plaintiff, and defendant excepts. Exceptions overruled.

Howard D. Moore and George H. Russ, for plaintiff. O. E. Washburn, for defendant.

PER CURIAM. There was evidence that the defendant employed the plaintiff to sell the land, and that the plaintiff, in pursuance of this employment, called Foster's attention to the land, and had some talk with him about purchasing it. It was competent for the court, trying the case without a jury, to infer from the evidence that Foster ultimately purchased the land, in consequence of the efforts of the plaintiff to sell it. Exceptions overruled.

(167 Mass. 424)

KNOWLTON, Atty. Gen., v. SHOMO.(Supreme Judicial Court of Massachusetts.
Worcester. Jan. 12, 1897.)**QUO WARRANTO—INFORMATION TO FORFEIT CHARTER—PROCEDURE.**

An information for the purpose of having a charter forfeited on the ground of nonuser or misuser of its franchise must be in the nature of quo warranto, brought by the attorney general on behalf of the commonwealth, and cannot be prosecuted by private counsel on behalf of the inhabitants of a town.

Information, on behalf of the inhabitants of the town of Petersham, for the purpose of having the charter of Shomo declared forfeited. Leave given to amend information.

Frank P. Goulding and Frank L. Dean, for informant. Robinson & Robinson, for defendant.

FIELD, C. J. If this information can be maintained for the purpose of declaring the charter of the defendant forfeited, it must be as an information in the nature of a quo warranto, brought by the attorney general in behalf of the commonwealth. Such an information is a common-law proceeding, and the pleadings and trial must conform to common-law procedure. Attorney Gen-

eral v. Sullivan, 163 Mass. 446, 40 N. E. 843. The pleadings are not regulated by the provisions of Pub. St. c. 167. There are some indications in the pleadings that the information was regarded by the parties as an information in equity, but, as no objection is made on that ground, it would not, perhaps, be necessary to discuss it; but it must be regarded as an injunction at common law, of which this court has jurisdiction, under Pub. St. c. 150, § 3; *Folger v. Insurance Co.*, 99 Mass. 268; *Attorney General v. Salem*, 103 Mass. 138. As an information in the nature of a quo warranto, to declare forfeited the charter of the defendant on the ground of the nonuser or misuser of its franchise, the information ought not to be prosecuted "at the expense and the instance of the inhabitants of Petersham," but should be prosecuted, if at all, in behalf of and at the expense of the commonwealth and by or under the immediate direction of the attorney general. *Com. v. Insurance Co.*, 5 Mass. 230; *Goddard v. Smithett*, 3 Gray, 116. The mention of relators in the information might be rejected as surplusage. *Com. v. Allen*, 128 Mass. 308. But, rejecting this, it does not appear that the information was filed by the attorney general in behalf of the commonwealth, and it apparently has been prosecuted by an attorney at law employed by the inhabitants of the town of Petersham; and the town of Petersham, it is conceded, has no interest in the prosecution which the law recognizes. It is for the attorney general, on his official responsibility, to determine whether he desires to apply for leave to amend the information so that it shall appear to have been brought by him in behalf of the commonwealth. *Rice v. Bank*, 126 Mass. 300; *High*, Extr. Rem. (3d Ed.) §§ 697, 698. If such an amendment is allowed by a single justice of this court, and both parties then agree in writing to submit the questions of law to the full court upon the report as it stands, this may be done. If such an amendment is allowed, and the parties do not so agree, the report must be discharged, and there must be a new trial. If such an amendment is not allowed, the information must be dismissed for the reason that it does not appear to have been brought or to be prosecuted by the attorney general in behalf of the commonwealth. So ordered.

(167 Mass. 222)

RUSSIA CEMENT CO. v. LE PAGE CO.
et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 5, 1897.)

ATTACHMENT—BONDS TO DISSOLVE—CONSTRUCTION.

Under Pub. St. c. 161, § 52, providing that, if final judgment in an attachment case is rendered for plaintiff, the property attached shall be held 30 days in order to its being taken on execution; and section 55, declaring that the final judgment intended in section 52 is that

which is rendered in the final action, whether upon appeal or otherwise, and not such as may be rendered on a writ of error or writ of review,—where the judgment in an attachment suit in the federal court was reversed on a writ of error after bonds to dissolve the attachment were given, the bonds did not secure a judgment afterwards obtained.

Exceptions from supreme judicial court, Suffolk county; Charles Allen, Judge.

Two actions by the Russia Cement Company against the Le Page Company and others on two bonds given by defendants to dissolve an attachment. There was a judgment in favor of plaintiff in each case, on failure of defendants to amend after the court ruled that the answer did not set up a defense, and sustained a demurrer thereto, and defendants excepted. Exceptions sustained.

Chas. H. Drew and Anson M. Lyman, for plaintiff. Walter C. Cogswell, Warren & Brandeis, and George R. Nutter, for defendants.

HOLMES, J. These are actions on two bonds given to dissolve an attachment in an action for infringing a trade-mark, brought in the United States circuit court for this circuit. The cases are here on demurrer to an answer, which sets up a number of defenses and raises as many interesting questions, all of which were discussed at the bar, but of which we shall consider only one, as in our opinion that disposes of the cases. After the first bond was given, the action passed to judgment on February 13, 1892, but this judgment afterwards was reversed on a writ of error by the United States circuit court of appeals. 2 O. C. A. 555, 51 Fed. 941. Still later the declaration was amended, and, after another trial, the plaintiff, on October 30, 1894, got a second judgment entered nunc pro tunc as of May 14, 1894, which is the judgment relied on. The second bond was filed while the first judgment was in force, and pending a writ of error.

A majority of the court are of opinion that the final judgment, payment of which the bonds secured, was the first judgment, which subsequently was reversed, and not the last judgment. The question is to be decided in accordance with the local law of Massachusetts. Rev. St. U. S. §§ 914-916. The Massachusetts statutes provide that, if final judgment in a case is rendered for the plaintiff, the goods and estate attached shall be held for 30 days after the judgment, in order to their being taken on execution. Pub. St. c. 161, § 52 (and then in section 55), expressly declares that the final judgment intended in section 52 et seq. is that which is rendered in the original action, whether upon appeal or otherwise, and not such as may be rendered upon a writ of error or writ of review. This declaration, which comes through Gen. St. c. 123, § 44, from Rev. St. c. 90, § 27, was proposed by the revisers "merely to adopt and confirm the

construction which has been given to the existing statutes. *Bingham v. Pepoon*, 9 Mass. 239, 241." Commissioners' Rep. Rev. St., note to chapter 90, § 28; *Clap v. Bell*, 4 Mass. 99. The "final judgment" mentioned in the condition of a bond given to dissolve an attachment is the final judgment, secured by the attachment, for which the bond is a substitute. We see no reason for giving the words any other meaning. If a supersedeas is issued with the writ of error, the United States law requires a new bond from the defendant to answer all damages and costs if it fail to make its plea good. Rev. St. U. S. § 1000. This security "is a substitute for any which before existed." *Otis v. Warren*, 16 Mass. 53, 56. See *Swett v. Sullivan*, 7 Mass. 342, 348. Such a bond was given in this case, although of inadequate amount. The policy of the law is settled in similar cases. *Dresser v. Cutter*, 161 Mass. 301, 37 N. E. 176.

Exceptions sustained.

(167 Mass. 443)

STARK et al. v. BOYNTON.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 13, 1897.)

QUITCLAIM DEED—BONA FIDE PURCHASER.

One taking a conveyance of a mortgagee's interest by quitclaim deed may claim as a bona fide purchaser, as against a grantee holding under a prior, unrecorded deed, under Pub. St. c. 120, § 4.

Appeal from superior court, Suffolk county.

Bill by Stark and others against one Boynton. From a decree for plaintiffs, defendant appeals. Affirmed.

Francis Burke, for appellant. C. W. Cushing, for appellees.

KNOWLTON, J. After the conveyance by the defendant to Lydia T. Anderson on June 20, 1888, and after the death of Mary E. Davis, which occurred prior to July 1, 1894, the said Anderson and Benjamin F. Davis were the only persons who had any title to the real estate in question. The deed of Benjamin F. Davis to the plaintiff on July 3, 1894, left the only outstanding title in Lydia T. Anderson. The plaintiff then took from her a quitclaim deed on September 15, 1894, which was duly recorded on November 6, 1894. He thereby acquired a perfect title, unless the deed given to the defendant by said Anderson on July 2, 1894, which was not recorded till November 10, 1894, takes precedence of the plaintiff's deed, which was recorded on November 6, 1894. It is not contended that the plaintiff had actual notice or knowledge of the defendant's prior, unrecorded deed, and therefore, by the express terms of Pub. St. c. 120, § 4, it is not valid as against the plaintiff. If it be assumed, as the defendant contends, that the title conveyed by the defendant to Lydia T. Anderson on June 20, 1888, was merely an interest as mortgagee, and that the mortgage in-

terest which she thus acquired did not merge with her ownership of a share in the equity of redemption, so that she might reconvey the mortgage to the defendant by her deed of July 2, 1894, it does not affect the result. One who takes a conveyance of a mortgage, either by a formal assignment or a quitclaim deed, from a person who appears of record to be the owner of it, will acquire a good title as mortgagee, unless he has actual notice or information of a defect in the title. *Welch v. Priest*, 8 Allen, 165; *Blunt v. Norris*, 123 Mass. 53; *Gallagher v. Galletley*, 128 Mass. 367; *Morse v. Curtis*, 140 Mass. 112, 2 N. E. 929. The effect of such a conveyance, when the mortgage purports to secure the payment of a note or bond which is not produced, but has previously been sold to a third person, is considered in *Wolcott v. Winchester*, 15 Gray, 461. The failure to include the note or bond in the sale may leave the conveyance ineffectual as against a previous purchaser of the debt, who has a prior, unrecorded assignment of the mortgage security, or who otherwise succeeds to the mortgage title. But there are no facts in the present case to make this doctrine applicable. We infer from the record that there was no note, bond, or other evidence of debt, except what is contained in the recitals in two of the deeds, and that there was nothing to show to the plaintiff, when he took his deed from Lydia T. Anderson, that he was not acquiring everything that she ever had upon which the validity of her title depended. Decree affirmed.

(167 Mass. 457)

SNOW v. TERRETT.

(Supreme Judicial Court of Massachusetts.
Hampden. Jan. 13, 1897.)

SALE—DELIVERY.

Owners of logs at a mill to be sawed delivered them to a purchaser by going to the mill, which was an open place, to which all persons had free access. There was no evidence that the mill men had any lien when the sale and delivery were made. *Held*, that there was no such actual possession of the logs by the mill men as to require an instruction on the power of the owner to deliver the logs to the purchaser, unless the mill owner joined in the agreement and became agent of the buyer.

Exceptions from superior court, Hampden county.

Action by Allen D. Snow against one Terrett to recover damages for the conversion of certain logs and lumber alleged to be the property of plaintiff. There was a finding in favor of plaintiff, and defendant excepts. Exceptions overruled.

Arthur S. Kneil and Richard J. Morrissey, for plaintiff. John J. Neilligan, for defendant.

BARKER, J. The case was tried without a jury, and the single exception was to the refusal to give a ruling requested by the defendant. Appended to the bill of exceptions is an agreed statement of facts, but the case was not tried upon it. It is in part a statement of

facts, with which, as we infer, the court, on finding, dealt as uncontested, and in part a statement of evidence given at the trial. The only question properly raised here is whether the ruling asked for should have been given. The action is for the conversion of logs and lumber. From the agreed statement it appears that Charles and Frederick Snow owned logs, some of which they had delivered at Soule's mill and the others at Goodboe's mill, to be sawed into lumber. Before any logs were sawed, Charles and Frederick sold them all to Allen D. Snow, and delivered him the logs by going with him to the mills, where, in the absence of the owners of the mills, the vendors and vendee looked over the logs which were then there to be sawed, the vendee marking with his initials some of the logs at Goodboe's mill. After this delivery, and after the logs at Soule's mill had been sawed, and before any of those at Goodboe's mill had been sawed, the defendant attached the boards and logs, as the property of Charles and Frederick Snow, upon a writ against them, and subsequently sold the logs and boards upon execution, in pursuance of the attachment. No one notified Soule of the sale to Allen D. Snow, and Soule had no knowledge of that sale until after the attachment, and neither Soule nor Goodboe was at any time notified by Allen D. Snow himself that he owned the logs. In addition to these facts, the agreed statement recites that after the attachment, and before the execution sale, the defendant was notified by Allen D. Snow that the logs had been sold to him by Charles and Frederick Snow, and were his property. The statement further recites certain conflicting evidence as to the logs at the Goodboe mill, from which it seems that the court could have found that Goodboe had notice of the sale to Allen D. Snow, or that he had no such notice, or that some one in charge of the mill, under Goodboe, not only had notice of the sale, but expressed a willingness to saw the logs which were there, if Allen D. Snow would pay for the sawing. The finding for the plaintiff was, as we infer, for the conversion of the lumber and logs at both mills. The ruling requested was "that no legal possession of said logs and lumber could be given by the alleged seller to the alleged buyer of said logs and lumber, while in the possession of a third person or bailee, unless the alleged seller and buyer and bailee all joined in the agreement, and the bailee attorn to, and become agent of, the buyer." We construe this to mean that the sale and delivery to Allen D. Snow would not give him a title which he could maintain against the subsequently attaching creditor of his vendors, unless the proprietors of the mills where the logs were not only had knowledge of the sale, but consented to keep the logs as the property of the purchaser. The bill of exceptions does not show that the presiding justice was wrong in declining to give this request, and it is not necessary to consider whether it is correct, as an abstract proposition of law. There is nothing

to show that the mill yards were not, as is usually the case with country sawmills, open places, to which all persons had free access, and where any owner of logs to which no lien had attached might, without committing a trespass, or infringing any right of the mill owner, do what he chose to his own logs. Nor is there anything to show that, when the sale to the plaintiff was made, the mill men had any liens. Under these circumstances, there was no such actual and exclusive possession of the logs by the mill men as to require the presiding justice to consider or pass upon the legal question which lies at the foundation of the ruling requested. Exceptions overruled.

(167 Mass. 290)

DECIE v. BROWN et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 8, 1897.)

CONSTITUTIONAL LAW — INTOXICATING LIQUORS —
RESTRICTIONS.

1. St. Mass. 1888, c. 340, providing that in cities the number of saloons shall not exceed one for each 1,000 of population, does not violate Const. Mass. pt. 1, § 6, as giving to persons having licenses unequal advantages and peculiar privileges.

2. Nor does such statute violate Const. U. S. Amend. 14, prohibiting states from denying to any person the equal protection of the laws.

Report from supreme judicial court, Essex county; Charles Allen, Judge.

Petition by Charles H. Decie against Moses Brown and others for writ of mandamus. The petition was denied, and case reported to the supreme court. Petition denied.

Horace I. Bartlett and David P. Page, for petitioner. Edmund S. Spalding and Robert E. Burke, for respondents.

BARKER, J. The petitioner, having been refused a license because of the restriction imposed by St. 1888, c. 340, that the number of places licensed shall not exceed one for each 1,000 of the population, contends that the statute is unconstitutional, because it, in effect, gives to the proprietors of licensed places unequal advantages and peculiar and exclusive privileges, and so conflicts with article 6 of part 1 of the constitution of the commonwealth, and with section 1 of article 14 of the amendments to the constitution of the United States. It is too late to question the validity of such statutes. This one does not differ in substance from any statute which forbids the carrying on of a trade or business, or the exercise of a profession, by other than licensed persons. Such statutes are upheld because the resulting exclusion of unlicensed persons is not designed to confer on those who are licensed an exclusive benefit, privilege, or right; and, where that result does follow, it is merely the collateral and incidental effect of provisions enacted solely with a view to secure the welfare of the community. See *Hewitt v. Charier*, 16 Pick. 353; *Com. v. Blackington*, 24 Pick. 352; *Com. v. Kimball*, Id. 359.

The limitation of the number of licensed places within the territory of a town or city is a reasonable exercise of the police power, and therefore is not in conflict with the constitution of the commonwealth or the fourteenth amendment of the constitution of the United States. See, also, *Com. v. Bennett*, 108 Mass. 27; *Com. v. Dean*, 110 Mass. 357; *Com. v. Fredericks*, 119 Mass. 199; *Bartmeyer v. Iowa*, 18 Wall. 129; *Beer Co. v. Massachusetts*, 97 U. S. 25; *Crowley v. Christensen*, 137 U. S. 86, 11 Sup. Ct. 13; *Glozza v. Tiernan*, 148 U. S. 657, 13 Sup. Ct. 721. It is unnecessary to consider whether, if the statute were void, a writ of mandamus could be ordered. Petition denied.

(167 Mass. 446)

OLNEY v. LOVERING et al.

(Supreme Judicial Court of Massachusetts, Suffolk. Jan. 12, 1897.)

WILLS—CONSTRUCTION—HEIRS AT LAW.

Testator gave \$20,000 and certain realty to trustees, and provided that, on the death of N.'s children, said sum of \$20,000 is to be distributed among their "heirs at law; * * * that is to say, as the children of the said N. decess successively, a proportion of the fund is to be distributed among the children or legal representatives of each child so dying,"—and that, on the decease of said N.'s children, the realty, or, if sold, the proceeds thereof, are to be conveyed in fee, paid over, or distributed among the "heirs at law" of said children the same as the \$20,000. Held, that the words "heirs at law" meant those who would be heirs as to realty, and therefore, the widow of a deceased child being a statutory heir only to the extent of \$5,000 (St. 1880, c. 211; Pub. St. c. 124, § 3), was only entitled to \$5,000.

Bill by one Olney, trustee, against Lovering and others.

Alfred Hemenway and Charles B. Barnes, Jr., for Anna J. Lovering. Sigourney Butler, for Nathaniel P. Lovering, Henry P. Lovering, Harry Lovering Smith, and Murray Smith. Francis I. Amory, for trustee.

ALLEN, J. The testator left \$20,000, and also two houses, in trust, and both income and principal of the personal and real estate were to be applied and disposed of in the same manner. The trustees also had power to convert the real estate into personal, and this was done, so that there was but one trust fund, with a common destination of income and principal. The question now before us arises upon the following words of the will: "Upon the decease of the said Nathaniel's children, said sum of \$20,000 is to be distributed to and among their heirs at law; * * * that is to say, as the children of the said Nathaniel shall decess successively, a proportion of the fund is to be distributed among the children or legal representatives of each child so dying. And on the decease of the said Nathaniel's children, said houses in Hollis and Tremont streets, or, if sold, the proceeds thereof, are to be conveyed in fee, paid over, and distributed to and among the heirs at law of

said children in the same manner as I have directed in regard to said \$20,000." The trust fund at the outset having been partly in real estate and partly in personal, and there being no reason to suppose that the testator wished that the distribution should be to different persons, the words "heirs at law" will be construed to mean those who would be heirs of real estate. *Fabens v. Fabens*, 141 Mass. 395, 5 N. E. 650. And in several recent decisions it has been held that these words, when there is nothing in the will to show a different intention, include a husband or wife as a statutory heir, under the provisions of St. 1880, c. 211, now Pub. St. c. 124, § 3. *Lavery v. Egan*, 143 Mass. 389, 9 N. E. 747; *Lincoln v. Perry*, 149 Mass. 368, 21 N. E. 671; *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 673. This construction, however, will yield, if the whole will shows a different intention. *Lawrence v. Crane*, 158 Mass. 392, 33 N. E. 605. The words in the present will which present this question most distinctly are found in the provision, "That is to say, as the children of the said Nathaniel shall decess successively, a proportion of the fund is to be distributed among the children or legal representatives of each child so dying." One of Nathaniel's children died, viz. a son, leaving a widow, but no child. It is his share respecting which the question arises. Since he left no children, the words "among the children" have no direct application, and we need not determine how it would be if there were children. The words "legal representatives," as used here, clearly do not refer to the executors or administrators of a child so dying, and must therefore have reference to those who would succeed to their property, either real or personal. See *In re Bates*, 159 Mass. 252, 34 N. E. 266; *Eager v. Whitney*, 163 Mass. 463, 40 N. E. 1046. These words do not control the meaning which would otherwise be given to the words "heirs at law." On the whole, the conclusion to which we have come is that this case must fall within the rule of *Lavery v. Egan* and the later cases, and that the widow, by virtue of the statute, is an heir to the amount of \$5,000, and no more. *Proctor v. Clark*, 154 Mass. 45, 27 N. E. 673. Decree accordingly.

(167 Mass. 434)

COMMONWEALTH v. CROWLEY et al.

(Supreme Judicial Court of Massachusetts, Suffolk. Jan. 12, 1897.)

ASSAULT WITH INTENT TO STEAL—INDICTMENT—EVIDENCE—SENTENCE.

1. An indictment, under Pub. St. c. 202, § 26, for assault with intent to steal from a building, etc., need not allege the ownership of the goods intended to be stolen.

2. Where witness has testified that a certain defendant struck him, it is not error to permit the witness to be asked how he knew such defendant struck him, or what such defendant was doing when witness turned around.

3. In a prosecution, under Pub. St. c. 202, § 26,

for assault with intent to steal from a building, etc., evidence as to the property claimed to have been stolen is admissible.

4. A conviction for assault may be had under an indictment for assault with intent to steal from a building. Pub. St. c. 202, § 26.

5. Pub. St. c. 202, § 26, providing for the punishment of persons committing an assault with intent to steal from a building, etc., does not create such an offense as "assault with intent to commit larceny."

6. On conviction for an "assault with intent to commit larceny," on a trial for assault with intent to steal from a building, defendant should only be sentenced for assault.

Appeal from superior court, Suffolk county.

One Crowley and others were convicted of a crime, and appeal. Modified.

F. F. Sullivan and Joseph M. Sullivan, for appellants. John D. McLaughlin, Second Asst. Dist. Atty., for the Commonwealth.

ALLEN, J. 1. The motion to quash was rightly overruled. The indictment contains a valid charge of assault and battery. As an indictment under Pub. St. c. 202, § 26, it need not aver the ownership of the goods intended to be stolen (see *Com. v. Moore*, 130 Mass. 45); and in other respects an indictment substantially similar, though open to criticism, was held sufficient, in *Com. v. Holmes*, 165 Mass. 457, 43 N. E. 189.

2. The witness Lord having testified that the defendant Crowley struck him, there was no valid objection to the questions, "How do you know it was Crowley that struck you?" and "What was Crowley doing when you turned around?" This objection appears to have been founded upon the language of the court in *Com. v. Phillips*, 162 Mass. 504, 39 N. E. 109, but in that case the witness had not named the defendant.

3. The evidence as to the property said to have been stolen was competent, upon the charge of the offense under Pub. St. c. 202, § 26.

4. The verdict of the jury was properly received and recorded. The purpose of directing the jury to put in writing the result which they had agreed upon was to enable the court to see that their verdict, as orally announced, conformed to what they had agreed upon before their separation. In their writing the jury did not use the word "count" in its technical sense. Since the indictment contained but one count, it is obvious that they used it as meaning "offense," and that, having reference to the instructions which had been given, they meant to express that the defendants Crowley and Green were guilty of an assault with intent to commit larceny, and guilty of assault and battery. *Com. v. Walsh*, 132 Mass. 8.

5. The defendants were acquitted of the full offense with which they were charged, under Pub. St. c. 202, § 26, and no question as to the sufficiency of the evidence to support the charge of that offense is now open.

6. The defendants requested the court to rule that the only offense charged in the in-

dictment was assault with intent to commit larceny, and therefore they have no ground of complaint because the court allowed the jury to return a verdict of guilty of an offense so described, and no exception on this ground was taken. It appears by the record that the defendants were sentenced "for their offense of an assault with intent to commit larceny," but execution of the sentences was stayed because the court had some doubt whether the sentences should stand. The defendants do not take the point that there is no such offense as assault and battery with intent to commit larceny, but we know of none. It is not an offense under Pub. St. c. 202, § 26, to commit an assault and battery with intent to commit larceny, without more; that is, it must also be done "for the purpose of stealing from a building, bank, safe, vault, or other depository of money." So far as we are aware, the offense of assault and battery with intent to commit larceny, without more, is not punishable, as a distinct offense, under any statute of this commonwealth, or at common law. The words "with intent to commit larceny" are merely matter of aggravation of the assault and battery, not in the sense of making a distinct offense, but only as influencing the discretion of the court in fixing the sentence. *Com. v. Fischblatt*, 4 Metc. (Mass.) 354, 356; *Com. v. Kennedy*, 131 Mass. 584; 2 Bish. New Crim. Law, § 42. The statute which comes nearest to creating an offense of assault with intent to commit larceny is Pub. St. c. 202, § 25; but in that a different offense is described, namely, an assault "with force and violence and with intent to rob or steal." This means actual violence, as distinguished from merely constructive force and arms, and it would seem that the intent must be to steal from the person. An offense which involves actual violence is not well charged by the use merely of the words "with force and arms." See *Com. v. Humphries*, 7 Mass. 242; *Com. v. Clifford*, 8 Cush. 215, 218; *Com. v. Shattuck*, 4 Cush. 141; 2 Bish. Cr. Proc. §§ 371-380, 390; 2 Bish. Cr. Law, §§ 507, 1167. It is not intimated on the part of the government that this indictment would be good as a charge under section 25. Nor can the indictment be supported as a charge of an attempt to commit the graver offense, under Pub. St. c. 210, § 8. A charge of an attempt must be set forth in direct terms. *Com. v. Roosnell*, 143 Mass. 32, 37, 8 N. E. 747, and cases there cited. The defendants should be sentenced only for assault and battery. This offense was well charged, and they may be sentenced for it, although acquitted of the full offense charged in the indictment. *Com. v. Kennedy*, 131 Mass. 584; *Com. v. Delehan*, 148 Mass. 254, 19 N. E. 221. Of course, the circumstances of aggravation may be considered, but we cannot know that the sentence would be the same. So ordered.

(167 Mass. 332)

STONE et al. v. PILLSBURY et al.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 6, 1897.)**COVENANTS — BUILDING RESTRICTIONS — EXPERT TESTIMONY.**

1. The use of a dwelling house as an asylum in which to treat patients for the liquor, opium, tobacco, and morphine habits is not a violation of a provision in the deed thereof that "no building other than one single dwelling house * * * shall be erected, placed, or maintained on said lot," since doubts should be resolved in favor of the grantee, when the meaning is not plain.

2. Evidence as to the meaning among real-estate men of "single dwelling house" is incompetent to prove the sense in which it was used by persons not real-estate men.

Report from supreme judicial court, Suffolk county; John Lathrop, Judge.

Bill by Joseph Stone and others, as trustees, under the will of Edward C. Harris, against Charles J. Pillsbury and others, to restrain the defendants from conducting a gold-cure institute in a house formerly the homestead of the deceased, and purchased of him by defendants by a deed providing, among other things, that "this conveyance is made subject to the restriction that until January 1, 1900, no building other than one single dwelling house, to cost not less than six thousand (6,000) dollars, and the structures usually appurtenant thereto, including a private stable, shall be erected, placed, or maintained on said lot."

Gaston & Snow, for plaintiffs. Charles E. Heller, for defendants.

ALLEN J. The defendants contend, in the first place, that the restriction was not intended to apply to the house already upon the lot, but only to houses which might be built in the future. If this were so, the plaintiffs would be without remedy if the house were to be considerably changed in its interior construction, and converted into an hotel for transient guests, a public eating house, a liquor shop, or a factory. We should be slow to give this construction to the deed. But, on other grounds, we do not see our way clear to give to the plaintiffs the relief which they seek. The house was built and occupied as a single dwelling house by its original owner. Since then it has not been altered in construction, either inside or outside. So far as its physical construction goes, it remains a single dwelling house. We do not determine whether any possible change in the manner of its use would be a violation of the restriction. It might, for example, be wholly given up as a residence, and used only for some purpose of trade. But its use as a residence continues, with some approach, also, towards a use as a private hotel or a private hospital. The words of the restriction are not very strong. They do not say that no building upon the granted land shall be used for any other purpose than

as a private residence for a single family, without boarders, or even that no building shall be used otherwise than as a single dwelling house. The provision, omitting words not now material, is that no building other than one single dwelling house shall be maintained on said lot. Physically speaking, no other building is maintained there. No doubt, the present use is such as might reasonably have been provided against, if it had been anticipated. But the words are not plain. While a reasonable construction is to be given to them, doubts are to be resolved in favor of the grantee in the deed. *Saltonstall v. Proprietors of Long Wharf*, 7 Cush. 195, 201; *Simonds v. Wellington*, 10 Cush. 313; *Thayer v. Payne*, 2 Cush. 327, 331; *Johnson v. Jordan*, 2 Metc. (Mass.) 234, 240; *Amidon v. Harris*, 113 Mass. 59, 65; *Grubb v. Grubb*, 101 Pa. St. 11. In some decided cases the limitation upon the use of the building has been clearly expressed. Of these, *Dorr v. Harrahan*, 101 Mass. 531, is an example. In *Gillis v. Bailey*, 21 N. H. 149, the limitation upon the use was clearly to be inferred from the detailed recital of the object of imposing the restriction. In the present case the inference is less clear, and the building itself being maintained as a single dwelling house, without structural change, we are unable to say that the introduction of the use which is described is a violation of the restriction. See *Hutchinson v. Ulrich*, 145 Ill. 336, 34 N. E. 556.

The evidence as to the meaning of "single dwelling house" among real-estate men was rightly excluded; it being limited to a particular class, which, so far as appears, did not include the original or subsequent purchasers of this property. Decree affirmed.

(167 Mass. 338)

BONNEMORT v. GILL et al.(Supreme Judicial Court of Massachusetts.
Norfolk. Jan. 8, 1897.)**WILLS—PROBATE—REVIEW—JURISDICTION—PARTIES.**

1. Where a nonresident, appealing with others from a probate decree, dies pending the appeal, a subsequent decree, on appeal, allowing probate, will bind all the decedent's representatives, even minors, though no citation is served on them, where they have actual notice of the pendency of the appeal, and their interests, though they were not parties, have been fully protected.

2. It is not essential that all persons interested in the probate of a will should be before the court, in order to confer on it jurisdiction to render a final decree allowing probate of the will.

Exceptions from supreme judicial court; Charles Allen, Judge.

Petition by one Gill and others against one Bonnemort, executor, for vacation of a decree allowing the probate of a will, and for a retrial. From a ruling denying their pe-

tion, petitioners bring exceptions. Exceptions overruled.

William H. Baker, for petitioners. James E. Cotter and Charles F. Jenney, for executor.

KNOWLTON, J. The petitioners are executors of the will of Mary E. Metcalf, late of Orange, N. J., and her two minor children, who appear by their father, as next friend. The children are the sole legatees and devisees under her will. Mary E. Metcalf was one of nine nephews and nieces of Howard Gill, who all appealed from the decree of the probate court admitting to probate the last will and testament of said Gill. While their appeal was pending in this court, she died, and afterwards, without the issuing of any notice or citation to her minor children, who lived in New Jersey, or to her executor, the case proceeded to trial upon the appeal of the other eight appellants, whose interests were identical with hers, and the will was proved and allowed in this court. John Gill, one of the present petitioners, was one of the appellants, and, on his personal account, was a party to the proceedings until the final decree. Before the trial he had been appointed executor of the will of said Metcalf in New Jersey, but he did not assume to represent her estate in the appellate proceedings here. Her will has never been proved in this commonwealth. The petitioners asked the court to vacate the decree allowing the will of Howard Gill, and to permit them to try the appeal taken by said Metcalf in her lifetime, and they requested the court to rule that upon these facts they were entitled to try the appeal as if the decree allowing the will had not been made. Their exception to the refusal of the judge so to rule presents the only question in the case. Their contention is, in substance, that, if one of several appellants in such a case dies, the court has no jurisdiction to go on and adjudicate upon the question whether the alleged will shall be allowed, without issuing a formal notice or citation to the representatives of the deceased appellants, notwithstanding that they are not residents of the commonwealth, and that they have actual knowledge of the pendency of the appeal, and do not desire to appear to prosecute it. The executor of the deceased appellant's will had as much authority to appear and ask to be admitted to prosecute this appeal before the trial as he has now. He knew all the facts, and it is not to be supposed that his efforts to prevent the allowance of the will at the trial would have been greater or more effectual if he had appeared in his representative capacity than they were while he was acting for himself. It can hardly be doubted that the father and next friend of the infant petitioners knew of the pendency of his wife's appeal at the time of her death, and was aware of the subsequent proceed-

ings in which her executor was personally a participant. If he had wished to have his children represented at the trial, he had the same right then as now to appear as their next friend. The contention of the petitioners is founded on a mistaken conception of the relations of the heirs of the deceased person to the question whether the instrument shall be allowed as his will. All his next of kin are interested in the question, but no one of them is a necessary party to the proceedings to determine it. The law does not require that a personal notice shall be given to any one of them. *Laugh-ton v. Atkins*, 1 Pick. 535-547; *Loring v. Steineman*, 1 Metc. (Mass.) 204-208; *Marcy v. Marcy*, 6 Metc. (Mass.) 360-368; *Crippen v. Dexter*, 13 Gray, 330-334; *Arnold v. Sablin*, 1 Cush. 525-530. Under the rules of court, in ordinary practice, a general notice is given, which is sufficient to justify final proceedings, even if in fact it fails to reach some of the persons interested. If some of the heirs are infants, idiots, or insane persons, their disqualification does not deprive the court of its power to proceed without them. *Parker v. Parker*, 11 Cush. 519-524; *Wells v. Child*, 12 Allen, 330; *Schultz v. Schultz*, 10 Grat. 358. The decree of the court admitting the will to probate is in the nature of a judgment in rem, which establishes the will against all the world. Any person interested may make himself a party to the proceedings by applying to the proper tribunal, and he is forever bound by the decree, whether he is in fact a party or not. *Crippen v. Dexter*, 13 Gray, 330-332; *Brigham v. Fayerweather*, 140 Mass. 411, 5 N. E. 265; *Bogardus v. Clark*, 4 Paige, 623-626; *Tompkins v. Tompkins*, 1 Story, 547-558, Fed. Cas. No. 14,091; *Woodruff v. Taylor*, 20 Vt. 65; *Wills v. Spraggins*, 3 Grat. 555. In *re Storey's Will*, 20 Ill. App. 183. After an appeal is taken, as was done in this case, by several persons, the case is not like an ordinary adversary proceeding *inter partes* at common law, in which the original parties or their representatives must be before the court in order that a valid judgment may be rendered for or against them. If one of the appellants dies or withdraws his appeal, the case must go on to final adjudication, notwithstanding his absence. In case of his death his legal representatives, if his interest survives, and if his death comes to the knowledge of the court, should be given an opportunity to come in and prosecute the appeal, but no formal notice or citation is absolutely necessary. It is enough if the court is satisfied that they know of the appeal, and do not desire to prosecute it, or that their interests are in some way fully protected. What justice requires in the way of notice or information is a question for the discretion of the court in each case. The probate of a will should not be unreasonably delayed on account of the death of an appellant who leaves no heir or repre-

sentative within the commonwealth. This view is supported by analogies in other provisions of the statutes. By Pub. St. c. 156, § 9, one who omits to claim or prosecute an appeal in a probate proceeding, without default on his part, can be permitted to prosecute his appeal only when justice requires a revision of the case. So a court, upon petition, will exercise its inherent power to revise a decree only when justice clearly requires it. *Waters v. Stickney*, 12 Allen, 1; *Gale v. Nickerson*, 144 Mass. 415, 11 N. E. 714. Exceptions overruled, and decree affirmed.

(148 Ind. 127)

SMITH v. PARKER.¹

(Supreme Court of Indiana. Jan. 16, 1897.)

PLEADING—COMPLAINT—MEASURE OF DAMAGES—CORPORATION CONTRACTS—RIGHTS OF STOCKHOLDERS.

1. A complaint for damages by reason of fraud in failing to furnish money to carry on a business according to promise is defective where it falls either to allege that when defendant made the promises he did not intend to fulfill them, or to state facts from which such intention can be inferred.

2. A complaint for fraud in failing to furnish money according to promise states no facts from which damages can be measured, where it omits to state the rate of interest defendant was to receive, and what plaintiff could have procured money for in the market, since the difference is the measure of damage.

3. A stockholder has no right of action on a contract made between himself and another as promoters of the corporation, where the contract runs to the corporation, and was adopted by it after organization.

Appeal from circuit court, Hendricks county; John V. Hadley, Judge.

Action by William Smith against James O. Parker for fraud. There was a judgment for defendant, and plaintiff appeals.

S. M. Shepard and Brill & Harvey, for appellant. Hogate & Clark, for appellee.

McCABE, J. The circuit court sustained a several demurrer to each of the two paragraphs of the complaint for want of sufficient facts, and the plaintiff refusing to amend or plead further, and standing upon his complaint, the court rendered judgment for the defendant.

The substance of the first paragraph of the complaint is as follows: The plaintiff complains of the defendant, and says: That on March 9, 1886, he obtained letters patent of the United States for an improvement in flour scoops and sifters. That afterwards, on April 26, 1887, Elmer E. Smith (a son of this plaintiff), Alfred Welshans, Elisha H. Hall, and Chester F. Hall organized a corporation under the laws of Indiana for the purpose of manufacturing and selling flour scoops and sifters, strainers, etc. That the capital stock of said company was fixed at \$5,000. Afterwards said company, which had adopted the name of the Smith Manufacturing Company, made a contract with plaintiff, whereby it

was agreed that the said company should have the right to manufacture flour scoops and sifters and other articles, under the said letters patent so issued to this plaintiff, and as a compensation for such right and license the company agreed to and did issue to this plaintiff paid-up stock in said company of one-fourth of the capital stock of said company, and by such agreement was to, and did thereafter, until as otherwise hereinafter stated, pay to this plaintiff, as a royalty on each and every article made, or parts thereof made, under said letters patent, one cent each on flour scoops and sifters, strainers, etc. That the Smith Manufacturing Company commenced doing business immediately after such contract, and, although said company had limited means and small capital, it succeeded in building up a large and rapidly growing business, and, but for said limited means, would have been able to have greatly enlarged its business; and thus matters stood until about the 1st of July, 1888, when the defendant, seeing the business was a prosperous one, and desiring to get control of the same, purchased the shares of capital stock owned by said Welshans and the two Halls. At the time of said purchase plaintiff individually owned tools used in said business of the value of \$400. That plaintiff had owing to him on a contract for manufacturing said articles for said company the further sum of \$500. That when said defendant had purchased said shares of stock, and got an insight into its business, he represented to this plaintiff that he (defendant) had plenty of means, and could command money in sufficient quantity to run said business upon a large scale, and thereupon defendant falsely and fraudulently represented to plaintiff that if plaintiff would consent to the formation of a new company, and would assign his said patent to said new company absolutely, and forego his (plaintiff's) rights to royalties on articles manufactured under said patent, and would put in said tools and materials then on hand, and release his claim for money due on said contract with said old company, they would form and organize a new company under the name of the William Smith Company of Danville, Ind.; and, if that was done, defendant could and would furnish the new company with all the money it might require to make it a large and prosperous business; and this plaintiff having but little means, and being desirous of increasing said business, and relying upon the representations of said defendant, and fully believing that said defendant would furnish said new company means in abundance to run such business upon a large scale, and thereupon plaintiff, at the special instance and request of said defendant, joined in the organization of the William Smith Company of Danville, Ind., as a corporation under the laws of the state of Indiana with a capital stock of \$10,000, of which \$2,000 was issued to plaintiff, and

¹ Rehearing denied.

defendant received of such capital stock \$5,000. Thereupon plaintiff, relying upon said representations, did, on July 7, 1888, assign his said letters patent to said William Smith Company. That immediately after such new company had been organized, defendant induced Frederick Neiger to purchase \$1,000 of said stock and Mrs. Dempsey \$1,000, a Mr. Crabb \$5,000, and a Mr. Ferree \$50. Said Crabb was then and there the father-in-law of said defendant, and said Ferree was a brother-in-law; so that in the family of said defendant there was a controlling interest in said capital stock of said new company. And that at the first annual meeting of the stockholders of said company this plaintiff was purposely omitted from the directory of said company, and the said family combination took possession of all the principal official situations in said new company, and thereafter controlled and managed the said affairs of said new company, built a factory on credit, bought other patents on royalty, and ran things, as far as possible, on credit; yet, notwithstanding the business was making money, and doing a prosperous business, by reason of the expense of taking in other manufactures, and by the mismanagement of said defendant, Parker, and his failure to furnish money of his own to put into the business, said new company became insolvent. Defendant found, in the course of the management of the business, that said patents were valuable, and he determined to wreck said company, and become the sole possessor of said patents, and to that end he studiously, fraudulently, and persistently refused to put in any money to run said business, but in every possible way sought by withholding his money to so embarrass said business as would, and finally did, result in the disaster to said business of said company. Afterwards, at the March term of the Hendricks circuit court for 1890, said Parker and others filed in said court a petition for a receiver of said new company; and said Parker, by virtue thereof, had said business sold by a receiver, and said defendant, Parker, became the purchaser of the assets of said company, and the owner of said letters patent. And plaintiff says that by reason of said wrongful and fraudulent conduct of said defendant, the plaintiff has been deprived of said patent, which was and is valuable, and the use and benefit thereof; has lost his tools and materials so put in, and money so owing to said plaintiff by said old company, and is damaged thereby in the sum of \$50,000; wherefore, etc.

The theory of this paragraph, as counsel on both sides agree, is an action for damages caused by fraud. It is contended by the appellee's counsel in support of the ruling of the court below that the fraud or misrepresentation which affords a ground of action for damages must be as to an existing fact or facts. And hence it is argued that, as the principal wrong complain-

ed of was appellee's failure to furnish the money to run the business of the new company, it does not amount to actionable fraud. Appellant's counsel seek to avoid this contention by urging that an action for damages arising out of a misrepresentation may be maintained in respect to a fact to transpire in the future if founded on promises that the defendant never intended to fulfill. They quote a portion of a section of Sutherland on Damages. But the whole section reads as follows: "To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts, or to the condition of things as then existent. It is not every misrepresentation relating to the subject-matter of the contract which will render it void, or enable the aggrieved party to maintain an action for deceit. It must be as to matters of fact substantially affecting his interests, not as to matters of opinion, judgment, probability, or expectation. Representations made in respect to a fact to transpire in the future must be a mere promise or opinion, and will not of themselves support an action for fraud, though a party may be liable for fraud by obtaining property on promises which he never intends to fulfill." *Suth. Dam. (2d Ed.)* § 1167. There is no allegation in the paragraph in question that the appellee, when he made the alleged promises, never intended to fulfill them. Nor is there anything in the pleading from which that fact could be reasonably inferred, even if that would supply the place of an allegation of such fact. In the case of *Child v. Swain*, 69 Ind. 230, also cited by appellant, it was expressly found that: "At the time said Child entered into said contract, * * * he did not intend to carry out and perform his part thereof, but intended to get the money of said Swain and said Graham, and give them no value therefor." If it be said that the latter case was a suit for a breach of contract, and not for fraud, then it is wholly inapplicable to the paragraph in question, which, as we have seen, is an action for damages for fraud. It is settled law that representations upon which an action for fraud can be predicated must be of alleged existing facts, and not upon promises to be performed in the future. *Balue v. Taylor*, 136 Ind. 363, 38 N. E. 269; *Bennett v. McIntire*, 121 Ind. 231, 23 N. E. 78; and cases there cited. Besides, this paragraph states no facts from which a basis can be fixed for estimating or measuring the damages. The measure of damages for refusal to loan money pursuant to agreement is the difference between the interest agreed to be paid and what the

plaintiff was compelled to pay to borrow the money. In contemplation of law, money is always in the market, and procurable at the lawful rate of interest. *Lowe v. Turple* (Ind. Sup.) 44 N. E. 32, 33. There is no statement of the rate of interest that appellee was to receive, and no statement of what the current rate of interest was, or what the money could have been procured for.

The second paragraph counts on the same facts, and is in theory a suit for breach of the same contract to furnish the new company money to carry on its business. This contract runs in favor of the new corporation before it was organized, between two persons who seem to have been its promoters. A corporation is not bound by such a contract, unless, after its organization, it adopts such contract. The obligation of the corporation does not rest on any supposed agency of the promoters, and a ratification of their acts, but upon the immediate and voluntary act of the company. The adoption of such agreement by the corporation after its formation may be implied by the acts or acquiescence of the corporation or its agent, without any express acceptance. After a corporation knowingly receives the benefit of an engagement entered into by its promoters prior to its organization, it will usually not be permitted to deny that it agreed to assume the corresponding burdens. 1 *Mor. Priv. Corp.* §§ 547, 549. The second paragraph sufficiently shows that the new corporation had knowingly received some of the benefits of said contract. And therefore it sufficiently appears that the new corporation has accepted and adopted the contract sued on, and, as that contract is the obligation of the defendant to the new corporation, and to nobody else, the question arises whether the appellant, though a stockholder in the new corporation, has any right of action for a breach of that contract; or, in other words, does a breach of that contract make a cause of action in his favor against the defendant? That question has been answered in the negative by this court in *Tomlinson v. Bricklayers' Union*, 87 Ind. 308. It was there held that a cause of action in favor of a private corporation could not constitute a cause of action in favor of one of its stockholders. There are other defects in the paragraph in question. For instance, there are not facts enough stated to enable the court in applying the law to prescribe any measure of damages beyond nominal damages. *Lowe v. Turple*, supra. A failure to assess nominal damages affords no grounds for the reversal of a judgment in this court. *Patton v. Hamilton*, 12 Ind. 256; *Hacker v. Blake*, 17 Ind. 97; *Black v. Coan*, 48 Ind. 385; *Mahoney v. Robbins*, 49 Ind. 146; *Wimberg v. Schwege-geman*, 97 Ind. 528.

Moreover, the appellee's counsel present a very serious question, which must be de-

cided in favor of appellant, before he can have a reversal, in contending, as they do, that the contract to furnish money is so vague and uncertain as to what the defendant bound himself to do as to render it void. The rule is thus stated in *Thomson v. Gortner*, 73 Md., at page 482, and 21 Atl., at page 373: "The law is too well settled to admit of doubt that, in order to constitute a valid verbal or written agreement, the parties must express themselves in such terms that it can be ascertained to a reasonable degree of certainty what they mean. And if an agreement be so vague and indefinite that it is not possible to collect from it the full intention of the parties, it is void; for neither the court nor the jury can make an agreement for the parties. Such a contract can neither be enforced in equity nor sued upon at law." But the courts are not wholly confined to the language of the contract. Where it is ambiguous, oral evidence may be resorted to to apply the contract to its proper subject-matter. An eminent author says: "Now, where does the law stop in this endeavor to remove uncertainty? We answer, not until it is found that the contract must be set aside, and another one substituted, before certainty can be attained. In other words, if the contract which the parties have made is incurably uncertain, the law will not, or rather cannot, enforce it; and will not, on the pretense of enforcing it, set up a different, but valid one, in its stead." 2 *Pars. Cont.* (8th Ed.) 561; 1 *Beach, Cont.* §§ 72, 73, and authorities there cited; *Rue v. Rue*, 21 N. J. Law, 369-377. It is insisted by the learned counsel for the appellant that the contract sued on here is no more uncertain than was the contract in *Child v. Swain*, supra, which, it is asserted, this court enforced. But there is not a word from the beginning to the end of the report of that case to indicate whether the contract was certain or uncertain. No question was made or decided in the case as to the certainty or uncertainty of the contract. The court finds simply that the contract, a copy of which is filed with the complaint, was entered into, without setting it out or stating its provisions. But we need not and do not determine whether the contract sued on here was void for uncertainty, as the other objections above mentioned to the second paragraph are fatal. The circuit court did not err in sustaining the demurrer to either paragraph of the complaint. Judgment affirmed.

(147 Ind. 125)

BEYERLINE v. STATE.¹

(Supreme Court of Indiana. Jan. 15, 1897.)
CRIMINAL LAW—FORGERY—SIGNATURE IN GERMAN
—FORMER ACQUITTAL—WIFE'S TESTIMONY
—SEPARATION OF JURY.

1. An affidavit and information for forgery of a note which aver that the forged name was

¹ Rehearing denied.

signed in German characters, and added a like statement after the signature itself, is sufficient, though the name is not set forth exactly as it appears on the note.

2. An information which charges defendant with uttering a forged note, and further alleges that the names thereon "were false and forged by the defendant, with intent then and there and thereby feloniously, falsely, and fraudulently to defraud," states only the crime of uttering a forged instrument, and does not preclude a subsequent information for forgery.

3. In a trial for forgery of a note, the testimony of defendant's wife was competent to show that he took her by the neck, and led her into their bedroom, where he made her sign the name to the note as he spelled it for her; such acts not being confidential communications.

4. The fact that the jury in a criminal trial were allowed by the court, after agreeing on their verdict and sealing it, to separate before they returned the verdict into court, is not a ground for a new trial, where no harm to defendant resulted therefrom.

Appeal from circuit court, Allen county; E. O'Rourke, Judge.

Fred Beyerline was convicted of forgery, and appeals. Affirmed.

Breen & Morris, for appellant. Wm. A. Ketcham, Atty. Gen., and Newton D. Doughman, for the State.

HOWARD, J. The appellant was charged by affidavit and information with the forging of a promissory note, and on the trial was convicted of the offense charged, and sentenced by the court. The errors assigned and discussed by counsel relate to the sufficiency of the affidavit and information, and of the special answer, and also question the correctness of the action of the court in overruling the motion for a new trial.

In the affidavit and information it is charged, among other things, that the appellant "did there and then feloniously, falsely, and fraudulently make, forge, and counterfeit a certain promissory note, purporting to have been made and executed by Fred Beyerline, George Beyerline (whose name is signed to said note in German characters), Jacob F. Schapvenacker, by and under the name of Jacob Schapvenacker, and Peter F. Poirson." In the copy of the note set out these names appear as signed thereto, the name of George Beyerline being followed, in parenthesis, by the words "In German." Appellant contends that, "because the name signed to the note in German, and said to be, in English, 'George Beyerline,' is not set forth in the copy of the note exactly as it appears upon the note, appellant believes the affidavit and information were bad, and should have been quashed." We do not think so. It is true that, if the forgery were in a foreign language, an exact copy of the forged document, as made in the original, should be set out in the indictment or affidavit and information, and this should be followed by an English translation. But, as said by Mr. Bishop (1 New Cr. Proc. § 564), "if there is simply a name, like the signature of a note in forgery, and it is, for

example, written in German or Gothic characters, and is the same name in English as in German, there is no need to aver that the signature is in German, and add a translation,"—citing *Duffin v. People*, 107 Ill. 113. But, in the affidavit and information before us, the state did aver that the name was signed in German characters, and added a like statement after the signature itself. There could be no such thing as a translation of the name. It was the same whether written in script or print, in Roman, Italic, Old English, or German letters. Words in a foreign language must be translated, that we may understand their meaning and the thoughts expressed; but proper names serve only to indicate the persons that are known by such names. It is certainly enough to give such names in English, and to state, as was done in this case, that the names were written in the characters shown in the document alleged to have been forged.

The first paragraph of answer, or defense, is a plea of former acquittal; and it is contended that the court erred in sustaining a demurrer to this plea. It is averred, in the plea so made, that appellant had theretofore been charged by affidavit and information with the uttering and publishing of the same note he is here charged with forging, and that, on a trial had upon such charge, he had been acquitted; and the contention is that the charge of forgery was included in the former affidavit and information. Counsel say: "The first information charges that appellant did 'unlawfully, feloniously, fraudulently, and knowingly utter, publish, and pass, indorse and deliver, to one Adam H. Bittinger, as true and genuine, a certain false, forged, and counterfeit note,' etc. [here follows note]; 'that of the signatures to said note, only that of the said Fred Beyerline and Peter Poirson were genuine; that the names of the said George Beyerline and Jacob Schapvenacker were false, and forged by the said Fred Beyerline with intent then and there and thereby feloniously, falsely, and fraudulently to defraud the said Adam H. Bittinger,' etc." It is admitted that such information was probably defective, and might have been quashed upon motion; but it is contended that there was sufficient in it to sustain a conviction for forgery. Forgery and the uttering of a forged instrument are two distinct crimes; and the charge, in the information referred to in the plea of former acquittal, is unquestionably one of uttering a forged instrument; and it is of that charge, and not of forgery, that the appellant was acquitted. Neither is it correct to say that the proof to sustain one charge is the same as would be required to support the other. It is true that it is stated, in the information set out in the plea, "that the names of the said George Beyerline and Jacob Schapvenacker were false and forged by the said

Fred Beyerline"; but that is by way of recital, and not as a charge,—the words being simply descriptive of the signatures to the note. Surely, if such statement and description had been made, showing that the names had been forged by another person named, it would not be contended by counsel that such other person would thereby be sufficiently charged with the crime of forgery.

The twenty-ninth reason for a new trial had reference to certain evidence given by appellant's wife, over his objection. She was called by the state, and gave the following evidence, which was objected to: "I was in the kitchen ironing, and he [the appellant, her husband] came with the note, and he took me by the back of the neck, and led me into the bedroom. That was our room. We were living out at his mother's house, and I did not know what he wanted. And after I went into the bedroom he handed me this paper. He said I had to sign Mr. Schapvenacker's name on there. * * * And I did not know how to spell his name I had to sign. He spelled the name. He stood right over me, and made me sign it, and so I signed it." The objection made to this evidence was that it detailed a confidential communication made to the wife by her husband, and also that, if there was any forgery shown, she committed it. It does not appear, however, from this evidence, that there was in fact any communication from the husband to the wife, whether confidential or otherwise. A communication implies something communicated,—knowledge imparted by one to another. This is rather evidence of a crime committed by the husband, or which he forced his wife to aid him in committing,—not of a communication made by him to her of any crime which he had committed. In *Polson v. State*, 137 Ind. 519, 35 N. E. 907, it was held competent for a wife to give evidence of the communication to her by her husband of a loathsome disease. "Such conduct on his part," said the court in that case, "was a gross breach of his duty as a husband; and he could not, therefore, shield himself from exposure in a court of justice, where such fact became material evidence in a cause, on the ground that it was a confidential communication." In the conduct shown in the evidence here objected to, the husband, instead of being engaged in confidential communications, such as the marital relation would shield from public exposure, was occupied in a double wrong,—abusing his wife, and using her as the instrument of his forgery.

It is not every conversation between husband and wife, nor every word or act said or done by either in the presence of the other, that is protected under the seal of secrecy, but only such communications, whether by word or deed, as pass from one to the other by virtue of the confidence resulting from

their intimate relations with one another. Where the criminal, in seeking advice and consolation, lays open his heart to his wife, the law regards the sacredness of their relation, and will not permit her to make known what he had thus communicated, even as it will not ask him to disclose it himself. But if what is said or done by either has no relation to their mutual trust and confidence as husband and wife, then the reason for secrecy ceases. Accordingly, many conversations and actions by and between husband and wife have been held not to be privileged. In *Beitman v. Hopkins*, 109 Ind. 177, 9 N. E. 720, which was an action to set aside an alleged fraudulent conveyance made by a husband to his wife, the wife was allowed to give evidence as to negotiations between her and her husband prior to and resulting in the conveyance of the land to her. The ruling of the trial court in admitting the evidence was approved, this court holding that the negotiations were in no sense such communications as are made incompetently by the statute. So, in *Brown v. Norton*, 67 Ind. 424, it was held that a wife might testify as to a parol contract entered into between her husband and another person; and in *Schmied v. Frank*, 86 Ind. 250, a like ruling was made concerning evidence given by a wife as to conversations between her and her husband, whereby she constituted him her business agent. In *Williams v. Riley*, 88 Ind. 290, it was likewise held that a wife should have been permitted to testify that she was present when a certain note executed by her husband and others had been paid. "Husband and wife," said the court in that case, "are not longer incompetent witnesses for or against each other, except that neither of them is allowed to testify in relation to a communication made by the other." A similar holding was made in *Jack v. Russey*, 8 Ind. 180. In divorce and other like proceedings a still larger liberty is permitted. *Smith v. Smith*, 77 Ind. 80, was an action for divorce brought by a wife. It was there held proper for her to testify as to her conduct as a wife, and as to her husband's habits of intoxication and his abuse of her. Also, in *Stanley v. Stanley*, 112 Ind. 143, 13 N. E. 261, being an action on an antenuptial bond given by the husband, it was held that the wife might testify as to the conduct of the husband in matters relating to the alleged violation of the conditions of the bond. And in *Malnard v. Reider*, 2 Ind. App. 115, 28 N. E. 196, which was an action by a husband to recover for the seduction of his wife, the evidence of the husband as to statements made in his presence by his wife to her seducer was held competent.

In criminal prosecutions the restrictions as to the competency of offered evidence are still further removed. By section 504, Rev. St. 1894 (section 496, Rev. St. 1881), all persons not expressly excepted are declared to be competent as witnesses in civil actions. In the succeeding section, those excepted as

Incompetent are the insane; children under 10 years of age, save in certain cases; attorneys, physicians, and clergymen, as to confidential matters; and, "sixth, husband and wife, as to communications made to each other." Other exceptions, not necessary to state here, are made in the sections of the statute immediately following. By section 1867, Rev. St. 1894 (section 1798, Rev. St. 1881), all persons competent to testify in civil actions are declared to be also competent in criminal prosecutions, and, in addition, three other classes of witnesses are named as competent,—that is, the accused, if he wishes to testify; his accomplices, if they consent; and the injured party. Under the last of these cases, it has been held that a wife, when the injured party, is competent to testify, even as to confidential communications between her and her husband. *Doolittle v. State*, 93 Ind. 272. It has also been held that, for the purpose of showing the relations that existed between husband and wife, letters written by her to her husband might be read in evidence, in a prosecution afterwards instituted against him in which he was charged with her murder. *Pettit v. State*, 135 Ind. 393, 34 N. E. 1118. In *Perry v. Randall*, 83 Ind. 143, the actions of a husband in taking money belonging to another, counting it over, putting it into his pocket, and not returning it to the owner, all in presence of his wife, were held to be confidential communications, which could not be testified to by her, even though she avoided the statement of any words spoken by her husband. Yet in *Hutchason v. State*, 67 Ind. 449, the testimony of a wife as to the acts of her husband in the commission of arson was held competent; and in *Jordan v. State*, 142 Ind. 422, 41 N. E. 817, a husband was permitted to testify as to a communication to him by his wife that she intended to burn a certain mill. The reason given for this last holding was that the husband was, under the statute above cited, an "injured party," being part owner of the mill which she was charged to have set on fire.

In the light of the interpretation so given to the statutes relating to a wife's testimony, there can be no doubt that the evidence here objected to was competent. It was not concerning any confidential or other communication made by the husband to the wife, but, as in several of the cases cited, was evidence of a crime committed by him in her presence. He, besides, forced her to aid him in the commission of the forgery; and appellant says that she herself committed the forgery. If she had been thus wrongfully accused by him, she might testify as an injured party; and, if she were indeed an accomplice with him, she might testify as such. If, on the other hand, as seems to have been the case, she was an abused and maltreated wife, forced, also, into the commission of a criminal action against her will, the marital relation had no connection with his act, and she might then, also, give evidence of the crime.

Appellant finally complains that the jury were allowed, after agreeing upon their verdict and sealing it up, to separate before they returned the verdict into court. This was done by leave of court, and there is nothing to show that it was not done in the presence of and with the consent of appellant. It is provided in clause 2, § 1911, Rev. St. 1894 (section 1842, Rev. St. 1881), that a new trial shall be granted, "when the jury has separated without leave of the court, after retiring to deliberate upon their verdict." The separation was here allowed by the court, and there is, besides, nothing to show that the appellant suffered any harm thereby. Even if the separation were without leave, as it was not, that would not be cause for a new trial, if it appeared, as we think it does here, that no harm resulted to the appellant. *Creek v. State*, 24 Ind. 151; *Riley v. State*, 95 Ind. 446; *Clayton v. State*, 100 Ind. 201; *Drew v. State*, 124 Ind. 9, 23 N. E. 1098. In case the jury had separated before agreeing upon their verdict and sealing it up, we should have a different question. The verdict was returned into court, and, on being opened and read in presence of the jury and the appellant, was acknowledged by the jury as their verdict. We can see no error in this. See *State v. Engle*, 13 Ohio, 490. No question is made as to the guilt of the appellant as charged in the affidavit and information. He was ably defended by accomplished and learned counsel, and he seems to have been convicted without the violation of any of his rights under the law. Judgment affirmed.

(146 Ind. 545)

LEVERING et al. v. BIMEL et al.

(Supreme Court of Indiana. Jan. 12, 1897.)

CORPORATIONS—INSOLVENCY—PREFERENCES.

1. An insolvent corporation may prefer creditors, though the preference also inures to the benefit of some of its directors as sureties on the indebtedness preferred.

2. A private corporation, unless restrained by statute, may legitimately deal with its property in a manner similarly as an individual deals with his.

3. Where a mortgage or other security is given to secure an honest debt, and is in a bona fide manner accepted for that purpose, the fact that it may result in defeating the claims of other creditors of the mortgagor affords no legal or equitable grounds for complaint on their part.

4. The corporate assets are not a trust fund before a corporation is placed under the control of a court for adjustment of its affairs.

5. The fact that preferences by an insolvent corporation inured to the benefit of some of the directors voting in favor thereof does not render them invalid, where the vote of such directors was not necessary to the passage of the resolution authorizing the preferences.

Appeal from superior court, Tippecanoe county; Frank B. Everett, Judge.

Petitions of intervention by Mortimer Levering, as trustee, and another, in an action wherein a receiver was appointed for the O'Brien Wagon Company, insolvent. Frederick Bimel and others intervened for the

purpose of answering said petitions. From a judgment against them, petitioners appeal. Reversed.

Stuart Bros. & Hammond and Kumler & Gaylord, for appellants. Wallace & Baird, Geo. B. Haywood, Caldwell & Caldwell, Geo. J. Eacock, and Corwin & Smith, for appellees.

JORDAN, C. J. The questions involved in this cause arise out of the proceedings of the trial and judgment in the lower court in adjudicating claims of the creditors of the O'Brien Wagon Company, a corporation organized under the laws of this state, and engaged in the manufacture and sale of wagons in the city of Lafayette. On August 10, 1893, this corporation, being insolvent, was placed in the hands of a receiver by order of the lower court. Appellant Levering, holder of a certain alleged note against said corporation, which he held as trustee of the First National Bank and the Merchants' National Bank of Lafayette, Ind., filed his intervening petition in the cause in which said receiver was appointed, wherein he averred that said note of \$39,400, which he so held, was secured by a chattel mortgage executed by said company, and he asked that this mortgage be foreclosed, and that the proceeds of the sale of the mortgaged property be ordered by the court to be first applied to the payment of this claim. At the same time, his co-appellant, Lucy A. Kaull, filed a like petition, in which she alleged that she held a note against said company for \$48,360, secured by a mortgage upon its real estate, and by a chattel mortgage upon certain personal property, etc. Appellees, being unsecured creditors of the corporation, were by the court permitted to appear and file answers to these intervening petitions, and to defend against said claims and mortgages. Upon these petitions, and the respective answers and replies of the parties, the issues were joined, and the cause was tried by the court. There was a special finding of facts; and, by its conclusions of law thereon, the court held that the note and mortgage held by Levering were illegal and void, and also that the note and mortgages held by Mrs. Kaull were illegal, and that the action of the corporation in assigning certain notes and accounts to her as collateral security was illegal and void, and judgment was rendered accordingly.

The facts material to the principal questions involved appear from the special finding to be substantially as follows:

On July 14, 1890, the O'Brien Wagon Company was duly incorporated at Lafayette, Ind., with a capital stock of \$100,000, the object of said corporation being to manufacture and sell wagons at said city. Before the incorporation of this company, it operated and carried on its business at Tiffin, Ohio, as a partnership, but was induced to locate at Lafayette, where, as before stated, it was

incorporated under the general laws of this state. On August 7, 1893, this corporation was indebted, as the court finds, to the First National Bank of the City of Lafayette, Ind., as follows:

On ten notes executed by the wagon company to said bank for borrowed money	\$11,500 00
On five notes executed by the wagon company to F. M. Ward, and indorsed by him to said bank	3,790 40
On one note executed by the wagon company to Frey, Reiff & Co., and by them indorsed to said bank...	189 15

All of which it is found, with interest, amounted on August 7, 1893, to	\$16,139 46
On indorsement of other notes	9,396 83

Total \$25,536 29

On nine of the notes first mentioned, Burt J. Kaull was a surety for the company, and Richard Carpenter was a surety for the company on the other note of said ten; Carpenter and Kaull being at the time directors of said corporation, the former being the president, and the latter secretary.

It is further found that, on the date last mentioned, the company was also indebted to the Merchants' National Bank of said city as follows:

On four notes executed by the wagon company to said bank for borrowed money	\$ 7,623 79
On two notes executed by the wagon company to Frey, Reiff & Co., and by them indorsed to said bank	874 54
On indorsements of promissory notes	7,572 12

Total \$16,070 45

On the four notes first named, said Burt J. Kaull was also surety for the company.

The court also finds: "That all the indebtedness from said corporation to said banks was for money on direct loans to said corporation, or for discount of commercial paper, governed by the law merchant, during the months of April, May, June, and July, 1893, and while said corporation was carrying on its business, and that all of said money was used by said corporation, in the ordinary course of business." On August 9, 1893, Lucy A. Kaull, appellee, it appears, held certain notes or claims against said corporation, which aggregated \$48,360.10, part of it being for money advanced and loaned by her to the corporation. That all of the notes held by Mrs. Kaull were signed by said Burt J. Kaull, as surety, he being the son of the former, and a director of said company at the time the notes were executed by it to his said mother. As to these notes, the court finds that, on said 9th day of August, there was only due to Mrs. Kaull from said corporation the sum of \$24,303.41, and no more. That, as to the remainder of her said claim, the company had received no consideration for the execution of the notes, and that the same were executed without authority from its board of directors. On the 7th day of

August, 1893, the corporation, by its board of directors, authorized the execution of a note for all of the pre-existing indebtedness due from it to said banks, together with a mortgage on the personal property of the company to secure said note; and immediately thereafter the note for \$39,400 and the mortgage to secure the same, as set out in Levering's petition, were executed to him by the president and secretary, and Levering thereupon executed a declaration of trust to both of said banks. That, before the execution of this note and mortgage, these banks surrendered to Levering all the notes held by them upon which the company was liable. That on August 9, 1893, the company, by its board of directors, authorized the execution of a note, and a mortgage to secure the same, to Lucy A. Kaull, for the indebtedness held by her against the corporation; and, in pursuance thereof, the note and mortgages set up in her petition were executed to her by the corporation. The execution of the notes and mortgages to Levering and Mrs. Kaull was authorized by the unanimous vote of all the directors, being five in number, and the execution of these notes was also approved by the stockholders of said corporation. Payments on the note to Levering were made after its execution, and before the trial of the cause, which reduced the amount due when the judgment was rendered to \$31,667.95. At the time of the execution of the mortgages in dispute, Carpenter was insolvent, and Burt J. Kaull had no property in this state, but owned some outside of Indiana. It is also found: That the latter was the agent of Mrs. Kaull in obtaining the mortgage set out in her petition. That on the 7th and 9th of August, 1893, said corporation was insolvent, which fact was known to its officers, and that Mrs. Kaull also knew, at the time of the execution of the note and mortgage to her, of its insolvency. That on the 9th day of August, 1893, Eugene N. O'Brien, a stockholder and one of the directors, a few hours after the execution of the mortgage to Mrs. Kaull, filed a petition to have a receiver appointed for said corporation; and that it, on the next day, appeared by its attorneys, and consented to the appointment of a receiver; and that thereupon a receiver was appointed by the court; and that he duly qualified, and assumed the duties of his trust. It is further disclosed by the finding: That each of said banks, at the time of the execution of the mortgage, knew that Burt J. Kaull and Carpenter were directors of the corporation, and liable as sureties on said notes. On August 2, 1893, a part of the employes of said company quit work, on account of the reduction of wages, and thereafter only a few men were employed for the time being, in finishing work and in the shipping department. That on said 7th day of August the assets of said corporation were worth \$75,000, and its direct liabilities \$110,308, and its contingent liabilities \$20,000.

Other facts are found, some of which are more in the nature of conclusions than a finding of facts. Fraud, however, as a fact, is not found by the court in its special finding. Neither is it in any way disclosed that the amounts found due to the appellees, respectively, by the court, were not bona fide pre-existing indebtedness against said corporation at the time of the execution of the mortgages.

It is conceded by appellees' learned counsel that the findings and conclusions of law as made and stated by the court do not proceed upon the theory of actual fraud in fact, but upon the theory that the notes and mortgages in question, and also the assignments of certain notes and accounts to Mrs. Kaull, as collateral security, as found by the court, were illegal and void, by reason of the facts stated in the special finding. The contention of counsel for appellees, as stated by them, is that "a corporation organized under the laws of this state, after it has become insolvent, and has abandoned the further prosecution of its business, cannot mortgage or pledge its property for the sole purpose of giving some of its creditors a preference over others in the distribution of its assets, especially if such preference inures to the personal benefit of some of the directors of such corporation." They admit that an insolvent corporation may secure some of its creditors by mortgage or otherwise, provided it be a going concern, and the security is given for the purpose of enabling it to prosecute its business, and with the expectation that it will continue to do so. It is true, they say, that a natural person may make any honest disposition of his property; but a corporation in this state can do only what it is expressly authorized to do by the law under which it is created and operates, and such other acts as are essential to carry into effect the powers granted. The learned counsel for the appellants, on the other hand, insist that the rights of a corporation in regard to preferring its creditors must be the same as natural persons, and that the notes and mortgages, under the facts in this case, must be held valid and enforceable obligations, at least to the amount found to be due by the court. This question, then, as asserted and denied by the parties to this appeal, may be said to be the cardinal one presented for our decision. The decisions of this court recognize the rule that a private corporation, unless restrained by statute, may legitimately deal with its property in a manner similarly as an individual deals with his. *Manufacturing Co. v. Probasco*, 64 Ind. 406; *Ward v. Polk*, 70 Ind. 309; *Wright v. Hughes*, 119 Ind. 324, 21 N. E. 907; *De Camp v. Alward*, 52 Ind. 468; *Parke Co. Coal Co. v. Terre Haute Paper Co.*, 129 Ind. 73, 26 N. E. 884; *Hill v. Nisbet*, 100 Ind. 341. A natural person has absolute dominion over the disposition of his property, provided such disposition does not result in defrauding his creditors. Under this

right, an insolvent debtor may, in good faith, prefer one or more of his bona fide creditors, to the exclusion of others. Where a mortgage or other security is given to secure an honest debt, and is in a bona fide manner accepted for that purpose, the fact that the giving and accepting of such security may result in defeating the claims of other creditors affords no legal or equitable grounds for complaint upon the part of the latter. This doctrine is settled in this state by many decisions, of which the following are a part: *Lord v. Fisher*, 19 Ind. 7; *Wilcoxon v. Annesley*, 23 Ind. 285; *Ball v. Barnett*, 39 Ind. 53; *Cushman v. Gephart*, 97 Ind. 46; *Grubbs v. Morris*, 103 Ind. 166, 2 N. E. 579; *Gilbert v. McCorkle*, 110 Ind. 215, 11 N. E. 296; *Hays v. Hostetter*, 125 Ind. 60, 25 N. E. 134; *Straight v. Roberts*, 126 Ind. 383, 26 N. E. 73; *Carnahan v. Schwab*, 127 Ind. 507, 26 N. E. 67; *Lice v. Irvin*, 110 Ind. 561, 11 N. E. 488; *Fuller & Fuller Co. v. Mehl*, 134 Ind. 60, 33 N. E. 773. Blackstone, in his Commentaries, says that it is necessarily and inseparably incident to every corporation aggregate that it has power to sue or be sued, implead or be impleaded, grant or receive by its corporate name, and do all other acts as a natural person may. *Bl. Comm. (Cooley's Ed.)* *475. In *Ang. & A. Corp.* p. 158, § 187, it is asserted that, independently of positive law, all corporations have the absolute *jus dispendi*, neither limited as to objects nor circumscribed as to quantity. Morawetz, in his law on Private Corporations (volume 2, § 802), says that, in the absence of a statutory prohibition, a corporation has the same power of making preferences among its creditors as an individual. Beach, in his work on Corporations (volume 1, § 358), says that a corporation, unless prohibited by law, may sell and transfer its property, and may prefer its creditors, although insolvent, even when all of its property be conveyed in the payment of a single debt, leaving other creditors unpaid. The fact that a solvent corporation, under the law in this state, has the power to borrow money and secure the payment thereof by mortgage, on its property or otherwise, the same as an individual, is not controverted by appellees. Upon what reasonable grounds, then, can it be said that an insolvent corporation, in the absence of legislation to the contrary, has not the power, under like circumstances as an insolvent natural person, to make a preference among its bona fide creditors? Appellees, however, seek to show a distinction by invoking the trust-fund doctrine which is recognized by the courts in some of our sister states, upon the theory, apparently, that the directors of a corporation are the trustees for all of the creditors. As between the corporation and its creditors, it cannot in reason be said that the relation is anything more than that of debtor and creditor. The relation of trustee and cestui que trust does not exist, so as to create a lien upon its assets in favor of the

creditor, in any other sense than applies to an individual debtor. This court recently had the question of this trust-fund doctrine presented for its consideration, and declined to accept it, as it is urged now by the appellees. We held that it does not exist before a corporation is placed under the control of a court for adjustment of its affairs; that, until such an event happens, no special lien upon its assets or property exists in favor of any creditor or class of creditors; and that the corporation, prior to such an event, had the power and right to prefer its creditors in like manner and under like circumstances as individuals or co-partnerships may do. This rule must now be considered as settled in this jurisdiction. See *Henderson v. Trust Co.*, 143 Ind. 561, 40 N. E. 516; *First Nat. Bank v. Dovetail Body & Gear Co.*, 143 Ind. 534, 42 N. E. 924; *Id.*, 143 Ind. 550, 40 N. E. 810; and the many authorities cited in the opinions. By these decisions it is also, in effect, held that an insolvent corporation is not to be denied the right to prefer a creditor or creditors when such preference does or may inure to the benefit of some of its officers who are sureties upon the claims of the creditors preferred. It being true, then, as a legal proposition, that an insolvent corporation may, in like manner as a natural person, prefer its creditors, upon what logical or reasonable grounds can it be said that a holder of a bona fide indebtedness against the former cannot be preferred, for the reason that some of the directors are the sureties for the corporation for the payment of said indebtedness? See *Worthen v. Griffith*, 59 Ark. 562, 28 S. W. 286.

The broad doctrine that the officers of a corporation cannot in their own names contract with it is unreasonable. Such a holding would virtually deny to corporations the credit upon which their business may be transacted. If the right of the stockholders and officers of a corporation to advance money to it to carry on its affairs, or to indorse for it to obtain money for such purpose, is denied, it would result in depriving the corporation of its most ready and frequent source of credit. If directors can lend money to the corporation, or indorse for it under the laws in this state, they should certainly have the right to collect their debt, or be secured therein, as is accorded by the law to other creditors. *Schufeldt v. Smith*, 131 Mo. 280, 31 S. W. 1039. Where, however, an officer of an insolvent corporation is preferred, the rule properly asserted by the authorities is that such act, when assailed, should be closely scrutinized by the court, and the burden will be cast upon the preferred officer to establish that he held a bona fide debt against the corporation. *Schufeldt v. Smith*, *supra*, and authorities there cited. While it may be said that, if a corporation is allowed to make preferences that will inure to the benefit of its officers, this will enable the latter, by reason of the position which

they occupy, to outstrip the other creditors in the race of diligence in collecting or securing claims, this fact, however, cannot be deemed sufficient to deny it the right to prefer its creditors. An individual debtor may prefer his wife, or any other member of his family, provided, of course, the preferred debt is an honest one. No more equity or reason appears for allowing an individual to do this than in permitting a corporation to prefer its own stockholders or officers. It is true that they have an advantage over others in this respect, but this vantage ground results from their position, and is known to every one who deals with the corporation, or extends it credit. See *Buell v. Buckingham*, 16 Iowa, 284. As said by Judge Dillon in this latter case: "Being an officer in the corporation did not deprive Buell of the right to enter into competition with other creditors, and run a race of vigilance with them, availing himself, in the contest, of his superior knowledge, and of the advantage of his position to obtain security for or payment of his debt." All preferences by insolvent debtors are inequitable. They result in favoring one creditor over another, equally entitled to such favor or preference. The insolvent person is generally prompted by his own feelings to prefer his friends. In fact, the rule which permits insolvents to prefer their creditors has resulted in much evil, but it is so firmly established that it cannot consistently be overthrown by judicial action, but the legislative department should interpose and regulate and control this right by statute.

The decisions of this court upon the question of preference by an insolvent corporation, and the holding that the trust-fund doctrine, applied to the extent insisted upon by appellees, cannot be upheld, are in harmony with the great current of decisions, both of state and federal courts. In addition to those cited in the opinions of this court in the previous cases we cite the following: *Worthen v. Griffith*, supra; *Schufeldt v. Smith*, supra; *Waggoner-Gates Milling Co. v. Zeigler-Zaliss Commission Co.*, 128 Mo. 473, 31 S. W. 28; *Bank of Montreal v. J. E. Potts Salt & Lumber Co.*, 90 Mich. 345, 51 N. W. 512; *Meyer v. Chair Co.*, 130 Mo. 188, 32 S. W. 300; *Thomson-Houston, etc., Co. v. Henderson, etc., Co.*, 116 N. C. 112, 21 S. E. 951; *Bank v. Whittle*, 78 Va. 737; *Insurance Co. v. Page*, 17 B. Mon. (Ky.) 412; *Coats v. Donnell*, 94 N. Y. 168; *Railroad Co. v. Spreckles*, 65 Cal. 193, 3 Pac. 661; *Sargent v. Webster*, 13 Metc. (Mass.) 497; *Catlin v. Bank*, 6 Conn. 233.

Neither of the appellants in this appeal was a stockholder or officer of the corporation, but a stranger thereto; hence the question of a preference by an insolvent corporation to its own officers for debts held by them against such a concern is not directly involved, and consequently the reasoning and holding therein must be limited to the fact in this respect that the directors in question were but sureties upon the claims preferred.

It is also insisted by appellees that the fact that the preferences in the case at bar were authorized by the votes of the two directors who were the sureties upon the notes of the preferred creditors rendered the mortgages illegal. But the execution of the mortgages, as it appears, was authorized by the unanimous vote of the five directors, being the entire directory. Consequently, a majority of the directors, constituting a quorum, by their votes authorized the preference, independent of the votes of the two who were the sureties. Therefore the principle asserted in the case of *Buell v. Buckingham*, supra, would apply. It was held in that case that a preference made by an insolvent corporation to its president, by a vote of its directors, sufficient without counting the vote of the former, was valid. The facts do not establish that the corporation in question took any steps itself to apply for a receiver when it executed the mortgages in dispute. Neither does it appear that the placing of the concern in the hands of the receiver, and the act of preferring the claims of appellants, were a part of the same transaction, so as to bring it within the principle affirmed in *Shillito Co. v. McConnell*, 130 Ind. 41, 26 N. E. 832. It is disclosed by the finding that the money loaned by the banks and Mrs. Kaull to this company was loaned at a time when it was carrying on its business. We fail to recognize anything under the facts that will take these preferences to the appellees out of the protection of the rule which we sustain and adhere to, relative to the right of an insolvent corporation to prefer its creditors in like manner as a natural person.

As the judgment must be reversed as to both of the appellants for the error of the court in holding the mortgages in controversy invalid, we do not determine the question, under the evidence, as to the consideration of that part of Mrs. Kaull's claim disallowed by the court. There is such a controversy as to the amounts that should be allowed to both of the appellants that we are of the opinion that justice can be best subserved by ordering a new trial upon all of the issues. The judgment as to both of the appellants is therefore reversed, and the cause is remanded to the lower court, with directions to vacate its judgment, and grant appellants a new trial, and for further proceedings not inconsistent with this opinion.

(146 Ind. 534)

WORTHLEY v. BURBANKS et al.

(Supreme Court of Indiana. Jan. 12, 1897.)

ADVERSE POSSESSION—BARREN LANDS.

1. Adverse possession of unproductive lands, consisting of barren sand hills cut up by sloughs, is shown by recording the deed under which the occupant claims, cutting all the timber of any value thereon, having the land surveyed and boundary lines grubbed out and staked, going upon the land at intervals, claiming absolute ownership, clearing a small portion, building a

brush fence around the portion cleared, employing agents in the neighborhood of the land to look after it, and paying taxes, without proof of actual occupation.

2. Adverse possession of any portion of a tract of land under color of title gives constructive possession of the entire tract.

Appeal from circuit court, Porter county; John H. Gillett, Judge.

Action by Catharine L. Worthley against John A. Burbanks and others. There was a judgment for defendants, and plaintiff appeals. Reversed.

E. D. Crumpacker and Collins & Collins, for appellant. J. W. Youche, for appellees.

HACKNEY, J. The appellant sued to quiet her title to an 80-acre tract of land in Lake county, and the appellee Burbanks, by cross complaint, sought to quiet the title thereto in himself. On change of venue from the Lake circuit court, the cause was tried and a special verdict rendered in the Porter circuit court. The appellant and the appellee each moved for a judgment upon the special verdict, and the motion of the latter was sustained, and that of the former was overruled. These rulings present the only question assigned as error in this court.

The facts found disclose: That the appellee, in October, 1857, became the owner of the legal title to said lands. That his deed was properly recorded in January, 1858; that he never conveyed or transferred his said title. That he was not, and has not since been, a resident of Lake county. That he did not see said lands, excepting in the years 1858, 1880, and 1891, when, during each of said first two years, he visited said lands once, and in the last of said years he built a small frame house thereon. That said lands were wild, uncultivated, and unimproved, and were never in his actual possession or occupancy prior to June, 1891. That for the years 1859 and 1860 said lands were subject to taxation in said county, and were assessed in the name of said Burbanks, but neither said taxes, nor any taxes thereafter assessed, were ever paid by him. For the years named said taxes became delinquent, and in January, 1861, said lands were sold therefor, by the treasurer of said county, at public sale, and were purchased by one Dibble, who received a deed therefor in 1864; said lands never having been redeemed from said sale. Dibble sold to Arvida Worthley in March, 1868; Arvida Worthley conveyed to one Rose in January, 1873; and Rose, on the same day, conveyed to the appellant. The deeds of said several conveyances were duly entered for record in Lake county near the dates of their execution, and since June 16, 1869, said lands have been entered for taxation against said Arvida Worthley and this appellant. The taxes on said lands from the year 1859 until 1892 were paid by said several grantees, Dibble, Worthley, and the appellant; and in the year 1890 she paid the sum of \$17.25 assessed in her name against

said lands for a public ditch then constructed. Said lands are located about two miles from the village of Tolleston, and have ever been "barren sand ridges and hills, interspersed with a few sloughs. That said sand ridges contained no soil, and were wholly unproductive and unfit for any kind of cultivation, and wholly unfit to be used for farming or gardening purposes, or for any other useful purpose whatever. That the sloughs on said land produced nothing but a coarse kind of grass in small quantities, which were utterly worthless and unfit for any purpose, and had no market value, either in the vicinity of the land or anywhere else. That said land was, * * * and has been, continuously, * * * incapable of producing any kind of crop or yielding anything of value whatever." That, when Dibble obtained his tax deed, he went upon said land, and cut off timber of any value, and removed the same, since which time said lands have been "covered in a large part by small brush and small scrub-oak trees," of no value for any purpose. That said lands have never possessed any value for, and have not been adapted to, "residence purposes, or platting or subdividing, or to any other useful purpose," "Said Arvida Worthley, in the summer of 1868, entered upon said land, claiming to own the same, and caused said land to be surveyed, and chopped and grubbed the brush out along the line thereof all the way around said tract, and caused stakes to be driven at the corners, and some places along the line, for the purpose of marking the line of said land," all of which remained visible to the common observer for four years. That in the year 1869 the said Arvida Worthley frequently visited said land, and went upon the same, and openly and notoriously claimed to be the owner thereof, and gave permission to a resident in the vicinity of said lands to cut a small quantity of coarse slough grass thereon. That in the year 1870 said Arvida Worthley visited and went upon said land frequently, still claiming the ownership thereof, and during said year, he grubbed and cleared about a half acre of said land, and inclosed the same with a brush fence; but the soil upon said land was so barren and poor that he did not plant any crop thereon, but, during said year, he planted a small patch of cranberry vines in a marsh or slough on said land. In each of the years 1871 and 1872 he went upon said land several times, and openly and notoriously claimed to own the same, and gathered small quantities of cranberries therefrom. In January, 1873, when said land was conveyed to the appellant, and when she and her husband, said Arvida, moved to Michigan City, from Tolleston, where they had theretofore resided, she (this appellant) put William L. Worthley, her son, in charge of said lands, and authorized him to look after and care for the same. That from said date, each year until and including 1878, said son visited said lands

three or four times, at each visit going upon and over said lands, claiming at all times, openly and notoriously, that the appellant owned said lands, and during the same period, and at all times thereafter, she claimed, openly and notoriously, to own said lands. That in 1878, when her said son moved to a Western state, she employed one Gibson, a resident of Tolleston, and authorized him to look after and take care of said land for her, and from that time to the time of the trial he went upon said lands several times each year, for the purpose of looking after the same, and at all times during said period he did openly and notoriously claim and declare that the appellant was the owner of said lands, and that he, as her agent, was in charge thereof. That the said Arvida Worthley, from the time he purchased from Dibble until January, 1873, and this appellant, from January, 1873, to the time of the trial, continuously, openly, and notoriously claimed to own said lands, and in like manner exercised all such acts of dominion, control, and ownership over the same, as fully and completely as other owners of like lands exercised respecting the same, and that they did severally, during said periods, respectively, exercise such dominion, control, and ownership over said lands as could be exercised, in view of the condition, character, and adaptability of said lands, all of which was open, notorious, and visible, and to the exclusion of every other person. That Burbanks never inquired as to the ownership of said land from 1858 to 1891, and, if he had made such inquiry in the vicinity of said land, he could easily have ascertained, at any time from 1868 to the time he commenced this suit, that the said Arvida Worthley and this appellant claimed to own the land.

The question presented in this court is as to whether the facts so specially returned by the jury disclosed such adverse possession, by and in favor of the appellant, as to preclude the reassertion by the appellee of his title acquired in 1857. In this state the statute of limitations (Rev. St. 1894, § 294; Rev. St. 1881, § 293) denies a right of action for the recovery of real estate after 20 years from the accrual of the cause of action; and this is the provision upon which the holder of lands in adverse possession for the term of 20 years is held to be the owner. The able counsel for the parties agree that, ordinarily, there are five indispensable elements in this adverse possession, namely: (1) It must be hostile, and under a claim of right; (2) it must be actual; (3) it must be open and notorious; (4) it must be exclusive; and (5) it must be continuous. In this agreement counsel are supported by the authorities. *Ward v. Cochran*, 150 U. S. 606, 14 Sup. Ct. 230; *Murray v. Hoyle*, 97 Ala. 588, 11 South. 797; *Ringo v. Woodruff*, 43 Ark. 409; *Oneto v. Restano*, 78 Cal. 374, 20 Pac. 743; *Noyes v. Heffernan*, 153 Ill. 339, 38 N. E. 571; *Hempsted v. Huffman*, 84 Iowa, 398, 51 N. W. 17;

Gildehaus v. Whiting, 39 Kan. 706, 18 Pac. 916; *Haffendorfer v. Gault*, 84 Ky. 124; *Inhabitants of School Dist. v. Benson*, 31 Me. 381; *Beatty v. Mason*, 30 Md. 409; *Middlesex Co. v. Lane*, 149 Mass. 101, 21 N. E. 228; *Paldi v. Paldi*, 95 Mich. 410, 54 N. W. 903; *Lantry v. Parker*, 37 Neb. 353, 55 N. W. 962; *Foulke v. Bond*, 41 N. J. Law, 545; *Law v. Smith*, 4 Ind. 56; *Peterson v. McCullough*, 50 Ind. 35; *McEntire v. Brown*, 28 Ind. 347; *Richwine v. Presbyterian Church*, 135 Ind. 80, 34 N. E. 737; *Silver Creek Cement Corp. v. Union Lime & Cement Co.*, 138 Ind. 297, 35 N. E. 145, and 37 N. E. 721; *Dyer v. Eldridge*, 136 Ind. 654, 36 N. E. 522; *Roots v. Beck*, 109 Ind. 472, 9 N. E. 698; 1 Am. & Eng. Enc. Law (2d Ed.) p. 795. There is no question but that the appellant held for the required period the color of title to said lands, and that if she occupied or possessed, as required by the rule in adverse possession, any part of the land, such possession will, under such color of title, be held constructively to include the whole of such lands. *Hargis v. Inhabitants of Congressional Tp.*, 29 Ind. 70; *Railroad Co. v. Oyler*, 60 Ind. 383; *State v. Bank*, 106 Ind. 461, 7 N. E. 379; *Roots v. Beck*, 109 Ind. 472, 9 N. E. 698; *City of Noblesville v. Lake Erie & W. R. Co.*, 130 Ind. 1, 29 N. E. 484; *Herff v. Griggs* 121 Ind. 471, 23 N. E. 279; *Dyer v. Eldridge*, supra; 1 Am. & Eng. Enc. Law (2d Ed.) p. 847.

The important inquiry, upon the facts found, is as to whether the appellant occupied or possessed, under the rule in adverse possession, any part of the land for the required term. Appellees insist that actual occupancy is necessary, while the appellant urges that occupancy is necessary only where it is possible with some return from the occupancy or use, and is not required if the land is not susceptible of some remunerative use. That there was not an actual occupancy for 20 years by or on behalf of the appellant and her grantors is not in doubt, nor is it questionable that the lands were not available for any productive use. The precise inquiry, therefore, is, what is meant by "possession," as applied to lands of the character of those in question here? It is manifest that there can be no absolutely unvarying rule with reference to every class of real estate, and that the required occupancy of or dominion over a section of desert lands, or of a mining camp, a nonnavigable lake, a prairie, a forest, a fertile farm in a high state of cultivation, or a town lot, would not answer as to a lot in the business center of a populous and thrifty city. As said in *Ewing v. Burnet*, 11 Pet. 41, "so much depends on the nature and situation of the property, the uses to which it can be applied, or to which the owner or claimant may choose to apply it, that it is difficult to lay down any precise rule, adapted to all cases." And, as said in the early case of *Robison v. Swett*, 3 Me. 316, where it was "wild and uncultivated land, the jury were not to expect the

same evidence of occupancy which a cultivated farm would present to them." In this connection it is said in 2 Wood, Lim. (2d Ed.) § 267: "The kind of possession which will be sufficient must depend largely upon the character of the land, the locality, and the purposes to which it can be put. * * * And where the land is so situated as not to admit of any permanent useful improvement, neither residence, cultivation, nor actual occupation are necessary, where the continued claim to the premises is evidenced by notorious acts of ownership, such as a person would not exercise over lands which he did not own. It is not necessary that the occupation should be such that a mere stranger, passing the land, would know that some one was asserting title to a dominion over it. It is not necessary that the land be cleared or fenced, or that any building be put upon it. The possession of land cannot be more than the exercise of exclusive dominion over it." Numerous cases are cited by the author which support the text. See *Ewing v. Burnet*, supra; *Draper v. Shoot*, 25 Mo. 197; *Ford v. Wilson*, 35 Miss. 490; *Morrison v. Kelly*, 22 Ill. 610; *Royall v. Lisle's Lessee*, 15 Ga. 545; *Eddy v. Gage*, 147 Ill. 162, 35 N. E. 347; *Tucker v. Shaw*, 158 Ill. 326, 41 N. E. 914; *Whitaker v. Shooting Club (Mich.)* 60 N. W. 983; *Twohig v. Leamer (Neb.)* 67 N. W. 152; *Mooney v. Cooledge*, 30 Ark. 640; *Normant v. Eureka Co.*, 98 Ala. 181, 12 South. 454; *Bowen v. Guild*, 130 Mass. 121; *Booth v. Small*, 25 Iowa, 177; *Brett v. Farr*, 66 Iowa, 684, 24 N. W. 275; *Murphy v. Doyle*, 37 Minn. 113, 33 N. W. 220; *Cooper v. Morris*, 48 N. J. Law, 607, 7 Atl. 427; *Stockton v. Geissler*, 43 Kan. 612, 23 Pac. 619; *Foulke v. Bond*, 41 N. J. Law, 527.

It is true, as counsel for the appellees insists, that in no one of these cases were there such slight acts of dominion over the lands in dispute as were exercised over those here in controversy during the last few of the 20 years from the first assertion of title by Dibble in 1861. But it can as safely be said that in no reported case were the lands in question so wholly unadapted to beneficial use as are the lands involved in this case. No act of dominion is suggested, with reference to the appellant's holding, which was not applicable to lands of productive qualities or subject to gainful use. If, as the cases cited concur in holding, actual residence, occupation, cultivation, inclosure, buildings, or improvement are not indispensable, and that the possession necessary, depending upon the character and location of the land, is such as the claimant would exercise over property held in his own right, and would not exercise over property which he did not claim, it would be difficult, indeed, to point to some act which the appellant did not but could have exercised, with benefit from the land, evidencing her adverse possession. From 1861 to 1873, fruitless efforts were made from year to year to make some beneficial

use of the land, and they were fruitless because the land was not adapted to any fruitful use. Nothing remained to be done, to manifest the adverse claim of ownership, which would not have been unproductive, and anything else done must have been of a character not to be expected from a sincere claimant. In *Wood, Lim.* § 268, it is said: "In determining the question of adverse possession, the jury may take into consideration the nature and situation of the land. And the placing of deeds on record, passing over the tract, employment of agents living in the neighborhood to look after it and prevent trespasses upon it, payment of taxes continuously under claim of title, and the like, may be considered by them; and it is not always necessary to prove actual occupation by the claimant. But the acts referred to would not be sufficient, of themselves, to establish title by reason of adverse possession, unless the land was unsusceptible of more definite and actual possession, or such acts were known to the party holding the legal title, and known to have been done under claim of adverse title,"—citing authorities. The general proposition involved in the authorities we have cited upon this branch of the question was recognized by this court in *Collett v. Board*, 119 Ind. 27, 21 N. E. 329. It was there said: "An entry upon land with the intention of asserting ownership to it, and continuing in the visible, exclusive possession under such claim, exercising those acts of ownership usually practiced by owners of such land, and using it for the purposes to which it is adapted, without asking permission, and in disregard of all other conflicting claims, is sufficient to make the possession adverse."

If the owner absents himself from lands of the character of those here involved, and ignores for 30-odd years the known annual tax claims of the county and state against the land, he can but anticipate outstanding colorable adverse title. He cannot expect to be advised, from a view of the land, that it is in the possession of another, since none of the evidences of occupancy applicable to productive lands are required by law, or would be probable from the customs of owners of such lands. The public records of conveyances, transfers, and payments of taxes would be a natural and proper source of knowledge; and the open and notorious claim of title by another, evidenced by the general understanding of the people of the neighborhood, gained from the frequent proclamations of the claimant, would afford another means of information. If he visited the land, he could see that the ancient timber was gone, and that all of value had gone with it. This, while not always sufficient notice of an advance claim or possession, would be a circumstance which, coupled with the other sources of notice to be anticipated, was proper to consider; and, if all combined were such notice as he might reasonably ex-

pect from an adverse title, then they were sufficient notice. We think the facts found by the jury establish every use of the land of which it was capable; that it was such use as was made by the owners of like lands; that the appellant's dominion over the land was such that, under the rules of law already stated, Burbanks was chargeable with notice of.

It is said, however, that by the decision of this court in *State v. Bank*, 106 Ind. 435, 7 N. E. 379, the law has been declared to be at variance with the proposition that actual occupancy is not indispensable where it may not be had with beneficial use. On page 461, 106 Ind., and page 395, 7 N. E., of the report of that case, it was said: "It was impossible for Bright to have had possession of the bed of the lake, unless he in some way had constructive possession, because, during the time that he claimed to be the owner, it was almost wholly covered with water." This statement, it will be observed from a careful reading of the opinion, was made in distinguishing between constructive possession under color of title and actual possession without color of title, with reference to the area to be included in either possession. Standing alone, it would not follow that there could be no adverse "possession because * * * 'the land' was almost wholly covered with water." The cases of *Whitaker v. Shooting Club*, supra, *Brophy v. Richardson*, 137 Ind. 114, 36 N. E. 424, and perhaps other cases, illustrate the proposition that there may be a possession of lands covered by water. The question of adverse possession in that case, however, was decided upon the absence of evidence tending to show possession for the required period, and not because such possession was impossible. Moreover, if it should be conceded that the bed of a lake covered with water was not capable of actual possession or occupancy, within the rule in adverse possession, the present case would not stand upon the same rule; for here actual occupancy is possible, but the many cases cited hold that it is not necessary where the land is not adapted to any beneficial use. We conclude that the court erred in rendering judgment upon the verdict in appellees' favor, and the judgment is reversed, with instructions to render judgment upon said verdict in favor of the appellant.

(148 Ind. 116)

HABBE v. VIELE.¹

(Supreme Court of Indiana. Jan. 13, 1897.)

APPEAL—REVIEW—OBJECTIONS NOT MADE BELOW—REFORMATION OF INSTRUMENTS—SUFFICIENCY OF EVIDENCE.

1. An objection that a motion for a new trial was not filed in time cannot be raised for the first time on appeal.

2. In an action to reform a lease, it appeared that defendant took the place of a former tenant, for an unexpired term, at \$2,400 per year, under an agreement for a lease for an addition-

al term at a fair rental; that a competitor of defendant desired to obtain a lease from plaintiff, and offered more rent and a bonus; that plaintiff's husband, acting for her, proposed to defendant a five years' extension at \$3,000 per year and \$500 bonus; that, after discussion, the former drew the lease in question, which was for a term of seven years, at a rental of \$2,000 per year for the first two years, and \$3,000 per year for the next five years; that, after a type-written copy was made, plaintiff signed and acknowledged them in duplicate, and had the original recorded; that, when the lease was executed and delivered, defendant paid the \$500 bonus; and that, when the first month's rent became due, defendant drew a check for \$166.66 to pay it, while plaintiff's husband, who was over 70 years old, drew a receipt for \$200. *Held*, that the evidence was insufficient to show that the lease was executed by plaintiff under a mistake.

Appeal from circuit court, Vanderburgh county; R. D. Richardson, Judge.

Action by Mary J. Viele against Charles Habbe to reform a lease. From a decree in favor of plaintiff, defendant appeals. Reversed.

Spencer & Brill, for appellant. J. E. Williamson, for appellee.

HOWARD, J. This was an action by appellee to reform a lease given by her to appellant for a double storeroom in the city of Evansville. The court found for appellee, and entered a decree reforming the lease as prayed for. It is contended that the evidence does not support the finding. Appellee does not discuss the question raised in appellant's brief, but contents herself with saying that there is evidence in the record to support the finding. She does contend, however, that the appeal is not properly before the court, for the reason that the motion for a new trial in the court below was not filed at the proper time. We do not think the question so raised by the appellee has been properly saved and presented for our consideration. The court entertained and passed on the motion for a new trial without objection or exception by appellee. The record shows that the findings and judgment were had on the last day of the September term of court. The motion for a new trial might, therefore, be made on the first day of the next or December, term. *Rev. St. 1894, § 570 (Rev. St. 1881, § 561); Railroad Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345; and 34 N. E. 511. The motion for a new trial was taken up and presented for the consideration of the court on the thirteenth judicial day of the December term, the parties being present. In the absence of any objection, then or thereafter taken, to the action of the court in entertaining and passing upon the motion, we must presume in favor of the regularity of such action, and, consequently, that the court found the motion to have been filed at the proper time. See *Boat Co. v. Gasch*, 102 Ill. 402, 44 N. E. 724. Did the error in fact exist, the attention of the trial court should have been called to it, that it might be corrected. Moreover, if the party excepting

¹Rehearing denied, 47 N. E. 1.

were still dissatisfied with the ruling, the alleged error should be shown to this court, as in *Emison v. Shepard*, 121 Ind. 184, 22 N. E. 883, to which we are cited by counsel.

It appears that appellee, who was represented by her husband, Charles Viele, as agent, was the owner of the double store in question, and that the same had been rented for many years to J. F. Lindley & Son, and to their predecessors, at an annual rental of from \$1,500 to \$2,400; the latter amount being the rental at the date of the proceedings. The Lindley lease was in parol, and had two years to run from January 1, 1895. The Lindleys, desiring to quit business, procured appellant to take the lease off their hands. To this appellant consented, and Charles Viele drew up a written contract, by which the premises were turned over to appellant for the unexpired term of the lease at the rental of \$2,400 a year. Appellant was engaged in the clothing business, and it seems that he had a rival, whose place of business was next door to appellee's store, and who, about the time when the negotiations were completed, offered the Lindleys a bonus for the unexpired term of the lease. Charles Viele, however, told Lindley that the negotiations with the appellant had proceeded too far, and the offered bonus was rejected. At the time of accepting appellant as tenant, it was agreed between appellant and appellee that appellant was to have the storeroom, at the end of the Lindley lease, "for an additional term, at a fair and reasonable rental." Soon after this contract was made, Viele went to appellant with a proposition that appellant should continue as tenant after the expiration of the Lindley lease,—that is, after January 1, 1897,—saying, at the same time, that he "had an offer of five years' extension to the present term at \$3,000 a year rent and \$500 bonus." Appellant asked who had made that offer, but Viele answered, "Do not ask any questions." Appellant then said he would have to have time to consider the proposition. About a week's time was agreed to, Viele leaving his proposition in writing,—“Five years' extension at \$3,000 per year, and \$500 bonus.” Viele returned at the appointed time. Up to this there is little or no discrepancy in the evidence. Mr. Viele's testimony now continues: "I went to Mr. Habbe, and asked him what he had decided to do. He hesitated a moment, and said he would accept my proposition. I then asked him who his attorneys were, and who he preferred should draw the lease. He said (after naming the attorneys) he was not particular about who drew the lease. I told him I had been renting property and writing leases for forty years or more, and would, if agreeable to him, prepare the lease myself, and save an attorney's fee. I went home, and drew the lease, and gave the same to Mr. Sonntag to have a typewritten copy made, and he made the same,—took the copy, with the original, to Mr. Habbe, after having taken them both to my wife,

Mary J. Viele (the appellee), and having her sign and acknowledge the same. Mr. Sonntag returned the original lease in my handwriting to me, and left the typewritten copy with Mr. Habbe. I had the lease recorded." Appellant's version of these negotiations is as follows: Mr. Viele "came to me, and said he had a proposition submitted to him for the rental of that building from the 1st of January, 1897, for five years at \$3,000 a year and \$500 bonus. I asked him whose proposition it was, and he said: 'Ask no questions.' * * * I had rather a heated conversation with Mr. Viele. I told him that I could not give him an answer. I said: 'Mr. Viele, do you recollect that conversation I had with you,—that I was to be the continuous tenant at a fair and reasonable rental? I believe I know the reason this proposition has been submitted to you. Mr. Viele, don't you know that if you took me out of competition for this building that you could not get \$2,400 a year for it, much less \$3,000 a year for it, and that it is not right to treat a tenant like that?' 'Well,' he said, 'a man has got to do the best he can.' I did not take this in good faith. This is about all I said to Mr. Viele at that time. Now, when he came to me about this building, I guess that I gave him to understand that the proposition he submitted to me was impossible, and I spoke of the expense of moving, and that I would not be out of there until the 15th of August, and said that I would have to have time to consider that. And, a short time after that, Mr. Viele came to my store at 209 Main street, and he began talking about the building, and I was telling him about the expense of repairs and moving; and then he said: 'Mr. Habbe, you may have the building the first two years at \$2,000 per year, and for five years after that at \$3,000 per year, and a bonus of \$500.' Well, in any event, Mr. Viele made this agreement; that is, the second time he came back. The proposition was \$2,000 a year for two years, \$3,000 for five years, and \$500 bonus. I calculated that mentally, and knew that my rent would be raised, but that I would get a much longer term on the building. I told Mr. Viele that the proposition was acceptable. * * * Mr. Sonntag came down there with the new lease in Mr. Viele's own handwriting, and brought a typewritten copy, each signed by Mrs. Mary J. Viele; and, inasmuch as this was a term of seven years' lease, I took the two leases, and read them carefully, and compared them, and found that they set out the contract exactly as I understood it, and just as Mr. Viele had stated it to me. I then signed them both, and I believe that Mr. Sonntag took them away with him,—I think for the purpose of having something done to them by a notary public, to put his seal on them. When he brought it back I gave him a check for \$500, and that completed the lease." When the time came for paying the first month's rent, that from January 1, 1895, appellant drew his check for \$166.66,

being at the rate of \$2,000 a year, while appellee drew a receipt for \$200, being at the rate of \$2,400 a year. This began the controversy which finally resulted in the present action, appellant insisting that the lease as drawn by Mr. Viele was in accordance with their agreement, while Mr. Viele himself declared that he had made a mistake in drawing the lease, and that it was not according to the contract.

The question here is, not as to the weight of the evidence, but as to its sufficiency. The weight of the evidence was for the trial court, but its sufficiency to sustain the findings may be considered by this court. *Railroad Co. v. Stjck*, 143 Ind. 449, 41 N. E. 365; *Paper Co. v. Webb* (at this term) 45 N. E. 474. It is said by Mr. Bispham, in his work on Equity (section 106), that "equity will not grant relief in cases of mistake, except upon very clear evidence. Where it is admitted in the answer, there can, of course, be little difficulty in granting relief; but where the fact of mistake is denied in the answer, evidence to overcome such denial must be of the most persuasive character." "To reform a contract, and then enforce it in its new shape," says the same authority (section 469), "calls for a much greater exercise of the power of a chancellor than simply to set the transaction aside. Reformation is a much more delicate remedy than rescission. Hence, in order to justify a decree for reformation in cases of pure mistake, it is necessary that the mistake should have been mutual. Where the mistake has been on one side only, the utmost that the party desiring relief can obtain is rescission, not reformation." And again: "A person who seeks to rectify a deed on the ground of a mistake must establish, in the clearest and most satisfactory manner, that the alleged intention, to which he desires it to be made conformable, continued concurrently in the minds of all parties, down to the time of its execution." See, also, *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290, at pages 316, 317; *Green v. Stone* (N. J. Err. & App.) 34 Atl. 1099; 2 Beach, Cont. § 870, and notes. "The writing," said this court, in *Dale v. Evans*, 14 Ind. 288, "should be read by the light of surrounding circumstances, to understand the meaning and intent of the parties, and, if necessary, that far parol evidence might be received; but, as the parties have constituted the writing to be the only outward and visible expression of their meaning, no other words are to be added to it, nor substituted in its stead." 1 Greenl. Ev. § 277. And therefore "all testimony of a previous colloquium between the parties, or of conversations or declarations at the time when it was completed, or afterwards, as it would tend, in many instances, to substitute a new and different contract for the one which was really agreed upon, to the prejudice, possibly, of one of the parties, is rejected." Id. § 275. These are salutary rules of evidence, and

should not be departed from, even in equity, unless in instances where the evidence offered is clear and unambiguous; and relief should not be extended where the evidence is loose, equivocal, contradictory, or in its texture open to doubt or opposing presumptions. 1 Story, Eq. Jur. § 157." See, also, *Linn v. Barkey*, 7 Ind. 69; *Bank v. Judy*, 146 Ind. 322, 43 N. E. 259; *Board v. Owens*, 138 Ind. 185, 37 N. E. 602, and authorities cited at pages 186 and 187, 138 Ind., and page 603, 37 N. E.

Tested by these principles, we do not think that any evidence given on the trial was sufficient to show that the lease ought to be reformed as prayed for. There was evidence to show that the appellee may have understood the agreement to have been that the rent for the first two years should be at the rate of \$2,400; but we do not think that any of the evidence was of that "persuasive character" needed to show that this was also the understanding of the appellant. The evidence is certainly not such as to "establish, in the clearest and most satisfactory manner," the mutuality of the alleged mistake. If the appellant, at the time the terms of the lease were agreed upon, understood these terms to be as appellee now contends for, such understanding must be drawn from vague and uncertain inferences, rather than from any clear or unequivocal evidence found in the record. If "the writing should be read by the light of surrounding circumstances," as said in *Dale v. Evans*, supra, then many reasons will be suggested to show that the agreement was as the lease was written. The appellant went to the new location with the expectation and agreement that he should remain for many years "at a fair and reasonable rental." He was, therefore, anxious to enter into the new and long-time tenancy. Yet he might well be indignant that advantage should be taken of a rival's offer of a large bonus and increased rental to force him into making a contract less favorable than he had a right to anticipate. On the other hand, the \$500 cash, with an addition, after two years, of \$600 a year to her former rental, would act persuasively on the mind of the appellee. The compromise shown in the lease would be a natural outcome. That Mr. Viele, shown to be over 70 years of age, and having been for so long accustomed to draw \$200 a month rent, should have forgotten the terms of the compromise, does not seem improbable. The "proposition" made to appellant, and which Mr. Viele says he put into writing, was: "Five years' extension at \$3,000 per year, and \$500 bonus." This proposition, Mr. Viele says, appellant agreed to; and that is not denied by the appellant. On the contrary, he has paid the bonus, and stands ready to carry out the other terms of the lease, as stated in the proposition agreed to. But he says that, to induce him to agree to the "proposition," appellee consented to re-

duce the rent for the first two years from \$2,400 to \$2,000 a year. We do not think there is a particle of evidence in the record to show that appellant ever understood that the lease should not be drawn to make this reduction. If there is any such evidence, it must be by way of inference, and only of the most meager and unsatisfactory character. Besides, it is to be remembered that appellant already had, by assignment, a lease for the first two years at \$2,400. If the new lease was made to include this time, together with the "five years' extension," it must have been for some purpose. The compromise shown in the new lease, as written, would seem to disclose such a reasonable purpose, namely, a reduction of the rent for this period, in consideration of the increase for the five-year period and the bonus.

Another reason may be mentioned why the reformation asked for ought not to be granted. Unless in case of the clearest evidence of inadvertence, relief should not be granted if the mistake is the result of the party's own negligence, or that of his attorney. Under this head, says Mr. Bispham, in the work already cited (section 191), "should be classed mistakes into which a party had fallen because he has not made use of the means of inquiry which were open to him; as, for instance, where he has not taken the trouble to read the paper which he was executing." See, also, Kerr, *Fraud & M.* (Am. Ed.) 407; Glenn v. Statler, 42 Iowa, 107. Charles Viele, the husband and agent of appellee, himself wrote the lease, and appellee signed and acknowledged it in duplicate, before it was taken to appellant. After its execution with these formalities, she placed it on record. Ought not appellee, after all this, to be conclusively held to know the contents of the lease, particularly when there is only the vaguest evidence to show that appellant did not understand it to be just as appellee had written it? This is not the case of a scrivener committing an agreement to writing in terms different from the mutual understanding of the parties. Mr. Viele wrote the lease himself, had a typewritten copy made, had his wife sign and acknowledge the original and the copy, then put it on record. He ought to know the contents. The judgment is reversed, with instructions to grant a new trial.

(147 Ind. 299)

CHICAGO & C. T. RY. CO. et al. v.
EGGERS.¹

(Supreme Court of Indiana. Jan. 14, 1897.)

APPEAL — BILL OF EXCEPTIONS — OBJECTIONS TO
FORM OF DECREE.

1. An assignment of error that a finding or verdict is contrary to the evidence cannot be considered where the bill of exceptions, though stating that it contains all the evidence, shows on its face that it does not.

2. It is essential that the record on appeal should show that the stenographer's longhand manuscript of the evidence was filed with the

clerk before being incorporated in the bill of exceptions, as required by the statute. If filed before the bill of exceptions, but on the same day, its prior filing should be noted by the clerk.

3. Objections to the form or substance of a decree will not be considered on appeal, though taken in the trial court, unless a motion was made to modify it.

Appeal from circuit court, Lake county; J. H. Gillett, Judge.

Action by Frederick A. Eggers against the Chicago & Calumet Terminal Railway Company and others. Decree for plaintiff, and defendants appeal. Affirmed.

J. H. Collins, T. J. Wood, and John B. Peterson, for appellants. J. W. Youche and E. D. Crumpacker, for appellee.

JORDAN, C. J. Action by the appellee against the Chicago & Calumet Terminal Railway Company, the Baltimore, Ohio & Chicago Railroad Company, and the Baltimore & Ohio Railroad Company, to enforce a certain contract for the sale of real estate for a right of way. After setting out the execution of the contract for the sale of said right by appellee to the first-mentioned appellant, facts are alleged showing that the other appellants purchased this right of way of the terminal company, and became liable for the performance of the contract set out in the complaint. Other facts are averred, which disclosed that the two Baltimore companies have incorporated the real estate into their railroad, and were using the same as a right of way. The relief demanded by the appellee in his complaint was a money judgment, and that a lien be declared upon the land in dispute to secure the payment of the same, etc. Under the issues joined in the action, a trial by the court resulted in a judgment for \$5,219, and in adjudging a lien in favor of appellee, etc. Appellants all appeal to this court, and the Baltimore, Ohio & Chicago Company and the Baltimore & Ohio Company have assigned but two errors, to wit: First, that the court erred in overruling the motion for a new trial; second, overruling objections to the form and substance of the decree. The reasons assigned in the motion for a new trial were that the finding of the court is contrary to law, and that its finding is also contrary to the evidence.

Counsel for appellee insist that we are forbidden, under a well-settled rule of this court, to consider any of the evidence, for the reason that it affirmatively appears that all of the evidence given upon the trial is not in the record. Upon examination of what purports to be a bill of exceptions, it is disclosed that counsel are correct in their insistence. There are statements in this bill that a certain letter and other documents were introduced and read in evidence, but these do not appear therein. The uniform rule of this court is that notwithstanding the statement in the bill that it contains all of the evidence given in the cause, still, when it is affirmatively shown upon its face that

¹ Rehearing denied.

such statement is not true, we cannot consider and decide any question which depends for its decision upon the entire evidence. This rule is firmly settled by numerous decisions of this court. *Shimer v. Butler University*, 87 Ind. 218; *Collins v. Collins*, 100 Ind. 268; *Jennings v. Durham*, 101 Ind. 391. When a part of the evidence, documentary or otherwise, given in the lower court, is omitted, it is manifest that this court, upon appeal, cannot intelligently or properly decide what bearing or effect, when considered in connection with the other evidence, ought to be given to the part omitted. Hence, in cases like the one at bar, where the finding of the court or verdict of the jury is assailed upon the ground that the same is contrary to the evidence, the rule asserted applies with full force, and all the evidence must be incorporated into the record; otherwise, we must presume in favor of the ruling of the lower court. See *Johnson v. Wiley*, 74 Ind. 233.

Upon other grounds, it appears that none of the evidence is properly in the record. It is shown that the longhand manuscript of the official shorthand reporter who took down the evidence, and the bill of exceptions embracing the same, were filed on March 9, 1894; but in no manner does it affirmatively appear that the filing of the longhand manuscript of the evidence was, in point of time, antecedent to its being incorporated into the bill of exceptions, as required by the statute. That this is essential is settled by the decisions of this court. See *Manley v. Felty* (Ind. Sup.) 45 N. E. 74, and cases there cited; *Rogers v. Elch* (Ind. Sup.) 45 N. E. 93; *Reid v. Houston*, 49 Ind. 181; *Joseph v. Weld* (Ind. Sup.) 45 N. E. 467. Under the holding in these cases, no part of the evidence can be considered as legitimately in the record, and therefore we are precluded from reviewing any of the questions arising out of the action of the court in denying appellants' motion for a new trial. We may here properly suggest that, in the event the longhand manuscript is filed on the same day that the bill of exceptions containing the evidence is filed, the clerk of the lower court should exercise care to show by his certificate, or a recital in the record, that the longhand manuscript of the evidence was filed in his office on said day prior to its being incorporated in the bill of exceptions by the signature of the judge.

Counsel for appellants, under the second assignment of error, seek to assail the form and substance of the decree. After the court had rendered its judgment or decree in the cause, it appears that the appellants the Baltimore, Ohio & Chicago Railroad Company and the Baltimore & Ohio Railroad Company filed their objections to the form and substance of the decree. These objections were that the court had no power under the issues to declare and foreclose any

lien against the railroad property, and no power "to fix any right of action by its decree in the plaintiff or any one else." These were the only objections made to the judgment. There was no motion made to modify or in any way correct the form or substance of the judgment, by requesting the court to eliminate or correct in any way that part of the decree which appellants claim was not authorized under the issues. The proper mode of objecting to a judgment, after its rendition, as recognized, approved, and held essential by many decisions of this court, is by a motion to modify it; pointing out in the motion the particular corrections or changes which the moving party desires the trial court to make. *W. U. Tel. Co. v. State* (at this term) 45 N. E. 473. In *Stout v. Curry*, 110 Ind. 514, 11 N. E. 487, it is said: "The question as to the form of the decree is not properly saved, for, although there was a general exception, there was no motion to modify; and it is quite well settled that a motion to modify is essential to present such a question." See, also, *Terry v. Shively*, 93 Ind. 413; *Queen Ins. Co. v. Studebaker Bros. Manuf'g Co.*, 117 Ind. 416, 20 N. E. 299; *Bristol v. McClelland*, 122 Ind. 64, 22 N. E. 299; *Association v. Spears*, 115 Ind. 297, 17 N. E. 570; *Furniture Co. v. Hascall*, 123 Ind. 502, 24 N. E. 336; *Hormann v. Hartmetz*, 128 Ind. 353, 27 N. E. 731; *Wood v. Hughes*, 138 Ind. 179, 37 N. E. 588; *Tewksbury v. Howard*, 138 Ind. 103, 37 N. E. 355; *Stalcup v. Dixon*, 136 Ind. 9, 35 N. E. 987.

Appellants having failed to file a motion to modify or correct that part of the decree which they contend was not warranted, no question is properly presented in this respect for the decision of this court. We may, however, say that we are satisfied that the relief awarded to appellee by the court was consistent with the facts alleged in the complaint, and that appellants' learned counsel are mistaken in their insistence that the court, by its decree, attempted "to fix a right of action" in the appellee or any other person. An examination of its provisions does not sustain this contention. There is no available error presented by the record, and the judgment is affirmed.

(146 Ind. 583)

COHOON v. FISHER.

(Supreme Court of Indiana. Jan. 14, 1897.)

Petition for rehearing. Overruled.

For former report, see 44 N. E. 664.

M. E. Clodfelter, for appellant. Paul & Vancleave, for appellee.

MCCABE, J. In deference to the earnest appeal of appellee's counsel to re-examine the question decided in the original opinion, we have carefully investigated it again. While

counsel have cited an imposing array of cases seemingly in conflict with the conclusion reached in the original opinion, yet they have studiously avoided mentioning the previous decision of this court on which the original opinion herein is founded. When this court has once decided a question of law, that decision, when the question arises again, is not only binding on all the inferior courts in the state, but it is binding on this court also until that case is overruled. The case that rules this case is *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355. In that case, like this, the action was brought to rescind a contract for fraud. Afterwards the complaint was so amended as to make it a complaint to recover damages for the fraud. The answer set up the original complaint as a conclusive election of remedies in bar of the amended complaint. But it was held that such election, to be a bar, must have been prosecuted to judgment. A long list of adjudications is cited by counsel decided in other jurisdictions apparently establishing a different rule. We are asked to follow those cases without a word of explanation as to how we are to escape the force of our own previous decision above referred to. Those cases are *Stuart v. Hayden*, 18 C. C. A. 618, 72 Fed. 402; *Washmuth v. Sims* (Tex. Civ. App.) 32 S. W. 821; *First Nat. Bank of Illinois v. First Nat. Bank of Emporia* (Kan. Sup.) 45 Pac. 79; *Bank v. McKinney* (Neb.) 66 N. W. 280. But our case in 124 Ind. and 24 N. E. is supported on the point in question by an extensive citation of decisions both in this country and England, and those decisions are directly in point. The facts in the cases cited by appellee's counsel as supporting the contrary rule, or at least so many of them as appear at all to be in point, are just the reverse of the facts in this case, or those in *Nysewander v. Lowman*, supra, and cases therein cited; that is, in the cases cited by appellee, the first suit was brought to recover damages for the fraud perpetrated in the procurement of the contract. After abandoning such suit, another suit was brought, seeking a rescission of the same contract on account of the same fraud. But in the case now before us and the one decided in 124 Ind. and 24 N. E. the suit for rescission was brought first, which was abandoned in the amended complaint, and instead a complaint for damages on account of the same fraud was substituted. It is true, in such a case the injured party has a choice of either of the two remedies mentioned, but it does not necessarily follow that a mere choice of one by bare commencement of proceedings under it without prosecuting it to a conclusion precludes a resort to the other. Nor does it follow that, because such preclusion does not arise in all cases, it may not arise in some cases. The facts of the cases to which appellee's counsel have referred us are either directly opposite to the facts in the case now before

us, or are of such a character as to make the rule laid in one of them applicable the same as it is applicable to the case now before us. That rule is stated in *First Nat. Bank of Illinois v. First Nat. Bank of Emporia*, supra, and is thus stated: "A man may not take contradictory positions; and where he has the right to choose one of two methods of redress, and the two are so inconsistent that the assertion of one involves the negation or repudiation of the other, his deliberate and settled choice of one, with knowledge or means of knowledge of such facts as would authorize a resort to each, will preclude him from going back and electing again." Now, how does the choice of the remedy of rescission involve the negation or repudiation of the remedy of a suit for damages for the fraud? No one will deny the right to abandon a suit for rescission. Its abandonment involves the affirmation of the contract. Then, if the plaintiff may abandon it, and thereby affirm the contract, that is all he does when he sues for damages caused by the fraud in the procurement of the contract. *Nysewander v. Lowman*, 124 Ind. 584, 24 N. E. 355, and cases there cited, namely, *Lenox v. Fuller*, 39 Mich. 268; *Warren v. Cole*, 15 Mich. 264; *Kraus v. Thompson*, 30 Minn. 64, 14 N. W. 266; *Newnham v. Stevenson*, 10 C. B. 713. See, also, note to *Fowler v. Bank* (N. Y. App.) 10 Am. St. Rep. 487-494, 21 N. E. 172. It is thoroughly settled in this state and everywhere under our system of jurisprudence that a suit for damages on account of the fraud is a ratification or affirmation of the contract. *Johnson v. Culver*, 116 Ind. 278, 19 N. E. 129; *Insurance Co. v. Howard*, 111 Ind. 544, 13 N. E. 103; *O'Donald v. Constant*, 82 Ind. 212; *St. John v. Hendrickson*, 81 Ind. 359; *Insurance Co. v. Schidler*, 130 Ind. 214, 29 N. E. 1071. See note to *Fowler v. Bank* (N. Y. App.) 10 Am. St. Rep. 487-494, 21 N. E. 172. Therefore there is much reason in holding, as the cases cited by appellee's counsel do, that an action begun to recover damages resulting from the fraud in procuring the contract is so inconsistent with the subsequent action to rescind the contract for the same fraud that it cannot be maintained, even though the first action was abandoned before judgment. When the contract is affirmed and ratified by the injured party by such action, it then becomes binding on him, and is no longer voidable, and hence he cannot afterwards maintain a suit to rescind it. If the commencement of the suit for damages resulting from the fraud amounts to a ratification and affirmation of the contract, as we have seen it does, then there is much reason for holding the plaintiff precluded from the remedy of rescission without showing that the first suit was prosecuted to final judgment. Not so, however, if the first suit is for rescission. Its commencement is nothing more than a bare choice of remedies. Its commencement

and abandonment before final judgment are not inconsistent with the continued subsistence of the contract, or a subsequent suit affirming such contract. There may be cases in other jurisdictions establishing a different rule, making the commencement of either suit first a conclusive choice of remedies without prosecution to final judgment. But we are of opinion that the better rule is that established in this state, and we adhere to it. All we mean to hold as to the point now under consideration is that the cases cited by appellee are not necessarily inconsistent with the conclusions we have reached, and, if they were, our own previous cases would and ought to control this case, supported as it is by both reason and authority. Petition overruled.

(146 Ind. 589)

MOSS et al. v. JENKINS et al.

(Supreme Court of Indiana. Jan. 14, 1897.)

EXEMPTIONS — PERSONAL PRIVILEGE — WAIVER —
INVENTORY — CLAIM AFTER SALE —
QUIETING TITLE.

1. Under Rev. St. 1894, § 715 (Rev. St. 1881, § 703; Acts 1879, p. 127), which provides that property not exceeding in value \$600, owned by any resident householder, shall be exempt; and section 725, Rev. St. 1894 (section 713, Rev. St. 1881), which provides that before a debtor shall receive the benefit of the exemption he shall deliver to the officer holding the execution a schedule of all his property, as now provided by law in case an exemption on execution is claimed, — the exemption is a personal privilege, which the debtor waives by a failure to claim it before a sale, and the officer cannot set apart any property to him as exempt unless he has received such an inventory.

2. The mere fact that a debtor has less than \$600 worth of property does not withdraw it from the lien of a judgment or execution in the hands of an officer.

3. Though the statutes make all the property of a judgment debtor prima facie subject to execution, an officer who has been sued on his official bond for a failure to levy an execution may defend on the ground that the debtor was a resident householder, and his property did not exceed in value the amount allowed by law as exempt from execution, the presumption being that the debtor would have claimed his privilege before sale; but, if the levy be made in such case, the officer is not liable to the debtor, unless the debtor claim his exemption before sale, as required by the statute.

4. The purchaser of real estate which the vendor could have claimed as exempt from sale on execution may maintain an action to quiet his title, if brought before the execution sale, since the right is one which the vendor could have exercised, and works no additional hardship to any one.

5. Under the rule that a debtor must claim his exemption before the execution sale, a purchaser of the property from the debtor subject to the lien can acquire no greater rights, and cannot maintain an action to quiet his title after the execution sale.

Appeal from circuit court, Hamilton county; R. R. Stephenson, Judge.

Action by Abijah M. Jenkins and others against David F. Moss and others to quiet title. From a judgment in favor of plaintiffs, defendants appeal. Reversed.

Roberts & Vestal, for appellants. Christian & Christian, for appellees.

MONKS, J. Appellees brought this action against appellants to quiet their title to certain real estate. The cause was tried by the court, and upon request of the parties a special finding of facts was made, and conclusions of law stated thereon, to each of which appellants severally excepted. Judgment was rendered in favor of appellees quieting their title to the real estate in controversy. Appellants assign as error that the court below erred in each of its conclusions of law.

It appears from the special finding: That one Vestal recovered a judgment on contract against Alexander Castor before a justice of the peace. Afterwards an execution was issued on said judgment, and returned by a constable, indorsed, "No property found." That afterwards, on the 25th day of May, 1889, a transcript of said judgment, including said constable's return, was filed in the office of the clerk of the Hamilton circuit court, and was duly recorded in the proper order book, and docketed in the proper judgment docket of said court. Afterwards, on June 13, 1895, the proper steps were taken, and an execution was issued on said judgment to the sheriff of said Hamilton county. The sheriff demanded property of said Castor whereon to levy said execution, but he did not deliver or point out any property for the sheriff to levy upon. Afterwards the sheriff levied said execution upon the property in controversy, and, after taking proper steps by giving notice, etc., sold the same to appellant Moss for the amount of said judgment, interest, and cost, and delivered to said appellant a sheriff's certificate therefor. That at said time appellant Moss had no knowledge of the amount of property which Castor, the judgment debtor, then owned, or the amount he had owned at any time since the rendition of said judgment. That said Castor, nor any one in his behalf, had ever filed a schedule claiming said real estate nor any property as exempt from either of the executions issued on said judgment. That said Castor was the owner of the real estate in controversy on and before the 15th day of August, 1889. That on said day he sold and conveyed said real estate to one William H. Craig, who paid full value therefor, and that said Craig sold and conveyed said real estate to appellees on October 29, 1890, who paid full value therefor. That each of said deeds was properly recorded within 45 days after they were executed. That when said judgment was rendered, and at all times since, said Castor has been a resident householder of Hamilton county, Ind. That on the day said judgment was rendered, and ever since, said Castor has not owned or possessed or acquired property of the value of six hundred dollars, including the property in controversy. Appellants insist that as Castor, and no one in his behalf, claimed the property in controversy as exempt from exe-

cution before sale, the sale was valid. Appellees claim that, as Castor had less than \$600 worth of property, neither the judgment nor execution was a lien on the property, and the same was exempt, and no duty rested on Castor, or any one else, to claim said property as exempt before said sale; and such sale was invalid.

This court has held that the purchaser of real estate in a case like this may maintain an action to quiet the title to such real estate if the same is commenced before the sheriff's sale. *King v. Easton*, 135 Ind. 353, 35 N. E. 181; *Dumbould v. Rowley*, 113 Ind. 353, 15 N. E. 463; *Barnard v. Brown*, 112 Ind. 54, 13 N. E. 401. We have not been cited to any case, nor do we know of any, in this state, where it has been held that such action can be maintained if brought after the sheriff's sale. Section 22 of the bill of rights in the constitution, being section 67, Rev. St. 1894 (section 67, Rev. St. 1881), provides that "the privilege of the debtor to enjoy the necessary comforts of life shall be recognized by wholesome laws exempting a reasonable amount of property from seizure or sale for the payment of any debt or liability hereafter contracted." This section of the constitution is not self-executing, but requires the action of the legislature to carry its provisions into effect. *Green v. Aker*, 11 Ind. 223. In section 715, Rev. St. 1894 (section 703, Rev. St. 1881; page 127, Acts 1879, in force May 31, 1879), it is provided "that an amount of property not exceeding in value six hundred dollars owned by any resident householder shall not be liable to sale on execution or any other final process from a court for any debt growing out of or founded upon a contract express or implied after the taking effect of this act." The legislature did not, however, enact a law absolutely exempting property of the value of \$600, but provided by section 725, Rev. St. 1894 (section 713, Rev. St. 1881; section 11, p. 129, Acts 1879, in force May 31, 1879), that "before a debtor shall receive the benefit of the exemption provided by this act he shall make out and deliver to the officer holding the execution a schedule of all his property, as now provided by law in case an exemption from sale on execution is claimed." Section 726, Rev. St. 1894 (section 714, Rev. St. 1881; section 1, p. 119, Acts 1861, in force July 5, 1861), made provision for the schedule of the debtor's property referred to in section 725, Rev. St. 1894 (section 713, Rev. St. 1881) as follows: "Before any person shall be entitled to the benefit of the provisions of the above recited act, he shall make out and deliver to the sheriff or other officer having the writ, an inventory of all his or her real estate, within or without this state, money on hand or on deposit within or without this state, rights, credits, and choses in action, and all personal property of every description belonging to him or in which he had any interest at the date of the issuing of the

writ, and make and subscribe an affidavit to the same that such inventory contains a full and true account of all such property as required in this act to be set out in said inventory, had or held by him at the time such writ was issued; and if any of such property has been disposed of by him since the issuing of the writ, such affidavit shall show that fact, and how the same has been disposed of, and what disposition he has made of the proceeds; and until such inventory and affidavit shall be furnished to such officer, he shall not set apart any property to the execution defendant as exempt from execution." Under this and prior acts with like provisions this court has held that exemption laws are to be liberally construed, yet the right of exemption granted to the debtor is a personal privilege, which he may waive or claim at his election. A failure to claim the exemption before sale is deemed a waiver of such right. *Pate v. Swann*, 7 Blackf. 500; *State v. Melogue*, 9 Ind. 196; *Eltzroth v. Webster*, 15 Ind. 21; *Godman v. Smith*, 17 Ind. 152; *Sullivan v. Winslow*, 22 Ind. 153; *Finley v. Sly*, 44 Ind. 266; *Gregory v. Latchem*, 53 Ind. 449, 453; *Terrell v. State*, 66 Ind. 570, 575; *Williams v. Osbon*, 75 Ind. 280, 285; *Over v. Shannon*, Id. 352, 356; *Boesker v. Pickett*, 81 Ind. 554, 555; *Haas v. Shaw*, 91 Ind. 384, 392, 393; *State v. Read*, 94 Ind. 103; *Berry v. Nichols*, 96 Ind. 287, 289, 290; *Guerin v. Kraner*, 97 Ind. 533, 535; *Robinson v. Hughes*, 117 Ind. 293, 295, 20 N. E. 220; *Graves v. Hinkle*, 120 Ind. 157, 21 N. E. 328; *Coppage v. Gregg*, 1 Ind. App. 112, 114, 27 N. E. 570; *Wagner v. Barden*, 13 Ind. App. 571, 573, 574, 41 N. E. 1067. Section 725, Rev. St. 1894 (section 713, Rev. St. 1881, which was passed in 1879), and section 726, Rev. St. 1894 (section 714, Rev. St. 1881, which was enacted in 1861), require of the execution debtor, as a condition precedent to his right to have the sheriff set off to him property as exempt, etc., that he furnish the officer holding the execution a verified inventory of all the property he owns, or has any interest in, anywhere in the world. Until this is done, the execution debtor is not entitled to his exemption, and the sheriff cannot set apart any property to him as exempt from execution. *Gregory v. Latchem*, supra; *Over v. Shannon*, 75 Ind. 352; *Graham v. Crockett*, 18 Ind. 119; *Astley v. Capron*, 89 Ind. 167. Appellees insist, however, that when the execution debtor has less than \$600 worth of property, neither the judgment nor execution is a lien on the same. The statutes in this state declare when and upon what property judgments and executions are liens. Section 694, Rev. St. 1894 (section 682, Rev. St. 1881), provides that an execution against the property of the judgment debtor shall require the sheriff to satisfy the judgment out of the property of the debtor subject to execution. Section 617, Rev. St. 1894 (section 608, Rev. St. 1881; section 601, p. 348, Acts 1881), provides that all

judgments of the supreme and circuit courts for the recovery of money or costs shall be a lien upon real estate and chattels real subject to execution in the county where the judgment is rendered. To determine what real estate is subject to sale on execution we turn to section 764, Rev. St. 1894 (section 752, Rev. St. 1881; section 600, p. 347, Acts 1881), where it is provided that: "The following real estate shall be liable to all judgments and attachments and to be sold on execution against the debtor owning the same and for whose use the same are holden, viz.: First. All lands of the judgment debtor whether in possession, remainder, or reversion. Second. Lands fraudulently conveyed with intent to delay or defraud creditors. Third. All rights of redeeming mortgaged lands; also all lands held by virtue of any land certificate. Fourth. Lands or any interest therein holden by any one in trust for or to the use of another. Fifth. All chattels real of the judgment debtor." The statute also declares what personal property of a debtor an execution is a lien upon and the time when the said lien takes effect. Section 698, Rev. St. 1894 (section 686, Rev. St. 1881), provides that: "When an execution against the property of any person is delivered to an officer to be executed the goods and chattels of such person within the jurisdiction of such officer shall be bound from the time of the delivery; but if there be several executions whether issued out of account of record or by a justice of the peace against the same defendant in the hands of different officers, that execution without regard to the time of its delivery under which the first levy is made shall have the preference and all liens created by prior delivery of any other execution shall be divested." This court has held under this section that an execution is a lien upon the execution debtor's property from the time of its delivery to the officer. *Willson v. Binford*, 54 Ind. 569; *McOrisaken v. Osweller*, 70 Ind. 131; *Lindley v. Kelley*, 42 Ind. 294; *Cones v. Willson*, 14 Ind. 465; *Johnson v. McLane*, 7 Blackf. 501; *Vandibur v. Love*, 10 Ind. 54. It follows from the foregoing sections of the statutes and the cases cited that all property of an execution debtor is prima facie subject to execution. *State v. Melogue*, supra; *Godman v. Smith*, supra; *Terrell v. State*, supra; *Boesker v. Pickett*, supra.

In *Terrell v. State*, which was an action on a sheriff's official bond for damages for failure to levy an execution issued on a judgment upon contract, this court, on page 575, said: "Construing all the statutory provisions bearing upon the seizure and sale of property upon execution, the inference is obvious that all the property of execution defendants in this state is considered as prima facie subject to execution, and that it is the duty of the officer holding an execution to proceed until some claim for exemption is lawfully interposed." In such case, however, the of-

ficer may defeat a recovery by showing that the debtor was a resident householder, and his property did not exceed in value the amount allowed by law as exempt from execution (*State v. Harper*, 120 Ind. 23, 25, 26, 22 N. E. 80; *Dick v. Hitt*, 82 Ind. 92); the presumption being that the execution debtor will claim the benefit of the exemption law. This presumption, which may not be conclusive, is predicated upon the theory that every man will do that which is to his own interest. *Dick v. Hitt*, supra. This principle has been approved in other cases. *Williams v. Osborne*, 95 Ind. 347, 348; *Simpkins v. Smith*, 94 Ind. 470; *Iles v. Watson*, 76 Ind. 359, 361; *Williams v. Osborn*, 75 Ind. 280; *Campbell v. Gould*, 17 Ind. 133; *Bozell v. Hauser*, 9 Ind. 522. While it is true that where an officer sued for a failure to levy an execution issued on a judgment upon contract makes, at least, a prima facie defense by showing that the execution debtor was a resident householder, and his property did not exceed the amount allowed by law as exempt from execution, yet, if he makes a levy upon such property, he is not liable therefor to the execution debtor, unless before the sale of such property on the execution the execution debtor claims his exemption substantially in the manner required by the statute, and the same is refused by the officer. *Huseman v. Sims*, 104 Ind. 317, 4 N. E. 42; *Boesker v. Pickett*, supra; *Pinley v. Sly*, 44 Ind. 266; *Douch v. Rahner*, 61 Ind. 64; *State v. Read*, supra; *Over v. Shannon*, 91 Ind. 99; *Chatten v. Snider*, 126 Ind. 387, 26 N. E. 166; *Van Dresor v. King*, 34 Pa. St. 201; 75 Am. Dec. 643, and note, pp. 645-653; 1 Freem. Ex'ns, § 215a; *Waples*, Homest. p. 781. After property has been set off by the sheriff under the exemption law as exempt from sale on execution, it may be sold by the debtor free from the lien of the execution and judgment. *Hall v. Hough*, 24 Ind. 273; *Vandibur v. Love*, 10 Ind. 54; *Ray v. Yarnell*, 118 Ind. 112, 20 N. E. 705. The right of the purchaser of real estate which the vendor could have claimed as exempt from sale on execution to maintain an action commenced before the execution sale to quiet his title to such real estate as against such lien rests upon equitable principles, and is not declared by the statute. *Barnard v. Brown*, supra. The execution debtor may, after he has sold property which was subject to the lien of an execution, include it in his schedule, and claim it as exempt. *Godman v. Smith*, supra; *Vandibur v. Love*, supra. There is no hardship to any one, therefore, in allowing the purchaser of said property to maintain an action to enforce his vendor's right to claim such property as exempt in order to protect his own title thereto. We think this doctrine is sound, and is sustained by the principles of equity. While it may be regarded as settled in this state that the purchaser of property which is subject to a judgment or execution lien may maintain such action when brought be-

fore the sale thereof by the sheriff, we do not think the doctrine should be further extended, as is sought in this case. It is clear that, if the sale to appellant Moss had been made by the sheriff before Castor conveyed the real estate to Craig, and no claim had been made by Castor before the sheriff's sale for the exemption of such property, such sale would have been valid. The execution debtor, as we have seen, is required to claim his exemption before the sale by the sheriff, and for the same reason his vendee must claim his vendor's right of exemption by commencing his action before the sheriff's sale. His right, in this respect, can be no greater than his vendor's under whom he claims. To hold otherwise would cast suspicion upon every title that depended upon a sale on execution, unless enough time had elapsed since the sale to give a title under some statute of limitations; for, if such an action can be maintained if commenced one day after the sale, it can be sustained if commenced at any time within the period of the statute of limitations. To such a doctrine we cannot yield our assent.

There may be language in some of the cases decided by this court which seems to sustain the trial court in its conclusions of law, but in those cases the question here presented was not before the court, and was not considered. Although the conclusion we have reached in this case may not be in harmony with the inference which might be drawn from the language used in the cases referred to, it is not in conflict with the final judgment of this court in any of those cases. Neither is our conclusion in this case in conflict with the doctrine enunciated in many of our cases where it was sought to reach property of the husband, alleged to have been conveyed to his wife or others to defraud creditors. In such cases the court has correctly held that when the debtor, who is a resident householder, has property worth not exceeding \$600, and fraudulently conveys or transfers the same without consideration to defraud his creditors, such property cannot be reached, for the reason that the debtor could successfully claim the same as exempt from execution if the indebtedness were reduced to judgment. Therefore his creditors had no right to complain, if he, before judgment, had placed his property beyond the reach of any judgment or execution. It follows that the court erred in its conclusions of law. Judgment reversed, with instructions to the court below to restate its conclusions of law in accordance with this opinion, and render judgment in favor of appellants.

(146 Ind. 574)

CRAIG v. BENNETT.

(Supreme Court of Indiana. Jan. 13, 1897.)

EJECTMENT—SPECIAL FINDINGS—SUFFICIENCY.

1. In an action to recover possession of land, in which plaintiff alleged that she "is the owner

in fee simple," etc., a judgment in her favor was not supported by a special finding that she was the owner in fee in 1854, about 40 years before the trial.

2. The statement of a fact or facts in the conclusions of law cannot make good the special finding which fails to find such fact or facts.

3. Where there is no finding in ejectment that plaintiff is entitled to possession, a judgment for plaintiff cannot be sustained.

Appeal from circuit court, Marshall county; A. G. Wood, Special Judge.

Action by Sarah H. Bennett against William H. Oraig to recover possession of certain land. From a judgment in favor of plaintiff, defendant appeals. Reversed.

J. D. McLaren, for appellant. Samuel Parker, for appellee.

McCABE, J. Appellee sued the appellant to recover possession of two acres of land situate in Marshall county. The issue made by the answer of general denial was tried by the court. Upon proper request the court made a special finding of the facts, upon which it stated conclusions of law. The court rendered judgment in favor of the plaintiff upon the special finding, pursuant to the conclusions of law. The errors assigned, among other things, call in question the conclusions of law. The only finding as to plaintiff's title was that "on December 26, 1854, the plaintiff, Sarah H. Bennett, became the owner in fee simple, by conveyance from James I. Sering, of the entire north half of lot 40, in what is known as 'Sering's Partition Plat,' or 'East Addition to the Town of Plymouth,' being part of section 13, Michigan road lands, in Marshall county, Indiana." The allegation in the complaint is that the plaintiff is the owner in fee simple and entitled to the possession of the premises (describing them). That means at the present time. The plaintiff, in order to maintain such an action, must have title at the commencement of the action. *Inge v. Garrett*, 38 Ind. 96; *Newell, Ej.* 360, 361; *Tyler, Ej.* 773, 820. And it has been held insufficient to allege title at some previous time. *Wintermute v. Reese*, 84 Ind. 308; *Brown v. Brown*, 133 Ind. 476, 32 N. E. 1128, and 33 N. E. 615. But appellee's counsel contends that the finding being that she owned the premises in fee simple in 1854, about forty years prior, the presumption must be indulged that that state of title still continues. But it has long been an established rule in this court that nothing can be added to a special verdict by inference or intendment. *Railway Co. v. Stupak*, 123 Ind. 210, 228, 23 N. E. 240; *Railroad Co. v. Spencer*, 98 Ind. 180; *Buchanan v. Milligan*, 108 Ind. 433, 9 N. E. 385; *Improvement Co. v. Loehr*, 124 Ind. 79, 24 N. E. 579; *Town of Freedom v. Norris*, 128 Ind. 377, 27 N. E. 869; *Railway Co. v. Miller*, 141 Ind. 551, 37 N. E. 343; *Fisher v. Railway Co.* (at this term) 45 N. E. 689. It is true that proof that the plaintiff owned the premises 40, or any other number of, years

prior to the trial is sufficient to warrant the inference that she still continues the owner, in the absence of evidence that she has since ceased to be such owner. But that inference is an inference of fact, and not one of law, and must be found by the trier of the facts. The court cannot draw that inference, because when the court tries the case it acts as a jury, and it is the exclusive trier of the facts. There was no finding that the plaintiff was entitled to the possession. But counsel for appellee, in answer to this point made by appellant's counsel, refer to the conclusions of law as furnishing a sufficient finding of that fact. The conclusions of law are as follows: "Upon the foregoing facts the court finds for the plaintiff, that she is now and was the owner and entitled to the possession of the real estate described in her complaint herein at the commencement of this action, and that the same has been wrongfully detained by the defendant from plaintiff; that the plaintiff is entitled to judgment in the sum of twenty-four dollars for the detention thereof." Whether the foregoing statement contains any conclusion of law at all may admit of some question. Be that as it may, it contains a statement of several facts that ought to have been found in and among the special findings of fact. But it is settled law in this state that the statement of a fact or facts in the conclusions of law cannot make the special finding good which fails to find such fact or facts. *Stalcup v. Dixon*, 136 Ind. 9, 35 N. E. 987, and authorities cited. Therefore we are constrained to hold that there is no finding that the plaintiff was entitled to possession. Without such a finding, the plaintiff was not entitled to judgment recovering possession. *Railway Co. v. O'Brien*, 142 Ind. 213, 41 N. E. 528, and cases there cited; *Roots v. Beck*, 109 Ind. 472, 9 N. E. 698; *Wilson v. Johnson* (Ind. Sup.) 38 N. E. 38.

There are other questions discussed by counsel, but they may not arise on another trial. The circuit court erred in its conclusions of law. Under the circumstances of this case, as disclosed by the special findings and conclusions of law, justice will be best subserved by awarding a new trial. The judgment is therefore reversed, with directions to award a new trial.

(146 Ind. 577)

CITY OF DECATUR v. GRAND RAPIDS & I. R. CO. et al.

(Supreme Court of Indiana. Jan. 14, 1897.)

APPEAL—HARMLESS ERROR—BILL OF EXCEPTIONS—JUDGMENT IN EXCESS OF DEMAND—PLEADING—CONDEMNATION.

1. An erroneous ruling, sustaining an answer against a demurrer, is not ground for reversal if the judgment on the merits is in favor of the plaintiff on the issue tendered by such answer.

2. Under Rev. St. 1894, § 3643 (Rev. St. 1881, § 3180), providing for appeals from proceedings for the condemnation of land by a city for street purposes, a statement filed by the appellant,

which stands for an answer, objecting to the amount of damages assessed, and demanding a greater amount, is sufficiently specific to form an issue on the question of damages, where no question is raised as to the regularity of the proceedings.

3. Where the question is made, it must affirmatively appear from the record that the reporter's longhand manuscript of the evidence was filed with the clerk before it was filed as a part of the bill of exceptions, as required by Rev. St. 1894, § 1476 (Rev. St. 1881, § 1410), to entitle it to be considered.

4. Where the amount of damages found in favor of a party, and for which judgment is rendered, exceeds the amount claimed in his pleading, it will be treated on appeal, as though the pleading had been amended to conform to the proof.

Appeal from circuit court, Adams county; Joseph D. Dailey, Special Judge.

Proceedings by the city of Decatur to open a street. The Grand Rapids & Indiana Railroad Company and another appealed from an assessment of damages, and from a judgment on the trial of such appeal for a larger amount the city appeals. Affirmed.

Mann & Beatty, for appellant. Zollars & Worden, for appellees.

HACKNEY, J. The appellees, the Grand Rapids & Indiana Railroad Company and the Cincinnati, Richmond & Ft. Wayne Railroad Company, appealed to the lower court from an assessment of \$500 damages, by the authorities of the appellant, occasioned by the extension of Madison street, in said city, across the yards and right of way of the latter company, whose line was operated by the former. In the lower court a trial resulted in a finding and judgment in favor of the appellees for \$5,100, and from that judgment said city prosecutes this appeal.

The action of the circuit court in overruling the appellant's demurrers to the first, second, and fourth answers of the appellees, and in overruling a motion by the appellant for a new trial, are assigned as error. The first answer described the land, alleged its ownership by the appellees, and that damages had been assessed in the sum of \$500, when in fact said land and the appellees would be damaged in the sum of \$5,000. The second answer pleaded the occupancy by the appellees of the land in question for 25 years, the construction thereon of one main line and three side tracks and switches, and the building of a structure from which to load and unload freight, all occupying the land to be crossed by said street. The fourth answer alleged the vacation by the city of said street, at the point of crossing, to induce the location of the railway and the establishment of said yards; that the road and yards were located at the point in question by reason of the vacation of the street; that no necessity existed for the extension of the street; but that it was urged for the advancement of the values of private property; and that the damage which would accrue to the companies could not be adequately

compensated. The second and fourth answers were drawn upon the theory that the appellant should be barred of any right to condemn the land, or to enforce an easement across it for street purposes. The finding and judgment of the court were in favor of the appellant as to the opening of the street, and the correctness of that holding is in no manner involved in this appeal. As to the appellees, in addition to the appropriation of the way, it was adjudged that they "have and recover of and from the plaintiff the sum of five thousand one hundred dollars, as hereinafter provided, as damages for and on account of the loss of storage room for cars on the strip of ground hereinbefore described, in the sum of five thousand dollars, and on account of the destruction of one loading dock, in the sum of one hundred dollars, and the aggregate sum of five thousand one hundred dollars."

If the rulings upon said two answers were erroneous, we are unable to observe any harm resulting to the appellant therefrom. It is the settled practice that an erroneous ruling in sustaining an answer against a demurrer will not constitute reversible error if the judgment upon the merits is in favor of the plaintiff upon the issue tendered by such answer. *McComas v. Haas*, 93 Ind. 276; *State v. Julian*, Id. 292; *Foster v. Bringham*, 99 Ind. 505; *Butt v. Butt*, 118 Ind. 31, 20 N. E. 538; *Indianapolis, D. & W. Ry. Co. v. Center Tp.*, 143 Ind. 63, 40 N. E. 134; *Miller v. McDonald*, 139 Ind. 466, 39 N. E. 159; *Miller v. Rapp*, 135 Ind. 614, 34 N. E. 981, and 35 N. E. 693; *Railroad Co. v. Maddux*, 134 Ind. 571, 33 N. E. 345, and 34 N. E. 511.

As to the first paragraph of answer, it is insisted that under section 3643, Rev. St. 1894 (section 3180, Rev. St. 1881), the appellees were required to "state specifically the grounds of" their "objection to the proceedings of the common council and commissioners," and that as this was a special proceeding, where the ordinary rules of practice do not obtain, a general claim for damages was insufficient. The statute referred to further provides that "the transcript of the proceedings of the common council and commissioners shall be considered as the complaint; and the written statement, to be filed by the appellant as aforesaid, shall be in the nature of an answer or demurrer. Issues of law and of fact may be found, tried and determined as in other actions at law." The latter provision determines very clearly that an answer sufficient to present an issue in other actions at law would be sufficient in proceedings of this character, unless it may be said that, under the former provision, any answer objecting to the damages assessed must be so specific as to point out the particular injuries sustained, and the elements of damage claimed. We do not think that provision of the statute makes such requirement. In the appeal to the circuit court, "the regularity of the proceedings of the commission-

ers and the questions as to the amount of benefits or damages assessed may be tried," and the answer shall "state specifically the grounds of objection." Perhaps an answer generally objecting to the condemnation and to the damages assessed would not comply with the statute; but when it is answered that the appellant is dissatisfied with the damages assessed, and demands an increased amount of damages, it will be sufficient as against a demurrer. Such pleading must be considered in the light of the complaint, the character of the demand, the uses to be made of the property, and the uses to which it is already subjected. When so considered, the general allegation of injury or loss of property and the damage will be sufficient to withstand a demurrer. If a more specific answer is desired, it should be sought by the usual means of a motion to make more specific.

Appellees object to a consideration of any question depending upon the evidence, and insist that the evidence is not properly in the record. The original longhand manuscript of the evidence is embodied in the transcript, and its filing, prior to its incorporation in the bill of exceptions, is questioned. By order-book entry, it appears that judgment was rendered January 18, 1896. On the same day, a motion for new trial was overruled, and a bill of exceptions upon that ruling was filed. The longhand manuscript was filed, and a bill of exceptions containing said manuscript was filed. That part of the entry disclosing such filings is as follows: "Which said bill of exceptions are [is] here now in open court, signed, sealed, filed, and made a part of the record in this cause. Also, the plaintiff files the longhand manuscript of the evidence taken in this cause by the official reporter. * * * Plaintiff also tenders her bill of exceptions number three, containing the original longhand manuscript of the evidence taken in this cause, in these words." Then follows a bill of exceptions, reciting a trial on the 22d day of February, 1895, in a cause entitled in the name of this appellant against one of these appellees, and not signed until the 18th day of February, 1896. Following the bill, said order-book entry of January 18, 1896, concludes as follows: "Which said bill of exceptions are [is] here in open court, signed, sealed, filed, and made a part of the record in this cause." A previous order-book entry showed that the trial in this cause had taken place, and that the finding was entered on the 4th day of November, 1895. Passing this confusion of dates, which probably shows the filing of the bill containing the evidence was 30 days before the bill was signed, as it disclosed upon its face, and accepting the only theory open to the appellant, that the filing of the bill was on the 18th day of February, instead of the 18th day of January, as the order book states by mistake, then the filing of the bill and the longhand manuscript appear to have

been concurrent acts, and it does not appear, as required by the statute (Rev. St. 1894, § 1476; Rev. St. 1881, § 1410), that the manuscript was filed before it was incorporated in the bill. See *De Hart v. Board*, 143 Ind. 363, 41 N. E. 825; *Joseph v. Wild*, 45 N. E. 467, and cases there cited. These cases hold that, where the question is made, it must affirmatively appear from the record that the longhand manuscript was filed before it was filed as a part of the bill of exceptions. In the present case no file mark or certificate is given aiding the contention that the manuscript was filed prior to the filing of the bill.

Two of the causes assigned for a new trial were: "(3) The damages assessed by the court are excessive. (4) The assessment of the amount of recovery is erroneous, being too large." If the first of these causes raises any question in this case, which may well be doubted (*White v. McGrew*, 129 Ind. 83, 28 N. E. 322), it must depend upon the evidence, which, as we have seen, is not in the record. Of the second of said causes it is simply said that the recovery, \$5,100, was \$100 in excess of the demand made in the answer. In such case this court will treat the question as if the pleadings had been amended to meet the amount of damage proven and found in favor of the appellee. *McKinney v. State*, 117 Ind. 26, 19 N. E. 613; *White v. Stellwagon*, 54 Ind. 186; *Webb v. Thompson*, 23 Ind. 428; *Kettry v. Thumma*, 9 Ind. App. 498, 36 N. E. 919. The record presenting no available error, the judgment is affirmed.

(17 Ind. App. 580)

EIGENMAN et al. v. EASTIN.¹

(Appellate Court of Indiana. Jan. 15, 1897.)

COSTS—SECOND ACTION—DISMISSAL.

1. A motion to dismiss a second action unless the costs of a former one, which plaintiff voluntarily dismissed, are paid, is addressed to the sound discretion of the trial court.

2. It was not an abuse of discretion to deny a motion to dismiss a second action unless the cost of a former one, which plaintiff voluntarily dismissed, were paid, where the motion showed that the former action was dismissed because the court announced that the evidence was insufficient, though it offered to allow further evidence to be introduced.

Appeal from superior court, Vanderburgh county; J. H. Foster, Judge.

Action by Laura B. Eastin, administratrix, against John G. Eigenman and others. There was a judgment for plaintiff, and defendants appealed. Affirmed.

Chas. L. Wedding and Gilchrist & De Bruler, for appellants. J. E. Williamson, for appellee.

BLACK, J. The appellee, on the 10th day of October, 1894, brought her action against the appellants, and recovered judgment against them for damages in the sum of \$1,750 for causing, through their negligence, the

death of her intestate, who was her husband.

The appellants, at their first appearance, moved that the appellee be required to pay the costs of a former action, and that, on her failure to do so within 10 days, the cause be dismissed. The motion was overruled, and this action of the court is assigned as error. The motion, which was verified, stated, in substance, that the plaintiff, in 1894, brought this action in the court below for the same matters and things for which this suit was brought, using the same complaint in each action; that, after ample time and proper care and attention to all the matters by counsel and court, the case was brought to trial October 9, 1894; that the defendants incurred extra expense in asking a struck jury; that the case was carefully tried by the plaintiff, and, after all her evidence was in, "it being the judgment of the defendants' attorney that, upon that evidence, there could be no recovery under the law by the plaintiff, declined to offer any evidence, and asked the court to instruct the jury to find a verdict for the defendants"; that, after the argument, the court extended the plaintiff further time to make further argument and cite authorities, and also offered to hear any further evidence which might be offered; "and that, after all this showing of liberality to the plaintiff, the court announced that upon all the points the plaintiff had failed to make any case, and thereupon the plaintiff, after this full and fair treatment, and after she was offered every opportunity to make her case, and yet failed," dismissed the case, and refiled the same complaint, and a judgment was entered against her for costs taxed at \$130.30. The record before us does not contain any counter affidavit, or indicate that any other evidence was offered by the parties or heard by the court upon the motion. Where a cause has been voluntarily dismissed by the plaintiff, and the costs have been awarded against him, and he has brought another action for the same cause, an application of the defendant for a stay of proceedings until the costs so awarded have been paid, or for the dismissal of the second action because of non-payment of such costs within a limited time, is addressed to the sound discretion of the court. The plaintiff has an absolute right to dismiss. An application to prevent him from proceeding with the second action unless he pay the costs of the former one should not be sustained unless it appears to the court, in the exercise of a sound discretion, under the facts and circumstances of the particular case, that the second action is without merit and vexatious. *Kitts v. Willson*, 89 Ind. 95; *Harless v. Petty*, 98 Ind. 53; *Sellers v. Myers*, 7 Ind. App. 148, 34 N. E. 496. The rule has been stated in this state to be "that the second action will be deemed vexatious until the inference shall be removed by a showing on the part of the plaintiff." *Kitts v. Willson*, supra; *Harless v. Petty*, supra. In *Sellers v.*

¹ Rehearing denied.

Myers, supra, it was said by this court that "the presumption of vexation gives rise only to the bare probability, which fades away upon the slightest countervailing evidence." Of course, if it should appear, from all the evidence before the court, that the suit is not vexatious, it would not matter which side produced the evidence. The court's action is open to review upon appeal only for an abuse of sound discretion. It devolved upon the court to so act as to advance the ends of justice. The plaintiff's complaint presented a meritorious cause of action. It was plainly shown, in the verified motion of the defendants, that the action of the plaintiff in dismissing the former suit was reasonable and prudent. In the second action the plaintiff has recovered judgment, whereas it is indicated that she would have failed in the former action. We cannot say that the court, in overruling the motion, was not acting so as to advance what then appeared to be the ends of justice. We cannot determine that, in the dismissal of the former suit, and the bringing of the action at bar, the appellants were vexatiously harassed by a multiplicity of suits, or that the action of the court upon the motion was unjustly injurious to the appellants. It is well settled that there is no available error in overruling a motion which is not well taken as a whole. *Spence v. Board*, 117 Ind. 573, 18 N. E. 513. We cannot say that the court might not properly regard the time limited in the motion as too short. We cannot decide that the court abused its judicial discretion.

The only other matter of dispute between the parties here relates to the question as to the sufficiency of the evidence. It is insisted, on behalf of the appellants, that the evidence did not sufficiently establish the charge of negligence of the appellants, and that it failed to prove want of contributory negligence on the part of the appellee's intestate. The injury which caused the death of her intestate was inflicted while he was engaged at work under the employment of the appellants in a cofferdam which the appellants were constructing in the building of a bridge over a creek. The evidence, which is quite voluminous, is rendered somewhat difficult to understand in many of its parts by reason of the fact that a model of the cofferdam, with the appliances employed in connection with it, was used before the jury, and the references to it by the witnesses, while easily understood by the jury, are so vague that, without a description or a plan in the evidence, the situation of the parties and their conduct are not so clearly presented in this court as would be desirable. It seems to have been intended to supply this want, in part; for it appears, in the course of the introduction of the evidence, that it was agreed "that the diagram contained in Mr. Arnold's deposition shall go into the record, with his explanation of it as contained in the deposition." We are unable to find this diagram, or the explanation

so mentioned, anywhere in the record. Yet we have looked into the evidence in the transcript, and we find it to be conflicting. We cannot decide the matter in dispute between counsel in regard to the evidence, without invading the province of the jury, and disregarding the well-known rule that this court cannot pass upon the question as to the weight of the evidence. Judgment affirmed.

(16 Ind. App. 562.)

LUHR v. MICHIGAN CENT. R. CO.

(Appellate Court of Indiana. Jan. 13, 1897.)

RAILROADS—FIRES—NEGLIGENCE—SPECIAL VERDICT.

A special verdict, merely finding that a railroad "negligently" allowed combustibles to accumulate and remain on its right of way, and "negligently" communicated fire to it, and "negligently" suffered the fire to escape to plaintiff's property, without stating facts from which a conclusion of negligence can be drawn, does not authorize a judgment against the railroad.

Appeal from circuit court, Porter county; J. H. Gillett, Judge.

Action by Henry Luhr against the Michigan Central Railroad Company. Judgment for defendant. Plaintiff appeals. Affirmed.

A. L. Jones, for appellant. J. W. Youche and J. B. Collins, for appellee.

BLACK, J. In the appellant's action against the appellee for damage caused by fire communicated to the appellant's land from the appellee's adjoining right of way, the court overruled the appellant's motion for judgment upon a special verdict, and this action of the court is presented for our consideration. The contention of counsel relates to the question whether the verdict sufficiently showed negligence on the part of the appellee to authorize judgment thereon for the appellant.

It was stated in the verdict that, on the 5th day of April, 1893, the appellant was the owner in fee simple of certain lands described, through which the right of way and railroad of the appellee ran on a line about 10 rods north of the south line of said land; that on said day there was standing on said land a grove of young growing timber of about six acres, which was north of and adjoining the right of way of the appellee; "that said six acres was of the value of \$60 per acre and of the total value of \$360; that on said 5th day of April, 1893, a large amount of dry grass, weeds, leaves, rubbish, and other combustibles were on the right of way of the defendant, along and through plaintiff's said land, which dry grass, leaves, weeds, rubbish, and other combustibles the defendant carelessly and negligently suffered and permitted to gather, accumulate, be, and remain on its said right of way, through and adjoining the said land of the plaintiff; that on said 5th day of April, 1893, the defendant, by its agents and servants, was

running and operating a train of freight cars along and on its said railroad, through and by the said land of the said plaintiff, which said train of cars was a way freight train, and was known as "Train No. 52," and was drawn and propelled by engine No. 39; that the defendant, by its agents and servants, so negligently operated and managed said engine as that large coals of fire were carelessly and negligently dropped therefrom, and sparks of fire were carelessly and negligently emitted therefrom, which said coals and sparks of fire, so being dropped by and emitted from said engine, the defendant carelessly and negligently suffered and permitted to fall among and set fire to the said dry grass, weeds, leaves, rubbish, and other combustibles, so negligently suffered and permitted to gather, accumulate, be, and remain upon the right of way of the defendant, and along its track, near and adjoining plaintiff's said land, as aforesaid; that the defendant carelessly and negligently suffered and permitted the fire so started to spread and escape from defendant's said right of way and onto plaintiff's said land, and to spread over and burn through said grove of young growing timber, thereby killing and destroying the trees and timber standing and growing on three acres of plaintiff's said land; * * * that said fire was started and spread, and said damage was done and caused, solely by and through the fault and negligence of the defendant, as hereinbefore found." The statements of the verdict were in great part repetitions of the complaint.

In a special verdict facts only should be found, and not mere conclusions of law. All the facts essential to a recovery must be stated. The verdict should contain the ultimate facts. If, in an action for negligence, such facts be stated in a special verdict that it can only be inferred from them that there was negligence, or that there was not negligence, the verdict need not state the inference of negligence or no negligence. In such case the court will determine, as a matter of law, from the facts so found, that there was or was not negligence. If, the facts being stated, reasonable men might candidly disagree as to the proper inference to be drawn therefrom concerning the existence or nonexistence of negligence, the jury should draw the proper inference, and state it in the verdict. But whether the facts are such that the conclusion should be left to the court, or such that the jury should state the proper inference, the facts upon which the conclusion of the court is to be based, or from which the jury make the inference, should be stated in the verdict. The facts cannot be supplied by implication or intendment. *Railroad Co. v. Spencer*, 98 Ind. 186; *Railroad Co. v. Grames*, 136 Ind. 39, 84 N. E. 714; *Railroad Co. v. Hadley*, 12 Ind. App. 516, 40 N. E. 760. The statement in a special verdict that an act or omission was neg-

ligent will not vitiate the verdict, but it may add nothing that will increase its value to the party having the burden of the issue. In the verdict before us it does not appear, from facts set forth, that the presence of the combustible materials upon the right of way at the time specified was due to the appellee's negligence. No facts are stated upon which either the court or the jury could properly base a conclusion that the appellee failed to perform its duty in the premises through want of due care and diligence. The judgment is affirmed.

(18 Ind. App. 561)

PARR v. CUTSINGER.

(Appellate Court of Indiana. Jan. 13, 1897.)

APPEAL—REVIEW OF EVIDENCE.

Judgment will not be reversed on weight of evidence, there being evidence to sustain the finding.

Appeal from circuit court, Johnson county; W. J. Buckingham, Judge.

Action by George Cutsinger against Peterson K. Parr. Judgment for plaintiff. Defendant appeals. Affirmed.

Miller & Barnett, for appellant. T. W. Woollen, for appellee.

ROBINSON, J. This action was brought by the appellee against the appellant on a judgment, and also for money paid by the appellee as surety for the appellant. A demurrer to the complaint was overruled, and exceptions taken. The appellee answered in four paragraphs: First, general denial; second, set-off; third, payment; fourth, a special plea of accord and satisfaction. A demurrer to the fourth paragraph of answer was overruled. A reply of general denial was filed to the third and fourth paragraphs of answer, and of general denial and payment to the second. Trial by the court, and a finding in favor of the appellant for \$671.16. A motion for a new trial was overruled, and judgment was rendered upon the finding. The only error assigned by the appellant is the overruling of the motion for a new trial. The reasons assigned for a new trial were that the finding of the trial court "was contrary to the evidence," that it was "not sustained by sufficient evidence," and also "contrary to the law." We have carefully read the evidence, and, while it is conflicting, yet there is evidence which supports the finding on every material point. The evidence fails to support all the material allegations of the fourth paragraph of the answer. Even if the agent had full power to accept the property in full satisfaction of the debts,—a point not necessary to decide,—yet there is nothing in the record showing that he entered into such an agreement. We find nothing in the record which takes this case out of the well-settled rule that, if there is any evidence to sustain the finding, this court will not reverse the case on the weight of the evidence.

The reasons for this rule have been so often stated that it is not necessary to repeat them here. *Lawrence v. Van Buskirk*, 140 Ind. 481, 40 N. E. 54; *Hoskinson v. Cavender*, 143 Ind. 1, 42 N. E. 358, and cases cited. Judgment affirmed.

(17 Ind. App. 338)

ALLEN v. DAVIS et al.¹

(Appellate Court of Indiana. Jan. 14, 1897.)

DEPOSIT OF PRINCIPAL'S MONEY BY AGENT—OVERDRAFT—LIABILITY OF PRINCIPAL.

Defendant furnished a firm money with which to buy wheat for him for cash. The firm deposited such money in its name as received, and other money, with plaintiffs, who were merchants, and gave checks on them for wheat bought, and for other purchases. Plaintiffs knew the firm was acting for defendant as his agent. During the course of the business, the firm issued a check for wheat bought for \$108. The holder drew only \$68, which plaintiffs indorsed on the check. While the check was outstanding, defendant and such firm had a settlement, and the firm received from plaintiffs all the money the firm had on deposit, and paid it to defendant. The latter knew the firm was depositing the money with plaintiffs, but did not know of the unpaid check when the money was paid him. Plaintiffs were afterwards compelled, by suit, to pay the \$100 due on the check. Held, that they could not recover it from defendant.

Appeal from circuit court, Tippecanoe county; W. C. L. Taylor, Judge.

Action by George Davis and others against David F. Allen to recover money paid on a check issued by defendant's agent to pay for wheat bought for defendant. From a judgment for plaintiffs, defendant appeals. Reversed.

Stuart Bros. & Hammond and Joseph P. Gray, for appellant. J. V. Kent, for appellees.

ROBINSON, J. On the 15th day of June, 1892, the appellant, then residing at Frankfort, Ind., entered into a written agreement with the firm of Miller & Kendall by which the appellant agreed to furnish, in such sums and at such times as were necessary to carry out their agreement, all the money with which Miller & Kendall should buy grain for the appellant, at Colfax, Clinton county, Ind. Miller & Kendall agreed to buy for the appellant exclusively all the grain possible, with the exercise of reasonable diligence, and to pay such prices only as the appellant should designate to them. They further agreed to guaranty the weights and grade of all grain so purchased by them, to load all the grain so bought, and ship the same in appellant's name to such points as the appellant should designate, and, as fast as shipped, to turn over all bills of lading to appellant, to send to appellant scale checks daily of all grain bought for him, to use all the money sent them in the purchase of grain for appellant, and to call upon him for money only when needful to comply with their agreement. The appellant was to pay Miller & Kendall for their services two cents a bushel for all grain so

bought and handled by them. The evidence in this case shows the following facts: Miller & Kendall bought wheat under this agreement from the date of its execution until some time in September following. During that time, the appellees, under the firm name of George Davis & Bro., were engaged in the mercantile business in Colfax. There being no bank at Colfax, Miller & Kendall deposited the money they used for purchasing wheat with appellees, and issued checks on the appellees for wheat bought from farmers and others, blank checks for the purpose being furnished by the appellees. The appellees requested that Miller & Kendall deposit their money with them. The appellant knew that the money, or some of it at least, he was furnishing from time to time to Miller & Kendall, was being deposited with the appellees. All the money deposited during said time by Miller & Kendall with the appellees was deposited in the name of Miller & Kendall, and all the checks drawn on the appellees were signed by Miller & Kendall in their own names. The first money deposited by them with the appellees was on June 18, 1892, and the last on September 3, 1892. They deposited with the appellees the money they received from the appellant, and also from other sources. During the time between and including these two dates, Miller & Kendall deposited, in their own names, with the appellees, the total sum of \$20,980.75; and during the same time the appellant furnished Miller & Kendall, under the contract, \$16,105. This money was kept in a pocketbook by the appellees, separate and apart from their own money. All money received by them from Miller & Kendall, from whatever source, was put in the same pocketbook, and was paid out only on checks signed by Miller & Kendall, without reference to whether it was used in payment for grain purchased for the appellant or for other purposes. No book account was kept of the money deposited and drawn out. The appellees kept a memorandum of the amounts deposited, with dates, and the checks paid showed the amounts paid out; but they kept no separate account of money which Miller & Kendall had received from the appellant, nor did they know what part of the total amount came from the appellant. On the — day of September, 1892, within a few days after the last deposit was made by Miller & Kendall with appellees, the appellant and Miller & Kendall had a settlement of their accounts. On that day, Miller & Kendall were owing the appellant an amount in excess of \$402, and on that day Miller and the appellant went to appellees' store, and, at the request of Miller, George Davis, of the firm of George Davis & Bro., paid to Miller all the money Miller & Kendall then had on deposit with the appellees, amounting to \$402, which sum Miller then paid to the appellant. On the 7th day of August, 1892, Miller & Kendall purchased from Malinda Mitchell wheat amounting to

¹ Rehearing denied.

\$163.68, and issued to her a check or order for said sum on appellees, and signed by Miller & Kendall. This check was presented to the appellees for payment during the month of August, and, at the request of Mrs. Mitchell, appellees paid her thereon \$63.68, and indorsed on the back thereof, "Paid on this check, \$63.68," and handed the check back to her, which she retained. At the time this payment was made, Miller & Kendall had more than enough money on deposit with the appellees to pay the whole amount named in the check or order, and the part payment was made entirely at the request of Mrs. Mitchell. At the time of the settlement between the appellant and Miller, this check was still unpaid. The appellant did not know until after the settlement with Miller that the check was in existence. After the settlement between the appellant and Miller, at appellees' store, the appellant was notified of the outstanding check. Payment was demanded of him, which he refused. Afterwards, in January, 1893, Mrs. Mitchell recovered a judgment in the Clinton circuit court against the appellees, for the balance due on the check, which judgment the appellees paid on February 23, 1893. This action is brought by the appellees to recover from the appellant the amount paid by them to Mrs. Mitchell. The complaint is in three paragraphs. A demurrer was sustained to the second paragraph, and overruled as to the first and third, and exceptions saved. The appellant then answered by general denial. The cause was tried by the court, and a finding made in favor of the appellees for \$100. Appellant filed a motion for a new trial, on the grounds that the finding was not sustained by sufficient evidence; that it was contrary to law; that the damages assessed were excessive; and for errors of law occurring at the trial, on the admission and rejection of certain testimony, which is particularly set out in the motion. The motion was overruled, and exception taken. Judgment rendered on the finding. The only errors assigned in this court, and discussed by counsel in their brief, call in question the overruling of the demurrer to the first and third paragraphs of the complaint, respectively, and the overruling of the motion for a new trial.

No error was committed in overruling the demurrer to the first and third paragraphs of the complaint. The first paragraph is the common count for money had and received, and contains all necessary averments. The third paragraph of the complaint also states a cause of action. We do not think it necessary to set out this paragraph at length. The objections urged by appellant's counsel are met by the allegation that the appellant, through his agent, deposited money with the appellees, under the agreement that, as purchases of grain were made, the agents would draw checks or orders on the appellees for the purchase price thereof, and, upon presentation of such checks to

them, the appellees would pay the same out of the money deposited with them by the appellant.

The only remaining error discussed by the appellant's counsel is the overruling of the motion for a new trial. There is some conflict in the evidence as to the time when, after the payment of the money to the appellant upon the settlement with Miller, the appellant was notified of the outstanding check. But it is not denied that he knew nothing of it until after the settlement had been completed, and the money paid to him by Miller, and the bona fides of the transaction is to be determined as of that time. Neither is it clear from the evidence whether the wheat purchased from Mrs. Mitchell, and for which the check was issued, was received by the appellant. But we do not think that question is material to a correct decision of this case so far as the equity of the case is concerned, for it cannot be said from the evidence that the appellant has both the wheat and the money. Miller & Kendall were the agents of the appellant, and were empowered to do everything necessary to carry out the terms of the written agreement. By the terms of that agreement, the agents had no power to purchase wheat on the appellant's credit. They had authority to purchase wheat for the appellant for cash only. For their own convenience, the agents entered into an agreement with the appellees for depositing the money with them. The consideration for that agreement was between the appellees and Miller & Kendall. The appellees knew of the agency, yet they chose to act with them on their own account. There was no agreement between the appellant and the appellees about how the money furnished Miller & Kendall should be deposited. Appellant may have known that the money he was furnishing them was being deposited with the appellees. But appellees paid out none of it, except on checks signed by Miller & Kendall. The money having been deposited in the name of Miller & Kendall, and mingled with their own money, the legal title to the money was in them. They could issue checks for it for any purpose they saw fit, and did issue checks on the deposit for purposes other than for the purchase of wheat for the appellant. The appellees were not owing the appellant any money when the \$402 was paid him. He did not receive as much money at that time as Miller & Kendall were owing him. A balance was still owing the appellant after the above payment by Miller. The rule of law governing this case is the same as it would have been had the outstanding check been issued for some purpose other than the purchase of wheat. It by no means follows that the \$402 was the balance of the money which the appellant had furnished to Miller & Kendall, and deposited by them with appellees. It cannot be said that appellant

received this money as his money, but he received it from Miller, as part payment of what Miller at that time owed him. When the money which appellant furnished to Miller & Kendall had been by them commingled with their own money, it lost its identity, and could not, therefore, stand on the same ground as chattels.

It was held in *Bank v. Plimpton*, 17 Pick. 159, that where an agent had loaned the money of his principal to his private creditor, who appropriated it to the payment of the debt, the principal could not recover it, the creditor not knowing at the time of the loan that the money belonged to the principal. And where an agent deposits his principal's money in his own name, and together with his own funds, the agent will be liable for a loss by a subsequent failure of the bank. *Naltner v. Dolan*, 108 Ind. 500, 8 N. E. 289; *Mechem*, Ag. § 529; *Story*, Eq. § 1270; *Story*, Ag. § 208; *Norris v. Hero*, 22 La. Ann. 605; *Cartmell v. Allard*, 7 Bush, 482; *Com. v. McAllister*, 28 Pa. St. 480. We can see no difference between the above rule and the case where an agent, after mingling the money with his own, deposits the whole in his own name, and then overdraws the amount by a check to an innocent third party. In the case of *Stapp v. Spurlin*, 32 Ind. 442, the party who sold the wheat, the agent, and the principal were the parties concerned. In that case the principal had put it in the power of his agent, acting for him, to wrong a third party, and it was rightly held that the principal must respond. The principal trusted the agent to act for him, and, as between the principal and the one who had dealt with him as his agent in good faith, the principal must suffer the consequences of the bad faith of the agent with him. But in the case at bar the rights of the parties are not to be determined from the original contract of agency. The arrangement entered into between the appellees and Miller & Kendall, as shown by the evidence, was not incident to the original contract of agency. The appellees knew of the original agency, and knew the agents were acting for the appellant. Knowing this fact, they entered into an agreement with Miller & Kendall, with which appellant had nothing whatever to do. He had no control over the deposit. It did not belong to him. A part of it was money derived from other sources. He could not issue checks or orders upon it. He was an entire stranger to the agreement. With a disclosed principal, the appellees chose to make an agreement with the agents alone; and, if a mistake arose in carrying out the agreement, a person who is not a party to the agreement, and who had nothing whatever to do with the commission of the mistake, should not suffer by it. If, at the time of entering into a contract, the agent discloses the name of his principal, and the contract

is then made with the agent alone, the person making such contract with the agent cannot maintain an action upon it against the principal. *Silver v. Jordan*, 136 Mass. 319. If money is paid under a mistake of a material fact, it may be recovered back. In this case a mistake was made when the appellees paid to Miller & Kendall more money than they then actually had on deposit. But there was no mistake in the payment of the money by Miller to the appellant.

As between the appellees and the agents, the appellant is innocent of wrong or laches. If there was a wrong, it consisted in drawing from the appellees money against a part of which there was an outstanding check. As between the appellees and the appellant, the rule should be applied that, whenever one of two innocent persons must suffer by the acts of a third, he who has put it in the power of such third person to occasion the loss must sustain it. *Preston v. Witherspoon*, 109 Ind. 457, 9 N. E. 585; *Hunter v. Fitzmaurice*, 102 Ind. 449, 2 N. E. 127; *Lickbarrow v. Mason*, 2 Term R. 70; *Railroad Co. v. Schuyler*, 34 N. Y. 30.

After a careful consideration of all the facts and circumstances in this case, we are of the opinion that the rights of the parties to this suit must be determined without reference to the original contract of agency. The record fails to show that Miller & Kendall did business with the appellees, as the agents of the appellant, but, on the contrary, that the appellees, knowing that they were appellant's agents, chose to do business with them as principals, and not as agents. The motion for a new trial should have been sustained. Judgment reversed.

(16 Ind. App. 572)

ALLEN v. RICE.

(Appellate Court of Indiana. Jan. 14, 1897.)

LIENS—PRIORITY—RES JUDICATA.

A decree by default in a proceeding to foreclose a drainage lien does not estop a defendant therein who is a holder of a senior lien for taxes to foreclose it, it not appearing that the complaint in the drainage lien foreclosure proceeding in any way asserted superiority of such lien to that of such defendant.

Appeal from circuit court, Huntington county; C. W. Watkins, Judge.

Ejectment by Virginia M. Allen against Solomon Rice. From the judgment allowing defendant a counterclaim, plaintiff appeals. Affirmed.

Branyan & Branyan and James F. France, for appellant. Spencer & Branyan and R. A. Kaufman, for appellee.

BLACK, J. A question is presented in this case concerning the amount of a tax lien, which was enforced upon certain land in Huntington county, in favor of the appel-

lee, under his counterclaim, in an action of ejectment brought by the appellant, in which the appellant obtained judgment for the recovery of possession. The facts, as set forth in a special finding, upon which the court stated a conclusion that the appellee was entitled to hold a lien in the sum of \$1,037.14 and to the foreclosure thereof, were, so far as necessary to elucidate the question discussed before us, in substance, as follows: Samuel Mahon died intestate, before the year 1870, seised in fee simple of the land in question, leaving, surviving him, as his heirs at law, a son, Elam A. Mahon, and two daughters, Cynthia E. Dunham and the appellant, Virginia M. Allen. The son died intestate about the year 1875, leaving as his heirs at law his two sisters above named, and owning one-third of said land. On the 29th day of June, 1891, said Cynthia E. Dunham conveyed by deed her interest in the land to the appellant, and on the 27th of October, 1891, Thomas Roche conveyed to the appellant, under an order of the court below, "upon proper proceedings for that purpose, the said Elam A. Mahon's interest in said land." On the 6th of March, 1882, at the sales of delinquent lands for the non-payment of taxes for the years 1876 to 1881, inclusive, and former years, made by the county auditor, Solomon Rice, the appellee, purchased the land here in question, paying therefor \$316.35, and received the auditor's certificate of such purchase; and on the 7th day of March, 1884, he presented said certificate to the auditor, and received a deed of conveyance as provided by law (said land not having been redeemed), and caused said deed to be duly recorded,—the cost of the deed and that of recording being certain sums stated. Since said purchase the appellee paid taxes on said land on the 10th of March, 1892, in the sum of \$96.65. In the tax duplicate, and in said certificate and said deed issued to the appellee, the description of the land was defective,—the defective description being set out in the finding; but the land so assessed is the land in question in this suit. On the 16th of October, 1888, one Edward Ely, as drainage commissioner, brought a suit in the court below against the appellant, the appellee, and others, alleging in his complaint, among other things, that under proceedings in the superior court of Allen county, Ind., upon the petition of James Branstrator and others for the improvement of the Little Wabash, an assessment of benefits to said land to the amount of \$480 by said proposed improvement had been finally adjudged and decreed by said court, and declaring such assessment a lien against said land, which was subject to lien of such assessment; but such complaint did not refer to appellee's purchase at the tax sale, which was prior to the proceedings in said superior court, or seek any relief against the same, or allege that the appellee's claim was invalid, void, or

unpaid, nor did the judgment in said cause so declare. The complaint in that cause asked judgment for 55 per cent. of the assessment, and a foreclosure of the lien thereof against said land. The appellee was duly served with process in that cause, and made default; and upon the hearing the court found that the alleged assessment was a lien upon the land described in the complaint, and entered a decree foreclosing such lien in the sum of \$286, and directed a sale of the land. Afterwards a copy of said decree was issued by the clerk of the court below to the sheriff, who advertised said land for sale, and upon the day named in the advertisement he sold the land to one C. S. Bash for \$100, and issued to him a certificate, which he afterwards assigned to one H. C. Paul, to whom the sheriff, on the return of the certificate, on the 31st of March, 1891, issued his deed conveying the land to him. On the 31st of October, 1891, said Paul conveyed the land to the appellant. At the commencement of this suit, and since the year 1890, the land was held by certain persons named as tenants of the appellee, and he had expended a sum mentioned for improvements, and had received a certain amount of rents and profits. The rental value for the period of appellee's possession was stated. Since 1890 the appellant has been a resident of New York, and has had no personal knowledge or charge of said land, and her sister, Cynthia, whose residence was not disclosed by the evidence, was at the date of the finding 33 years of age. The sum for which the court concluded the appellee entitled to the enforcement of a lien included the amount which he paid upon his purchase at the tax sale, and the amount of the taxes paid by him afterwards, with interest.

It is contended on behalf of the appellant that the claim of the appellee should not be upheld, except for the taxes paid by him after the adjudication in the proceeding to enforce the drainage lien, and proper interest thereon; that the purchaser under the decree foreclosing the drainage lien acquired title paramount to the lien of the appellee for the purchase price at the invalid tax sale; that the decree in the drainage proceeding, to which the appellee was made a party, and in which he suffered a default, estop him from asserting his prior lien. It appears from the special finding that the appellee held the senior lien. If its enforcement can be defeated because of the former adjudication in the proceeding to foreclose the drainage lien, it should affirmatively appear in the special finding that in the former proceeding his lien was res judicata. Unless the facts that the appellee was made a party defendant in that proceeding, and was duly served with process, and made default, can be regarded as sufficient to bar his right to an enforcement of his lien, he is not concluded by the decree in that proceeding.

It is not claimed that any fact beneficial to the appellant was proved which is not stated in the finding; and, if this were true, the remedy for such omission would be sought by motion for a new trial, and could not be had through an exception to the conclusion of law. It is a general rule that a default is only conclusive as to such matters as are properly averred in the complaint. *Barton v. Anderson*, 104 Ind. 578, 4 N. E. 420. A judgment is conclusive upon all questions which were or might have been litigated within the issues before the court. *McFadden v. Ross*, 108 Ind. 512, 8 N. E. 161; *Griffin v. Wallace*, 66 Ind. 418; *Axtel v. Chase*, 83 Ind. 546, 553. "The general rule is that the issuable facts or matters upon which the plaintiff's case proceeded determine what was in issue, unless it appears, from an examination of all the pleadings in a given case, that other matters were brought forward, and thus became necessarily involved and determined in the suit." *McFadden v. Ross*, supra. The bare fact that a senior mortgagee is a party in a suit to foreclose a junior mortgage does not estop him from afterwards foreclosing his mortgage. *Ulrich v. Drischell*, 88 Ind. 354, 362; *English v. Aldrich*, 132 Ind. 500, 31 N. E. 456. It does not appear that the complaint in the proceeding to enforce the drainage lien stated any facts which, if admitted, would subject the appellee's lien to the drainage lien, or to the relief sought in that proceeding; nor is there any statement of fact in the finding before us showing that the appellee was challenged in any form by that complaint to litigate the question as to the superiority of his lien, or showing that such question was determined by the judgment rendered in that proceeding. *Krutsinger v. Brown*, 72 Ind. 466, was an action of foreclosure brought by Brown. *Krutsinger* was made a defendant, it being alleged in the complaint that he held a mortgage junior and subsequent to that of the plaintiff, which *Krutsinger* had foreclosed upon the real estate described in the plaintiff's mortgage, and that, at a sale under his decree of foreclosure, the real estate had been purchased by *Krutsinger*, who still held a sheriff's certificate of sale therefor. It was held that Brown, the holder of the senior mortgage, could not be required to aver and prove that his rights had not been defeated in the action brought by the junior incumbrancer upon the inferior lien; and, in discussing the answer of *Krutsinger* to Brown's complaint, it was said by the court that the answer of res adjudicata, to be good, must affirmatively show that the question was litigated, or could have been litigated, under the issues, and was, therefore, impliedly covered by the judgment. We do not find the conclusion of law upon the facts stated open to the objection urged against it by the appellant.

As to the effect of the portions of the finding showing part ownership of the appellant

in the land in question at the time the taxes or a portion thereof accrue, for nonpayment of which the land was sold to the appellee, we make no decision. There is some indefiniteness in the finding upon this matter. The subject is not discussed by the appellant, and we have not found it necessary to examine the question.

The appellee moved to dismiss the appeal for the reason that a person who was made a party defendant in the court below, and was defaulted, was not named as an appellee in the assignment of errors. The appellee's joinder in error was filed at the time of the filing of the assignment of errors. This constituted an appearance. The motion to dismiss was not filed until nearly six months thereafter, and until more than three months after the filing of appellant's brief. It was filed with the appellee's brief upon the merits. The person named in the motion has no material interest in the matter in controversy here, his presence is not necessary for its decision, and his absence does not harm the appellee. The motion to dismiss is overruled. *Wilson v. Hifflin*, 81 Ind. 35.

We find no error in the action of the court which has been brought in question before us. Judgment affirmed.

(16 Ind. App. 584)

STALCUP v. LOUISVILLE, N. A. & C. RY. CO.

(Appellate Court of Indiana. Jan. 15, 1897.)

CARRIERS—WHO ARE PASSENGERS—MASTER AND SERVANT—WHO ARE SERVANTS.

1. That plaintiff was on defendant's train by the "invitation and permission of the conductor" does not render him a passenger, so as to entitle him to recover as a passenger for injuries received.

2. That plaintiff was rendering services on defendant's train as brakeman, with the "acquiescence, knowledge, consent, and permission of the conductor," does not render him a servant of defendant, so as to entitle him to recover damages as such for injuries caused by defendant's negligence.

Appeal from circuit court, Greene county; W. W. Moffett, Judge.

Action by Ol Stalcup, by next friend, against the Louisville, New Albany & Chicago Railway Company. There was a judgment for defendant, and plaintiff appeals. Affirmed.

Wm. S. Slinkard, for appellant. E. C. Field, W. S. Kinnan, and Davis & Moffett, for appellee.

WILEY, J. The appellant, being a minor, brought this action by his next friend, to recover damages alleged to have been sustained while riding on appellee's railroad. The complaint is in two paragraphs, to each of which the appellee addressed a demurrer, which was sustained by the trial court, and an exception reserved. The appellant refusing to plead over, the court rendered judg-

ment for appellee for its costs, and the appellant appealed. The error assigned is the sustaining of the demurrer to each paragraph of the complaint.

The first paragraph of the complaint avers that the appellee was the owner and operating a line of railroad from Bedford, Ind., to Swiss City, Ind., passing through the town of Bloomfield, and engaged in carrying passengers and freight, on what was known and designated a "mixed train"; that a part of the line of said road was a bridge over White river, about 40 feet high, and 300 feet long; that on the 4th day of June, 1893, and for a long time prior thereto, the "plaintiff, by invitation and permission of the conductor and all others in control of said train, and with full knowledge and consent of all persons conducting the management of said train, was riding on said train, and for more than two years before said time, between said point, had been riding on said train for the purpose of being carried from said town of Bloomfield to said town of Swiss City, by said defendant; that said bridge, on said day, was composed of three spans; that the middle span was on said day rotten, decayed, weak, old, dangerous, and unsafe; that defendant on said day, and for more than six months prior thereto, had full knowledge of said condition of said span, and recklessly, negligently, and wantonly refused, neglected, and failed to make the same safe and secure; * * * that on said day, while riding on said train, said span of said bridge, without any fault or negligence on the part of the plaintiff, but wholly through the fault, negligence, recklessness, and wantonness of the defendant, gave way, broke, and tumbled into said White river, and the train and car on which plaintiff was riding was thrown and fell into said river, a distance of forty feet, whereby he was seriously injured," etc. It is strongly urged by counsel for appellant, in their very able brief, that each paragraph of the complaint is sufficient, and that the court erred in sustaining the demurrer thereto. From the parts of the complaint quoted in this opinion, it is apparent that the first paragraph proceeds upon the theory that the plaintiff was upon the defendant's train, at the time of the accident, by the invitation, permission, and consent of the conductor, who was in charge of it; that the plaintiff was without fault or negligence; and that the defendant is liable to respond in damages by reason of such facts. As it is averred that plaintiff was on defendant's train by the invitation of the conductor, to be carried from Bloomfield to Swiss City, in the absence of any contrary allegation, it is to be presumed he was being carried free of charge. Do these facts constitute the relation of passenger and carrier? The answer to this inquiry will lead us to the solution of the question under consideration. The supreme court of Pennsylvania has given a very lucid definition of the term "passenger," as follows: "A

'passenger,' in the legal sense of the word, is one who travels in some public conveyance, by virtue of a contract, express or implied, with the carrier, as the payment of fare or that which is accepted as an equivalent therefor." *Bricker v. Railroad Co.*, 132 Pa. St. 1, 18 Atl. 983. "A passenger is a person whom a common carrier has contracted to carry from one place to another, and has, in the course of the performance of that contract, received under his care, either upon the means of conveyance, or at the point of departure of that means of conveyance." 2 Am. & Eng. Enc. Law, p. 742; *Railroad Co. v. Price*, 96 Pa. St. 256. It is clear, therefore, from these authorities, that the facts stated in the first paragraph of the complaint do not show that the appellant was a "passenger," in the legal meaning of that term, on defendant's train. As averred in this paragraph, the appellant was upon the train "by the invitation and permission of the conductor." The general rule is that conductors and other employes in charge of a train are not clothed with authority to invite persons to take passage with them as their guests, and especially is this true of conductors and employes of freight trains. In New York it has been held that "the servants of the railway in charge of such trains have no implied authority to invite strangers to become passengers thereon, and, in the absence of proof of express authority vested in the conductor, the acceptance of his invitation to ride thereon does not make a stranger a passenger." *Eaton v. Railroad Co.*, 57 N. Y. 382; *Waterbury v. Railroad Co.*, 17 Fed. 671; *Dunn v. Railway Co.*, 58 Me. 187. The complaint in the case now under consideration avers, in the first paragraph, that appellant was on defendant's train by the "invitation and permission" of the conductor. It is not averred that the conductor was empowered with the authority either to invite or permit the appellant to become a passenger, or to ride upon the train, under the facts charged. In the absence of such allegation, no presumption can be indulged that the conductor or other employes connected with the train were authorized to extend to appellant such invitation. It is the settled rule in this state that, before there can be any liability on account of negligence in cases of this character, it must appear that the party complained of was under some legal duty or obligation to the person injured. *City of Indianapolis v. Emmelman*, 108 Ind. 530, 9 N. E. 155; *Penso v. McCormick*, 125 Ind. 116, 25 N. E. 156; *Thiele v. McManus*, 3 Ind. App. 132, 28 N. E. 327; *Carskaddon v. Mills*, 5 Ind. App. 22, 31 N. E. 559. Under the averments of the first paragraph of appellant's complaint, no such duty or obligation exists. Counsel for appellant, with other cases, cites the case of *Railway Co. v. Meadows*, 13 Ind. App. 160, 41 N. E. 398, in support of his contention that appellant was a passenger, and entitled to all the rights of a passenger, by reason of the

invitation of the conductor. In that case, a girl 10 years of age was invited by the driver of a street car, drawn by mules, to ride, and was injured while so riding, by the gross carelessness of the driver. And again, in that case, it was conceded by appellant that the child was rightfully upon the car, and hence it was held that the appellant owed her some protection.

The second paragraph of the complaint is couched in almost the same language as the first, except it seeks to aver that the plaintiff, at the time of the accident, was in the employment of the defendant. That part of the second paragraph of the complaint is as follows: "This plaintiff, on said day, and for more than two years prior thereto, was and had been working for said defendant, loading and unloading freight, assisting passengers on and off said train, setting and throwing breaks, and doing the general work of a brakeman. That said plaintiff, on said day, and for more than two years before said day, did and had performed said labor with the acquiescence, knowledge, consent, and permission of the conductor and all other persons conducting and running said train, and for more than two years before and on said day plaintiff had ridden and did ride on said train between said towns of Bloomfield and Swiss City, performing the work as aforesaid. * * * That on said day said plaintiff was on said train, in performance of said work and labor, and going to the said town of Swiss City to perform similar work and labor for said defendant, when said span of said bridge gave way," etc. The averments of the second paragraph of the complaint are wholly insufficient to show that he was an employé of the defendant. He avers that he was then performing labor, and for more than two years prior thereto had been performing labor, with the "acquiescence, knowledge, consent, and permission of the conductor, and all other persons running and conducting said train." It is not charged that the conductor or other persons operating the train were authorized to employ the appellant to perform the labor in which he was engaged. No emergency or necessity is shown for the employment of appellant. Counsel for appellant concede that he could not maintain an action against appellee to recover for the services he had performed; and in this concession, we think, he tacitly admits the insufficiency of his second paragraph of complaint. The case as made by the second paragraph of the complaint is identical in principle to the case of *Cooper v. Railway Co.*, 136 Ind. 366, 36 N. E. 272. In the case just cited, appellant got on one of defendant's freight trains at the town of Poneto, under an arrangement with the conductor and brakeman, who had charge of the train, that he should assist the brakeman so far as he could, in consideration of being permitted to ride to Muncie. While switching at Montpelier, he was injured, by being thrown from the top of a freight car

by the carelessness and negligence of the employés of appellee. The supreme court, in that case, by Howard, C. J., say: "While the conductor and brakeman were in charge of the train, it does not appear that they had any authority to employ assistance in its management. No emergency is shown for the employment of appellant. Neither was appellant a passenger; for, even if he had a right to ride upon a freight train, it does not appear that he paid or offered to pay his fare. No custom, rule, or regulation of the appellee company is shown by which appellant might pay his way by working on the train, assisting the brakeman or other employé. There is no theory suggested by counsel, and the court can see none, according to which the complaint might be held good. At most, the appellant was upon the train by the sufferance of the conductor and brakeman, who were themselves without authority to so receive him. Any dangers to which he thus became exposed were wholly at his own risk." It is useless, under the case just cited, to pursue our inquiry further. As neither paragraph of the complaint stated a cause of action, the trial court properly sustained the demurrer. Judgment affirmed.

(16 Ind. App. 566)

SISK v. CITIZENS' INS. CO.

(Appellate Court of Indiana. Jan. 14, 1897.)

INSURANCE—ACTION ON POLICY—PLEADING—SUFFICIENCY OF ANSWER—VALIDITY OF POLICY.

1. In an action on a fire policy, which provides that it shall be void in case of additional insurance, unless consent in writing is indorsed on it by the company, an answer which alleges that additional insurance was procured by plaintiff without defendant's consent being so indorsed in writing, is good without alleging that such consent was not given in any other manner.

2. An answer which alleges prior insurance without notifying defendant, and without procuring its consent, indorsed on the policy, is good.

3. An allegation in the answer "that plaintiff procured to be issued to her a policy of insurance" is equivalent to an allegation of delivery to and acceptance of such policy by plaintiff.

4. Where a fire policy states that it shall be void if insured's interest is not truly stated in it, or if his interest be "other than the entire, unconditional, and sole ownership," etc., and the insured owns only the undivided half of the property when insured, the policy is void.

5. In an action on a fire policy, which provided that the best endeavor of the insured should be used in protecting the property from damage at and after the fire, and in case of failure to do so the company should not be liable for damage caused by such failure, the answer alleged that the property became very wet from the water thrown thereon to extinguish the fire in the building where it was situated; that plaintiff made no endeavor to dry or clean the same, but suffered it to remain in that condition; and that, if it had been properly cared for, the damage would not have exceeded \$100. It admitted \$100 damages, and set out such facts as a defense to the excess only. Held, that the answer was good.

Appeal from circuit court, Knox county; G. W. Shaw, Judge.

Action by Eliza M. Sisk against the Cit-

zens' Insurance Company on a fire insurance policy. From a judgment in favor of defendant, plaintiff appeals. Affirmed.

Cullop & Kessinger and F. M. Brantloover, for appellant. Thomas Hanna, for appellee.

COMSTOCK, C. J. This action was commenced in the Knox circuit court on the insurance policy issued by appellee to appellant in the sum of \$1,000. To the complaint a demurrer was filed and overruled. The defendant then answered in six paragraphs. The first was a general denial. The plaintiff demurred severally to the second, third, fourth, fifth, and sixth paragraphs, which demurrer was sustained as to the sixth, and overruled as to the others. The plaintiff replied to the second, third, fourth, and fifth paragraphs. There was a trial by jury, and verdict and judgment for the defendant. The errors assigned are the overruling of the demurrers of appellant to the second, third, fourth, and fifth paragraphs of defendant's answer.

The policy is set out in the complaint, and contains the following provisions: "If the interest of the insured in the property be any other than the entire, unconditional, and sole ownership of the property for the use and benefit of the assured, or if the building stands on grounds not owned in fee simple by the assured, it must be so expressed in the written part of the policy; otherwise the policy shall be void." "This policy shall be void * * * if the interest of the assured in the property, whatever that interest may be, is not truly stated in the policy." "This policy shall become void in each of the following instances, unless consent in writing of the company is indorsed hereon, viz.: If the assured, or any person having an insurable interest in the property, shall now have, or shall hereafter make, any other insurance on the property hereby insured, or any part thereof, whether the same be valid or not."

The second paragraph of the answer alleges that after the issuance of the policy in suit plaintiff procured on the same property insurance from the German Insurance Company of Freeport, Ill., in the sum of \$700, without the consent in writing of the defendant company indorsed upon the policy sued upon, which said policy issued by the German Insurance Company was and still is valid. Counsel for appellant contend that this paragraph is fatally defective, because it does not aver that consent of the company for other insurance was not given in any other manner than in writing, and does not negative the waiver of the condition that such consent must be given in writing indorsed on the policy; that to avoid the policy for this reason the defendant assumed the burden, and should have pleaded the matter of avoidance. To this proposition we cannot assent. Such a provision in a policy, as has often been stated by the courts, is for the benefit of

the insurer to protect the company from the hazard of overinsurance. The law will not presume that the defendant waived a provision intended for its protection. Such condition may be waived, as held in *Moffitt v. Insurance Co.* (Ind. App.) 38 N. E. 835; *New v. Insurance Co.*, 5 Ind. App. 83, 31 N. E. 475; *Insurance Co. v. Hart* (Ill. Sup.) 36 N. E. 990, cited in appellant's brief; and in numerous other decisions of our supreme court. In the cases in which the question of waiver is passed upon, as a rule, averments of facts claimed to constitute waiver are set out either by way of reply to answer, pleading the breach of condition, or in the complaint. The matter set up in the paragraph of answer was such as in terms avoided the contract of insurance. Plaintiff, in effect, rendered it voidable, and the waiver of the forfeiture was a proper subject of reply.

The third paragraph of answer alleges prior insurance without notifying defendant company, and without procuring its consent indorsed on the policy. The objections to the second and third paragraphs are substantially alike, and the same authorities and reasoning apply to both. It is further urged that the allegation "that the plaintiff procured to be issued to her a policy of insurance" is not equivalent to an allegation of delivery to and acceptance of such policy by the plaintiff. Conceding the learning of counsel, we think they are in error in this interpretation. A standard dictionary defines the word "procured," "to acquire for one's self," "to cause"; and the word "issue," "to deliver for use." An allegation that one has caused to be delivered to himself any article imports its acceptance.

The fourth paragraph of answer alleges that the plaintiff does not own the entire interest in the property insured, but that one James Sisk owned the one undivided half thereof at the time said policy was issued. The objections urged to this paragraph are that it does not aver facts showing no insurable interest in the property. In support of this proposition, counsel, in their able brief, cite *Insurance Co. v. Dunham*, 117 Pa. St. 460, 12 Atl. 668; *Knop v. Insurance Co.* (Mich.) 59 N. W. 653; *Cross v. Insurance Co.*, 132 N. Y. 133, 30 N. E. 390; *Carpenter v. Insurance Co.*, 135 N. Y. 298, 31 N. E. 1015; *Van Scholck v. Insurance Co.*, 68 N. Y. 434,—the policies in which cases contain provisions as to title of the insured similar to the policy issued by the defendant company. *Insurance Co. v. Dunham*, 117 Pa. St. 460, 12 Atl. 668, was a case in which the holder of the policy was the purchaser under articles of the land upon which stood the property insured. The court held that the policy was not void, upon the ground that he was the equitable owner in fee, and, in respect to the insurance, the entire, unconditional, and sole owner; that, when articles are entered into for the sale of land, the purchaser is considered the owner. In *Knop v. Insurance Co.*

(Mich.) 59 N. W. 653, the insured held the property under contract of purchase; and in *Carpenter v. Insurance Co.*, 135 N. Y. 298, 31 N. E. 1015, the court held that the provisions of the policy were waived by the insurer. In these cases the insured held the property under articles of purchase, and were, in the respective opinions given by the court, owners in fee. In *Cross v. Insurance Co.*, 132 N. Y. 133, 30 N. E. 390, and *Carpenter v. Insurance Co.*, 135 N. Y. 298, 31 N. E. 1015, and *Van Scholck v. Insurance Co.*, 68 N. Y. 434, it is held that the policies were not avoided although the insured did not own the entire and sole interest in the property, because the agents soliciting the insurance and issuing the policies had knowledge of the facts as to the titles of the insured; that their knowledge was the knowledge of their principals, and that the circumstances attending the issuing of the policies amounted to a waiver of the condition in question. In *Philadelphia Tool Co. v. British-American Assur. Co.*, 132 Pa. St. 236, 19 Atl. 77, the insured was a lessee for a term of years of a building in which he was engaged in a manufacturing business, and the court used the following language: "We ought to assume that a policy written under such circumstances was written upon the knowledge of the representative of the insurer, and intended to cover in good faith the interest which the insured had in the building; that fraud is not presumed." If the court in that case was justified in holding that the policy was issued with knowledge of the interest the insured held in the real estate in which its business was being carried on, the assumption that the insured in the case before us owned only an undivided interest in the household goods described in the policy, and that the defendant had knowledge of that fact, we think would not be warranted. Counsel cite a number of authorities to the effect that, whenever loss may be sustained, an insurable interest exists. This proposition is not questioned; but it is also true that, unless a statement of interest is required either in the application or policy, the insured need make none; and, unless otherwise provided, it is sufficient that the applicant has an insurable interest. Unless more particularly inquired about, or there be a fraudulent concealment or misrepresentation, it does not invalidate the policy, when the applicant states that he is the owner of the property, or that it is his, if in some substantial sense this is true, although it turns out that he has not a perfect and absolute title. But it is different when more exact information with regard to the title is required; as when the true title is called for, or where it is provided that, if the interest of the insured be any other than that the entire, unconditional, and sole ownership of the property for the use and benefit of the insured, or be incumbered, it must be so represented to the company, and so expressed in the policy, oth-

erwise the policy shall be void. 7 Am. & Eng. Enc. Law. 1020-1022; vide *Phillips v. Insurance Co.*, 20 Ohio, 174; *Abbott v. Insurance Co.*, 3 Allen, 213; *Pinkham v. Insurance Co.*, 40 Me. 587; *Fuller v. Insurance Co.*, 36 Wis. 599; *Addison v. Insurance Co.*, 7 B. Mon. 470; *Murphy v. Insurance Co.*, 7 Allen, 239; and the many other cases there cited. Judged by these decisions, the fourth paragraph of the answer is sufficient.

The fifth paragraph alleges that the property became very wet from the water thrown thereon to extinguish the fire in the building where the same was situate; that the plaintiff used no endeavor to dry or clean the same, but suffered it to remain in that condition; that, if it had been properly cared for, the damage thereto would not have exceeded \$100. It admits a damage occasioned by the fire of \$100, and is pleaded only as a defense to the amount claimed in excess of that sum. The policy provides that the best endeavor of the insured shall be used in saving and protecting the property from damage at and after the fire, and, in case of failure to do so, the company shall not be liable for damage caused by such failure. There can be no abandonment to the company of the property insured. This paragraph charges a failure of the insured to perform her part of the contract in case of injury of the property by fire, and states wherein she was negligent. We find no error in the rulings of the court below. Judgment affirmed.

ROBINSON, J., took no part in this decision.

(16 Ind. App. 579)

PITTSBURGH, C., C. & ST. L. RY. CO. v. COPE.

(Appellate Court of Indiana. Jan. 15, 1897.)

APPEAL—RECORD—EVIDENCE.

That the longhand manuscript of the evidence may be considered on appeal, the record must affirmatively show that it was filed in the clerk's office before the filing of the bill of exceptions.

Appeal from circuit court, Henry county; E. H. Bundy, Judge.

Action by Jacob C. Cope against the Pittsburgh, Cincinnati, Chicago & St. Louis Railway Company. Judgment for plaintiff, and defendant appeals. Affirmed.

John L. Rupe and L. P. Newby, for appellant. John M. Morris and Brown & Brown, for appellee.

HENLEY, J. Appellee began this action against the appellant to recover damages on account of the destruction of his sawmill by fire, which fire, it is alleged in the complaint, was caused by the negligent act of appellant. There was a trial of the issues joined, resulting in a verdict and judgment for the plaintiff, over defendant's motion for a new trial. The errors complained of in the mo-

tion for a new trial are the admission of certain evidence, the giving and the refusal of the court to give certain instructions, and that the verdict was contrary to the law and the evidence.

Counsel for appellee urge with much earnestness that the evidence is not in the record, and, as most of the questions presented here for decision could not be decided without the evidence, we will first determine that matter. It is imperative that the longhand manuscript of the evidence should have been filed in the clerk's office before it was incorporated in the bill of exceptions. *Rev. St. 1894, § 1476 (Rev. St. 1881, § 1410); De Hart v. Board, 143 Ind. 363, 41 N. E. 825; Marvin v. Sager (Ind. Sup.) 44 N. E. 310; Rogers v. Eich (Ind. Sup.) 45 N. E. 93; Hamrick v. Loring, Id. 107; Manley v. Felty, Id. 74; Railroad Co. v. Wagner (Ind. App.) Id. 76.* The courts of this state have gone to the extent of holding that the record must affirmatively show that the longhand manuscript of the shorthand report of the evidence was filed in the clerk's office before the filing of the bill of exceptions, and not at the same time or as a part of the bill of exceptions. *Hamrick v. Loring, supra.* In the last-mentioned case, Judge Hackney, delivering the opinion of the court, says: "The transcript contains a bill of exceptions signed by the trial judge, and filed in the clerk's office on a day named. This bill contains what purports to be the original longhand manuscript of the shorthand report of the evidence; but the record in no manner disclosed the filing of the manuscript in the clerk's office before it was incorporated in such bill, nor otherwise than as a part of the bill. This failure violates the statutory requirement, where the evidence is not copied by the clerk, and where the original is made part of the record. It is true that, within the bill of exceptions, there is a certificate of the clerk of the trial court to the effect that, on a day named, being the same day upon which the bill of exceptions was filed, the longhand manuscript of the evidence was filed in his office, and is the same which is embodied in the bill of exceptions. This certificate, if we observe it, as a proper method of disclosing the fact of a filing, does not advise whether such filing was as a part of the bill, was separate from it, or was before or after the filing of the bill. All that the clerk certifies may be true, and the manuscript may have been filed after the bill of exceptions was filed. From the facts disclosed, the clerk may have judged that the filing of the bill, including the manuscript, was a filing of the manuscript. We must hold, therefore, that the appellee's contention in this respect shall prevail." And in *Rogers v. Eich, supra*, the supreme court, by Jordan, J., say: "The evidence introduced upon the trial was taken down by an official reporter, and it is sought to have the original longhand manuscript certified to this court. It does not affirma-

tively appear that the longhand manuscript was first filed in the office of the clerk before it was incorporated into the bill of exceptions, and, under the holding of this court at this term, the evidence cannot be considered as properly in the record." And in the case of *Manley v. Felty, supra*, the supreme court of this state (opinion by Hackney, J.) say: "Other questions are discussed upon the motion for a new trial, all depending upon the evidence; but the appellee's objection to a consideration of the evidence must prevail. It is certified by the clerk 'that on the 31st day of May, 1895, the official shorthand reporter who took down the evidence in said cause filed in my office his longhand transcript and manuscript thereof, and the plaintiff at the same time filed his bill of exceptions, which longhand manuscript was made a part thereof, which is the same manuscript of the evidence incorporated in the bill of exceptions.' In the recent case of *Carlson v. State (Ind. Sup.) 44 N. E. 660*, it was said: 'It is settled by the decisions of this state that the filing of the longhand evidence must be antecedent to its being incorporated into a bill of exceptions by the signature of the judge to such bill.'"

The record in this cause, on page 19, shows that on the 6th day of August, 1895, appellant filed her bill of exceptions No. 1, and on page 53 the following entry occurs: "And at the same time comes the said defendant, and files herein her bill of exceptions No. 2, which is the record of all of the evidence given upon the trial of said cause, and the objections thereto, made and certified by A. D. Ogborn, the official reporter of the Henry circuit court, on the request of the said defendant, from the shorthand reports of said reporter, and the same being the longhand transcript of such evidence, made from such shorthand notes taken by said reporter during the trial of said cause, under oath; and the same, duly signed and certified by the judge of said court, as well as by said reporter, is now filed by the defendant as her bill of exceptions No. 2 of the evidence in this cause, to be attached to the transcript therein as a part of the record in this cause on appeal, as provided by statute in such cases, which is as follows." Then follows the original longhand manuscript of the evidence, and following this the certificate of the trial judge, and following this the certificate of the clerk of Henry circuit court, which is as follows: "State of Indiana, Henry County—ss.: I, Charles L. Hernly, clerk of the Henry circuit court, do hereby certify that the foregoing transcript is a full, true, and complete copy of all the proceedings and order-book entries made, and all of the papers now on file in my office, and of the judgment of the court, and that the evidence embodied in the transcript is the identical, original, longhand manuscript of the evidence made by the official shorthand reporter, who was duly sworn according to law to

report the evidence in said cause, as embodied in defendant's bill of exceptions No. 2. In witness thereof, I have hereunto set my hand and affixed the seal of the Henry circuit court at Newcastle, Indiana, this 21st day of August, A. D. 1895. Charles L. Hernly, Clerk Henry Circuit Court." It nowhere affirmatively appears that the longhand manuscript of the evidence was ever filed in the clerk's office before it was incorporated in the bill of exceptions. The certificate of the clerk does not recite that it was ever filed in his office except at the same time and as a part and parcel of the bill of exceptions. In fact, the record in the cause affirmatively shows that the longhand manuscript was filed by defendant (appellant) at the same time and as a part of her bill of exceptions. The reasons for the statutory requirements in this regard are fully set out and explained in *De Hart v. Board*, supra, and it is not necessary for us to further examine the matter. As was said in *Manley v. Felty*, supra, "the most favorable construction of the record for the appellant is that the longhand manuscript and the bill of exceptions were filed at the same time, and that the former had not been filed before it was incorporated in the bill." Under the decisions of this court, and of the supreme court of this state, the evidence in this cause is not in the record.

Having held that the evidence is not in the record, the court will presume that the instructions asked and refused were refused because they were not applicable to the case made by the evidence (*Jenkins v. Wilson*, 140 Ind. 544, 40 N. E. 39; *Holland v. State*, 131 Ind. 568, 31 N. E. 359; *Railroad Co. v. Rowan*, 104 Ind. 88, 3 N. E. 627), and that the instructions given cannot be regarded as erroneous if they can be considered correct upon any state of facts admissible under the issues (*Hilker v. Kelley*, 130 Ind. 356, 30 N. E. 304; *Joseph v. Mather*, 110 Ind. 114, 10 N. E. 78; *Rapp v. Kester*, 125 Ind. 79, 25 N. E. 141; *Abrams v. Smith*, 8 Blackf. 95). We have examined the instructions carefully, and we are of the opinion that none of the instructions would be erroneous under any state of facts that was admissible under the issues. The evidence not being in the record, the admission or rejection of any part thereof complained of by appellant is not before us; nor is the question whether the verdict is contrary to the law or the evidence presented. There is no error as shown by the record. The judgment is therefore affirmed.

(17 Ind. App. 400)

DEERING HARVESTER CO. v. PEUGH
et al.¹

(Appellate Court of Indiana. Jan. 13, 1897.)
SURETY — DELIVERY IN VIOLATION OF CONDITION
— VERIFICATION OF PLEADING.

1. One who signs a note as surety under an agreement that it shall not be delivered unless also signed by another, cannot be held by the

payee who accepted the note with knowledge of the condition, and without the signature of the other surety.

2. An answer verified on information and belief is equivalent to one sworn to in absolute terms.

Appeal from circuit court, Washington county; S. B. Voyles, Judge.

Action by the Deering Harvester Company against Andrew J. Peugh and John A. Zaring on a note. Judgment for defendant Zaring, and plaintiff appeals. Affirmed.

Alsbaugh & Lawler and F. W. Babcock, for appellant. Mitchell & Mitchell, Milton B. Hottel, and Harvey Morris, for appellees.

HENLEY, J. This was an action brought by the appellant in the court below against the appellees upon a promissory note. Andrew J. Peugh, who was the principal in the note sued on, making no appearance to the action, judgment was rendered against him by default for the amount due. Appellee John A. Zaring answered the complaint in three paragraphs, to each of which appellant filed a demurrer, which demurrer was by the court overruled to each paragraph of answer. The cause was put at issue by appellant filing a general denial to the first and second paragraphs of the separate answer of John A. Zaring. There was a trial by the court, and a finding in favor of appellee Zaring. The errors assigned by appellant are the overruling of the demurrer to the first and second paragraphs of the separate answer of appellee Zaring, and that the court erred in overruling appellant's motion for a new trial.

The first and second paragraphs of the answer of appellee are in fact the same. They are special pleas of non est factum, and are both properly verified. The first paragraph of answer is as follows:

"The defendant John A. Zaring, for separate answer to the plaintiff's complaint, says that he admits that he signed the note sued on, and mentioned in plaintiff's complaint, but he says that he signed the same solely as surety for his co-defendant, Andrew J. Peugh, and under the express understanding and agreement with said Peugh that said note was not to be delivered to the plaintiff, or any one for the use of the plaintiff, until one Charles McClintock had also signed said note as co-surety with this defendant; and that said Peugh promised and agreed with this defendant that said note should not be delivered to plaintiff, or to any one for plaintiff's use, until said McClintock had signed said note as co-surety with the defendant; and that said Peugh thereupon took said note away with him for the purpose of procuring the signature of said McClintock pursuant to said promise and agreement; but that said McClintock failed and refused to sign said note. And defendant further says that afterwards the agent of plaintiff, representing and acting for plaintiff with full power and authority from plaintiff, took said note from said Peugh, and that

¹ Rehearing denied.

said agent took said note with full knowledge of the agreement and conditions under which this defendant had signed the same, and that at the time said agent so took said note said Peugh informed him that it was not to be delivered to plaintiff, or to any one for plaintiff's use, until said McClintock had signed it as co-surety with this defendant; but, notwithstanding such information, and over the objection of said Peugh, said agent took said note into his possession, all in violation of the said promise and agreement by and between this defendant and the said Peugh, and with full knowledge of the same, as defendant is informed and believes. Wherefore defendant prays that plaintiff take nothing as to him, and judgment for costs and all other proper relief. [Signed] John A. Zaring.

"Subscribed and sworn to by John A. Zaring before me this 8th day of June, 1895. John Stratton, Clerk Ct. Ct."

It is settled beyond question in this state that one who signs a promissory note as surety with the express understanding that he shall also have other responsible co-sureties, which fact is known to the payee of such note at the time of accepting the same, will not be bound upon the contract unless the conditions as to additional sureties imposed upon the principal and known to the payee are fully and strictly complied with before delivery of the instrument. *Allen v. Marney*, 65 Ind. 398, and cases cited therein; *Manufacturing Co. v. Kimmel*, 87 Ind. 560. The first paragraph of the answer avers that appellee agreed to become surety upon said note only upon condition that one Charles McClintock would become a co-surety with him; that appellant knew of this condition imposed by him upon the principal, Peugh; and that appellant, with this knowledge, accepted the note without the signature of said McClintock. The second paragraph differs only in alleging that appellee agreed to become surety for said Peugh if said Charles McClintock, or some other person equally as reliable financially, would become a co-surety with him, and alleging the knowledge of appellant as in the first paragraph.

There is no merit in appellant's contention that the answers are bad because not sworn to in absolute terms. A statement sworn to upon the belief of the affiant is equivalent to one sworn to in absolute terms. *Simpkins v. Malott*, 9 Ind. 543; *Bonnell v. Bonnell*, 41 Ind. 476.

Measured by the rules of law as above stated, we are of the opinion that both paragraphs of appellees' answer were sufficient, and that the court below was right in overruling the demurrers. Appellant's counsel, in their brief filed herein, argue none of the causes assigned in the motion for a new trial, except that the judgment is not sustained by sufficient evidence. We have carefully read all the evidence in the cause, and not only think that there was evidence tending to prove every material allegation of appellees'

answer, but are of the opinion that the evidence justified the finding of the lower courts. It is needless to cite authorities upon the oft-repeated rule of this court that the judgment of the lower court will not be disturbed when there is any evidence to sustain it. Judgment affirmed.

GODSCHALCK v. FULMER et al.¹

(Supreme Court of Illinois. Jan. 17, 1896.)

STATUTE OF FRAUDS—EXPRESS TRUSTS.

A trust resulting from a conveyance of land, purchased by a wife, to a third person, to protect it from the debts of the husband, the grantee agreeing to reconvey to the wife on payment of a lien on the land for which the grantee was liable, is an express trust, and therefore not enforceable (Rev. St. c. 59, § 9) unless evidenced in writing.

Error to circuit court, Douglas county; Francis M. Wright, Judge.

Bill by Johanna Godschalck against Ruben H. Fulmer and others. There was a decree for defendants, and complainant brings error. Affirmed.

T. J. Smith, for plaintiff in error. Eckhart & Moore, for defendants in error.

WILKIN, J. This is a bill in chancery by plaintiff in error against defendants in error to set aside a deed of conveyance by Ruben H. Fulmer to Julius F. Roedel, assignee, to the following described real estate: "The east half of the southwest quarter of section six, township sixteen, range nine east of the 3d P. M., in Douglas county, Ill.;" and to compel the said Fulmer to convey the same to her, claiming to be the owner, the legal title being held by Fulmer, her brother, in trust for her. The bill sets up the fact that plaintiff in error, together with her said brother, and other members of the family, after the death of their father, continued to reside upon the home place near St. Marys, in the state of Indiana, until complainant reached the age of 31 years; when she married, and moved to Douglas county, this state; that no division of the home place in Indiana was ever had; that, while she remained there, by her labor and attention to the household affairs of the family she contributed to paying indebtedness against the home farm, and also in purchasing other lands, the title to which was taken in the name of her brothers; that her said brother, Ruben H. Fulmer, has continued to reside upon the home place, exercising ownership over it as his own; that, after her marriage and removal to this state, he informed her that, if she would select a place here, he would purchase it for her, in lieu of her interest in the Indiana farm; and that, relying upon that promise, she and her husband selected the land in question, then belonging to Henry Gray, and contracted with him for the purchase thereof, at a consideration of \$3,080. The allegation of the

¹ Rehearing denied January 18, 1897.

bill upon which prayer for relief is based is as follows: "And, upon contracting for the same, oratrix notified her brother, Ruben H. Fulmer, of the contracting for such farm; and on the 10th day of March, 1887, the contract for the purchase of said land was consummated; and, in consideration of an agreement between oratrix and the said Ruben H. Fulmer, deed was taken to and in the name of said Fulmer, to be by him held in trust for oratrix, for the reason that there were fears that, if deed was taken in the name of oratrix, oratrix might, through the influence of her husband, squander and lose the farm for debts made by her said husband; and so it was agreed that the deed might be, and was, taken in the name of said Ruben H. Fulmer, to be by him held in trust for oratrix, until oratrix and her husband would pay off a trust-deed lien, which at the time of the purchase of the same existed against said land, to the amount of \$1,500 and interest. She then alleges that she went into possession of the land, under that arrangement, and has since resided there, making valuable and lasting improvements thereon, and paying all taxes against the land; that the \$1,500 has been paid off, by making a new loan of \$2,200, the excess being paid to her brother in satisfaction of debts due from her and her husband to him; that she has frequently requested her brother to execute a conveyance for said land to her, but that he has neglected and refused to do so; that on the 14th day of August, 1893, her said brother made a deed of assignment, conveying all of his estate to Julius F. Roedel, as assignee for the benefit of his creditors." Complainant then tenders a deed of conveyance for all her interest in the Indiana farm, and prays that Fulmer may be required to make her a good and sufficient deed of conveyance, and that the deed of assignment be removed as a cloud upon her title. To this bill the brother filed an answer, which, in effect, is a denial of the allegations of a promise on his part to purchase the land for complainant, and an agreement to hold in trust for her. He also sets up the statute of frauds in bar of the right of complainant to the relief prayed.

After a careful reading of the testimony in this record, we are strongly impressed with the truth of complainant's theory of the transactions between herself and brother relating to this land. She is strongly corroborated in her statements of the facts by the testimony of other disinterested witnesses, while her brother makes inconsistent and unreasonable attempts at explaining his claim to absolute ownership of the property. The statute of frauds is, however, an insuperable obstacle in the way of granting the relief prayed in this bill. That the contract above set forth is an express trust, and within the statute (section 9, c. 59, Rev. St.), it not being in writing, cannot be successfully denied. It has been many times held by this court that, under this statute, express trusts can only be enforced when created or evidenced by writing. These decla-

sations are so numerous and uniform that a citation of them is unnecessary. It is true that resulting trusts, or "trusts created by construction, implication, or operation of law, need not be in writing, and the same may be proved by parol." But it has also been held by this court that, where there is an express trust, there cannot be a resulting or implied trust. *Stevenson v. Crapnell*, 114 Ill. 19, 28 N. E. 379, citing *Kingsbury v. Burnside*, 58 Ill. 310. In this cause it is expressly averred in the bill that, by the agreement of parties, the brother was to hold the title in trust for the sister, until certain incumbrances placed on the land were paid off. The \$1,500 mortgage alluded to was executed by the brother, he giving his personal obligation for the debt; and therefore it is apparent that he took the title in trust for the purpose, in part at least, of protecting himself against that liability. Whether the complainant could have enforced her rights upon a bill for specific performance, or if she had relied solely upon a resulting trust, it is not important now to decide. We are forced to the conclusion that, upon the bill as filed, the relief prayed could not have been granted by the circuit court without wholly ignoring the statute of frauds and previous decisions of this court; and its decree must therefore be affirmed.

(146 Ind. 681)

CAMPBELL v. IRWIN.

(Supreme Court of Indiana. Feb. 2, 1897.)

LIBEL AND SLANDER—PLEADING IN CIVIL ACTION—ANSWER IN JUSTIFICATION—REQUISITES OF.

An answer in a civil action in justification of an alleged slander, where the words impute the commission of a crime, must state specific facts, such as would be sufficient in an indictment. An answer merely reaffirming the truthfulness of the words spoken, when they do not specifically describe the offense, but are alleged in the complaint with an innuendo, is insufficient.

Appeal from circuit court, Montgomery county; James F. Harney, Judge.

Action for slander by Edna Campbell against Mary I. Irwin. Judgment for defendant, and plaintiff appeals. Reversed.

M. E. Clodfelter, for appellant. M. W. Bruner and Crane & Anderson, for appellee.

JORDAN, C. J. Appellant, an unmarried woman, sued the appellee in an action for slander, wherein she demanded damages for the alleged wrong in the sum of \$5,000. The complaint is in three paragraphs, each containing three sets of words upon which the alleged slander is based. By innuendoes and averments, it is charged that the defendant, on the several occasions mentioned, by speaking and publishing the words set out therein, imputed to the plaintiff the crime of fornication with one Dr. S. G. Irwin; that she so meant and intended to impute said crime to the plaintiff, and was so understood

by the persons in whose presence the words were spoken. The complaint was held sufficient by the court upon demurrer, and the appellee filed her answer in two paragraphs, the first being a general denial. The second purports to be in justification, and was held to be sufficient as such on demurrer. Under the issues joined, a trial by jury resulted in a verdict for the defendant, and judgment was rendered in her favor for costs.

Among the errors assigned, the action of the court in overruling appellant's demurrer to the second paragraph of the answer is called in question. This paragraph is as follows: "Par. 2. The defendant, for further cause of defense herein, alleges that she admits the speaking of the words set out in the complaint, but she says that Dr. S. G. Irwin has been keeping and running the plaintiff for a long time; that Dr. S. G. Irwin did have plaintiff locked up in his back office for bad purposes, and was criminally intimate with her, and plaintiff did have criminal intercourse with Dr. S. G. Irwin, and she is not a virtuous woman; that plaintiff did send for Dr. S. G. Irwin at Alamo; and that he did go when it was pouring down rain, when he would not have gone across the street to see any other patient. So the words charged in the complaint are true, and defendant demands judgment for costs." By section 285, Rev. St. 1881 (section 286, Rev. St. 1894), every charge of incest, fornication, adultery, or whoredom falsely made against a female is actionable in the same manner as are slanderous words charging a crime, etc. Fornication is made a crime by the Criminal Code (section 1991, Rev. St. 1881; section 2077, Rev. St. 1894). The infirmity of this answer in the main is that it simply reiterates, in part, the defamatory words averred in the complaint, with a conclusion that they are true, without setting out a single fact that the charge or offense of fornication attributed to the appellant, as alleged in her complaint, was true. It is well settled by our decisions that the justification of the slander must be as broad as the charge, and must apply to the very charge which the defendant attempts to justify. The plea or answer of justification is required to affirmatively show that the plaintiff is guilty of the offenses imputed by the words set out in the complaint, and that they were true in the sense in which they are averred to have been spoken by the defendant; and, where it is addressed to the entire charge, it must justify every set of words alleged in the complaint. Section 373, Rev. St. 1881 (section 376, Rev. St. 1894), provides that the defendant may allege the truth of the matter charged as defamatory, etc. Section 347, Rev. St. 1881 (section 350, Rev. St. 1894), pertaining to the practice in civil actions, provides that the answer shall contain a statement of any new matter constituting a defense, etc., in plain and concise language. Neither of these provisions of

the Code can be said to authorize a defendant in an action for slander to justify by the mere reiteration of the slanderous words in his answer, with an averment that they are true, without a statement of any facts showing that the imputed charge of which plaintiff complains is true. Under the common-law rule, the defendant, in his plea of justification, was required to state specific facts, showing in what particular instances and the exact manner in which the plaintiff had misconducted herself. 1 Chit. Pl. § 494. Our Code does not seem to have changed the common-law rule in this respect. The decisions of this court and many other authorities sustain the requirement that, to render an answer in justification in a libel or slander suit sufficient as such, it must specifically allege the facts constituting the wrong charged to the plaintiff by the slanderous words; and, where they attribute to him the commission of a crime, the defendant can only justify by stating in his answer the facts constituting the plaintiff guilty of the particular crime. It is not merely the words, but the charge contained therein, that must be true, in order to justify the defendant in speaking them. See *Mull v. McKnight*, 67 Ind. 535; *Funk v. Beverly*, 112 Ind. 190, 13 N. E. 573. A distinction is made where the words impute an offense in a general way, and where they particularize the charge. Where the defamatory words as set out sufficiently describe the offense, then an admission by the defendant that he spoke the words as charged, and a general affirmation that they are true, have been held to be sufficient. The authorities go to the extent that the defendant, by his quasi indictment, under his answer in justification, puts the plaintiff upon trial as to the particular offense therein averred, and therefore it should be equally as direct and certain as regards the party and the offense as is required of an indictment or information in a criminal prosecution. *Mull v. McKnight*, supra, and authorities there cited; *Townsh. Sland. & L.* (2d Ed.) §§ 212, 357, 358; *Downey v. Dillon*, 52 Ind. 442, and authorities there cited. The following additional authorities sustain the rule as to the requisites of a plea of justification: *De Armond v. Armstrong*, 37 Ind. 35; *Sunman v. Brewin*, 52 Ind. 141; *Miller v. McDonald*, 139 Ind. 465, 39 N. E. 159; *Bliss*, Code Pl. § 161; *Wachter v. Quenzer*, 29 N. Y. 547. Tested by the rule asserted and maintained by the decisions of this court and the other authorities, the second paragraph of the answer cannot be held sufficient as a plea of justification; and, for the error in overruling the demurrer thereto, the judgment must be reversed.

Some other questions are discussed by counsel for appellant, but, as these may not arise again upon another trial, we pass them without consideration. The judgment is reversed, and cause remanded to the lower

court, with instructions to grant appellant a new trial, and sustain her demurrer to the second paragraph of appellee's answer, with leave to amend.

(16 Ind. App. 640)

LAKE SHORE & M. S. RY. CO. v. BOYTS.

(Appellate Court of Indiana. Jan. 28, 1897.)

RAILROADS — ACCIDENTS AT CROSSINGS — NEGLIGENCE AND CONTRIBUTORY NEGLIGENCE — IMPUTED NEGLIGENCE.

1. It is negligence to back an engine and cars across a street in a town at the rate of eight miles an hour, with no one on the cars, and without sounding the whistle, ringing the bell, or giving other warning.

2. The negligence of an owner and driver of a team at a railroad crossing cannot be imputed to a guest riding with him.

3. Plaintiff was riding in the daytime in a cutter, with the owner and driver of the team. When 20 or 30 feet west of a railroad crossing, near a station, with which plaintiff was familiar, they could have seen a car 60 or 80 feet south of the crossing. Though plaintiff knew a train was at the station, he did not, after getting within 30 feet of the track, look for approaching cars. The horses were driven on the track on a trot, and were struck by a car going north, eight miles an hour. It did not appear that at any time plaintiff listened for approaching cars. *Held*, that it was not shown that plaintiff was free from negligence.

Appeal from circuit court, Elkhart county; J. M. Van Fleet, Judge.

Action by Josiah P. Boyts against the Lake Shore & Michigan Southern Railway Company for personal injuries caused by defendant's negligence. From a judgment for plaintiff, defendant appeals. Reversed.

Francis E. Baker and Charles W. Miller, for appellant. Osborn & Zook, for appellee.

ROBINSON, J. The facts in this case, as found by the jury, are, in substance, as follows: The appellant's railroad track runs through the town of Constantine, Mich., in a general north and south direction, and parallel to and west of the main track is a side track. Centerville street, in said town, crosses the main track and side track at grade in a general east and west direction. The appellant's depot building is 280 feet north of the Centerville street crossing. The appellee was familiar with the crossing where the accident occurred, and with the location of tracks and buildings as they existed on that day and for 10 months prior thereto. The side track terminated and connected with the main track 485 feet south of the Centerville street crossing. Station street, in said town, connects with Centerville street from the north 65 feet west of the railroad tracks, and extends north, in the general direction of the railroad tracks, to a point west of the depot buildings, and then branches off somewhat to the left, looking north. The railroad tracks were laid on a curve extending from the depot to the end of the side track south of the crossing, the outer side of the curve being west. The two tracks were

the only railroad tracks at the crossing. The ground north of Centerville street, and between Station street and the railroad tracks, up to the depot building, was vacant and unoccupied, except for some logs lying thereon; but these logs would not prevent a person proceeding southward along Station street, either riding in a cutter or walking, from seeing engines and cars on the tracks to the east and southeast of him. The appellee knew of these logs being there before January 14, 1893. On the south side of Centerville street, and six feet eight inches west of the west rail of the side track, is a lime house. On the same side of Centerville street, and west of the lime house, is a lumber office. These buildings would not prevent a person in a cutter who was on Centerville street until within about 20 feet of the railroad tracks, and also on Station street for about 100 feet north of Centerville street, from seeing an engine and cars approaching on the side track from the south of Centerville street until such engine and cars came within about 40 or 50 feet of the northeast corner of the lime house. A person driving south on Station street, when at a point about 200 feet north of Centerville street, and opposite the depot, could see an engine and cars approaching from the south on the side track for about 65 feet south of the northeast corner of the lime house. A person driving south on Station street, when at a point about 185 feet north of Centerville street, could see an engine and cars approaching from the south on the side track for about 60 feet south of the northeast corner of the lime house. The appellee approached the crossing coming southward along Station street, and then eastward on Centerville street, seated in the left-hand side of a cutter, with a friend named Hamilton on the right side, the cutter being drawn by two horses, the cutter and horses being the property of Hamilton, and the team being at the time driven by him. Appellee came upon Station street more than 240 feet north of Centerville street, and had his ears covered with ear muffs or ear tips while he was in the cutter, up to the time of the accident. The team was driven all the way south on Station street, and east on Centerville street, "on a good trot," until the heads of the horses were at the west rail of the side track. While going south on Station street, the appellee looked straight ahead, and to the left, towards the depot. On Centerville street the appellee looked straight ahead, and did not see the engine and cars until they were within one or two feet of the heads of the team. On the day of the accident, the appellee was in full possession of his senses of sight and hearing. While riding southward on Station street, appellee did not see the engine and cars at the switch, or at any point between the switch and the Centerville crossing and the side track. The train was a local freight train, and came in-

to Constantine on the main track from the north, at about its usual time, and stopped at the station. The engine, with two cars, went south along the main track, to the switch south of the crossing, and backed in on the side track. Part of the train left standing on the main track projected south beyond the south end of the depot building, which part the appellee saw while riding along Station street. Appellee knew that a local freight came from the north at that time. At the time appellee saw that portion of the train on the main track, he did not know that the engine had gone south on the main track. The appellee knew the location of the switch. The engine was equipped with a steam whistle and bell, as required by a law of the state of Michigan. There was no city or town ordinance requiring the sounding of the whistle within the limits of Constantine, nor prohibiting the running of trains faster than six miles per hour. As the engine and car backed in on the side track and upon the street crossing, there was no brakeman upon the rear car, nor was the engine bell ringing. The employés of the company stopped the engine and cars as soon as possible after the team and cutter came in sight, east of the line of the lime house. The appellee approached the tracks in the center of Centerville street, which is 33 feet from the north line of the lime house. A person in the center of Centerville street, when 20 feet west of the nearest rail, can see a car approaching from the south on the side track a distance of 80 feet from the center of Centerville street, and, at a distance of 30 feet west of the nearest rail, can see a car approaching a distance of 60 feet from the center of Centerville street. Neither when appellee was at the point 30 feet west of the nearest rail, nor when 20 feet west of the nearest rail, nor at any time between these points, did he look south to see whether an engine and cars were approaching. Appellee "told Hamilton to look out; there might be a train." In approaching the crossing, the appellee did nothing to prevent an accident at the crossing. The accident occurred at about half past 3 in the afternoon. It was a clear, quiet, cold day. There were sleigh bells on the team, which rang as the team trotted. As the heads of the horses reached the west rail, the team turned, and went northward, parallel with the track, and west of it. The car struck one of the horses, and the team fell. Appellee was in the cutter after the team fell, but he was not struck by the cars or engine. The appellee alighted from the cutter on his feet and hands, in snow eight to ten inches deep. The appellee did not at any time prior to the time the horse was hit by the car attempt to get out of the cutter, nor attempt to stop the cutter. The ailments the appellee complains of were caused by this accident. On the south side of Centerville street, com-

ing flush to the south line or edge of the street, and being within seven feet west of the west rail of the switch line, there was a building known as the plaster or lime house. About ten feet west of this building was a building known as the lumber office. It is about 70 feet from the point where the center of Station street intersects the center of Centerville street to the west rail of the switch track. These buildings obstructed the view, so that a person riding in a cutter on Station street, and east on Centerville street, could not see the approach of an engine or car coming north on the side track at any point between the switch and the place at which the car would emerge to view in front of the northeast corner of the plaster house. The appellee traveled in the center of said streets. The team and cutter belonged to Hamilton, who was at the time driving, and who was a competent and careful driver. Appellee had no control over or right to control Hamilton or the team. As the cars were being pushed north from the switch, the engine bell was not ringing, nor was any other signal given. It was down grade from the switch northward to the crossing. The cars were being pushed at the rate of eight miles per hour, and made less than the usual amount of noise. The injuries referred to in the complaint were the injuries received by appellee at the time mentioned. When in the center of Centerville street, about 70 feet west of the switch track, the appellee said to Hamilton, "You better hold up; there might be a train coming," or words to that effect. Centerville street was much traveled at that time, was 66 feet wide, and was the main thoroughfare leading from the village to the country east and north. There was no flagman or gates at the crossing. Hamilton did not stop his team before reaching the crossing. From the horses' heads to where Hamilton sat in the cutter was about 16 feet. When appellee spoke to Hamilton to hold up, appellee braced his feet to prepare to spring out in case there should be danger. Appellee jumped out of the cutter as soon as he could after the advancing cars appeared to view. The damages were fixed at \$400. Upon the special verdict, the appellant moved for a judgment in its favor, which was overruled by the court, and judgment rendered in favor of the appellee for the sum of \$400.

The appellant has assigned errors as follows: "(1) The court erred in overruling appellant's motion for judgment in its favor on the special verdict returned by the jury. (2) The court erred in rendering judgment in favor of appellee for the sum of four hundred dollars on the special verdict returned by the jury."

It is firmly settled by the supreme court of this state that, in an action of this kind, contributory negligence on the part of the plaintiff is not a matter that the defendant must

establish, but that the plaintiff must allege in his complaint, and prove, that the injury was incurred without his own negligence having contributed thereto. The burden is on him to show, not only the negligence of the defendant, but also his own freedom from any negligence contributing to the injury. Appellant's counsel insist in their brief that the special verdict fails to show any negligence on the part of the railroad company. The facts found by the jury show that, at the time of the accident, there was in force a law of the state of Michigan requiring the appellant to sound the whistle twice, at least, 40 rods before a crossing was reached, and to ring the bell continuously until the crossing was passed, under a penalty of \$100 for every neglect. But, in the absence of any statute, it was the duty of the appellant to give reasonable and timely warning as it neared the crossing. Hence, to back an engine and cars across a street in a town at the rate of eight miles an hour, with no person on the car, and without sounding the whistle or ringing the bell, and without giving any notice or warning of its approach, is sufficient to establish negligence on the part of those operating the train. *Railway Co. v. Burton*, 139 Ind. 357, 37 N. E. 150, and 38 N. E. 594; *Railroad Co. v. Rush*, 127 Ind. 545, 26 N. E. 1010; *Railroad Co. v. Butler*, 103 Ind. 31, 2 N. E. 138; *Railroad Co. v. Schmidt*, 126 Ind. 290, 25 N. E. 149, and 26 N. E. 45.

It appears from the special verdict that the appellee was the special guest of his neighbor, Hamilton, who was found to be a competent and careful driver, and with whom appellee was riding. The team and sleigh or cutter belonged to Hamilton. As they turned into Centerville street, about 70 feet from the appellant's tracks, the appellee "told Hamilton to look out; there might be a train." In view of the facts found, it seems to us clear, beyond question, that Hamilton, the owner and driver of the team, was guilty of negligence in attempting to cross the railroad tracks in the manner he did. And it is contended by counsel for the appellee that inasmuch as the appellee was simply the guest of the driver, and had no control over the team, the driver's negligence cannot be imputed to him. Whatever may be the law in other jurisdictions, the rule prevails in this state that when one, as a guest, accepts the invitation to ride in the vehicle of another, without any authority to control or direct the movements of the driver, or without any reason to doubt that the driver is skillful and competent, the negligence of the owner or driver will not be imputed to the guest, so as to deprive him of the right to compensation from one whose neglect of duty has resulted in his injury. *Brannen v. Road Co.*, 115 Ind. 115, 17 N. E. 202; *Railroad Co. v. Spencer*, 98 Ind. 186; *City of Michigan City v. Boeckling*, 122 Ind. 39, 23 N. E. 518; *Town of Knights-town v. Musgrove*, 116 Ind. 121, 18 N. E. 452;

Town of Albion v. Hetrick, 90 Ind. 545; *Railroad Co. v. Creek*, 130 Ind. 139, 29 N. E. 481; *Board v. Mutchler*, 137 Ind. 140, 36 N. E. 537; *Railway Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476. But even if the negligence of the driver, Hamilton, cannot be imputed to the appellee,—and, as shown by the above cases, it cannot be,—the appellee must still show that he was free from negligence contributing to his injury. And the same rule would not apply where the guest was riding inside a closed carriage, without opportunity to discover danger, and inform the driver of it, that would apply where the guest was seated at the driver's side, and had the same opportunities with the driver to discover and avoid danger. *Brickell v. Railroad Co.*, 120 N. Y. 290, 24 N. E. 449. Although he may be simply a guest, if he has the opportunity to do so, it is no less his duty than it is the duty of the driver when approaching a railroad crossing to look and listen, and to learn of danger, and avoid it, if practicable. He has the burden of establishing affirmatively freedom from contributory negligence, or, as said in the opinion in *Tolman v. Railroad Co.*, 98 N. Y. 202, that "plaintiff approached the crossing where the collision and injury occurred with prudence and care, and with senses alert to the possibility of approaching danger." In *Railway Co. v. Howard*, 124 Ind. 280, 24 N. E. 892, where a daughter, injured at a railway crossing, was riding in a buggy drawn by a horse driven by her father, it was held error to refuse the following instruction: "The burden is on the plaintiff to show, by a preponderance of the evidence, that she and her father vigilantly used their eyes and ears to ascertain if a train of cars was approaching; and, if this has not been shown to you by a preponderance of the evidence, the plaintiff cannot recover." In the case of *Hoag v. Railroad Co.*, 111 N. Y. 199, 18 N. E. 648, in speaking of a case where the wife was seated in a wagon drawn by a team which her husband was driving, it was said: "If they did not see it [the train], or, at least, the deceased did not see it, she was negligent, for she was bound to look and listen, and the facts show that, if she had looked, she could have seen, and would have seen, the approaching train. She had no right, because her husband was driving, to omit some reasonable and prudent care to see for herself that the crossing was safe." This statement was approved in *Miller v. Railway Co.*, 128 Ind. 97, 27 N. E. 339; *Allyn v. Railroad Co.*, 105 Mass. 77. In *Miller v. Railway Co.*, supra, which was an action by a wife injured at a railway crossing while riding in a wagon with her husband, who was driving, it is said: "The intestate approached a crossing known to her to be dangerous, and approached it when a train was in full view. She took no precaution to warn her husband, or to avert the threatened danger, although slight care might

have avoided it. While the husband's negligence is not to be imputed to her, she was, nevertheless, under a duty to herself to exercise ordinary care." In *Cadwallader v. Railway Co.*, 128 Ind. 518, 27 N. E. 161, the appellee kept a watchman at the crossing, who gave no notice to the appellant that a train was approaching. Before entering upon the crossing, with which the appellant was familiar, she did not look for approaching trains, but looked at the watchman stationed at the crossing. At the time of the injury, the appellant was a person of ordinary intelligence, and possessed of good hearing and good eyesight. When within 20 feet of the railroad track, the appellant had an unobstructed view of the track for the distance of 100 feet north; and, when within 10 feet of the track, she had an unobstructed view for the distance of 300 feet, and could have seen the approaching train before she stepped upon the track, had she looked. "It has been repeatedly decided," says Coffey, J., speaking for the court, "by this and other courts of last resort, that one who approaches a railroad crossing with which he is familiar, and attempts to cross without looking and listening for approaching trains, where it is possible to do so, is guilty of such contributory negligence as precludes him from a recovery if he is injured. Indeed, the principle is so well settled, and is so firmly fixed in our jurisprudence, as not to need further elaboration." *Railway Co. v. Hill*, 117 Ind. 56, 18 N. E. 461; *Railway Co. v. Wilson*, 134 Ind. 95, 33 N. E. 793; *Railway Co. v. Hammock*, 113 Ind. 1, 14 N. E. 737; *Railway Co. v. Hedges*, 118 Ind. 5, 20 N. E. 530; *Railway Co. v. Greene*, 106 Ind. 279, 6 N. E. 603; *Railway Co. v. Pinchin*, 112 Ind. 592, 13 N. E. 677; *Mann v. Stock-Yard Co.*, 128 Ind. 138, 26 N. E. 819. In view of the above well-settled law of this state, and reasoning therefrom, we fail to see any difference in principle between relying upon the watchman in the one case and upon the driver in the other. The negligence of neither the watchman nor the driver can be imputed to the traveler, but it certainly could not be said that the traveler could excuse himself by exercising a less degree of care when relying upon the driver than when relying on the watchman.

The special verdict finds that the appellee was riding in a cutter, seated in the same seat with the driver, and upon the driver's left. He was then, and for 10 months had been, familiar with the crossing and the surroundings with reference to location of tracks and buildings. His sight and hearing were good. He entered upon Station street more than 240 feet north of Centerville street. While riding south on Station street, the appellee did not simply look straight ahead, but looked to the left, towards the depot. While riding on Centerville street, he looked straight ahead. While riding east on Centerville street, he did not see the engine and

car approaching the crossing until they were within one or two feet of the team. The lime house and lumber office on the south side of Centerville street, and west of the railroad tracks, would not prevent a person in a cutter who was on Centerville street, east of Station street, until within about 20 feet of the railroad tracks, and also on Station street, for about 100 feet north of Centerville street, from seeing an engine and cars approaching on the side track from the south of Centerville street until they came within about 40 or 50 feet of the northeast corner of the lime house. At a point on Station about 200 feet north of Centerville street, a person could see an engine and cars approaching from the south on the side track for about 65 feet south of the northeast corner of the lime house, and, at a point about 185 feet north, could see an engine and cars about 60 feet south. A person in the center of Centerville street, when 20 feet west of the nearest rail, can see a car approaching from the south on the side track a distance of 80 feet from the center of Centerville street, and, when 30 feet west, can see a car 60 feet. Appellee approached the railroad tracks in the center of Centerville street, and neither when 20 feet west of the nearest rail, nor when 30 feet west of the nearest rail, and at no place between said points, did he look south to see whether an engine and cars were approaching. The above is the finding of the jury as to what the appellee did in the way of looking, and as to his opportunities to see if he had looked. The rule laid down in *Hathaway v. Railway Co.*, 46 Ind. 25, has been approved in many subsequent cases, as follows: "When a person crossing a railroad track is injured by a collision with a train, the fault is, *prima facie*, his own, and he must show affirmatively that his fault or negligence did not contribute to the injury, before he is entitled to recover for such injury." *Railroad Co. v. Butler*, *supra*; *Railroad Co. v. Stick*, 143 Ind. 449, 41 N. E. 365; *Railway Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37; *Smith v. Railroad Co.*, 141 Ind. 92, 40 N. E. 270; *Shirk v. Railroad Co.*, 14 Ind. App. 126, 42 N. E. 656. The verdict shows that there were some obstructions to the view south of the crossing, but it also shows that these obstructions were not so great as to shut out all sight. The fact that the appellee had his ears covered with ear muffs or ear tips, and that there were sleigh bells on the team ringing, imposed the duty of increased care in the use of the sense of sight. *Beach, Contrib. Neg.* (2d Ed.) § 183, and cases cited. It is shown that as the engine and cars backed north on the side track, and approached the crossing, they made much less than the usual amount of noise and rumbling sound; but there is no finding that the appellee listened for the train, or that he could not have heard it had he listened. In *Stewart v. Pennsylvania Co.*, 130 Ind. 242, 29 N. E. 916, the court says: "A person is

bound to use the senses, and exercise the reasoning faculties with which nature has endowed him. If he fails to do so, and is injured in consequence, neither he in life, nor his representative after death, can recover for resulting injuries." In *Smith v. Railroad Co.*, 141 Ind. 92, 40 N. E. 270, Monks, J., speaking for the court, says: "It is settled law in this jurisdiction that, when one approaches a point where a highway crosses a railroad track on the same level, it is his duty to proceed with caution; and, if he attempts to cross the track either on foot or in a vehicle of any kind, he must exercise ordinary care, under the circumstances, in so doing. He must assume that there is danger, and act with ordinary care and prudence upon that assumption. The law defines precisely what the term 'ordinary care,' under the circumstances, shall mean in these cases. The question of care at railway crossings, as affecting the traveler, is no longer, as a rule, a question for the jury. The question of care, in a large class of cases is exactly prescribed as a matter of law. In attempting to cross, the traveler must listen for signals, notice signs put up as warnings, and look attentively both ways for approaching trains, if the surroundings are such as to admit of that precaution. If a traveler, by looking, could have seen an approaching train in time to avoid injury, it will be presumed, in case he is injured by collision, either that he did not look, or, if he did look, that he did not heed what he saw. Such conduct is negligence per se. *Railway Co. v. Duncan*, 143 Ind. 524, 42 N. E. 37; *Railway Co. v. Hill*, 117 Ind. 56, 18 N. E. 461; *Beach, Contrib. Neg.* (2d Ed.) §§ 180, 181, and cases cited. It appears affirmatively that the appellee did not look, except once, towards the depot, before entering upon the crossing, and that he did not see the engine and cars until they were within one or two feet of the team at which time he attempted to jump out of the cutter; and it does not appear that, before entering upon the crossing, he listened at any time for an approaching train, nor does it appear that listening would have availed nothing. Taking these facts in connection with the further facts that the appellee was familiar with the crossing and its surroundings; that he knew, when approaching the crossing, the time of the arrival of a local freight train from the north; that he knew the train had arrived, a part of which, without the engine, he saw standing at the depot,—we cannot say that he exercised that care and prudence which the law of this state exacts of one approaching a railroad crossing."

Disregarding the finding of the jury that the appellee did nothing in approaching the crossing to prevent an accident, we are still unable to conclude from the special finding that the appellee did all that a reasonably prudent man would be expected to do under the circumstances. In the very able brief

presented by counsel for the appellee, it is insisted that, as the appellee was the guest of the driver, he did all that a man would do ordinarily when he said to the driver, "You better hold up; there might be a train." There is nothing to show that the driver knew that any train was near. But the appellee knew, when he spoke to the driver, that the train had arrived at the depot from the north; that the engine had been detached from the train; and that a part of the train, without the engine, was then standing at the depot. With no further communication with the driver, and without looking to the right or left, he braced his feet to spring out if he should see any danger, and, looking straight ahead, rode until the engine and car were within one or two feet of the team. While it is said that the act of the appellee in bracing his feet to jump from the cutter if danger appeared was an effort on his part to avoid injury, yet it can be said with equal propriety that by such conduct he realized the presence of danger, and, without taking any precaution, concluded to take the risk. Had the appellee looked southward when within 30 feet of the nearest rail, he would have had an unobstructed view of the side track a distance of 60 feet from the center of the street. It must be presumed he knew this fact, for the finding shows he was familiar with the crossing and its surroundings. "When it is said that a person approaching a railroad crossing must look and listen attentively for approaching trains, it is not to be understood that he may look from a given point, and then close his eyes; but it is to be understood that he must exercise such care as a reasonably prudent person, in the presence of such danger, would exercise to avoid injury. The courts cannot close their eyes to matters of general notoriety, and to matters of everyday observation." *Mann v. Stock-Yard Co.*, 128 Ind. 138, 26 N. E. 819.

It is argued that the appellee was under no obligation to look to the south, as he was on the north side of the cutter; and, in support of this, counsel cite *Railroad Co. v. Grames*, 8 Ind. App. 117, 34 N. E. 613, and 37 N. E. 421. But in that case the brother of the appellee, who was driving the team, spoke to the appellee, directing him to keep a watch to the north side, while he looked and listened for engines and cars on the south side. The driver and the appellee in that case were making mutual arrangements for their joint protection; while in this case it appears the driver did not look at all, nor did he request the appellee to look. No excuse is given for his failure to look both ways as he approached the crossing. He was familiar with the crossing and the surroundings, and was bound to use more care than if he had not previously known it. In the case of *Railway Co. v. Grames*, 136 Ind. 39, 34 N. E. 714, it is said: "In approaching a crossing, the law requires that the traveler shall listen for sig-

nals, must take notice of the signs put up as warnings, must look attentively up and down the track, if the surroundings are such as to admit of this precaution, and he must not attempt to cross in front of a moving train. If he neglects these precautions, and, by reason of such negligence, is injured, the court will adjudge, as a matter of law, that he has been guilty of contributory negligence." The failure on appellee's part, under the circumstances, to vigilantly use his senses of sight and hearing to ascertain whether a train was approaching, was a neglect on his part to use such precaution as the law of this state requires. When within 30 feet of the crossing, he had an unobstructed view of the side track, looking south a distance of 60 feet, which increased, as he approached the track, to 80 feet at 20 feet from the track. He could have seen if he had looked. The burden was on him to show that he listened for an approaching train, or that listening would have availed nothing. This he has failed to do. We think the conclusion necessarily follows from the finding that the appellee was injured because he neglected these precautions, which the law required of him; and, by reason of that neglect, "the court will adjudge, as a matter of law, that he was guilty of contributory negligence." We think the verdict is insufficient to support the judgment rendered in favor of the appellee, and that the appellee was guilty of negligence which contributed to his injury. Judgment reversed, with instructions to sustain appellant's motion for a judgment in its favor.

(16 Ind. App. 630)

CLARK COUNTY CEMENT CO. v. WRIGHT.

(Appellate Court of Indiana. Jan. 27, 1897.)

MASTER AND SERVANT — ACCIDENTAL KILLING — PLEADING — ASSUMPTION OF RISK — EXPERT WITNESS — LIFE EXPECTANCY — DEFECTIVE MACHINE — FELLOW SERVANTS.

1. In an action for personal injuries to a servant, the rule that ignorance of the danger to which he was exposed must be affirmatively shown by the complaint does not apply where the servant was ordered to do work out of the line of, or away from the place of, the work which he was hired to do.

2. In an action for the death of plaintiff's intestate, a complaint which alleges that the work at which he was engaged when killed was entirely different from the work which he was employed to do, and was more dangerous, and had to be done with different workmen, and with appliances and in a place different from those of the work which the intestate was employed to do, sufficiently alleges that he was working out of the line of, and away from the place of, the work which he was hired to do.

3. When a master orders a servant to do something which involves a risk not contemplated in his employment, unless the danger is such that a man of ordinary prudence would not take the risk, the servant may obey the order, using care in proportion to the risk apparently assumed, and, if injured, the master must respond in damages.

4. In an action for the death of plaintiff's intestate while in defendant's employ, it will not

be presumed that the intestate knew of defects in the machinery, where the complaint alleges that he did not know of them.

5. A person who has been in the life insurance business for eight years, has been supplied by his companies with tables giving the expectancy of life, and has used them in his business, may be examined as an expert witness on the issue of a life expectancy.

6. Where it is urged that the court erred in giving instructions numbered 1, 2, 3, etc., of a series, "and in giving each of said instructions," the assignment is several.

7. In an action for the death of an employé, where a recovery is sought on the ground of a defect in the machinery, and it appears that the decedent was acquainted with his surroundings, plaintiff must show that the decedent had no knowledge of the defects.

8. In an action by an employé for personal injuries received in the course of his work, he must show that in doing such work he did not assume the risk of its attendant dangers.

9. An employé whose duty it is to attend to the unloading of a car in which rock is drawn to the top of cement kilns by a wire rope, and another whose duty it is to operate the wire rope from a power house at a signal given by a wire running from the kilns to the power house, are fellow servants.

Appeal from circuit court, Clark county.

Action by Robert Wright, administrator, against the Clark County Cement Company, for the death of plaintiff's intestate. From a judgment in favor of plaintiff, defendant appeals. Reversed.

M. Z. Stannard and W. H. Watson, for appellant. L. A. Douglas, for appellee.

HENLEY, J. This was a suit for damages for negligently causing the death of appellee's decedent while working for appellant. Counsel for appellant argue the insufficiency of the first paragraph of complaint because it fails to show decedent's want of knowledge of the dangerous defects which caused his death. Ordinarily the servant does, as a part of his contract, assume the risk of all known dangers connected with his employment. *Pennsylvania Co. v. Witte* (Ind. App.) 43 N. E. 319, and cases therein cited; *Coal Co. v. Albani*, 12 Ind. App. 497, 40 N. E. 702; *Ames v. Railway Co.*, 135 Ind. 363, 35 N. E. 117. It is also true, as in those cases decided, that want of knowledge of the danger is an independent element of the plaintiff's case, which must be affirmatively shown by the complaint. The rule, however, is not applicable where the servant is ordered to do work out of the line of, or away from the place of, the work he is hired to perform. *Stuart v. Manufacturing Co.* (Ind. App.) 43 N. E. 961; *Coal Co. v. Hoodlet*, 129 Ind. 327, 27 N. E. 741; *Railroad Co. v. Hanning*, 131 Ind. 528, 31 N. E. 187; *Railroad Co. v. Madden*, 134 Ind. 462, 34 N. E. 227; *Railroad Co. v. Woodward*, 9 Ind. App. 169, 36 N. E. 442; *Lynch v. Railroad Co.*, 8 Ind. App. 516, 36 N. E. 44; *Bridge Co. v. Eastman*, 7 Ind. App. 514, 34 N. E. 835; *Railroad Co. v. Holcomb*, 9 Ind. App. 198, 36 N. E. 39. While the terms of decedent's employment are not def-

initely stated in the complaint, nor any specific averment made as to just what work he was to perform under it, yet it is directly and pointedly alleged that the work at which he was engaged by the master's orders when killed was entirely different from the work which he was employed to do, and was more dangerous and hazardous than such work, and had to be performed with different workmen, operating under different rules and methods, and with appliances and in a place distinct and different from those of the work which decedent was employed to do. These averments entirely exclude the possibility of the work in the performance of which decedent was killed being the same as that which decedent was originally employed to do. Nor can it be said that decedent was necessarily negligent by reason of his obeying the master's order with knowledge of the additional hazard of the new work. The supreme court in *Coal Co. v. Hoodlet*, supra, say: "When a master ordered a servant to do something which involves encountering a risk not contemplated in his employment, although the risk is equally open to the observation, it does not necessarily follow that the servant either assumes the increased risk, or is negligent in obeying the order. If the apparent risk is such that a man of ordinary prudence would not take the risk, the servant acts at his peril. But, unless the danger is such as to deter a man of ordinary prudence from encountering it, the servant will not be compelled to abandon the service, or assume all additional risk, but may obey the order, using care in proportion to the risk apparently assumed; and, if he is injured, the master must respond in damages." This court is of the opinion that the first paragraph of complaint stated facts sufficient to constitute a cause of action, and therefore the lower court did not err in overruling the demurrer thereto.

The second paragraph of complaint proceeds upon the theory that appellant did not provide the decedent with a safe working place and appliances, and directly avers that the machinery with which decedent worked was so constructed that decedent was exposed constantly to danger, all of which was unknown to decedent and was known to appellant; that the decedent's death was caused by the wrongful act and negligence of appellant, and without any fault or carelessness of decedent. This court will not presume that the decedent knew of the defects in the machinery, if any there were, in the face of the allegation in the complaint that he did not know of them. *Railway Co. v. Brown* (Ind. Sup.) 42 N. E. 359. That the master must use reasonable care to provide his employes with reasonably safe working places, and with reasonably safe appliances with which to work, and to use every reasonable care to keep such places and appliances in such condition, is the undisputed

law of the state, and has been so repeatedly held by this court and the supreme court of this state that argument for and against the proposition, and the citation of authorities, become useless. It is also well settled, in this class of actions, that the averment of negligence on the part of the defendant, and the averment of the want of contributory negligence or knowledge of dangerous defects by the plaintiff, is to be deemed sufficient, against a demurrer, unless the facts specifically stated in the complaint show the contrary,—*Railway Co. v. Wagner* (Ind. App.) 45 N. E. 76; *Railway Co. v. Malott*, 13 Ind. App. 289, 41 N. E. 549; *Coal Co. v. Bridge-water*, 13 Ind. App. 333, 40 N. E. 1101,—and that the general averment of knowledge or want of knowledge includes both actual and imputed knowledge,—*Pennsylvania Co. v. Witte* (Ind. App.) 43 N. E. 319. The lower court properly overruled the demurrer to the second paragraph of complaint.

We have examined the question of the competency of the evidence of the witness Thomas B. Rader, objected to by the appellant, and are of the opinion that the witness had sufficient experience, and showed himself sufficiently familiar with the subject about which he testified, to make him competent as an expert in the matter testified about. This witness testified that he had been in the life insurance business eight or ten years, that he was supplied by his companies with tables giving the expectancy of life, and that he used the same in his business, and, over the objection of appellant's counsel, was permitted by the court to refer to his tables, and tell the jury the decedent's expectancy of life. We think the witness competent, and the testimony proper. *Shover v. Myrick*, 4 Ind. App. 7, 30 N. E. 207.

Appellant contends that the court erred in giving certain instructions to the jury, and one of the reasons assigned for a new trial herein is as follows: "That the court erred in giving to the jury instructions numbered 1, 2, 3, 4, and 5 of the series of instructions given to the jury in said cause by the court of its own motion, and in giving each of said instructions; that the court erred in giving to the jury instructions numbered 1, 2, 3, 4, 5, 5½, 6, 7, 8, 9, 10, and 11 of the series of instructions tendered to the court by the plaintiff, and given by the court to the jury at the plaintiff's request, and in giving each of said instructions." Counsel for the appellee argue that the foregoing assignments are joint, and that, if either of the instructions named therein was properly given, the error in giving any other instruction named therein would not be noticed by the court. The rule stated by counsel is correct, where the assignment is joint. *Tegarden v. Phillips*, 14 Ind. App. 27, 42 N. E. 549. But in this case the assignment is several, being made so by the closing words, "and in giving each of said instructions."

Taken as a whole, we do not believe the in-

structions given by the court stated the law unfairly to the appellant. The evidence in the cause establishes the following facts: That decedent was a man 33 years of age, in good health, intelligent, and possessed of all his faculties; that he had worked about cement mills for 10 years, and probably longer; that the greater portion of this time he was engaged in that portion of the business known as "coaling"; that he was thoroughly familiar with the duties of a coaler; that he was employed to work for appellant under a general employment to do whatever work was to be done about the mill; that it was stipulated in the contract of employment that decedent should have \$1.35 per day for work in the quarry, and \$1.75 per day for work as coaler; that during the time he was employed by appellant he ran the steam drill, and drilled, sledged, and loaded rock, headed barrels, tied sacks, drew lime, and coaled; that during the time he worked for appellant, covering about 12 months, he worked as coaler upon as many as 13 different periods of time, and received, under the contract, the stipulated coaler's wages; that while engaged in the work of coaling the kilns he received the injury from which he died; that decedent was alone when the accident occurred. The evidence further shows: That a part of the duties of the coaler was to attend to the drawing up of the car, and dumping the rock with which the car was loaded into the cement kilns. These kilns were circular in shape, built of sheet iron, and lined with fire brick, and stood five in a row. The car loaded with rock reached the top of the kilns by means of an incline, upon which there was a track for the car to run, and the incline and track began at the quarry near by, and extended to the top of, and across and over the tops of, all the cement kilns. The car, with its load, was drawn up the inclined track, and over the kilns, by a wire rope and friction pulley, controlled and operated by the crusher feeder in the crusher room, situated a short distance from the kilns. On the top of the kilns, and extending along the track upon which the car ran, was a walkway for the use of the coaler, and, in the performance of his duties, it sometimes became necessary for him to leave the walkway and cross the track. That there was a wire extending from the top of the kilns, where the coaler worked, into the crusher room, which connected with a bell which was used for giving signals between the coaler and the crusher feeder. That decedent was acquainted with the manner and mode of giving the signals, and the effect of the same. That while decedent was upon the track, and between the end of the car and the power (the car not yet having been taken back down the incline by the horse power provided therefor after the same had been unloaded), the signal was given the crusher feeder to apply the power to draw up the car. The power was applied, and the car already up was pulled off over the end of the track, and over the last kiln to the ground, thus striking de-

cedent, and inflicting injuries from which he died. The evidence shows that decedent was acquainted with his surroundings, and if, as the appellee claims, the machinery was defective, the evidence shows no such defects, and the defects claimed and pointed out in the counsel's argument were certainly such as were equally open to the observation of both master and servant. The burden of proof is upon the servant to show that he had no knowledge of any defect in the machinery or appliances with which he worked. *Railway Co. v. Wagner* (Ind. App.) 45 N. E. 76. The evidence clearly shows that the decedent was working at the time of his death in the regular line of his employment, and that in doing such work he assumed the dangers incident thereto. "The burden of proof is upon the servant to show that he had not assumed the risk of the danger." *Railway Co. v. Quinn* (Ind. App.) 43 N. E. 240. In *Power Co. v. Murphy*, 115 Ind. 566, 18 N. E. 30, Mitchell, J., says: "What he [the master] especially engages is that he will not expose the employé to danger which is not obvious, or of which the latter has no knowledge or adequate comprehension, and which is not reasonably and fairly incident to, and within the ordinary risks of, the service which he has undertaken. There is another equally well settled principle correlative to the rules which define the duties of the employer, which holds the employé to the assumption of all risks naturally and reasonably incident to the service in which he embarks, so far as the hazards of the service are obvious, and within the apprehension of a person of his experience and understanding." And if an employé voluntarily uses a defective implement, the defect being alike open and obvious to employer and employé, the employé cannot maintain an action for an injury resulting from the use of such implements.

The evidence, we think, also shows that decedent and the crusher feeder were fellow servants. There was no evidence offered to prove, or tending to prove, that the appliances used by appellant were not such as were commonly used by other mills of similar purpose, or that the appliances could have been rendered less dangerous in their operation. Nor were there any seeming defects pointed out that were not equally open and obvious to employer and employé. If decedent gave the signal to apply the power while standing upon the track, he was guilty of contributory negligence. If he gave the signal, and then stepped upon the track, he was guilty of contributory negligence. If his fellow servant (Bates) in the crusher room applied the power without the signal, or by a mistaken signal, decedent's administrator cannot recover, because decedent's death would be the result of the act of a fellow servant. It is the rule of the supreme court of this state, and of this court, that, after the circuit court has finally passed upon the verdict of the jury, all presumptions are in its favor, and this court will

not interfere unless it clearly appears that substantial justice has not been done. In reversing the cause, we do no violence to the rule. The evidence in this cause, in our opinion, does not establish the material averments of either paragraph of the complaint. The judgment is reversed, with instructions to sustain the motion for a new trial.

BLACK, J., was absent.

(164 Ill. 398)

WILSON v. TURNER et al.¹

(Supreme Court of Illinois. Nov. 10, 1896.)

MONEY HAD AND RECEIVED—WILLS—ABSOLUTE GIFT—VOID LIMITATION OVER.

1. Assumpsit for money had and received will lie against persons to whom money belonging to the estate of plaintiff's intestate has been paid over, and who are not justly entitled to retain it.

2. Testator bequeathed to his wife "one-half of all the personal property * * * not hereinbefore otherwise disposed of, which I may own or have a right to at the time of my death," and, in a subsequent clause, declared that "all the personal property hereby given my said wife absolutely, which at her death shall remain undisposed of," shall go to her nephews and nieces. Held that, as the bequest to the wife was absolute, the limitation over was void for repugnancy. 55 Ill. App. 543, reversed.

3. A devise of real estate to testator's wife for life, "she to have all the rents, issues, and profits * * * from the time of my death, for and during her natural life," gives her an absolute property in the rents, etc.; and hence a subsequent provision that whatever part thereof may remain undisposed of by the widow at her death shall go to others is void for repugnancy. 55 Ill. App. 543, reversed.

Appeal from appellate court, Third district.

Assumpsit by George H. Wilson, administrator of Nancy C. Kent, deceased, against John T. Turner and another, executors of Henry Kent, deceased. A judgment for plaintiff was reversed by the appellate court (see 55 Ill. App. 543), and plaintiff appeals. Reversed.

Govert & Pape and Patton, Hamilton & Patton, for appellant. J. F. Carrott, for appellees.

CRAIG, J. Henry Kent died, testate, in Adams county, on the 13th day of August, 1879. The provisions of his will material to be considered in the disposition of this case are as follows: "Fourth. After the payment of my said debt and funeral expenses, I give, devise, and bequeath unto my wife, Nancy C. Kent, one-half of all the personal property, money, and effects, not hereinbefore otherwise disposed of, which I may own or have a right to at the time of my death. And I also give, devise, and bequeath to my said wife the farm upon which we—my wife and myself—now reside, for and during the term of her natural life, she to have all the rents, issues, and profits growing out of or arising from the same

from the time of my death, for and during her natural life, whether such rents, issues, and profits arise from a lease now made or which may hereafter be made by me of said farm. Fifth. It is my will that the remainder of the personal property, rights, and effects of which I may die possessed, not hereinbefore disposed of, be sold by my executors, as soon as the same can conveniently be done after my death, in the manner and upon the terms hereinafter specified; and I hereby give, devise, and bequeath the proceeds of such sale, after the proper expenses thereof are paid, to my nephews and nieces. Sixth. It is my will that all the real estate of which I may die seised, as soon as can conveniently be done after the death of my said wife, be sold by my executors, as hereinafter they are directed; and I hereby authorize and empower my said wife, after the expenses necessarily incurred in said sale are paid, to dispose of one-half of the proceeds of said sale, by will, as to her may seem best. The remaining half of said proceeds of said sale I give, devise, and bequeath to my said nephews and nieces. Seventh. In case my said wife shall not make disposition of half of said proceeds of said sale of said real estate, as it is hereinabove provided that she may do, then it is my will that said proceeds of said sale, so left undisposed of, together with all the personal property hereby given my said wife absolutely, which at her death shall remain undisposed of, and also all the rents, issues, and profits of the property hereby bequeathed to her, undisposed of at the time of her death, to pass to and be divided between the nephews and nieces of my said wife, namely: * * * And I hereby constitute John T. Turner and Parden B. Grover, both of said county, executors of this, my last will and testament, hereby revoking and annulling all former wills by me made, and ratifying, publishing, and confirming this, and none others, to be my last will and testament. And I hereby authorize, empower, and direct my said executors, as soon as may conveniently be done after my death, to sell all the personal property owned by me at the time of my death, not hereinbefore specially bequeathed to my said wife and the said Edward K. Bodurtha and Henry Bodurtha, such sale to be made in the manner and after such advertisement as may seem to my said executors proper and advantageous, for the interests of my said estate, and to make distribution of the proceeds of such sale as hereinbefore provided. And I further authorize and direct my said executors, upon the death of my wife, in case she shall survive me, or as soon thereafter as practicable, to sell the real estate of which I may die seised, at public auction, upon the homestead where I now reside, first giving such notice of such sale, by advertisement, in such manner and for such time, as my said executors, in the exercise of

¹ Rehearing denied January 14, 1897.

their best judgment, shall deem best calculated to secure the most advantageous sale of my said real estate; said real estate to be offered in such parcels as shall to my said executors seem best for the interests of all concerned, the payment or payments for said real estate so sold to be made as follows, to wit: One-fourth of the purchase money to be paid cash in hand, and the remaining three-fourths to be paid in three equal installments, in one, two, and three years, respectively, from the day of such sale. Such deferred payments to be secured upon the real estate so sold, and, when the sale is made, to first pay out of the proceeds thereof all the proper and necessary expenses of said sale, and then to distribute one-half of the remainder of said proceeds to my said nephews and nieces, as hereinbefore provided; and in case my said wife shall not have disposed of the remainder of said proceeds, together with the personal property, rights, and effects of which she shall become possessed hereby, and the increase, rents, issues, and profits of property hereby bequeathed to her by will, then it is my will that the same be divided and distributed between the nephews and nieces of my said wife hereinbefore named, as indicated by the provisions of this will, by my said executors. In witness whereof, I, the said Henry Kent, have hereunto set my hand and seal, this, the thirteenth, day of January, A. D. 1876. H. Kent. [Seal.]

Turner and Grover duly qualified as executors of the will. They also, from the time of Mr. Kent's death, which occurred August 13, 1878, acted as the agents of his widow, Nancy C. Kent. They ceased to be such agents some time in the year 1891, when Frederick J. White became their successor in such agency. In settling the estate, they turned over all moneys coming to Mrs. Kent under the will to themselves, as her agents. On September 2, 1879, they turned over to themselves, as such agents, \$153.40, being a part of her widow's award. They also, with Mrs. Kent's consent, sold the whole of the personal property, and turned over to themselves, as her agents, one-half of the proceeds of said sale, as follows: First the sum of \$120, and then the sum of \$1,277.27½, making in all the sum of \$1,550.67½. During their agency, they also rented for Mrs. Kent the farm in which she had a life estate, for \$1,000 a year. Mrs. Kent did not use the whole of the proceeds of this rent, and whatever sum was not expended by her they retained, as her agents. In 1891, Frederick J. White succeeded them as agent of Mrs. Kent. At that time, Turner and Grover had in their possession moneys belonging to Mrs. Kent amounting to \$4,208.38, which they paid to White. White acted as her agent until the time of her death, renting the farm for the same rent, of \$1,000 a year. At the time of her death, which occurred May 6, 1893, he had in his hands, as her agent, the

sum of \$3,573.12. This sum he paid to Grover after Mrs. Kent's death, the latter receiving it in his capacity as executor of Henry Kent, deceased. George H. Wilson was appointed administrator of the estate of Mrs. Kent, and brought this, an action of assumpsit, against Turner and Grover, as executors of the estate of Henry Kent, to recover the moneys paid Grover by White. On a trial of the cause in the circuit court, a jury having been waived, the court rendered judgment in favor of George H. Wilson for \$1,430.67½. This judgment, on appeal to the appellate court, was reversed.

An action for money had and received will lie whenever one person has received money which, in justice, belongs to another, and which, in justice and right, should be returned. In *Allen v. Stenger*, 74 Ill. 119, in discussing this question, the court said: "Assumpsit always lies to recover money due on simple contracts. And this kind of equitable action to recover back money which ought not, in justice, to be kept, is very beneficial, and therefore much encouraged. It lies only for money which, *ex aequo et bono*, the defendant ought to refund. Chit. Cont. 474. When, therefore, according to this rule, one person obtains the money of another, which it is inequitable or unjust for him to retain, the person entitled to it may maintain an action for money had and received for its recovery. And it is not necessary that there should be an express promise, as the law implies a promise. The scope of the action has been enlarged until it embraces a great variety of cases, the usual test being: Does the money, in justice, belong to the plaintiff, and has the defendant received the money, and should he, in justice and right, return it to the plaintiff? Under the rule announced, if the money paid over to Turner and Grover, as executors of the estate of Henry Kent, deceased, belonged to the estate of Nancy C. Kent, deceased, they had no right to hold the money, and no good reason is perceived why the equitable action for money had and received was not an appropriate remedy. Whether the money which White turned over to Turner and Grover belonged to the estate of Nancy C. Kent, or to the estate of Henry Kent, deceased, depends upon the construction to be placed upon the will of Henry Kent. It will be observed that the money in question, with the exception of \$153.40, which was a part of Mrs. Kent's specific allowance, consisted of money received from a sale of one-half of the personal property of Henry Kent, deceased, and from the rent of the farm on which Mrs. Kent had an estate for life. As the rent and the personal property do not rest entirely upon the same principle, we will consider them separately. Section 4 of the will declared: "I give, devise, and bequeath unto my wife, Nancy C. Kent, one-half of all the personal property, money, and effects, not hereinbefore otherwise disposed of, which I

may own or have a right to at the time of my death. And I also give, devise, and bequeath to my said wife the farm upon which we—my wife and myself—now reside, for and during the term of her natural life, she to have all the rents, issues, and profits growing out of or arising from the same from the time of my death, for and during her natural life, whether such rents, issues, and profits arise from a lease now made or which may hereafter be made by me of said farm." By the sixth clause, the testator directed the sale of his real estate after the death of his wife, and also empowered her to dispose of one-half of the proceeds of the sale by will. Clause 7 of the will declares: "Seventh. In case my said wife shall not make disposition of half of said proceeds of said sale of said real estate, as it is hereinabove provided that she may do, then it is my will that said proceeds of said sale, so left undisposed of, together with all the personal property hereby given my said wife absolutely, which at her death shall remain undisposed of, and also all the rents, issues, and profits of the property hereby bequeathed to her, undisposed of at the time of her death, pass to and be divided between the nephews and nieces of my said wife, namely: * * *." The last clause of the will directs the executors to divide the remainder of the personal property, which shall not have been disposed of by Nancy C. Kent, among his nephews and nieces. The language of the fourth clause of the will is plain and unambiguous, and there can be no question or doubt in regard to the fact that one-half of the personal property owned by the testator was willed absolutely to Nancy C. Kent. The clause contains no condition, reservation, or restriction, but in absolute terms the property is devised. More explicit language could not have been selected by the testator to manifest an intention to confer upon and vest his wife with an absolute ownership of the personal property named in the fourth clause of the will. That the testator intended to make an absolute gift to his wife is confirmed by the language found in the seventh clause, as follows: "Together with all the personal property hereby given my said wife absolutely." The testator not only made an absolute gift, but, in a subsequent part of the will, declared that the gift was absolute. The gift being absolute, did the condition named in the seventh clause, that the property undisposed of should be divided among the nephews and nieces, have any effect upon it?

In a case of this character, we think, the law is well settled that the gift over is void. In 2 Williams, Ex'rs (7th Am. Ed.) p. 1131, the rule is stated as follows: "Another instance of a repugnant, and therefore void, condition, may be found in the doctrine that if there is an absolute bequest of property, with a proviso that, if the legatee dies without having disposed of it by will or other-

wise, his interest in it shall cease, and it shall go over to another, the gift over is void, and the legacy absolute." The rule is the same in regard to both real and personal property. If either is given absolutely, the limitation over is void. In 2 Jarm. Wills (5th Am. Ed.) p. 529, note 19, it is said: "And, in general, a gift over, by remainder or otherwise, after an absolute legacy or a devise in fee, of whatever may remain if the first legatee or devisee die without having disposed of it, is repugnant to the nature of the estate or interest first given, and void." The same rule is laid down in Massachusetts. *Ide v. Ide*, 5 Mass. 500; *Gifford v. Choate*, 100 Mass. 346. To the same effect is *Jackson v. Robins*, 16 Johns. 587, where the court said: "And we may lay it down as an incontrovertible rule that where an estate is given to a person generally or indefinitely, with a power of disposition, it carries a fee; and the only exception to the rule is where the testator gives to the first taker an estate for life only, by certain and express words, and annexes to it a power of disposal. In that particular and special case the devisee for life will not take an estate in fee, notwithstanding the distinct and naked gift of a power of disposition or reversion. This distinction is carefully marked and settled in the cases." See, also, *Van Horne v. Campbell*, 100 N. Y. 287, 3 N. E. 316, 771. To the same effect are cases in Maine. *Jones v. Bacon*, 68 Me. 34; *Pickering v. Langdon*, 22 Me. 413; *Ramsdell v. Ramsdell*, 21 Me. 288. The same rule has been declared in Iowa. Thus, in *Rona v. Meier*, 47 Iowa, 610, the court says: "It is fully settled by authority that if the first taker has the power, by the terms of the will, to dispose of the property, he must be considered the absolute owner, and any limitation over is void for repugnancy." In *re Burbank's Will*, 69 Iowa, 378, 28 N. W. 648. In *McKenzie's Appeal*, 41 Conn. 607, where a testator gave his widow certain real estate, and provided that, if any remained at her death, it should be divided equally among "my children then living," the court held that an absolute power of disposal was given to the widow, and that the gift over was void. See, also, *State v. Smith*, 52 Conn. 562. In *Wolfer v. Hemmer*, 144 Ill. 554, 33 N. E. 751, in discussion of the question, it was, among other things, said: "It is clear, then, that, the fee being devised to the wife by the express terms of the first clause, a devise over, as is claimed by the second, could only take place as an executory devise. But, as is said in 2 Redf. Wills, p. 277: 'It is a settled rule of American as well as English law that when the first devisee has the absolute right to dispose of the property in his own unlimited discretion, and not a mere power of appointment among certain specified persons or classes, an estate over is void, as being inconsistent with the first gift.'" After reciting the same rule established in Kent's Commentaries, the court said: "Numerous deci-

sions might be cited approving and following this rule, and our attention has been called to none to the contrary. It has been expressly recognized by the court in *Fairman v. Beal*, 14 Ill. 244; *Welsch v. Bank*, 94 Ill. 203; *Hamlin v. Express Co.*, 107 Ill. 448. See, also, 20 Am. & Eng. Enc. Law, 955, and numerous cases there cited. More comprehensive language to confer an unlimited discretionary power of disposition could not be commanded than was used by the testator in the second clause of this will. The wife is given 'full power to sell, mortgage, exchange, invest, and reinvest the same in the same manner I [the testator] might do if living, and to distribute the same, by gift or otherwise, among my children at any time during her life, as to her shall seem well and proper, and to appoint the same among my children by will after her decease, according to her own judgment and discretion.' The devise over would therefore, under the foregoing authorities, be void, however clearly expressed." In *Hamlin v. Express Co.*, 107 Ill. 448, the court says: "The doctrine relied upon by counsel for plaintiff in error, that, where there is a devise of an unlimited power of disposition of an estate in such manner as the devisee may think fit, a limitation over is inoperative and void, by reason of its repugnance to the principal devise, is not controverted by counsel for defendant in error, and is undoubtedly well established." In *Welsch v. Bank*, 94 Ill. 203, the court says: "We fully recognize the doctrine that where, by the terms of a will, there is given to one an unlimited power of selling or otherwise disposing of an estate, in such manner as the devisee may think fit, a limitation over is inoperative and void, by reason of its repugnance to the principal devise." We do not think this case can be controlled by *Bergan v. Cahill*, 55 Ill. 160, cited in the brief, as in that case there was not an absolute power of disposition in the party to whom the property was first devised. Here there was an absolute devise of the personal property to the wife, and the limitation over in a subsequent clause of the will was inoperative and void. This case is also distinguishable from the case of *Glover v. Condell* (opinion filed this term) 45 N. E. 173, because in that case the will conferred no power of disposition upon the first taker, while here the first taker had absolute power of disposition.

The only remaining question relates to the rents, issues, and profits arising from the farm. The fourth clause of the will, as has heretofore been seen, declares: "And I also give, devise, and bequeath to my said wife the farm upon which we—my wife and myself—now reside, for and during the term of her natural life, she to have all the rents, issues, and profits growing out of or arising from the same from the time of my death, for and during her natural life." The last part of clause 7 of the will provides that all

the personal property devised to his wife which at her death shall remain undisposed of, and also all the rents, issues, and profits of the property bequeathed to her, at the time of her death, pass to and be divided between the nephews and nieces of his wife. Under the will, the wife took a life estate in the farm, and the life estate would carry with it all rents and profits arising from the farm during the existence of the estate. Whatever rents the wife received from the farm became and were her absolute property, which she was at liberty to dispose of as she pleased. The property having been given to her coupled with the power to dispose of it as she saw proper, the condition imposed by the last part of clause 7, inconsistent with and repugnant to the gift, was void. By the limitation over, the testator undertook to take away the absolute property in the rents which had been conferred on the wife by a preceding clause in the will. That could not be done. Upon the absolute transfer of an estate, the grantor cannot, by any restrictions or limitations contained in the instrument of transfer, defeat or annul the legal consequences which the law annexes to the estate thus transferred. *Steib v. Whitehead*, 111 Ill. 249. 2 *Williams, Ex'rs* (7th Am. Ed.) p. 1129, lays down the rule as follows: "Among illegal conditions subsequent may be classed such as are repugnant. 'I find it laid down as a rule long ago established,' said Lord Alvanley in *Bradley v. Peixoto* [3 Ves. 325], 'that where a gift is with a condition inconsistent with and repugnant to such gift, the condition is wholly void.' * * * 'If property,' says Lord Eldon in *Brandon v. Robinson* [18 Ves. 433], 'is given to a man for his life, the donor cannot take away the incidents to a life estate.'" The same rule is laid down in 2 *Woerner, Adm'n*, p. 954: "A condition which is inconsistent with the estate to which it is attached is void, and the estate devised or bequeathed passes absolutely." Likewise, in 2 *Jarm. Wills* (4th Am. Ed.) p. 527: "Conditions that are repugnant to the estate are absolutely void. Thus, if a testator, after giving an estate in fee, proceeds to qualify the devise by a proviso or condition which is of such a nature as to be incompatible with the absolute dominion or ownership, the condition is nugatory, and the estate absolute," etc. The doctrine is enunciated in 2 *Redf. Wills* (2d Ed.) 287: "It seems to be a universal rule that, where conditions are repugnant to the estate to which they are annexed, they are absolutely void."

We think, under the authorities, it is clear that the will gave to the wife an absolute estate in the personal property and the rents of the farm, and upon her death whatever remained of the proceeds of either belonged to her estate. The judgment of the appellate court will be reversed. The judgment of the circuit court will also be reversed, for the reason it was too small. The cause will be re-

manded to the circuit court for another trial in conformity to this opinion.

**PEOPLE ex rel. CANTRELL v. ST. LOUIS,
A. & T. H. R. CO.¹**

(Supreme Court of Illinois. Jan. 17, 1896.)

**MANDAMUS — RAILROAD — DUTY TO OPERATE PAS-
SENGER TRAIN.**

1. Mandamus will lie to compel a railroad to run a passenger train.

2. A railroad company running through three counties, having a population each of from 17,000 to 19,000 inhabitants, and eight towns, ranging in population from 200 to 5,000, the country being tributary to St. Louis, should be required to run a daily passenger train. The running of a passenger coach attached to a freight train is not a compliance with its duty to the public, where the revenues of the company are sufficient to pay the operating expenses of a separate train for passengers.

3. Where a railroad company operates its main line and branches (mere feeders of the main line) as one road, without attempting to keep separate accounts of each, in determining whether its revenue is sufficient to require the company to run a passenger train on one of the leased branches, the revenue of the system as a whole is to be considered, and not merely the business over such leased line.

4. In estimating the liabilities of a railroad company to determine whether its revenues are sufficient to require it to run a separate train for passengers, preferred stock is not to be considered as a debt.

Appeal from circuit court, Franklin county;
A. K. Vickers, Judge.

Petition on the relation of William S. Cantrell against the St. Louis, Alton & Terre Haute Railroad Company. From a judgment for defendant, relator appeals. Reversed.

This is a petition for a writ of mandamus in its amended form, presented in the name of the people of the state of Illinois, at the relation of William S. Cantrell, a citizen and property owner of Benton, Franklin county, Ill., as the patron of the defendant railroad company, the prayer of which petition is as follows: "That a writ of mandamus be issued, delivered to the St. Louis, Alton & Terre Haute Railroad Company, commanding it to cause to be furnished, placed, run, and operated on said railroad, extending from Eldorado to Duquoin, a daily (Sundays excepted) passenger train, each way, suitable and sufficient to carry all passengers, with their necessary baggage, in comfortable and reasonable security, and at a reasonable speed, and to operate said line of railroad from East St. Louis to Eldorado as a continuous line; and that, upon final hearing hereof, such further order be made in the premises as to the court shall seem meet and proper." The petition was answered by the respondent railroad company. A replication was filed to the answer, exceptas to one paragraph thereof which was demurred to, and the demurrer sustained. A jury was waived, and the cause submitted

by agreement for trial before the circuit judge without a jury. The trial judge rendered judgment refusing the prayer of the petition, and dismissing the same, from which judgment the present appeal is prosecuted. A large amount of testimony, oral and documentary, was introduced upon the hearing, including reports of the respondent company to the railroad and warehouse commissioners, the charter of the Belleville & Eldorado Railroad Company (as found on pages 485, 486, and 487 of the Private Laws of 1861), and the lease executed by the Belleville & Eldorado Railroad Company to the respondent in 1880. The petition avers that the railroad of the Belleville & Eldorado Railroad Company is the only railroad in Franklin county, and also contains the following averments: "That on or about December 1, 1893, numerous citizens of said towns of Benton, Eldorado, Christopher, Mulkeytown, Thompsonville, and other towns along said line of railroad, presented petitions to the said railroad and warehouse commission of the state of Illinois, complaining of the train service on said railroad extending from Eldorado to Duquoin, and setting forth the alleged facts relating thereto, and asking said commission to take cognizance of their complaint, and by appropriate order or orders, or by appropriate suit or suits, compel the said St. Louis, Alton & Terre Haute Railroad Company to run its trains through from St. Louis to Eldorado as one continuous line, and run a daily through passenger train, with appropriate connections with other trains at Duquoin and Eldorado, and give the public such further relief in the way of train service on said railroad as justice and right demand. That thereupon said commission gave notice to said railroad company of the presentation of said petition, and such action was thereupon afterwards taken and had by said commission that on January 9 and 10, 1894, a hearing was had at Benton on said petition, at which time and place said railroad company was present, and represented by its president, Hon. George W. Parker, and its counsel, F. M. Youngblood, and said petitioners were represented by Hons. C. H. Layman and D. R. Webb; and thereupon, after hearing and considering the evidence introduced by the petitioners and said company, the said commission made and promulgated the following order or recommendation in the premises, to wit: 'We therefore recommend to you, the St. Louis, Alton & Terre Haute Railroad Company, that you, without delay, cause to be placed and operated on the Belleville & Eldorado Division of your road, in addition to the mixed train now being operated by you on said line, a daily passenger train, suitable and sufficient to carry all passengers with their necessary baggage, in comfort and security, and at a reasonable speed, and that you operate your said railroad from East St. Louis to Eldorado as a continuous line, so that persons desiring to leave Eldorado and intermediate points in the morning of each

¹ Rehearing denied January 18, 1897.

day (Sunday excepted) may be able to go on said railroad to East St. Louis, and return the same day.' That said St. Louis, Alton & Terre Haute Railroad Company has wholly neglected to comply with said order, or follow said recommendation, but, on the contrary, refuses to comply therewith, and yet continues to run its said train as before, and still fails to accommodate the traveling public." Such other facts, set up in the pleadings and developed by the proofs, as are necessary to an understanding of the questions involved, are sufficiently stated in the opinion.

M. T. Moloney, Atty. Gen., H. J. Hamlin, and A. W. O'Hara, for appellant. J. H. Mulkey and F. M. Youngblood, for appellee.

MAGRUDER, J. (after stating the facts). The main question in this case is whether a railroad company can be compelled by mandamus to run a passenger train. The appellee operates about 50 miles of railroad running from Duquoin easterly to Eldorado, which it leased in 1880, for 985 years, from the Belleville & Eldorado Railroad Company; and it is conceded that it runs no passenger train—that is, no train for passenger service, exclusively—over this distance of 50 miles, between Duquoin and Eldorado. On Sunday and Monday evenings, a train consisting of a baggage car and one passenger coach runs from Duquoin easterly to Benton, about 18 miles, returning from Benton to Duquoin the next morning, about 4 o'clock; but the only train which runs the whole length of the branch road, between Duquoin and Eldorado, is what is called a "mixed train," consisting of coal, stock, and freight cars, to which are attached a combination car and passenger coach. This mixed train leaves Duquoin daily at 11 o'clock a. m. for Eldorado, and, returning in the afternoon, arrives at Duquoin at 7:10 p. m. Appellee runs through trains from St. Louis, by way of Belleville, to Duquoin; but the mixed train in question does not connect at Duquoin with any of the passenger trains run by appellee from Duquoin to St. Louis, nor at Eldorado with any of the trains upon the Cairo Division of the Cleveland, Cincinnati, Chicago & St. Louis Railroad, or the Shawneetown Branch of the Louisville & Nashville Railroad. Passengers for St. Louis, or points west of Duquoin, must remain over night at Duquoin, and take the train next morning, at 4:50 o'clock. This mixed train carries freight, express, baggage, stock, mail, and passengers. On account of the freight carried and handled, it is a slow train, being often behind its schedule time from 20 minutes to 3 hours. During the busy shipping season, it often has to be cut in two on the grades, one part going forward to a switch, and returning for the balance of the train, including the passenger coach. At Eldorado the entire train is often

pushed in front of the engine down to the depot. When the mixed train goes east, the passenger coach, which is used by all classes of passengers, both ladies and gentlemen, is between the freight cars and the combination coach. The mixed train has two brakemen, is operated by hand brakes, and has no air brakes. The regular passenger trains on the other parts of the road are equipped with air brakes operated from the engine. The roadbed is a dirt ballast, and the passenger car on the mixed train is dirtier and dustier than the passenger cars on the west end of the road. There is often an odor from the stock cars ahead of the passenger coach. It is bad for ladies and children. The stock cars are frequently filthy and offensive, from the manure in them. The train is often delayed at the station, to take on and deliver freight. It is subject to jars that stagger the passengers. Much switching is done, and, when switching is done at a station, the passenger coach is usually uncoupled; and passengers must wait while the cars are loaded with stock, cattle, and hogs, and are often inconvenienced by the gang planks thrown out. The country through which the mixed train passes is a farming country, and well settled. The products shipped are mostly grain, mill products, and live stock, and the freight distributed along the line is merchandise. St. Louis seems to be the commercial center for that part of the state. Of the counties through which the mixed train runs, Franklin county has a population of 17,138, Perry county 17,259, Saline county 19,342; and, of the towns along the line of the road, Duquoin has a population of about 5,000, Benton 1,200, Eldorado 2,000, Galatia 800, Thompsonville 500, Raleigh 500, Christopher 200, Mulkeytown 200. Improved lands in that section are worth from \$20 to \$50 per acre. Such being the character of the mixed train, and such being the character and population of the territory through which the mixed train runs, ought the appellee to be required to furnish the people with a passenger train? The question is not whether appellee should run more than one train, but the question is whether it does all that it is required to do when it runs a passenger coach attached to a freight train, or whether it is its duty to run one or more passenger coaches, separate and disconnected from freight cars, for the accommodation of passengers only, and not of passengers in connection with shippers.

When it is sought by mandamus to compel a railroad company to do any act in relation to the equipment and operation of its road, the courts, as a general rule, will not interfere with its management of its railway in these respects, except where the act sought to be enforced is specific, and the right to its performance in the manner proposed is clear and undoubted. *People v. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. 857.

Whether or not the people are here entitled to relief by mandamus against the appellee company must be determined by the answer to the inquiry whether the act sought to be enforced is specific, and whether the right to a performance of that act is clear and undoubted. There can be no doubt about the clear legal duty of the appellee to operate the railroad from Duquoin to Eldorado, leased by it from the Belleville & Eldorado Railroad Company. The act of February 12, 1855, to enable railroad companies to enter into corporate contracts, and to borrow money, authorized railroad companies organized under the laws of Illinois to make contracts and arrangements with each other, and with railroad corporations of other states, for leasing or running their roads, or any part thereof. 2 Starr & C. Ann. St. p. 1921. In case of a lease by one railroad company to another, the lessee assumes the rights, franchises, and obligations contained in the charter of the lessor, and must conform to the requirement of said charter. 1 Ror. R. R. p. 610; 19 Am. & Eng. Enc. Law, p. 897. "And, when one company leases its road to another, the lessee must, in operating it, be governed by the charter of the lessor." City of Chicago v. Evans, 24 Ill. 52. When, therefore, the appellee leased the road in question from the Belleville & Eldorado Railroad Company, it assumed the charter obligations of the latter company, and agreed to conform to its charter requirements. Section 1 of the act to incorporate the Belleville & Eldorado Railroad Company, in force February 22, 1861, declares that the company "shall possess all the powers * * * necessary to carry into effect the objects and purposes of this act, which is to lay out, build, construct, equip, complete, and continue in operation a railroad from Belleville, in St. Clair county, by way of Benton, in Franklin county, and Galatia and Raleigh, and to Eldorado, in Saline county; * * * and they may make connections with any railroad on the line, or at either terminus, on such terms as may be mutually agreed upon between the parties." Priv. Laws Ill. 1861, p. 485. Section 4 of the act provides that "said company shall have power, when, in their discretion, they have a sufficient amount of capital stock subscribed, to proceed to lay out, locate, construct, build, equip complete and operate their road." Id. p. 486. It will be noticed that the charter of the Belleville & Eldorado Railroad Company provides for the construction, equipment, and operation of a railroad "from Belleville, in St. Clair county, by way of Benton, in Franklin county, and Galatia and Raleigh, and to Eldorado, in Saline county." As matter of fact, however, the Belleville & Eldorado Railroad Company never constructed a road from Belleville to Eldorado. It constructed a road about 50 miles long, from Eldorado to Duquoin, in Perry county, the latter place being distant more than 56 miles from Belleville; and as soon as the road be-

tween Duquoin and Eldorado was finished, and on July 1, 1880, it leased the latter road to appellee. At that time, appellee owned and operated a railroad running from East St. Louis, opposite St. Louis, to Belleville, a distance of a little more than 14 miles, and, prior to that time, had leased for a long term of years the railroad of the Belleville & Southern Illinois Railroad Company, running from Belleville to Duquoin, and was then operating the entire line from East St. Louis to Duquoin as one road, commonly known as the "Calro Short Line." The lease made on July 1, 1880, by the Belleville & Eldorado Railroad Company to appellee, recites the ownership by appellee of the road from East St. Louis to Belleville, and its lease of the road from Belleville to Duquoin, and its operation of the two as one line, and also recites the completion of the road from Duquoin to Eldorado, and that it is deemed and considered for the mutual interest of the parties hereto [the Belleville & Eldorado Railroad Company and appellee] that said roads [the three roads] should be placed under the same management and operated as one line; and, to that end, the party of the second part [appellee] has agreed to lease from the party of the first part [the Belleville & Eldorado Railroad Company] its railroad from Duquoin to Eldorado," etc. It thus appeared from the recitals of the lease of July 1, 1880, that the object of that lease was to so connect the road from Duquoin to Eldorado with the roads from East St. Louis to Belleville, and from Belleville to Duquoin, as that the three roads could be operated as one line. And so, although the Belleville & Eldorado Railroad Company did not construct a road from Belleville to Eldorado, as its charter provided, yet, by the connection thus made with the road leased by appellee which ran from Belleville to Duquoin, it became a part of a continuous road from Belleville to Eldorado, the terminal points named in its charter. As the Belleville & Eldorado Railroad Company, the lessor company, was bound to equip and operate its road, the appellee, the lessee company, was also bound to equip and operate the leased road. "Equipment," as applied to railroads, has been defined to be "the necessary adjuncts of a railway, as cars, locomotives." Rubey v. Mining Co., 21 Mo. App. 159; 6 Am. & Eng. Enc. Law, p. 655, note 6. Section 12 of article 11 of the constitution says: "Railroads heretofore constructed, or that may hereafter be constructed, in this state, are hereby declared public highways, and shall be free to all persons for the transportation of their persons and property thereon, under such regulations as may be prescribed by law." 1 Starr & C. Ann. St. p. 163. It follows that the obligation to equip and operate and continue in operation the leased road involved the obligation to furnish and use cars and locomotives for the transportation of persons and property; that is to say, for the carriage of both passengers and freight.

Section 22 of the act of this state in relation to fencing and operating railroads provides (2 Starr & C. Ann. St. p. 1940) that "every railroad corporation in the state shall furnish, start and run cars for the transportation of such passengers and property as shall, within a reasonable time previous thereto, be ready or be offered for transportation at the several stations on its railroad and at the junction of other railroads, and at such stopping places as may be established for receiving and discharging way passengers and freight." It is claimed, however, in behalf of appellee, that, while it is obliged to furnish cars for the carriage of passengers, yet it is not necessarily obliged to carry passengers upon a separate passenger train, and that it has the right to exercise its own discretion as to the manner of their transportation. The discretionary power of railroad companies in this respect is subject always to the condition that there is no statutory provision limiting and restricting such power, and that its exercise is not opposed to the terms of the charter. *People v. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. 857; *Mobile & O. R. Co. v. People*, 132 Ill. 559, 24 N. E. 643; 2 *Mor. Priv. Corp.* (2d Ed.) § 1119. This discretion is also subject to the condition that it must be exercised in good faith, and with a due regard to the necessities and convenience of the public. *People v. Chicago & A. R. Co.*, supra.

Counsel for appellant rely upon articles 1 and 6 of the lease of July 1, 1880. Article 1 is as follows: "The party of the second part shall have, possess, and operate the said railroad from Duquoin to Eldorado for and during the term hereinbefore mentioned, upon the terms and conditions herein set forth, and shall at all times during the continuance of this lease furnish all necessary rolling stock and equipment for the complete and perfect operation of the said demised railroad." And in the sixth article the defendant company covenants as follows: "The said party of the second part shall and will, during the term hereby granted, operate, maintain, and keep in good repair, the railroad and premises hereby demised, and shall from time to time make all necessary additions and improvements, and shall and will indemnify and save harmless the said party of the first part, its successors and assigns, from and against all costs, charges, and expenses, damages, and liabilities whatsoever growing out of the maintaining, repairing, operating, or using of the said road." Thus, by the terms of the agreement made for the connection of the road of the Belleville & Eldorado Railroad Company, with the roads of appellee, appellee was to operate the three roads from East St. Louis to Eldorado as one road, and to "furnish all necessary rolling stock and equipment for the complete and perfect operation" of the road from Duquoin to Eldorado.

But independently of the provisions of the

lease, which was a contract between the lessor and the lessee companies, the right of the people to insist upon the running of a separate passenger train is implied from the charter obligation to equip and operate the road. Inasmuch as a railroad company is bound to carry both passengers and freight, the obligation of the appellee required it to furnish all necessary rolling stock and equipment for the suitable and proper operation of the railroad as a carrier of passengers, no less than as a carrier of freight. It cannot be said that the carriage of passengers in a car attached to a freight train is a suitable and proper operation of the railroad, so far as the carriage of passengers is concerned. The transportation of passengers on a freight train or on a mixed train is subordinate to the transportation of freight, a mere incident to the business of carrying freight. To furnish such cars as are necessary for the suitable and proper carriage of passengers involves the necessity of adopting that mode of carrying passengers which is best adapted to secure their safety and convenience. This can be accomplished better by operating a separate passenger train than by operating a mixed train; that is to say, the duty of furnishing all necessary rolling stock and equipment for the suitable and proper operation of a railroad carrying passengers involves and implies the duty of furnishing a train, which shall be run for the purpose of transporting passengers only, and not freight and passengers together. Railroad corporations, engaged in the transportation of passengers for hire or reward, are bound to the exercise of the highest degree of care and diligence in the conduct of their business. "Their duties and liabilities in this respect extend as well to the appliances used as to the manner of using them." 2 *Ror. R. R.* pp. 948, 949. But there are necessary differences between passenger and freight trains. 2 *Wood, R. R.* p. 1288. These differences need not be here noticed, but are well understood and easily recognized. Railroad companies are not required to adopt, on freight or mixed trains, all the appliances which they use on passenger trains, but they are merely required to use the highest degree of care consistent with the practical operation of such trains. *Oviatt v. Railway Co.*, 43 *Minn.* 300, 45 *N. W.* 436; *Missouri Pac. R. Co. v. Holcomb* (*Kan. Sup.*) 44 *Am. & Eng. R. Cas.* 311, note (24 *Pac.* 467). When passengers are carried on freight or mixed trains, the care required by the company, so far as such appliances are concerned, is such as the nature of the train permits. 2 *Wood, R. R.* p. 1288. And, when a passenger rides on a freight or mixed train, he takes upon himself the increased risk and lessened comfort which is incident thereto; nor has he the legal right to demand any other care in the management of such a train than is requisite for that kind of a train, or any other security than such a mode of conveyance affords. 2 *Ror. R. R.* p.

947; Railroad Co. v. Fay, 16 Ill. 568; Railroad Co. v. Hazzard, 26 Ill. 373.

It follows that, when the only trains operated by a railroad company is a mixed train, passengers, being unable to ride upon any other kind of train, are forced to incur risk and submit to inconvenience which do not exist on a separate passenger train. Hence the operation of a railroad with a mixed train only is inconsistent with the duty of furnishing such cars and locomotives as are necessary to the suitable and proper operation of the railroad when engaged in the passenger traffic. We are not unmindful of the fact that, within certain limits, a discretion may be exercised as to what rolling stock and equipment are necessary for the suitable and perfect operation of a railroad carrying passengers. Where the mode of carrying passengers is separate from the mode of carrying freight, the legitimate exercise of discretion may begin. What we hold is that there cannot be a suitable and proper operation of the railroad as a carrier of passengers where the car in which it carries its passengers is part of a freight train, because freight trains are inferior to passenger trains, and travel in them attended with less comfort, convenience, and safety than travel in passenger trains. The inferiority of a freight train to a passenger train as a mode of carrying passengers is so obvious that no man of ordinary understanding would regard the use of a freight train for the purpose of hauling a passenger car as a suitable and proper operation of a railroad in the matter of transporting passengers. We are therefore of the opinion that the act here sought to be enforced—the running of a passenger car or cars separately from freight cars—is sufficiently specific to be enforced by mandamus, and the right to compel its performance is clear and undoubted, unless such right is changed or modified by the decision of the question whether the expense of running such passenger car or train would be justified by the amount of business over the particular line of road running from Duquoin to Eldorado.

Counsel for appellee insist that a railroad company is not bound to provide a separate passenger train when its business is not sufficient to warrant it in doing so. In *Ohio & M. Ry. Co. v. People*, 120 Ill. 200, 11 N. E. 347, where the lower court awarded a mandamus upon a petition to compel a railroad company to repair and improve generally a certain portion of its road, and to increase the passenger trains thereon, we reversed the judgment, and held that the writ was improperly issued, upon the grounds that the business of the road did not pay the current expenses,—that the defendant was unable to perform the acts sought to be enforced,—and that the requirement made upon the defendant was too general, and involved too much discretion as to details; but it was there said that a railroad company could be compelled,

by mandamus, to perform any specific duty which it owed to the public as owner or operator of its road, such as operating its road as a continuous line, and running daily trains; and the following language was used: "It is believed, however, no case can be found which, in the absence of a statutory requirement, has gone to the length of holding that a railway company may be compelled, by mandamus, to increase the number of trains on its road, or to run daily a particular number of trains over its road; and we are satisfied there is no common-law authority for making such an order. Of course, where the charter of the company expressly requires that not less than a given number of trains shall be run daily, the company may be compelled by mandamus to perform this, like any other specific duty enjoined by its charter, or by other statutory provision. * * * A company that runs a daily passenger train each way over a road which cannot, with proper management, be made to keep up repairs and pay running expenses, certainly does as much as the law requires of it, so far as passenger trains are concerned." There are several marked differences between the *Ohio & M. Ry. Co. Case* and the case at bar. Here the appellee does not run a daily passenger train each way over the road from Duquoin to Eldorado. Here the charter enjoins a duty which cannot be regarded as otherwise than specific, in view of the considerations already presented. Here it cannot be said that the appellee is financially unable to discharge the duty imposed upon it by the law, and which it owes to the public. The learned circuit judge before whom this case was tried below says, in his decision of it, that "the defendant railroad company is solvent, and in a prosperous condition, its net earnings last year being over \$600,000,—a net income of about \$3,000 per mile of road." After a careful examination, we are satisfied that the statement thus made is sustained by the evidence. When, however, it is said that "the defendant railroad company" has a net yearly income of some \$600,000, the reference is to the defendant railroad company, of its branches or leased roads, as well as the main stem. So far as appears from this record, the main road, owned by appellee, and operated under its own charter, is the short line running from St. Louis to Belleville, besides the leased roads running from Belleville to Duquoin, and Duquoin to Eldorado. Appellee also operates three other roads leased by it for long terms of years, to wit: The Belleville & Carondelet Railroad, a short road about 17 miles long, running west from Belleville to East Carondelet, on the Mississippi river; the St. Louis Southern Railroad, about 46 miles long, which taps the said leased road that runs from Belleville to Duquoin, at Pinkneyville, about 10 miles east or northeast from Duquoin, and runs from Pinkneyville to Marlon; and the Chi-

cago, St. Louis & Paducah Railway, about 52 miles long, running from Marion to Brooklyn, on the Ohio river. The Belleville & Carondelet road was not leased by appellee until June 1, 1893, and therefore but little consideration can be given to it in making up the estimates of earnings and expenses, as found in the record. The large net income referred to is based mainly upon the earnings of the other five roads already mentioned. It is said that the earnings of the Belleville & Eldorado Railroad, running from Duquoin to Eldorado, when that road is taken by itself, and considered separately, are not sufficient to justify the expense of running a separate passenger train from Duquoin to Eldorado. But why should this branch be considered separately and by itself? Appellee operates its main road and its leased branches as one system, and, as thus operated, the main road and its connections or branches yield the net yearly income of about \$600,000, already referred to. All the divisions, which are entirely within the boundaries of the state of Illinois, are mere feeders of the main road running from East St. Louis to Belleville, which is also in Illinois; and all the leased roads above mentioned, except that running from East Carondelet, are feeders of the road running from Belleville to Duquoin. The latter road and the Belleville & Eldorado Railroad are required, by the charter of the Belleville & Eldorado Railroad Company, and by the terms of its lease to or agreement with appellee, to be operated as one line; and such operation as one continuous line is merely the carrying out of the original intention of said charter, which provided for the operation of one continuous line from Belleville to Eldorado. It is no more proper to select the 50 miles from Duquoin to Eldorado of this compact network of roads, all operated under one system, and all contributing to the support of each other, as being deficient in the profits necessary to justify a reasonably safe and convenient operation of passenger traffic, than it would be to select any other portion of the line running from East St. Louis to Duquoin, and charge that portion with being deficient in such profits.

If it be admitted that a railroad company is not bound to run a separate passenger train when its business is not sufficient to warrant it in doing so, we are confronted at this point with the question whether this doctrine refers to the business done by the main road and other roads leased by it and connected with it, all of which are operated, or are required to be operated, as one line, or whether it can be made to refer to a small part of the continuous line or system which happens to run through a section of country, where the freight is not so much, and the passengers are not so many, as is the case on some other part of the line. We are of the opinion that

the whole business of the various parts operated as one line should be taken into consideration where the circumstances are such as are revealed by this record. The duty required of a railroad company in the matter of transporting passengers is the duty to meet and supply the public wants. These wants are measured by the business actually done, or what it could be clearly shown would be done if increased facilities were granted. That there is here a public demand for passenger service is shown by the fact that a passenger car is attached to a freight train, and that passengers are invited to ride, and do ride, upon this mixed train. It is not contended that appellee is not abundantly able, out of the earnings realized by it from the system controlled by it, to pay the expense of running a passenger car separately from freight cars over the Belleville & Eldorado Railroad, and thereby save the travelling public from the increased danger and inconvenience of taking passage on a freight train. Nor does it appear that such expense could not be easily met by the earnings of the line running from East St. Louis to Eldorado, by way of Duquoin. The following language, used by the supreme court of the United States in *St. John v. Erie Ry. Co.*, 22 Wall. 136, is applicable here: "The business of the road was a unit. If it had been disintegrated, as proposed by complainant, we apprehend it would have been found that the co-relations of the main stem and the branches were such, and that the expenses and charges incident to the entire business, and to those of the several parts, were so interwoven and blended, that an accurate ascertainment of the net profit of the main line, and any of the auxiliaries taken separately from the rest, would have been impracticable. An ancillary road may be short, and yield but little income; yet by reason of its reaching to coal fields, or from other local causes, its contributions to other roads of the series may be very large and profitable. Whether, in this case, the partial computation insisted upon could or could not have been made, the process was one upon which the company was neither bound nor had the right to enter." The reports made by appellee to the railroad and warehouse commissioners for the years 1891, 1892, and 1893 show that it has never kept a separate account of the actual earnings or expenditures of the road from Duquoin to Eldorado, but has treated the line from East St. Louis to Eldorado as one continuous line, making no difference in its accounts between the division from Duquoin to Eldorado and any other portion of the road.

In estimating the liabilities of the Belleville & Eldorado Railroad Company, certain indebtedness, which is in the nature of preferred stock, is charged up as a liability, in the accounts produced, to show that the ob-

ligations of appellee are such as to relieve it from the duty of operating the passenger train asked for. This is manifestly improper, because guaranteed or preferred stock is but a dividend, and not a debt, and the holder of a certificate for such stock can have no action against the company as for a debt, but his right is to a dividend. *Taft v. Railroad Co.*, 8 R. I. 310; *St. John v. Erie Ry. Co.*, supra; 1 Ror. R. R. p. 167. The object of incorporating railroad companies is to secure to the public increased facilities of transit from point to point, and an improved mode of carrying persons and property. Their public character is apparent from the fact that they are clothed with the power of taking private property, through the exercise of the right of eminent domain. Prior to the adoption of the present constitution, municipal corporations were authorized to aid in the construction of railroads by subscription for their stock. As matter of fact, Franklin county, through which the Belleville & Eldorado Railroad passes, subscribed \$150,000 to its construction, of which indebtedness \$37,000 is still outstanding. Railroads are creatures of the law, and are intrusted with the exercise of these sovereign powers to promote the public interest, and are therefore bound to conduct their affairs in furtherance of the public objects of their creation. The interest of stockholders in their profits is secondary, and, in the main, subsidiary to the interest of the public. It is in view of their public character that the courts are authorized to determine and enforce the public duties enjoined upon them. The duties which they owe to the state and the general public cannot be shirked or evaded. 1 Wood, R. R. p. 12; *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269. We do not think that there is here such insufficiency of business or profits as to present valid defense to the application of the people. The writ of mandamus should issue as prayed for. The judgment of the circuit court is reversed, and the cause is remanded to that court, with directions to enter a judgment awarding the writ in accordance with the prayer of the petition. Reversed and remanded, with directions.

(162 Ill. 138)

PEOPLE ex rel. ATTORNEY GENERAL v.
KIRK et al., Commissioners.¹

(Supreme Court of Illinois. June 11, 1896.)

OWNERSHIP OF LANDS UNDER THE GREAT LAKES—
CONSTITUTIONAL LAW—TITLE OF ACT—EXTENSION
OF LAKE SHORE DRIVEWAY—POWER OF
PARK COMMISSIONERS TO CONTRACT WITH SHORE
OWNERS.

1. Title to and dominion over lands beneath the navigable waters of the great lakes are in the states, respectively, within whose boundaries such lands are located, each state holding the fee thereof in trust for the people for the purposes of navigation and fishing.

¹ Rehearing denied.

2. Act June 4, 1889, authorizing the board of commissioners for Lincoln Park, in the city of Chicago, to extend its driveway over and upon the bed of Lake Michigan, and to sell and convey to the adjoining shore owners the submerged lands which might be reclaimed in extending such driveway, was a valid exercise of legislative discretion, since it did not interfere with the rights of navigation and fishing.

3. Act June 4, 1889, entitled "An act to enable park commissioners having control of any boulevard or driveway bordering upon any public waters of the state to extend the same" (providing for the extension of the driveway over and upon the bed of such waters, and for an estimate of cost, and the consent of the owners of, at least, two-thirds of the water frontage, and authorizing the board to contract for the construction of the extension, and to sell and convey the submerged lands lying between the shore and the inner line of the driveway, for the purpose of defraying the cost of the work), did not violate the constitutional requirement that every act shall embrace but one subject, which shall be expressed in the title.

4. Since such act did not attempt to locate the proposed extension, but merely provided that it should be over and upon Lake Michigan, the fact that the new driveway is not joined to the end of the original Lake Shore drive, and does not run in the same direction, is immaterial.

5. Act June 4, 1889, authorizing the board of commissioners for Lincoln Park, in the city of Chicago, to extend its driveway over and upon the bed of Lake Michigan, to contract for the construction of the extension, and to sell and convey to the adjoining shore owners the submerged lands between the shore and the inner line of the driveway, for the purpose of defraying the cost of the work, did not require the board to sell for cash, but authorized it to make a contract whereby the shore owners should pay part cash, and the balance in constructing the proposed improvement in front of their premises.

Appeal from circuit court, Cook county; Thomas G. Windes, Judge.

Information by the attorney general of Illinois against Charles S. Kirk and others, as commissioners of Lincoln Park, Chicago, and certain owners of land bordering on Lake Michigan, to cancel contracts entered into between said commissioners and property owners for the extension of the Lake Shore driveway. From a judgment for defendants, relator appeals. Affirmed.

This was an information brought by the attorney general against the commissioners of Lincoln Park and the owners of the land adjacent to the shore of Lake Michigan, between Ohio street and Oak street, in the city of Chicago, for the purpose of canceling certain contracts entered into between said park commissioners and said property owners for the extension of the Lake Shore drive from Oak street to Ohio street, entered into under an act of the legislature of the state of Illinois passed in the year 1889, and for the purpose of having removed the filling, breakwaters, and extension of the drive already made under said contracts. The contracts in question bear date the 22d day of June, 1891, and provide for the completion of the work called for by the contracts during the year 1893. At the date of the passage of the act of the legislature in question, in the

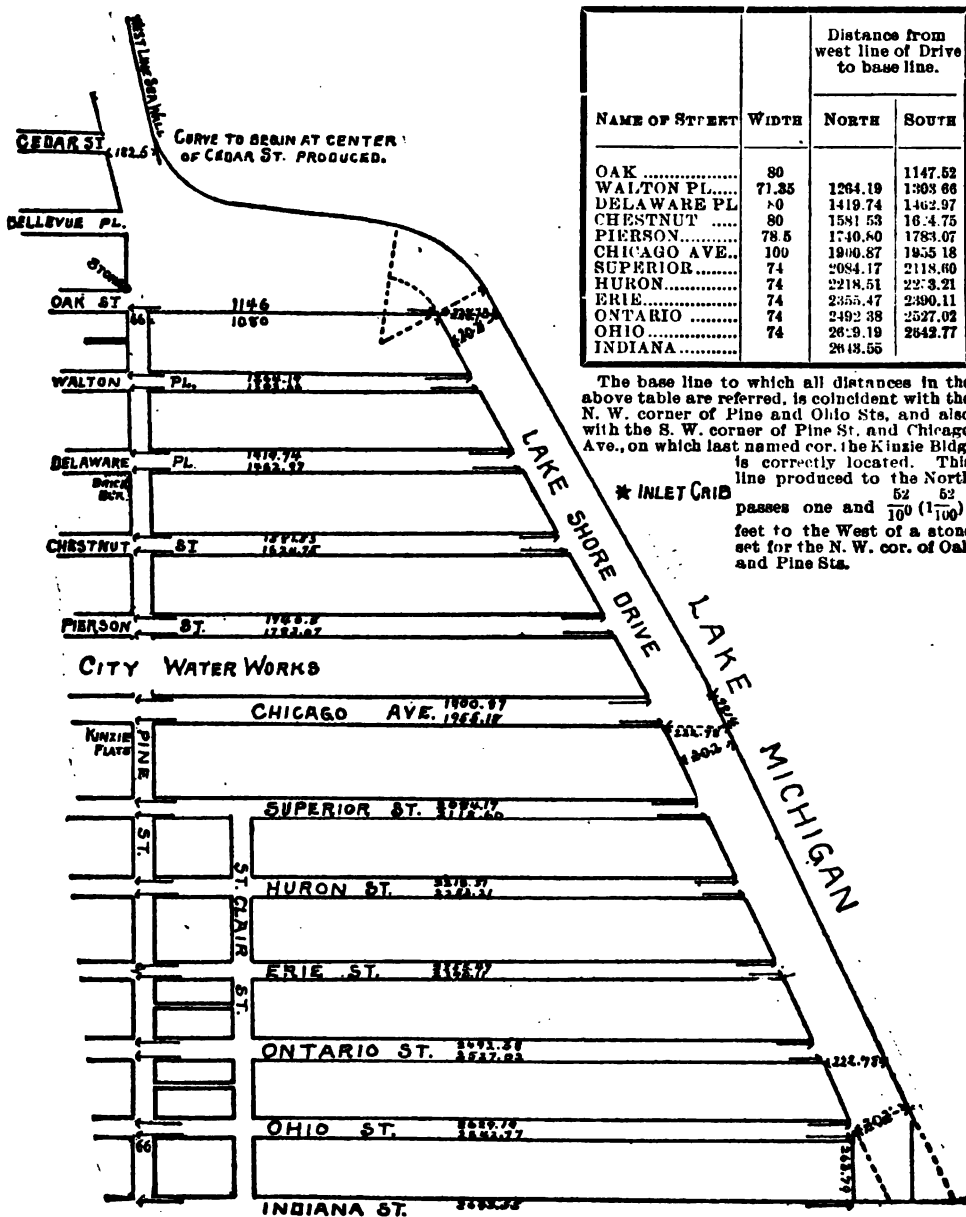
year 1889, a drive had already been constructed by the park commissioners from the south line of Lincoln Park, at North avenue, to Oak street, over the bed of Lake Michigan, a short distance from the shore, and the shore owners had filled out and improved their property to the inner edge of said Lake Shore drive. In like manner, Lincoln Park had been enlarged by the extension of the Lake Shore drive north from North avenue, over the waters of Lake Michigan, and the filling in of the submerged lands lying between such drive and the original lake shore, excepting such portions thereof as were set apart for a basin to be used by boats. Section 1 of the act provided: "That every board of park commissioners existing under the laws of this state, that now has, or may hereafter have, control over any driveway or boulevard connecting with any public park under the control of such park board, and bordering upon any public waters in this state, shall have power, subject to the limitations in this act contained, to extend such boulevard or driveway, of the width of not more than two hundred feet over and upon the bed of such public waters: provided, however, that no such boulevard or driveway shall be extended under the provisions of this act in such a manner as to interfere with the navigations of such public waters for the purposes of commerce, and that the lands adjacent to such public waters and connected with the termini of such boulevard or driveway as extended under the provisions of this act, shall lie within the district or territory, the property of which shall be taxable for the maintenance of the parks under the control of such board." Section 2: "Whenever such board of park commissioners shall determine to extend any such boulevard or driveway under this act, said board shall prepare a plan of such proposed extension, and make an estimate of the cost thereof, and shall obtain the consent in writing of the owners of at least two-thirds of the frontage of all the lands not appropriated to or held for public use abutting on such public waters in front of which it is proposed to extend such boulevard or driveway for the making of such extension, and shall also obtain the consent of the supervisor and assessor, corporate authorities of the town or towns in which the lands abutting upon such public waters in front of such proposed extension may lie, to the making of such extension. The riparian or other rights of the owners of lands on the shore adjoining the waters in which it is proposed to construct such extension, the said board of park commissioners may acquire by contract with or deeds from any such owner; and in case of inability to agree with any such owner, proceedings may be had to condemn such rights according to the provisions of article 9 of an act entitled 'An act to provide

for the incorporation of cities and villages,' approved April 10, 1872, and the amendments thereof." Section 3: "Upon complying with section 2 of this act, said board shall have power to contract in writing with any person or persons for the construction of such extension of such boulevard or driveway, according to such plan, and under the supervision of said board, and, in all cases where any boulevard or driveway is extended under the provisions hereof, the submerged lands lying between the shore of such public waters and the inner line of the extension of such boulevard or driveway shall be appropriated by the board of park commissioners to the purpose of defraying the cost of such extension, and to that end such board of park commissioners are authorized to sell and convey such submerged lands in fee simple by deeds duly executed on its behalf by its president and under its corporate seal, and every deed executed in pursuance hereof shall vest a good title in the grantee to the premises intended to be conveyed thereby." Section 4: "Upon the completion of any such extension of such boulevard or driveway, the title thereto, and to the bed thereof, shall be vested in such board of park commissioners, for the purpose of a boulevard or driveway and shall become a part of the public park or parks under the control of such board, and shall thenceforth be maintained and controlled by such board in the manner provided by law for the government and maintenance of other boulevards and driveways under its control." Under this act of the legislature, the board of commissioners of Lincoln Park located its boulevard or driveway over upon Lake Michigan in such a manner that 93 acres of submerged land lying between the shore and the western boundary of the driveway were reclaimed. This large tract of reclaimed land was, under the provisions of the act, sold by the board of commissioners to the shore owners, each shore owner obtaining that portion of the reclaimed land lying opposite the tract of land by him owned. In consideration of the sale of these lands, the shore owners agreed to construct the driveway in the lake, and fill in the submerged lands between the driveway and the shore, except the commissioners agreed to build so much of the driveway as should lie north of the center line of Oak street extended, and to have the same completed by the 1st day of May, 1893; also, to build the boulevard or driveway between the center line of Pearsons street and the center line of Chicago avenue. In addition to the work agreed to be done by the shore owners, they also agreed to pay the commissioners \$100 per lineal foot of their respective frontages on Lake Michigan. The following plat, put in evidence on the trial, shows the location of the boulevard and the lands lying east of Pine street, made by its construction:

EXHIBIT C.

MAP OF THE OHIO STREET EXTENSION OF THE LAKE SHORE DRIVE.

ISHAM RANDOLPH, Consulting Engineer.



Maurice T. Moloney, Atty. Gen., T. J. Scofield, M. L. Newell, and Louis M. Greeley, for appellant. Herrick, Allen & Boyesen, Geo. W. Smith, Marston, Augur & Tuttle, Wilson, Moore & McIlvaine, and Edward O. Brown, for appellees.

CRAIG, C. J. (after stating the facts). The first ground relied upon by the people to reverse the judgment of the circuit court has been subdivided in the argument into the three following propositions: First. That the legislature of the state of Illinois has no power to alienate the submerged lands of Lake Michigan, as proposed by the act of June 4, 1889. Second. That Lake Michigan and its submerged lands (subject to the paramount right of the general government under the commerce clause of the constitution of the United States) can only be disposed of by the state of Illinois in aid of trade, commerce, and the free navigation of the same. Third. The people of the state having a common right to piscary over all the waters of the lake, the state cannot alienate the submerged lands, or any part thereof, so as to destroy such right of piscary. The law seems to be well settled in the different states that the title to and dominion over lands covered by tide waters within the boundaries of the several states belong to each state wherein they are located. The state holds the fee in trust for the public. The doctrine established in regard to lands covered by tide waters has also been held applicable to lands bounded by fresh water on our large lakes. As early as 1860 the question arose in this state in regard to the proper construction to be placed on a deed conveying lands with Lake Michigan as a boundary line; and, in disposing of the question, this court, in *Seaman v. Smith*, 24 Ill. 523, held that a grant giving the ocean or a bay as the boundary line by the common law carries it down to the ordinary high-water mark; that the point at which the tide usually ebbs and flows is the boundary of a grant to the shore; and that the rule which governed in regard to land in tide water applied to lands on our large lakes. It is there said: "A fair and reasonable construction of the language running to the lake and with the lake would mean to that place where its outer edge is usually found. * * * We are therefore of the opinion that the line at which the water usually stands when free from disturbing causes is the boundary of land in a conveyance calling for the lake as a line." Aside from the fact that the waters of our large lakes are fresh, and there is no ebb and flow of the tide, they do not differ materially from the open sea; and no reason is perceived why one rule should be applied to lands bounded by the sea, and a different rule applied to lands bordering on our great lakes. Where a navigable river is called for as a boundary line, the grantee will take to the thread of the current of the stream; but the rule that

governs our rivers has no application to our great lakes. The supreme court of the United States, in *Illinois Cent. R. Co. v. Illinois*, 146 U. S. 387, 13 Sup. Ct. 110, announced the same doctrine laid down by this court. It is there said: "We hold that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the great lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations." It is true that the state, holding the title to the lands covered by the waters of Lake Michigan does not hold such title subject to barter and sale, as does the United States its public lands; but the state holds the title in trust in its sovereign capacity for the people of the entire state, for the purposes of navigation and fishing. The governmental powers of the state over these lands cannot be relinquished or given away. The trust imposed upon the state must be kept and faithfully observed. But did the state repudiate the trust, and transcend its powers, in the enactment of the act of June 4, 1889, which authorized the board of park commissioners to extend its boulevard or driveway over and upon the bed of Lake Michigan, and sell and convey the submerged lands which might be reclaimed in extending the driveway in the lake? The extension authorized, as construed by the board of park commissioners in making the improvement, is not a matter of small moment, but, on the other hand, owing to the large amount of territory involved, and the large interest of the public in the waters of the lake, and of property owners in the lake, the proposed extension is so far-reaching in its effect as to present questions of great importance. The distances of the outer breakwater from the shore line of the lake as it existed in 1888 (being the blue-shore line, as shown on attorney general's map, Exhibit 1 to the certificate of evidence) are as follows: At the south line of Oak street, 1,340 feet; at the north line of Pearson street, 1,250 feet; at the center of Chicago avenue, 1,370 feet; at the north line of Oak street, 1,330 feet; at the north line of Indiana street, 850 feet. The entire area reclaimed or to be reclaimed from Oak street to Indiana street, taking the shore line of 1888 and the outer face of the breakwater as outer and inner boundaries, is 93.14 acres, of which 31 acres lie between the south line of Oak street and the north line of Pearson street, 10.44 acres between the north line of Pearson street and the center of Chicago avenue, and 51.70 acres between the center of Chicago avenue and the north line of Indiana street. This large tract of land, containing 93 acres, held by the state in trust for the people, is taken and transferred to the adjacent shore owners, to be by them used for such purpose as they

may think for their own personal interest. If the question of policy was one to be considered by the court in the decision of this case, we would have no hesitation in condemning the action of the legislature in passing the act, as unwise and detrimental to the best interest of the people of the state. But our legislature is chosen by the people, clothed and intrusted with power to enact laws for the people, and the propriety or impropriety of legislation is a matter solely with the legislative department of the state; and, unless an act passed by the legislature infringes upon some provision of our organic law, it is not the province of the courts to declare such legislation invalid.

The question before us is not one of policy or expediency, but it is one of power: Was the legislature clothed with power to convey reclaimed lands which were originally covered by the waters of Lake Michigan? In the Illinois Cent. R. Co. Case, *supra*, in speaking of this question of power, the court said: "The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the state. The trust with which they are held, therefore, is governmental, and cannot be alienated, except in those instances mentioned, of parcels used in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining." In the case cited, the court recognize the power of the state to convey parcels of the lands held by the state under navigable waters when such conveyance will not impair the public interest in the lands and waters remaining. In *Weber v. Harbor Com'rs*, 18 Wall. 57, where the question arose in regard to the conveyance of certain land covered by the waters of the Bay of San Francisco, the court, among other things, said: "Upon the admission of California into the Union upon equal footing with the original states, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the state, with the consequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several states, the regulation of which was vested in the general government." In *Hoboken v. Railroad Co.*, 124 U. S. 688, 8 Sup. Ct. 643, the question arose in regard to the validity of an act of the state of New Jersey, under which certain companies paid the state a certain sum of money for the privilege of filling up and reclaiming for their own use submerged land under public waters of the state in front of lands owned by said parties. The act of the legislature was sustained, and the court, among other things, said: "In the examination of the effect to

be given to the riparian laws of the state of New Jersey by the act of April 11, 1864, in connection with the supplementary act of March 31, 1869, it is to be borne in mind that the lands below high-water mark, constituting the shores and submerged lands of the navigable waters of the state, were, according to its laws, the property of the state as sovereign. Over these lands it had absolute and exclusive dominion, including the right to appropriate them to such uses as might best serve its views of the public interest, subject to the power conferred by the constitution upon congress to regulate foreign and interstate commerce." In *Shively v. Bowlby*, 152 U. S. 9, 14 Sup. Ct. 550, the correctness of the rulings of the supreme court of Oregon arose; the ruling, as given in the report of the case, being as follows: "Second. The supreme court of Oregon decided that said state was the absolute owner of all rights in front of the high land granted by the United States to said grantee, with said Columbia river as a boundary, below the meander line, out to the channel of said Columbia river, to the exclusion of all rights of the grantee aforesaid of the United States under the said act of congress of September 27, 1850. Third. The supreme court of Oregon decided that said state had the absolute power to dispose of the soil of said river, and of all the wharfage rights in front of the high land granted by the United States to said grantee, the predecessor of the plaintiff in error, with said Columbia river as a boundary, to a private person, for a private beneficial use, and had so disposed of the same to the defendants in error." The court, after reviewing many decisions of different courts in regard to the control of the state over submerged lands, said: "The foregoing summary of the laws of the original states shows that there is no universal and uniform law upon the subject, but that each state has dealt with the lands under the tide waters within its borders according to its own views of justice and policy, reserving its own control over such lands, or granting rights therein to individuals or corporations, whether owners of the adjoining land or not, as it considered for the best interests of the public. Great caution, therefore, is necessary in applying precedents in one state to cases arising in another." In *Barney v. Keokuk*, 94 U. S. 324, the disposition of submerged lands was held to be a question for the several states to determine for themselves; and, if they chose to resign to the riparian proprietor rights which properly belong to them, it was not for others to object. Under the authorities, the law seems to be well settled that the legislature was clothed with power to enact a law authorizing the extension of the driveway over and upon the waters of the lake, so long as the extension did not interfere with navigation and commerce, and the right of fishing upon the lake; and we see no reason why the submerged lands re-

claimed by the extension of the driveway may not, as provided in the act, be appropriated for the payment of the improvement. The legislature represents not only the state, which holds the title which at common law was vested in the crown, but the legislature also represents the public, for whose benefit the title is held; and in that capacity it possesses the sovereign power of parliament over the waters of the lake and the submerged lands covered by the waters. In providing for the construction of the drive over and upon the shoal waters of the lake, and placing the control in the hands of the park commissioners for park purposes, no attempt has been made by the legislature to relinquish its governmental powers, or place them beyond the power of future legislation. The right of navigation and of fishing remains substantially in the public, as before. If their rights were taken away or materially infringed upon by the act, or the action of the commissioners under the act, the action of the commissioners could not be sustained, as the legislature has no power to dispose of the waters of Lake Michigan, or the lands under the waters, contrary to the trust under which they are held for the people.

But it is said in argument that the king of Great Britain did not at common law have the power to dispose of the title to lands covered by navigable waters, and, as the common law has been adopted in this state, the legislature has no such power. The common-law in this state owes its existence to an act of the legislature, and it is subject to alteration, modification, or absolute repeal by the legislature at any time the legislature may choose. The powers of the legislature are in no manner limited or restricted by the common law. The first section of the fourth article of our constitution confers the legislative power of the state on the general assembly, and the general assembly is clothed with all power of legislation in regard to all matters pertaining to the state, except so far as it is prohibited by the constitution of the state or of the United States. This question is discussed at considerable length in *Langdon v. City of New York*, 93 N. Y. 155, where it is said: "From the earliest times, in England, the law has vested the title to and the control over the navigable waters therein in the crown and parliament. A distinction was taken between the mere ownership of the soil under water and the control over it for public purposes. The ownership of the soil, analogous to the ownership of dry land, was regarded as *jus privatum*, and was vested in the crown. But the right to use and control both the land and water was deemed a *jus publicum*, and was vested in parliament. The crown could convey the soil under water, so as to give private rights therein; but the dominion and control over the waters, in the interest of commerce and navigation, for the benefit

of all subjects of the kingdom, could be exercised only by parliament. *Com. v. Alger*, 7 Cush. 53; *People v. New York & S. I. F. Co.*, 68 N. Y. 71. * * * In this country, each state, subject to limitations found in the federal constitution, has the absolute control of all the navigable waters within its limits. As said by the chancellor in *Lansing v. Smith*, 4 Wend. 9, the state, through its legislature, 'may exercise the same powers which previous to the Revolution could have been exercised by the king alone, or by him in conjunction with parliament, subject only to those restrictions which have been imposed by the constitution of this state or of the United States.'" See, also, *Clark v. City of Providence*, 16 R. I. 338, 15 Atl. 763, and *Mowry v. City of Providence*, 16 R. I. 422, 16 Atl. 511, where the same doctrine is announced. In the last case cited, it is said: "In the case of *Clark v. City of Providence*, 16 R. I. 337, 15 Atl. 763, this court held the act to be constitutional. We held in that case that the state, or general assembly, as the organ of the state, is the representative of the public or people as to the public right, and, as such, has power to release the right, the general assembly having in the matter the authority, not simply of the English crown, but of both crown and parliament, except so far as it has been limited by the constitution of the state or by the constitution and laws of the United States."

Here there is no complaint on behalf of the federal government, or of any of its officers, that the action of the legislature, and the extension of the driveway, in pursuance of the act, upon the waters of the lake, will in any manner interfere with commerce. The only complaint comes from the attorney general, acting for and on behalf of the people. The people, however, have spoken through their representatives, who were clothed by them with full power to act. If the legislation was unwise or detrimental to the best interest of the state, the people cannot complain, because they alone are to blame in selecting men to represent them who were unfit to discharge the duties with which they were clothed. The remedy is in the hands of the people,—to elect competent and honest men to represent them in the legislature. When the people have chosen their representatives, clothed with legislative power, they cannot complain of the action of their chosen representatives, so long as the legislation does not conflict with the organic law of the state or of the United States, or so long as they do not undertake to part with governmental power.

But it is said if the legislature has the power to dispose of the submerged lands in question, under the pretense of constructing a boulevard 200 feet wide, why could it not give away any indefinite quantity of the submerged lands of the lake? It is not

claimed here that the legislature has the power to dispose of submerged lands of the lake in any case where the disposition would materially interfere with the navigation of the lake for the purpose of commerce and the right of fishing; and it may be conceded that such power is governmental, and does not exist. Indeed, the first section of the act in question, in direct terms, prohibits an extension of the boulevard in such manner as to interfere with the navigation of the lake for the purpose of commerce. Upon looking into the evidence, it will be found that the waters of the lake west of the driveway, as constructed, were not adapted to navigation, and were not used to any great extent for that purpose. The learned judge before whom this case was tried, in speaking of the evidence on this branch of the case, said: "It is true that, in some cases, tugs, small craft for carrying passengers in a small way to and from the government breakwater, and to other points near this drive along the lake, small sailing yachts, and boats for pleasure, have, from time to time, passed over these waters, and that a very considerable portion of these waters were, before being filled, deep enough to be navigated by small vessels actually engaged in trade and commerce between the port of Chicago and other ports on the lake; but it is also a further fact, shown by the evidence, that all such small vessels are a very insignificant proportion of the whole number of vessels engaged in trade and commerce to and from the port of Chicago, and that these small vessels never have passed over these waters, because, in going to and from the harbor of Chicago, these waters are outside of the usual course, and are considered dangerous by sailors on the lake. Even a very small portion of all the vessels arriving at and departing from Chicago ever come within the government breakwater off this shore; and, when they do, they invariably pass quite near the breakwater, which is about fifteen hundred feet easterly from the easterly line of said proposed drive, in order to avoid shoal water."

From the foregoing it is apparent that the construction of the boulevard authorized by the act will not materially interfere with or obstruct the navigation of the lake. But it is said that the act is invalid because it conflicts with that provision of the constitution which provides that every act shall embrace but one subject, and that shall be expressed in its title. The title to the act is as follows: "An act to enable park commissioners, having control of any boulevard or driveway bordering upon any public waters of this state, to extend the same." Section 1 provides for the extension of such driveway over and upon the bed of such public waters. Section 2 provides for an estimate of cost, and the consent of a certain amount of the frontage abutting such

waters. Section 3 provides that the board may contract for the construction of such extension, and that the submerged lands lying between the shore and the inner line of such extension shall be appropriated to the purpose of defraying the cost of such extension, and to that end the board are authorized to sell and convey such lands, etc. Upon examination it will be found that the act has but one general object, and that is fairly indicated by the title; and under the rule laid down in *People v. Nelson*, 133 Ill. 575, 27 N. E. 217, we do not regard it in conflict with the constitution. The act conferred power on the board of park commissioners to extend a boulevard over upon the waters of Lake Michigan. This was the main purpose of the act, but, in order to facilitate the work, it was proper to provide means to defray the cost of the work in the same act. In the prosecution of the work, it was obvious that there would be submerged lands between the boulevard as constructed and the former shore, and these lands were by the act appropriated to defray the cost of the improvement. These provisions are, as we think, germane to the real purpose of the law as expressed in the title. See *Johnson v. People*, 83 Ill. 431, and *Larned v. Tiernan*, 110 Ill. 177.

It is also claimed that the location of the boulevard is not an extension of the Lake Shore drive, within the meaning of the statute. The Lake Shore drive, as constructed by the Lincoln Park commissioners at the time the act of 1889 was passed by the legislature, commenced at North avenue, and extended along Lake Michigan south to Oak street, where it connected with Pine street. Under an ordinance of the city of Chicago, Pine street, from Oak street south, had been turned over to the Lincoln Park commissioners as a boulevard. The extension of the boulevard as located by the commissioners of Lincoln Park leaves the old Lake Shore drive at its terminus at the south, and extends east a certain distance, and then turns to the south, as shown by the map put in evidence. The argument is that the boulevard, as laid out, is not an extension of the original Lake Shore drive, because not joined to the end of such drive, and does not run in the same direction as the old drive. The act of 1889 did not attempt to locate the extension of the driveway; it merely provided it should be over and upon Lake Michigan, thus leaving a large discretion in the hands of the commissioners; and, in the exercise of the discretion vested in them, there has been no such departure from the act as to render the action of the commissioners nugatory. Section 3 of the act contains the following provision: "In all cases where any boulevard or driveway is extended under the provisions hereof, the submerged lands lying between the shore of such public waters and the inner line of the extension of such boulevard or drive-

way shall be appropriated by the board of park commissioners to the purpose of defraying the cost of such extension, and to that end such board of park commissioners are authorized to sell and convey such submerged lands in fee simple by deeds duly executed." Under this statute, it is claimed that the park commissioners were only authorized to sell the submerged lands for cash, and that the contracts entered into by the park commissioners with the shore owners, under which the lands were to be conveyed to the shore owners upon the completion of the work called for by the contracts, and upon the payment of \$100 per foot, were not authorized by the statute. Under the statute *supra*, the submerged lands lying between the shore of the lake and the inner line of the boulevard to be constructed were placed in the hands of the commissioners, to be used in payment of the cost of the improvement. If the park commissioners had sold the submerged land to the shore owners, for cash, and used the money to defray the cost of the improvement, it is not suggested that the statute would have been violated. If the work agreed to be performed by the shore owners was done as cheap as if they had been paid cash, and if the price given for the submerged lands was its full market value, in principle it made no difference whether the lands were sold for all cash, or a part cash and a part in making the improvement. These submerged lands were set apart to be used in payment of the cost of the improvement, and, until it has been shown that they have been disposed of in such a way that the commissioners have not received their full value on the improvement, no one can properly object. The right of a shore owner on Lake Michigan to fill up portions of the lake, and thus extend his lands, does not arise in this case, and that question will not be considered. The judgment of the circuit court will be affirmed.

(164 Ill. 391)

SULLIVAN et al. v. EDDY.¹

(Supreme Court of Illinois. Nov. 23, 1896.)

**ADVERSE POSSESSION — EJECTMENT — DEFENSES —
DEPOSITION — TAX TITLE.**

1. Evidence, in ejectment, that plaintiff had the land in suit surveyed when he purchased it, visited it thereafter nearly every Sunday, pastured horses on it, set out trees, dug a well, dictated the erection of a small house, and every year for 20 years mowed the land or let it out to mow, is sufficient to sustain a verdict that he had been in actual, open, visible, notorious, exclusive, uninterrupted, and adverse possession of the land for 20 years.

2. Defendant in ejectment cannot defeat plaintiff's recovery by showing outstanding title in a stranger, with which he has in no way connected himself, when defendant is a mere trespasser.

3. It is not error to refuse an instruction which singles out particular facts, and promi-

nently calls the attention of the jury to these facts.

4. An affidavit by a purchaser at a tax sale that he made diligent search for the owner, and was unable to find him, is insufficient to show that such owner could not, "upon diligent inquiry, be found in the county," within the meaning of Rev. St. 1891, c. 120, § 216. *Van Matre v. Sankey* (Ill.) 36 N. E. 623, followed.

5. It is not error to receive in evidence a deposition taken in another state, because it is opened by the clerk of the court to which it is returned, in pursuance of an order of court.

Appeal from circuit court, Cook county; Edmund W. Burke, Judge.

Ejectment by Clara E. Eddy against Mary Sullivan and another. Judgment for plaintiff. Defendants appeal. Affirmed.

Edward Roby and S. P. Shope, for appellants. C. S. Darrow, H. S. Mecartney, and Morris St. P. Thomas, for appellee.

CRAIG, J. This was an action of ejectment, brought by William H. Eddy against Andrew Sullivan and Henry H. Gage, to recover a certain tract of land in Cook county, consisting of 9 or 10 acres, which is accurately described in the declaration. On a trial of the cause in the month of June, 1893, the plaintiff recovered the land in controversy, and the defendants appealed to this court, where the judgment was affirmed. See *Sullivan v. Eddy*, 154 Ill. 200, 40 N. E. 482. In July, 1894, before the expiration of one year after the first trial, the defendants paid the costs, and took a new trial under the statute. On a second trial of the cause before a jury the plaintiff again obtained a verdict in his favor upon which the court entered judgment. To reverse this latter judgment the defendants have brought this appeal.

William H. Eddy purchased the land in controversy from Peter A. Baker, and obtained a deed from him January 11, 1856, which was duly recorded January 23, 1856. On the trial the plaintiff claimed title to the premises—First, under a regular chain of conveyances from the United States to Baker, and from Baker to himself; second, 20 years' actual possession of the land under the deed from Baker before Henry H. Gage took possession, in the spring of 1886. The plaintiff read in evidence deeds purporting to convey lands of which the tract in question is a part, from the United States, by a continuous chain of title down to himself. One of the deeds in the chain it is claimed was not acknowledged as required by law, and on that account the title did not pass by that deed. We shall not stop to discuss the question raised by this point, because, if the plaintiff established his title in the other branch of the case,—which we think he did,—that was sufficient to authorize a recovery, regardless of the supposed defect in the deed referred to. In 1865, Eddy purchased 20 acres immediately adjoining the land in question on the north from Phineas E. Mer-

¹ Rehearing denied January 15, 1897.

rihew, and from that time both tracts were used together by him as one tract until Gage took possession of both tracts in the spring of 1886. The evidence, therefore, in regard to the possession of one tract applies to the other, and it was stipulated on the trial that the evidence introduced on the trial wherein either piece was involved might, so far as competent, be read on the trial of the action involving the other tract. The 20-acre tract was before the court in *Eddy v. Gage*, 147 Ill. 162, 35 N. E. 347. Sullivan set up no title to the land. He was placed in possession by Gage, and paid no rent, but merely held possession of the land for Gage. The defendant Gage relied upon a tax sale of the land, followed by a deed executed in March, 1877, and seven successive years' payment of taxes while the land was vacant and unoccupied, followed by possession of the land in March, 1886, after the completion of the seven years' payment of taxes under the deed executed in March, 1877, as color of title.

The ruling of the court in the admission and exclusion of evidence has been criticised in the argument, but, without entering upon a critical review of the questions raised, we are satisfied, after a careful consideration of the objections, that no prejudicial error was committed by the court in its rulings on the evidence. It is claimed that the court erred in refusing to suppress a deposition of a witness named Child, which was taken in the state of Indiana, and transmitted to the clerk of the court in Cook county. After the deposition had been received by the clerk, he opened it on September 25, 1895, and marked the deposition "Filed." This action of the clerk seems to have been done under and in pursuance of an order of court, and we see no reason why the deposition should have been suppressed.

If the land was vacant and unoccupied in March, 1877, when Gage procured color of title, and remained in that condition until March, 1886, the time Gage took possession, his color of title, seven years' payment of taxes, and possession taken after the completion of the seven years' payment of taxes, would bar a recovery on behalf of Eddy. If, on the other hand, Eddy was in possession of the land during the seven years Gage paid the taxes, that fact would defeat the title of Gage set up under the statute of limitations; and, if Eddy established twenty years' possession of the land under his deed from Baker, claiming title, he would be entitled to recover. There were on the trial of the cause two leading and vital questions of fact to be determined from the evidence by the jury: First. Whether Eddy was in the actual adverse possession of the land under claim of title for twenty years prior to the time Gage entered upon it and took possession in the spring of 1886. Second. Was Eddy in the uninterrupted possession under claim of title during any portion of the seven years

next preceding the fencing by Gage? The jury not only returned a general verdict in favor of the plaintiff, but, under the instructions of the court, returned two special findings as follows: (1) "Was William H. Eddy in the actual, open, visible, notorious, exclusive, uninterrupted, and adverse possession of the land described in the declaration, under claim of title thereto, continuously for the full period of twenty years prior to the fencing of the land by the defendant Gage in 1886? A. Yes." (2) "Was William H. Eddy in the actual, open, visible, notorious, exclusive, uninterrupted, and adverse possession of the land described in the declaration under claim of title thereto during any portion of the seven years just prior to the fencing of the land by the defendant Gage in 1886? A. Yes,"—signed by all the jurors. If this special finding of the jury is sustained by the evidence, the defendants' title set up under the statute of limitations was worthless, and the title relied upon by the plaintiff was a valid title, and one upon which he was entitled to recover the land. There is much evidence in the record tending to prove that Eddy went into the possession of the two tracts of land at the time he purchased them, and continued in the possession until Gage entered upon the land, in March, 1886. We shall not go into the evidence of the different witnesses in detail. It would serve no useful purpose to do so. When Eddy purchased the lands, he had them surveyed, and established the corners and the lines. After the purchase of the 20-acre tract, in February, 1865, he used the two tracts together. Almost every Sunday, Eddy visited the land. He mowed it, pastured horses on it, took his friends out to see the land, set out trees, dictated the erection of a small house, dug a well, and every year from 1865 to 1886 he mowed the land, or let it out to others to mow. The land was known and recognized in the neighborhood as the property of Eddy, or "Horse Eddy," as he was known. We think the evidence was ample to authorize the finding of the jury. Upon the first trial of this cause the plaintiff called nine witnesses to establish his possession of the land for a period of 20 years. When the case was here on appeal we held the evidence of those nine witnesses was amply sufficient to sustain the finding of the jury in favor of Eddy on the question of possession. 40 N. E. 482. The evidence of those nine witnesses was before the jury on this second trial, and, in addition, a large number of other witnesses were introduced, which very much strengthened the evidence. It is true, the defendant called witnesses on the last trial, but the evidence introduced did not overcome the case made by the plaintiff. We must, therefore, hold, as we did when the case was here before, that the evidence fully justified the finding of the jury.

It is claimed in the argument that the court erred in giving plaintiff's seventh in-

struction, which was as follows: "If the jury believe from the evidence that the plaintiff was in the open, notorious, exclusive, and adverse possession of the land in controversy at and before the time the same was fenced by the defendant Gage, and that the defendant Gage acquired possession of the said land wrongfully and without the permission of the plaintiff, and ousted the plaintiff from said lands, then the court instructs you that the defendant Gage cannot defeat the plaintiff's recovery in this action by showing an outstanding title in a stranger, with which outstanding title the defendant Gage has in no way connected himself." We think the instruction lays down a correct rule of law. The substance of the charge is that a mere intruder upon the notorious adverse possession of another cannot protect his trespass and intrusion under an outstanding title in a stranger. This is a correct principle, and one that is fully sustained by the authorities. See *Jackson v. Harder*, 4 Johns. 211; *Williams v. Swetland*, 10 Iowa, 51, 56; *Tapscott v. Cobbs*, 11 Grat. 172; *Carleton v. Townsend*, 28 Cal. 219, 223; *Proprietors of Enfield v. Permit*, 8 N. H. 512; *Jackson v. Schaubert*, 7 Cow. 187, 200; *Fisher v. Philadelphia*, 75 Pa. St. 392, 397; *Bates v. Campbell*, 25 Wis. 613; *Hardin v. Forsythe*, 99 Ill. 312.

It is also claimed that the court erred in refusing instruction No. 10. Upon looking into the record, it will be found that the court gave, at the request of the defendant, 16 long instructions. These, in connection with those given for the plaintiff, fully covered all legal questions involved in the case, and no necessity existed for giving further instructions on behalf of either party. Moreover, the refused instruction was bad, for the reason it singled out particular facts, and prominently called the attention of the jurors to these facts. Instructions of this character have frequently been condemned by this court.

On the trial the defendant offered in evidence two certain delinquent lists, judgments of the county court, precepts, certificates of sale, with affidavits showing an alleged compliance with the statute requiring notice and tax deeds for the purpose of showing title to the land in question. Various objections were made to the introduction of these papers as showing title, and the court excluded the deeds, as paramount title, but admitted them in evidence as color of title.

A number of objections are urged against the validity of the tax proceedings as title, but it will only be necessary to refer to one of them. It appears that the land sold for taxes was assessed in the name of L. J. Eddy. No notice of the sale was served on him, but a notice was published in a newspaper. The affidavits filed with the county clerk as a compliance with section 216 of the revenue law, upon which deeds issued, will be found upon examination to be substan-

tially like the affidavit in *Van Matre v. Sankey*, 148 Ill. 562, 36 N. E. 623, which this court in that case held defective. As the affidavits upon which the deeds issued failed to show a compliance with the revenue laws, the tax proceedings and deeds offered as title were properly excluded by the court. But it is said in the argument: "Even if the affidavits and deeds were excluded as evidence of title, still the delinquent lists, judgments, and precepts should have been received to prove that the land was known and assessed separately from all other land in the name of Lorenzo S. Eddy, and that the assessment was paid by sale." We do not see how the manner of the assessment of the land, or how the assessment was paid, can have any special bearing on the question of title involved in the case, but, however that may be, the exclusion of the papers offered was no such error as could work a reversal of the judgment. The judgment of the circuit court will be affirmed. Affirmed.

(151 N. Y. 431)

FROBISHER v. FIFTH AVE. TRANSP. CO., Limited.

(Court of Appeals of New York. Jan. 10, 1897.)

OMNIBUS—DEFECTIVE STEP—NEGLIGENCE—SPECIAL DAMAGES—PLEADING.

1. A carrier is not chargeable with negligence because there is no back to a step 22 inches long and 16 inches wide on the side of its bus,—those without backs as well as those with backs being in general use, and each having its advantage and disadvantage; the solid back, while preventing all possibility of the foot slipping through, being more liable to fill with mud and snow, and cause the foot to slip; and it not appearing that there had ever been any other accident by a person's foot slipping through an open back step. 30 N. Y. Supp. 1099, reversed.

2. An allegation that plaintiff has become disabled for life to such an extent as to seriously interfere with the active prosecution of his business is sufficient to admit of proof of special damages. 30 N. Y. Supp. 1099, affirmed.

Appeal from supreme court, general term, First department.

Action by Daniel L. G. Frobisher against the Fifth Avenue Transportation Company, Limited. From a judgment of the general term (30 N. Y. Supp. 1099) affirming a judgment for plaintiff, defendant appeals. Reversed.

William Irwin, for appellant. J. Tredwell Richards, for respondent.

HAIGHT, J. This action was brought to recover damages for a personal injury. On the 14th day of October, 1889, the plaintiff was standing upon the west side of Fifth avenue, in the city of New York, just south of Twenty-Third street. He signaled the driver of a Fifth avenue omnibus to stop, and the driver thereupon pulled up his horses, and nearly stopped the bus. While it was moving slowly, the plaintiff stepped aboard, taking hold of the handle at the side of the door. While stand-

ing upon the step, and before entering the bus, the driver started ahead, and the plaintiff's body was jerked backward. At that instant his foot slipped from the step under the body of the bus, his hold upon the handle loosened, and he fell backwards, striking upon the pavement, causing the injuries for which this action was brought.

It was, among other things, charged in the complaint that the stage, or omnibus, was negligently constructed, and unfit for carrying passengers, and that such negligence caused his fall. At the conclusion of the trial the defendant requested the court to charge "that there is no proof that the step of the stage, or the stage itself, was in any way defective." To this the court replied, "You have the evidence in regard to what might have been done with known appliances with respect to the step." To this the defendant entered an exception. It was not claimed that the stage, or omnibus, was in any way defective, other than in the construction of the step by which it was entered. There was but one step, 22 inches long and about 16 inches wide. It was held in position by two large braces, one on each end, and there was a corded rubber, covering the step. The back of the step was open and not closed. The charge of negligence is based upon this opening. One of the witnesses testified that the open step was used for large cities, and another that he had never seen a stage with a solid back to its step, except the hotel coaches. It is quite apparent, from the testimony given, that both kinds of steps are in general use, and that each may have its advantage and disadvantage. With the solid back step there would be no danger of the foot slipping through and catching under the bus, but it would be more liable to fill with mud and snow in traveling over the streets, and thus cause the foot to slip forward. It did not appear that any accident of the character of this had before occurred by reason of the use of the open back step. We think, therefore, that the defendant was not chargeable with negligence by reason of its use of the open step, and that its use did not render the omnibus defective. *Crocheron v. Ferry Co.*, 56 N. Y. 636; *Loftus v. Ferry Co.*, 84 N. Y. 455; *Laffin v. Railroad Co.*, 106 N. Y. 136, 12 N. E. 599.

An exception was taken by the defendant to the introduction of evidence as to the plaintiff's income from his business before and after the injury. The objection to this evidence, however, was made upon the ground that special damages were not pleaded in the complaint. It was not objected to upon the ground that damages of this character were not competent, or that they were remote or speculative. The complaint did allege interference with his prosecution of his business, from which he suffered damages. The allegation is quite general to become the foundation for the awarding of special damages, but the defendant could have had it made more specific upon motion had it so desired. The objection having been con-

finied to the pleading, we think the question as to whether damages of that character could, in any event, be awarded, is not now raised for our consideration. But, upon the exception taken to the refusal of the court to charge as requested, the judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except BARTLETT, J., not voting. Judgment reversed.

(151 N. Y. 369)

PEOPLE ex rel. WARD v. ROOSEVELT et al.

(Court of Appeals of New York. Jan. 19, 1897.)

ELECTIONS—FACTIONAL NOMINATIONS—DESIGNATION ON BALLOT.

Laws 1896, c. 909, § 56, provides that, if there be a division within a party, and two or more factions claim the same device, the secretary of state shall decide between them, giving preference of device and name to the faction recognized by the regularly constituted party authorities, and, if no other devices are presented, the said officer shall select a different device and party name for each such other faction, to be used upon the ballots. If two or more conventions are called by different authorities, each claiming to represent the same party, the said officer shall select a suitable device and party name to distinguish the candidates of one faction from those of the other. *Held*, that the section applies, not only to factions within a party, but to a contest between two or more conventions, each claiming to regularly represent a political party. 41 N. Y. Supp. 572, affirmed.

Appeal from supreme court, appellate division, Second department.

Application by William L. Ward for a writ of mandamus to Theodore Roosevelt and others. Appeal by the relator from an order of the appellate division, Second department (41 N. Y. Supp. 572), reversing an order of the special term directing that a peremptory writ of mandamus issue commanding the respondents to desist and refrain from printing the name of Ben L. Fairchild as a candidate nominated by the National Republican party for representative in congress upon the official ballot. Affirmed.

Henry C. Henderson and J. Rider Cady, for appellant. Francis M. Scott and Theodore Connolly, for respondents.

HAIGHT, J. The time has passed in which an adjudication herein can affect the rights of the parties, but, inasmuch as the question involved calls for an interpretation of a statute which is of public importance, we have thought it wise to retain the case and consider it upon its merits. The relator claims that, at a Republican convention of the Sixteenth congressional district, held at White Plains on the 16th day of September, 1896, he was nominated for representative in congress, and that the certificate of such nomination made by the convention was duly filed in the office of the secretary of state. It also appears that Ben L. Fairchild claims to have been nominated for the same office by a Republican convention held on the

same day at Yonkers, and that a certificate in due form, signed by the presiding officer and the secretary of the convention, was duly filed in the office of the secretary of state. Each of the persons so nominated filed objections to the certificate of his opponent, and the secretary of state, after hearing the parties, decided that Ben L. Fairchild was the Republican nominee, and that his name should be placed upon the official ballot as the candidate for that party. A review was had in the supreme court by Justice Edwards, who overruled the determination of the secretary of state, and held that the relator was regularly nominated, and that his name should be printed upon the official ballot as the candidate for the Republican party in that district. Thereupon the secretary of state issued to the clerk of the county of Westchester and the board of police commissioners of the city and county of New York, in which the congressional district in question was located, a certificate to the effect that a certificate of nomination of Ben L. Fairchild had been filed with the secretary of state, and, the courts having decided that such nomination shall not be placed in the Republican column under the Republican emblem, the secretary of state, by virtue of the power in him vested by section 56 of the election law, has decided that said nomination shall be placed in an independent column, under the name of the National Republican party, and under the emblem of a flag and staff, with the word "Protection" thereon. The mandamus issued by the special term restrained the respondents from printing the name of Fairchild upon the official ballot as required by this certificate.

The statute, or so much thereof as is pertinent to the inquiry here presented, is as follows: "If there be a division within a party and two or more factions claim the same, or substantially the same device or name, the officer aforesaid shall decide between such conflicting claims, giving preference of device and name to the convention or primary, or committee thereof, recognized by the regularly constituted party authorities; and if the other faction or factions shall present no other device or party name, the said officer shall select a different device and party name for each such other faction, which shall be used upon the ballots to distinguish its ticket. If two or more conventions are called by different authorities, each claiming to represent the same party for that purpose, the said officer shall select a suitable device and party name to distinguish the candidates of one faction from those of the other, and the ballots shall be printed accordingly." Laws 1896, c. 909, § 56. It is contended, on behalf of the appellant, that this provision of the statute refers solely to nominations by factions within the same party, and has no reference whatever to a contest between two or more political conventions, each claiming to regularly repre-

sent the entire party in a given territory or district. We quite agree that the statute has reference to factions within a party, for it, by express terms, so provides; but we are unable to indorse the appellant's contention that it has no application to a contest between two or more conventions, each claiming to regularly represent a political party. To so hold would virtually nullify the provision with reference to factions. It is not common for a convention to nominate two or more candidates for the same office. Ordinarily such nominations are made by opposing factional conventions, each claiming regularity, and to represent the principles of their party. It is such factional contests that the statute was designed to cover, and such appears to have been the contest waged between the relator and Fairchild. It appears to us that the statute was properly construed by the appellate division, and that its order reversing the determination of the special term, and denying the motion for a mandamus, should be affirmed. All concur. Order affirmed.

(151 N. Y. 497)

PEOPLE ex rel. LOVETT v. RANDALL.

(Court of Appeals of New York. Jan. 19, 1897.)

TOWN OFFICERS—EXTENDING TERM OF OFFICE—HOLDING OVER.

1. Laws 1893, c. 344, empowering the electors of towns, at their annual meetings, to determine by resolution whether they shall thereafter elect one or three commissioners of highways, and providing that, if they determine on one, thereafter only one shall be elected, who shall hold his office for two years, does not operate in any town till the electors have taken some action; and, in the absence of this, the term of office remains as before.

2. As the constitution requires town officers to be elected by the electors or appointed by some local authority, an act extending the term of a town officer cannot apply to one already elected.

3. Under Laws 1892, c. 681 (Public Officers' Law), authorizing an officer to hold over and continue to discharge the duties of the office till his successor is chosen, but providing that, after expiration of his term, the office shall be deemed vacant for purpose of choosing his successor, a successor may be elected a year after expiration of his term, whether the term is one or two years.

Appeal from supreme court, general term, Second department.

Quo warranto by Ellhu Lovett against William A. Randall. From a judgment of the general term (36 N. Y. Supp. 202) affirming a judgment for relator, defendant appeals. Affirmed.

M. N. Kane, for appellant. T. E. Hancock and M. H. Hirschberg, for respondent.

O'BRIEN, J. The relator and the defendant each claimed to be entitled to hold the office of commissioner of highways of the town of Warwick, in the county of Orange. The courts below have decided that the relator was entitled to hold the office, and that

the defendant was not. The town has had but one commissioner of highways since the year 1857. At the annual town meeting in March, 1893, the defendant was elected to the office for one year. At the annual town meeting in March, 1894, the defendant and the relator were candidates for the office, but no choice was made, the vote being a tie. The defendant continued to perform the duties of the office, holding over under the statute. At the annual town meeting in March, 1895, the relator was again a candidate, without opposition, and received all the votes cast for the office. He qualified and entered upon the duties of the office so far as he could, but it is alleged and found that the defendant intruded into it, and ousted the relator. The controversy depends upon the tenure of the defendant, as an officer, holding over after the expiration of the term of one year in March, 1894. It is admitted that he could hold the office under the statute until the election of the relator, in March, 1895. But the defendant insists that by chapter 344 of the Laws of 1893, passed after his election, the term of the office was extended to two years; and that, since the election of 1894 resulted in no choice, he could hold over for a full term of two years,—that is to say, until March, 1896,—and that, consequently, there was no vacancy in the office in March, 1895, when the votes were cast for the relator, and therefore he was never elected to the office. The real question, therefore, is whether the electors of the town had the power to make choice of a new commissioner at the town meeting in March, 1895. If they had, the result of the election has displaced the defendant, and conferred the office upon the relator.

We think that the defendant's contention cannot be sustained for the following reasons:

1. The act of 1893, above referred to, did not absolutely extend the term to two years. It empowered the electors of the town, at their annual town meeting, to determine, by resolution, whether they should thereafter elect one or three commissioners. If they determined to elect only one, and the town was one having but one commissioner, thereafter only one should be elected at each alternate town meeting, who should hold his office for two years. The statute did not operate upon the town of Warwick until some action had been taken by the electors, and, since no such action was had in that town, the defendant's term of office, as it existed at the time of his election, was not changed. It still remained an office, to be filled at each annual town meeting, and it was competent for the electors to make a choice in March, 1895.

2. Legislation of this character cannot apply to the term of a town officer already elected. It operates only upon future election. An act of the legislature extending

the term of a town officer then in office is virtually an appointment to the office for the extended time. The legislature has no power to appoint a town officer. The constitution requires that they shall be either elected by the electors, or appointed by some local authority. *People v. Foley*, 148 N. Y. 677, 43 N. E. 171; *Rathbone v. Wirth*, 150 N. Y. 459, 45 N. E. 15. The defendant had been elected for a term of one year. He was in office under that term when the act was passed. Since it could have no application to him under the constitution, it should have been construed as applicable only to officers thereafter elected. The legislature had the power, either with or without the intervention of the electors of the town, to enlarge the duration of the term of office of commissioners of highways, but the change must always precede the election. A town officer chosen by the electors of the town for one year, who has entered upon his term, cannot be kept in office for a longer period by subsequent legislation. His right to the office depends upon the law existing when he was elected.

3. But by section 5 of article 1 of the public officers' law (chapter 681, Laws 1892), while the defendant was expressly authorized to hold over and continue to discharge the duties of the office until his successor was chosen, it was also provided that, after the expiration of the term, the office should be deemed vacant for the purpose of choosing his successor; so that, whether the term was one or two years, the office was vacant in March, 1895, for all the purposes of an election, and it was competent for the electors to vote for and elect the relator to the office as they did. The term for which the defendant had been elected had expired, and though he was still in lawful possession of the office, holding over, the statute contemplates the right on the part of the electors to make choice of his successor. In every light in which the case is examined, it will be seen, therefore, that there was power to elect a commissioner at the annual town meeting in 1895. That the relator was, in fact, elected to the office at that time, is not disputed, and the defendant's right to hold over any longer ceased. The case was properly decided in the courts below, and the judgment should be affirmed. All concur. Judgment affirmed.

(151 N. Y. 453)

MARK et al. v. VILLAGE OF WEST TROY.
(Court of Appeals of New York. Jan. 19, 1897.)

DEDICATION—STREET TERMINATING AT RIVER.

Where the owners of land on a navigable river, and of adjoining land under the waters of such river, filed a map of it, on which a street was designated as running to the river, and, before such dedication was accepted by the public, the owners partitioned the land among themselves, but excepted from the conveyance a ferry owned by them, in operation at the time

from the end of the street, the right of the public in the street does not include the land under the water, but terminates at the water's edge. Bartlett, J., dissenting. 27 N. Y. Supp. 543. affirmed.

. Appeal from supreme court, general term, Third department.

Action by George Mark and others against the village of West Troy to recover damages for destroying a fence alleged to have been erected by plaintiffs on their premises, and for an injunction. From a judgment of the general term (27 N. Y. Supp. 543) affirming a judgment in favor of plaintiffs, defendant appeals. Affirmed.

In 1808, Elizabeth Bleecker was the owner of a farm of land where now the village of West Troy stands. Its easterly boundary was the Hudson river. She was also the owner, through a grant from the state, of some of the adjoining land under water. In 1823 she and her husband conveyed to George Tibbits and others the farm with adjoining land under water, upon trust, to hold the same in certain proportionate interests for some 17 persons, and to such uses as the beneficiaries should from time to time declare. In 1826, by grant from the state, the trustees in the Bleecker deed were invested with the title to certain additional lands under water in the Hudson river adjoining the farm, beyond what had been acquired by Mrs. Bleecker. In 1829 a partition deed, in nine parts, was executed between the trustees and their cestui que trust, which recited the execution, in 1823, of a deed by the latter to the former, by the terms of which the trustees were empowered, in their discretion, to lay out the premises into village lots, and to sell and convey the same, or any part thereof. There was also the recital of the fact that the trustees had caused a certain part of the farm to be laid out into a village plat, under the name of West Troy, in accordance with a map made by one Roberts, dated March 7, 1828, and filed in the Albany county clerk's office, with the field book accompanying the same. It appears, and it is so found, that the trustees, in mapping out the proposed village, had granted and dedicated to the public and to the defendant certain portions thereof for streets and highways. The parties to the partition deed just mentioned partitioned among themselves the village lots according to their respective rights and shares, the conveyance of lots bordering upon the river including the land under water lying in front of the same. The grants of lots were made subject to the agreements and reservations expressed in the partition deed, and there were especially reserved all rights of ferrying, or of establishing ferries, across the river, to the trustees, which, it was agreed, should remain vested in them until further partition was made by the proprietors of the residue of the trust estate. By this partition deed, and by the map and

field book of Roberts, the surveyor, certain streets are laid out and described, and, among them, Canal street (now called Sixteenth street) was described as extending across the Erie Canal eastwardly "to the river," or "to the waters of the Hudson river," or "to the water's edge." Broad street (now called Broadway) extended from Canal street southwardly, and at that point was the most easterly street laid down on the Roberts map. The description of the lots on the east side of Broad street extends to the land under water opposite them. There was excepted from the conveyance in the partition deed a certain lot at the southeast corner of the intersection of Broad street with Canal street. At the time of the partition there was, and had long been, a ferry in operation across the river to Troy, with a landing at the point where Canal street would terminate; and the lot at the corner of Canal and Broad streets, being No. 40 upon the map, was retained by the trustees, and reserved for the purpose of maintaining the ferry. In 1835 and 1836, Cushman and Wiswall became the owners, by conveyance from the trustees, of lot No. 40, and also of all the exclusive right and privilege of keeping and maintaining a ferry and ferries from every part of the village of West Troy, "and the right and privilege of approach to said ferries, as now used and vested in the said trustees." Wiswall at the time was owner of lot 39, and was operating the old ferry; and he and Cushman had thus become the owners, not only of so much of the land under water as extended eastwardly from their lots into the river, but also of the ferry then being operated and the property belonging to said ferry, and of all the particular and general ferry rights and property which had been possessed by the trustees. Cushman and Wiswall and their successors gradually filled in the river in front of the foot of Canal street, and in front of lot No. 40, until a strip of land of some 200 feet in length was reclaimed, eastwardly from the former foot of Canal street to where the present ferry landing is. The ownership of the ferry landing and lands pertaining to it changed from time to time; but the ferry was always maintained, and all its rights, franchises, and property, which had vested in Cushman and Wiswall, became vested in the plaintiffs, who are the present owners thereof. From 1865, when the gate from the tollhouse was built across the ferry grounds, all the land redeemed from the river, extending from the former foot of Canal street, has been inclosed, and, in connection with an additional strip of land purchased by Wiswall immediately north of the ferry property, has been used for ferry approaches and purposes. No part of this land at the foot of Canal (or Sixteenth) street, and which the tollgate shuts off at a point near the former foot of the street, has ever been laid out upon or worked by the public authorities as a street;

nor has the public ever used it as a public highway, nor otherwise than as a passage, through an arch and through gates, to reach the ferryboats. There was never any formal acceptance by the defendant of the dedication of Canal street upon the map, and, as to that dedication, the user has been confined to the street as it terminated formerly. There had been no interference with plaintiffs on the part of the defendant until in 1888, when, pursuant to a resolution of the defendant's board of trustees, the street commissioner removed and destroyed the fence, which the plaintiffs had maintained for the purpose of inclosing the ferry landing and property. They rebuilt it, and then defendant's board of trustees adopted another resolution, directing the street commissioner to remove forthwith the fences, buildings, and other obstructions maintained by the plaintiffs at the foot of Sixteenth street (the former Canal street) in the event of the plaintiffs failing to remove the same upon notice. Thereupon plaintiffs brought this action to restrain the defendant and its officers from putting the threat into execution. The trial judge found that, in mapping out the Bleeker farm into village lots and streets, the then owners thereof "did not intend to dedicate to the public said Canal street (now known as Sixteenth street) any further east than as indicated on said map; nor did they intend by such dedication as was made to interfere with or encroach upon the public ferry then existing, and which at that time had its landing within the said lines of said street produced easterly." He also found that it was the intent of the farm owners, in mapping out and partitioning the lots among themselves, to "except out of such dedication the then existing ferry and the exclusive right of occupying and maintaining a ferry or ferries." The dispute between the plaintiffs and defendant is whether there was such a dedication of Canal street as a highway as would carry or extend that street over the newly-made land to the river's edge. The special term awarded to the plaintiffs equitable relief by way of an injunction against the defendant, and the general term have affirmed that determination; the theory of the decision of the latter court, as gathered from the opinion, being that there was no intention on the part of the farm owners to include, as a part of Canal street, the shore, so far as the same was required for ferry use, or, if the dedication of the street was not so limited, then that there had been, in effect, a revocation or modification of the dedication as the effect of their deed in 1835, to Cushman and Wiswall.

E. Countryman, for appellant. R. A. Parmenter, for respondents.

GRAY, J. (after stating the facts). In determining the scope and purpose of the dedication of Canal street as a public street, we

may refer to the acts and declarations of the donors, and to those surrounding circumstances, which throw light upon the subject, and in that way discover the intention. *Morgan v. Railroad Co.*, 96 U. S. 723. If we can gather the intention that that street should not extend eastwardly beyond its easterly terminus, as laid down on the Roberts map, then it must control. Undoubtedly, it is the general rule of law that a public street leading to navigable waters would keep even pace with the extension of the land, so as to preserve an unbroken union between the easement on land and that on such navigable waters, whether the change in the land be due to natural causes, or to the voluntary act of the owner of the land. *People v. Lambler*, 5 Denio, 9. That general rule applies to all cases of a public right acquired by dedication, where there is nothing in the facts and circumstances connected with the dedication to show that a restriction was intended and imposed, which would preclude the public from claiming a right of access to the river over the highway. It is usually the case that the gift to the public of a street ending at the shore of a navigable river is for the purpose of providing the means of access to the waters of the river; but the present case is one where, as it seems to me, such an intention did not exist, when the village of West Troy was planned and mapped out by the proprietors of the land, and where, indeed, it seems to be distinctly negated by their acts. When the Bleeker farm was mapped into streets and lots to constitute the future village of West Troy, the proprietors, in causing the partition between themselves of the lots, expressly reserved to, and vested in, their trustees, who held the legal title, an exclusive right of ferriage between their shore and the opposite city of Troy. The ferry then existed and was at the foot of Canal street, as laid down upon the map; and, in the partitioning of the village lots, the trustees retained the ferry property, and reserved the adjoining lot for the very purpose of maintaining the ferry. Thus, it was in contemplation at the time that the ferry, which had for years been operated at that particular point, should remain and be operated as such by the trustees, and should constitute pro tanto a barrier to the public access to the waters of the river. It is to be observed that the trustees held the title to the adjoining lands under the waters of the Hudson river by grant from the state, and in every case of a conveyance, in the partitioning of the property, of lots bordering upon the shore of the river, the grant included the land under water in front of the lots. At the time of the completion of the partition of the property as mapped out, the trustees remained the proprietors of the land under water in the river in front of the foot of Canal street, as well as of the next adjoining lot which they had reserved to be used in connection with their ferry. I think that upon reflection the reservation and agreements in the partition deed will seem to demonstrate

that the scope of the dedication of Canal street as a street was to provide a means of access to the ferry, which was to be maintained at its foot, and not to make of it a public highway reaching to the navigable waters of the river. The intention was to preserve the ferry that was there, and to deprive every beneficiary, in this scheme for the creation of a municipality, of any right of ferriage, or of ferry landings, and to compel them to use the established ferry. The public could enjoy the street for the purpose apparently intended of reaching the established ferry, and the design of the street for that purpose is the more reasonable inference.

The features in this case of the ferry at the foot of the street, and of the reservation to the trustees of the exclusive right to operate it, differentiate it from the other cases to which our attention has been called by the appellant. In the *Lambier Case*, *supra*, after Warren street had been laid out and opened from Court street, in Brooklyn, to the East river, an act of the legislature passed in 1836 authorized the several persons therein named to construct wharves, bulkheads, piers, etc., in the East river, in front of their lands in the city of Brooklyn. One of the persons named in the act, and who owned the piece of land through which Warren street passed, erected a bulkhead in the river in front of his land, including that covered by the street, and filled up the intervening space with earth, so as to transfer the shore of the river to the bulkhead. It was held that the design of the act of 1836 was to confer privileges on the owners of the land adjoining the East river, but not to destroy the right of the public to reach its waters through Warren or any other street, which then led to its shore. It was observed in the opinion that while the act authorized piers and bulkheads to be erected, and the bed of the river to be filled up in front of the lands of the persons named, that could hardly be understood to include land over which a perpetual right of way existed in favor of the public, although the fee might be in such owners. That case differs, therefore, in essential facts, as the several cases to which we are referred in the New Jersey courts differ, from the case at bar; where it cannot fairly be inferred from the acts and declarations of the proprietors of the Bleecker farm that Canal street should afford to the public a means of direct access to the navigable waters of the Hudson river. The intention that Canal street, at its easterly point, should terminate at the ferry grounds, is further made manifest by the subsequent conveyance by the trustees, in 1835 and 1836, to Cushman and Wiswall, of exclusive ferry rights and privileges, "and the right and privilege of approach to said ferry as now used and vested in the said trustees," together with the lot adjoining the foot of Canal street on the south, which the trustees had retained for use in connection with the ferry. As an act on the part of those who held the legal title and acted as trustees for the land

proprietors, it very clearly indicated their understanding that the public had acquired no rights in Canal street, as a highway, beyond where the ferry rights commenced. I think we may assume, too, that such has been the understanding of the defendant, for whose benefit the dedication was made. Since the time when Cushman and Wiswall and their successors reclaimed the land under water in front of the foot of Canal street, and made it useful and valuable for their ferry purposes, and inclosed it, as far back as 1805, no attempt has been made by the defendant to interfere with the ferry properties, or to exercise any authority over the reclaimed land, until the proceedings which resulted in the present action. This acquiescence through such a long period of time is a very significant circumstance. It seems to me that the finding of the trial court that the owners of the Bleecker farm did not intend to dedicate to the public Canal street any further east than is indicated on the Roberts map, and that they did not intend to interfere with or encroach upon the existing ferry, is supported by every reasonable inference which can be drawn from their acts and declarations. I advise, therefore, that the judgment appealed from should be affirmed. All concur, except ANDREWS, C. J., not voting, and BARTLETT, J., dissenting. Judgment affirmed.

(151 N. Y. 434)

ALLEN v. BUFFALO, R. & P. RY. CO.

(Court of Appeals of New York. Jan. 19, 1897.)

RAILROADS—HIGHWAYS—STATUTORY DUTY—NEGLECT—QUESTION FOR JURY—FRANCHISE AND INCIDENTS.

1. Laws 1890, c. 565, § 11, requiring a railroad which builds along a highway to restore the highway to its former state, or to such state as to not unnecessarily impair its usefulness, contemplates that the highway should be constructed and left in that condition with reference to the new surroundings and dangers, and not to the old.

2. It is a question for the jury whether or not a railroad company performs its statutory duty of leaving a highway along which it builds in such a state as not to unnecessarily impair its usefulness (Laws 1890, c. 565, § 11), where it appropriates the old highway, and sinks its tracks 20 feet below its surface; builds another highway south of the old one, and along the brink of the cut, but so graded as to slope towards the cut; neglects to erect barriers between the line of the highway and the cut; and undermines the bank so as to cause the roadbed of the highway in several places to slide into the cut.

3. The duty of restoring a highway to its original condition, or to such state as not to unnecessarily impair its usefulness (Laws 1890, c. 565, § 11), is inseparable from the franchise permitting a railroad to divert a highway from its original location; and, being a continuous obligation, binds all subsequent holders of the franchise to maintain the condition so far as the safety of the highway is affected by the operation of the railroad.

Appeal from supreme court, general term, Fifth department.

Action by Lina M. Allen against the Buffa-

lo, Rochester & Pittsburgh Railway Company for personal injuries. There was a judgment for plaintiff, which was affirmed by the general term (30 N. Y. Supp. 1129), and defendant appeals. Affirmed.

Henry G. Danforth, for appellant. George E. Spring, for respondent.

O'BRIEN, J. The basis of the recovery in this case was the omission of the defendant to perform the statutory duty to restore a public highway to its former condition, or to such state as not unnecessarily to have impaired its usefulness. The plaintiff, while driving upon one of the public highways of the town with a horse and carriage, was thrown out and injured. At the point in the highway where the accident occurred there was a defect which the jury could have found to have been the proximate cause of the injury. The defense of contributory negligence on the part of the plaintiff was properly submitted to the jury, and that question has been determined against the defendant by the verdict.

When the railroad bed of the defendant was constructed, about the year 1873, several rods of it were built in a public highway. In order to make a proper grade for the railroad, the highway was cut down from 17 to 25 feet below the surface, thus forming a deep cut, with sloping banks on each side, for a distance of some 40 or 50 rods.

The defendant, having appropriated the highway for several rods in length for its roadbed, it was, of course, impossible to restore that identical road to its former state. The statutory duty could not be performed except by the construction of a new highway at some other place. This it proceeded to do by the purchase of a strip of land south of the railroad, and immediately adjoining it, 50 feet wide; the old road being 3 rods in width. The new highway was constructed and laid out along the brink of the cut on the surface of the ground, and at the point where the accident occurred the cut was some 17 feet below the bed of the new highway. On the south bank of this cut the defendant, or some of its predecessors in title, in procuring gravel, had so affected the slope of the bank that a part of the new highway was eaten away, and fell into the cut. In this way the highway was narrowed to 33 feet from the south boundary line to the brink of the cut, and there were no guards or fences between the highway and the cut. The surface of the road sloped quite sharply from the south line towards the cut at the place where the injury occurred, and there was a considerable bank or rise on the south, and a bend in the line of the road. At this point the horse which the plaintiff was driving became frightened at a passing train in the cut below, and, seeking to avoid the precipice on the north, which extended into the highway, she reined the horse to the south,

and in doing so drove upon the bank or high ground, and the carriage was overturned, and the plaintiff injured. The evidence tended to show that when the horse was reined towards the south he was within a couple of feet of the unguarded declivity. In this condition of the proof the trial judge submitted all the questions to the jury, and a verdict for the plaintiff was found, which has been affirmed at general term.

It is argued that as the defendant, or rather its predecessor in title, constructed a new road in place of the old one, which it took for its right of way, and that, since the new road was suitable and equal to the old one in point of safety and convenience, the whole statutory duty has been discharged, and, whatever changes may have occurred thereafter to render the road more unsafe or to impair its usefulness, the defendant is not liable for the result under the statute, whatever may be the liability for negligence at common law. There are, we think, two answers to this proposition:

(1) The construction of the railroad on the line of the highway by sinking the tracks 20 feet below the surface, producing a deep cut, in which trains were to be operated, created a new and more dangerous situation, and the new road, in order to be as safe as the old one, or in order to be in such a state as not unnecessarily to impair its usefulness, should have been constructed and left in a condition with reference to all the new surroundings. It does not follow that because the railroad laid out a new road just south of the old one, which it had appropriated for its own purposes, of the same width and grade, and in the same general direction, it performed the duty enjoined upon it by the statute. The new road having been constructed upon the brink of a deep cut, and so graded that it sloped towards the cut instead of from it, was obviously more dangerous than the old one, which was not menaced by any such perils. The railroad was, therefore, in constructing the new road, bound to take all reasonable precautions to guard against accidents to be apprehended from these new dangers. It was bound to construct safe and permanent barriers between the line of the highway and the brink of the cut, to so grade the surface that the tendency of travel should not be always towards a deep and dangerous declivity, and to secure the banks in such a manner that a part of the highway would not slide into the cut, as it did. It cannot be affirmed as matter of law that the railroad ever performed this duty. It is true that it laid out a new road in another place; but whether this road, in view of all the circumstances, and with reference to the new condition of things, and the dangers to be apprehended, was such a restoration of the old one as the statute contemplates, was, upon all the evidence in the case, a question of fact to be determined by the jury. The court was not authorized, under

the circumstances of the case, to hold, as a matter of law, that the railroad had ever performed the full statutory duty. The facts and circumstances bearing upon this question were of such a character as to require their submission to the jury.

(2) The statute under consideration has frequently been the subject of judicial construction. Laws 1890, c. 565, § 11. The defendant's title to the railroad is derived from various corporations preceding it in the operation of the same, and it was one of these corporations that appropriated the old road and constructed the new one. We do not think that the defendant's obligations are changed by these facts. The duty of restoration is inseparable from the franchise granted, permitting the railroad to cross the highway, or divert it from the original location. The duty, it is true, was primarily imposed upon the corporation that appropriated the highway, yet, as it was a continuing obligation incident to the franchise when the defendant became vested with the property and its privileges, it also became burdened with the duty of restoration. The duty was not only to restore the road to its former condition, but to maintain this condition in a reasonable way, at least so far as its safety or usefulness was affected by its own acts and the ordinary operations of its business. The duty is not performed when the railroad restores the road on one day and destroys it on the next day. Though restoration may have been made, yet, if the railroad, by its ordinary operations, destroys the benefit of such restoration to the public, and renders the road unsafe, or unnecessarily impairs its usefulness, the duty which accompanies the exercise of the franchise imposes upon the corporation the burden of further restoration and maintenance. Any other rule would permit a railroad, that has once complied with the statute, to destroy what it had done, or to allow it to become useless or dangerous, without being subject to any of the remedies in favor of the public that the statute contemplates. When the defendant, or the corporation whose duty it has assumed, built the road on the edge of the cut, and subsequently undermined the bank, thus causing the roadbed to slide into the cut, leaving a dangerous pit or opening in the highway, the continuing duty imposed by the statute was not complied with until the defect thus caused had been repaired, and the road made safe. The usefulness of a highway is unnecessarily impaired, within the meaning of the statute, by a railroad that has occupied it, whenever it is left in such a condition that it is reasonably probable that it will become unsafe in consequence of the new situation and new surroundings. A highway laid out on the top of a bank of gravel which is being undermined by drawing off the material for the use of the railroad track, should be so secured and guarded by proper supports and barriers as to make it reasonably certain that the roadbed will not fall into the cut; and, if the new

road is left in such a state that such a result may reasonably be anticipated, the railroad has not complied with the spirit of the statute. In this case that result did occur, and the opening thus made in the road was, in the judgment of the jury, a proximate cause of the accident. The defendant, when called upon to respond in damages to the plaintiff for the injury, cannot defeat the claim by alleging that the road had once been put in proper condition, even if that fact had been found in its favor. It left the road with a frail fence on the south line of the railroad, which soon fell into decay, and disappeared, thus exposing travelers to the perils of the declivity below. It left the bank in such a condition that by the use for procuring gravel for its own purposes it could easily be foreseen that at some time the roadbed itself would be undermined, and its safety impaired. All this might, under the circumstances, have been reasonably anticipated, and, as such dangers in the process of time became more evident, it was the duty of the defendant under the statute to guard against them, and so maintain the highway in a reasonably safe condition against all defects produced by the railroad. This we conceive to be a reasonable construction of the statute, and one that is sustained in principle by the following authorities, in which the duty of maintenance, as well as of restoration, has been held to be implied in the statute: *Cott v. Railroad Co.*, 36 N. Y. 214; *People v. New York Cent. & H. R. R. Co.*, 74 N. Y. 302; *Hatch v. Railroad Co.*, 50 Hun, 64, 4 N. Y. Supp. 509; *Vaughan v. Railroad Co.*, 72 Hun, 471, 25 N. Y. Supp. 246; *State v. Dayton & S. E. R. Co.*, 36 Ohio St. 434; *Burritt v. City of New Haven*, 42 Conn. 174; *Thayer v. Railroad Co.*, 93 Mich. 150, 53 N. W. 216. If the duty of care and maintenance is enjoined by the statute where a railroad crosses a stream upon a bridge, or where the highway is changed, and made to pass over the railroad above grade, upon a bridge with approaches, we see no reason why the same duty does not exist in this case. It was a question for the jury to determine whether, upon either of these grounds, the statute had been complied with or not. If it had been disregarded, either in its letter or spirit, the defendant was liable for the damages resulting to the plaintiff. *Bryant v. Town of Randolph*, 133 N. Y. 70, 30 N. E. 657; *Schild v. Railroad Co.*, 133 N. Y. 446, 31 N. E. 327; *Post v. Railroad Co.*, 123 N. Y. 581, 26 N. E. 7; *McMahon v. Railroad Co.*, 75 N. Y. 231; *Masteron v. Railroad Co.*, 84 N. Y. 247.

When a public highway has once been appropriated to the use of a railroad company, the statute contemplates that the new use may endanger the safety of the road, not only in the first instance, but subsequently through the operations of the company, and by such changes as such operations may from time to time produce; and hence the duty of maintenance as well as restoration is comprehended in the statute. This result arises,

not only from the language of the statute, but from the nature of the case, and the new condition of things produced by the operation of a railroad on a highway. Since the town authorities cannot make such repairs or changes as the safety of the public may require, without interfering with the management and operation of the railroad, the duty is imposed upon the latter, so far as rendered necessary by its own operations. If, for instance, the railroad should find it necessary to relay its track on a different grade at a crossing, the statute would require it to make such repairs or changes in the highway as to conform to the new situation. It would be no answer, when charged with failure to perform the statutory duty, to say that it had once restored the road. So long as changes are made by the railroad, or occur in consequence of its operation, which affect the safety of the highway, the statutory duty to preserve the usefulness of the latter attaches, and remains until fully complied with. This principle applies where a new road has been substituted for an old one along the line of the railroad, as in this case, as well as where the old road is used for both purposes. The case was properly submitted to the jury, and, as there was no material error in the charge, the judgment must be affirmed. All concur, except HAIGHT, J., not sitting. Judgment affirmed.

(151 N. Y. 411)

**MCINERNEY v. PRESIDENT, ETC., OF
DELAWARE & H. CANAL CO.**

(Court of Appeals of New York. Jan. 19,
1897.)

NEGLECT—WHAT CONSTITUTES.

1. Plaintiff's employer, W., owned a switch track on his land from his mill to defendant's railroad. It was the custom to keep several box cars standing on this track, which were uncoupled and moved by hand as required. When W. desired to move any of the cars away, defendant's switch engine and crew would come to the yard for such purpose. On the day in question, the engine stopped at the entrance to the yard, and the crew notified W. that they were ready to do his work. Under W.'s direction, the engine went into the yard to couple the cars. At the time, plaintiff was between two of the cars, moving one of them by hand, and was injured by such cars being driven together by the engine. Its speed was a mile an hour, or less. *Held*, that defendant was not negligent, in the absence of knowledge by any of the engine crew that plaintiff was at work between the cars.

2. Defendant was not the master of W.'s employes, as well as of its crew; and hence defendant owed to plaintiff no active duty of vigilance, the failure to perform which was, in law, negligence.

Appeal from supreme court, general term, Third department.

Action by John McInerney against the President, Managers, and Company of the Delaware & Hudson Canal Company, for personal injuries caused by defendant's negligence. From a judgment of the general term, Third department (31 N. Y. Supp. 1130), affirming a judgment in favor of de-

fendant dismissing the complaint, at the close of the evidence, plaintiff appeals. Affirmed.

J. Newton Fiero, for appellant. Lewis E. Carr, for respondent.

BARTLETT, J. This is an action to recover damages for personal injuries. The plaintiff, at the time of his injury, October 31, 1890, was in the employ of James N. Willard, Jr., lumber dealer, in the city of Albany, who was the proprietor of a yard upon which stood a mill for the cutting and dressing of lumber, situated some distance from the railroad of the defendant. A switch had been constructed from the railroad premises to the lumber yard, entering at the north end, and extending its entire length parallel with the mill. A low platform was erected between the track and the mill, on which lumber was loaded and unloaded. It is an admitted fact that this track was the property of Willard, and built upon his land. When cars were standing in the yard for the purpose of loading or unloading, they were uncoupled and moved by hand as required, and it was customary to keep standing upon this track a number of box cars for the convenience of the business. When Willard desired to move any of these cars away, he sent word to the defendant company, and a switch engine, with its crew of men, would come to the yard for that purpose. It was customary for the engine to stop at the entrance of the yard, and the crew would send notice to Willard, or, in his absence, to his foreman, that they were ready to do his work, and they would await orders. This course of procedure was pursued on the morning of the accident. Willard was duly notified, and, under his direction, the engine entered upon the track in the yard, for the purpose of coupling the cars and drawing them out. It appears that plaintiff and a fellow workman were between two of the cars, engaged in moving one of them by hand, at the time the engine was backed down, and the cars were forced together. Plaintiff was caught between the bumpers, and severely injured. There is a conflict of evidence as to whether Willard, through his foreman, notified his various employes at work about and between the cars of the fact that the engine was about to back down. The plaintiff having been nonsuited, this disputed point must be deemed decided in his favor; and the single question is presented whether the defendant discharged its full duty in the premises, by notifying Willard, and proceeding with the work in the yard under his directions.

It was stated on the argument by the learned counsel for both parties that the precise question now presented has not been decided by this court. It seems to us quite clear, upon principle, that the defendant cannot be held liable on the admitted facts of this case, after giving to the plaintiff the

benefit of every presumption to which he is entitled under the record as it stands. It may be conceded at the outset that the engineer and crew on the defendant's engine, while operating in the yard of Willard, rested under the general duty imposed upon all men to abstain from injuring another intentionally or carelessly. There is no evidence that any of the engine crew knew that plaintiff was at work between the cars which were forced together. The engine had coupled on several cars, and stopped; then backed up further, for other unconnected cars, when the accident happened. The speed of the engine was a mile an hour or less, and the impact of the coupled cars upon the cars standing by themselves moved the latter from two to four feet. The plaintiff was working at a point where he was concealed from the engine crew, and at a time when they had every reason to assume, from the usual course of business in the yard, that all men working between and about the cars had been warned that they were about to be coupled and moved. It is therefore clear that the defendant did not violate any general duty imposed upon it which resulted in the injury of plaintiff.

We come, then, to the question whether the defendant owed to the plaintiff any active duty of vigilance, the failure to perform which was in law negligence. To render one liable for the negligence of another, the relation of master and servant, or principal and agent, must exist. *Stevens v. Armstrong*, 6 N. Y. 435; *King v. Railroad Co.*, 66 N. Y. 181. It is necessary to determine the precise relation of the parties, as a matter of law, under the admitted facts. The counsel for plaintiff insists that defendant was bound to use the same care and caution as it would be obliged to exercise upon its own track for the protection of persons properly engaged thereon, and that the question is whether the defendant discharged its whole duty towards plaintiff by giving notice to Willard, and failing to notify the men actually engaged upon the work. If the defendant was, in law, the master of not only the engine crew, but of all of Willard's employes during the moving of cars in the lumber yard at the time of the accident, then it undoubtedly rested under the obligation to notify the plaintiff that the cars were to be coupled and moved, and a notice to Willard alone would not be a discharge of its whole duty. It would be immaterial whether Willard was regarded as the servant or agent of the defendant for the purpose of giving notice to the plaintiff, as defendant would be liable for his failure to perform the duty imposed upon him. We are of opinion, however, that the defendant did not sustain the relation of master to the plaintiff, or to any one engaged in moving the cars in the lumber yard during the time that work was in progress on the day of the accident. Willard was the master on that occasion; and the plaintiff was in his employ.

45 N.E.—54

The track belonged to Willard, and was built upon his property. The engine crew of the defendant came upon Willard's track at his request, to perform a service for him; and during the time they were thus engaged and acting under his orders, and subject to his control, they were, in law, his servants. It would, doubtless, have been a careless and negligent act for the engine crew, upon being sent for, to have entered the yard of the plaintiff, and begun the work of coupling and moving cars without notice to Willard or his representative; but they discharged their whole duty to plaintiff, and to all the regular employes in the lumber yard, when they notified Willard, on the day of the accident, of their readiness to proceed with his work, and thereupon entered the yard with the engine, and coupled and moved the cars, in obedience to his orders.

We do not express any opinion as to whether, between the plaintiff and Willard, the latter was negligent, or whether plaintiff was injured by the act of a fellow servant. These questions are not before us, and nothing we have said is intended to bear upon them in any way.

The counsel for plaintiff insists that two rules of the defendant applied to the situation at the time of the accident, viz. rules 100 and 102; but, as the defendant rested under no responsibility as master, its rules cannot be invoked in aid of plaintiff's case. It is a hard situation for the plaintiff, who appears to have been very seriously injured, but the case was properly disposed of by the supreme court. The judgment appealed from should be affirmed, with costs. All concur, except *ANDREWS, C. J.*, not sitting. Judgment affirmed.

(151 N. Y. 443)

SPEARS v. WILLIS.

(Court of Appeals of New York. Jan. 19, 1897.)

PARTNERSHIP—ACCOUNTING—ASSIGNMENT OF PATENTS—EQUITABLE RELIEF.

1. A private stipulation of a partner, whereby he procures a partnership contract to be canceled, and a new one, on like terms, to be made to him individually, accrues to the benefit of the partnership; and such partner must account to his co-partner for his share of the profits realized under the new contract.

2. An expression by a partner of his unwillingness to continue in business and divide the profits, and an expression of a willingness by the co-partner to sell his interest in the business, are merely naked propositions from each, which do not affect the partnership relation or business.

3. Where a partnership agreement contemplated the manufacture of articles under a designated patent, and the firm manufactured according to improved patterns furnished by one of the partners, and these were used as partnership property, the conduct of the parties will preclude a denial by one of the partners that the firm was not engaged in the business contemplated by the partnership agreement, and that his co-partner had no interest therein. 28 N. Y. Supp. 1118, affirmed.

4. Rev. St. U. S. § 4898, providing that "every patent or any interest therein shall be assignable in law by an instrument in writing," refers to the method of conveying legal interests, but does not preclude the acquisition of equitable interests in patents under oral contracts.

5. Specific performance will not be denied where it was verbally agreed that defendant should sell plaintiff a half interest in a patent, and that they should manufacture under the same, and they accordingly manufactured for a number of years, even though plaintiff's testimony of payment for his interest in the patent is denied by defendant; demand of payment not being shown. 28 N. Y. Supp. 1118, affirmed.

Appeal from supreme court, general term, Third department.

Action by James Spears against Eben Willis to dissolve a partnership, and for an accounting. There was a judgment for plaintiff, affirmed at general term (28 N. Y. Supp. 1118), and defendant appeals. Affirmed.

Theodore H. Swift, for appellant. Ledyard P. Hale, for respondent.

ANDREWS, C. J. Some of the questions litigated on the trial have, by lapse of time, become of little practical importance. The patent of 1877 has expired during the pendency of the litigation, as has also the period during which, by the terms of the contract between Millar & Son and the firm of Willis & Spears, of January 18, 1887, that contract was to continue in force. The provision in the judgment, therefore, requiring the defendant to assign to the plaintiff, by formal assignment, a one-half interest in the patent of 1877, and the provision vesting in the receiver the contract of Millar & Son, have become unimportant. But the substantial question remains as to the liability of the defendant to account to the plaintiff for one-half of the gains realized by him from the sale of sap spouts by the defendant to Millar & Son, in his individual name, after January 1, 1888. The complaint alleges that in the year 1879 the defendant was the owner of letters patent No. 189,330, issued April 10, 1877, by the United States, for an improvement in sap spouts, and, in the year first mentioned, entered into an agreement with the plaintiff whereby he sold to him an undivided half interest in the said patent, for the sum of \$500, which sum was thereupon paid by the plaintiff to the defendant, and whereby the parties entered into a co-partnership, under the name of Willis & Spears, to conduct the business of the manufacture and sale of sap spouts under said letters patent, each party contributing to the partnership his half interest in the patent, and agreeing to furnish one-half of all necessary capital, and each to receive one-half of the profits. It alleges that the firm carried on the business contemplated until a short time before the commencement of the action; that the defendant now claims to be the sole owner of the patent, and has taken exclusive possession of the partnership business, and prevents the plaintiff having access thereto;

that the defendant refuses to execute an assignment to the plaintiff of a one-half interest in the patent in the form required by the rules of the patent office of the United States. The complaint, among other things, demands judgment that the defendant be required to execute a proper assignment of an undivided one-half interest in the patent to the plaintiff, for a dissolution of the co-partnership and an accounting. The answer admits the formation of the co-partnership as alleged in the complaint, but (as amended on the trial) denies that the plaintiff paid the purchase price for the one-half interest in the patent, and avers that the agreement for the sale of the one-half interest thereto was not in writing, and was for that reason invalid, and did not transfer any interest therein to the plaintiff. The answer also alleges that, soon after the making of the agreement alleged in the complaint, the defendant made a new and improved sap spout, which he has since manufactured and sold, in which the plaintiff had no interest, and that but a few sap spouts were made under patent No. 189,330. The answer further alleges, in substance, that, about three years before the commencement of the action, the plaintiff abandoned the business, and refused to have anything further to do with it.

The case was heard before a referee. It was undisputed that the parties carried on the business of manufacturing and selling sap spouts from 1879 to about January 1, 1888, under the firm name of Willis & Spears. Prior to 1887 the business was conducted in this way: The firm procured the sap spouts to be manufactured by a manufacturing corporation in Connecticut, and sales were made by the members of the firm, and through agents, as customers could be found. In January, 1887, the firm entered into a written contract with Millar & Son, of Utica, by which the latter firm agreed to take the whole output of Willis & Spears up to 100,000 sap spouts "during the life of the patent, about eight years," and to pay the price named therein. Thereafter the course of business was that Millar & Son, at the commencement of each season, would notify Willis & Spears of the number of sap spouts they required; Willis & Spears would notify the manufacturers in Connecticut; and the sap spouts would be forwarded from the place of manufacture directly to Millar & Son, who would then remit the price to Willis & Spears, who, in turn, would remit the cost of manufacture to the Connecticut corporation. This arrangement greatly simplified the business, and but little personal attention was thereafter required on the part of Willis & Spears. In the fall of 1887 the plaintiff removed from Colton (in St. Lawrence county) to Canton, in the same county, and thereafter took but little, if any, part in the business of Willis & Spears. In the early part of 1888, Willis, without the

knowledge of Spears, procured Millar & Son to cancel the written contract of January, 1887, and to substitute a verbal contract therefor of the same tenor, the only change, in its terms, being that Willis individually was substituted as the vendor of the sap spouts in place of Willis & Spears; and after this change Millar & Son accounted to Willis individually for sap spouts purchased by them. The referee decided that the defendant was bound to account to the plaintiff, as co-partner, for his share of the profits realized by Willis in the dealings with Millar & Son after January 1, 1888; and the correctness of the ruling is sharply contested by the defendant.

The partnership agreement was oral, and the duration of the partnership was not expressed in the agreement between the parties. The defendant concedes that, by implication, it was to continue during the life of the patent No. 189,330, which expired about 1895. But if it was a partnership at will, either because its duration was not fixed by the agreement, or for the reason that it was an oral agreement, not to be performed within a year from its inception; nevertheless, it continued until it was dissolved by the act of one or both of the parties. It was claimed by the defendant that the removal of the plaintiff to Canton, in the fall of 1887, and his thereafter ceasing to take any part in the business, was an abandonment by the plaintiff of the partnership, and operated as a dissolution. The defendant also sought to establish that in the fall of 1887 he informed the plaintiff that he would no longer continue the partnership. It is sufficient to say that the referee refused to find that the plaintiff abandoned the business of the partnership, and his finding as to what was said between the parties in the fall of 1887 shows simply that while the defendant expressed an unwillingness to continue the business and divide the profits, and the plaintiff showed a willingness to sell his interest, there was only a naked proposition from either, and that no change was effected in their relation as partners.

The dissolution of a partnership at will may be implied from circumstances; but, when not the result of mutual agreement there must be notice by the party desiring a dissolution, to his co-partner, of his election to terminate the partnership, or his election must be manifested by unequivocal acts or circumstances brought to the knowledge of the other party, which signify the exercise of the will of the former that the partnership be dissolved. 2 Lindl. Partn. bk. 4, p. 572, § 1, and cases cited. It is claimed in behalf of the defendant that the firm of Willis & Spears never conducted the business contemplated in the partnership agreement, namely, the manufacture and sale of sap spouts under patent No. 189,330, of 1887, and that the sap spouts which were supplied to

ent, but were a new invention and improvement, invented by the defendant, in which the plaintiff had no interest. It is insisted, therefore, that, the firm of Willis & Spears not having any interest in the new invention, the defendant was authorized to terminate the contract with Millar & Son, and thereafter supply them with sap spouts on his own account. The sap spouts furnished Millar & Son after January 1, 1888, were of the same description as those which Willis & Spears were manufacturing when the contract of January, 1887, was made, and which they furnished to Millar & Son under that contract during that year, and while the partnership of Willis & Spears (as conceded by the defendant) was in existence. The referee found that the sap spouts manufactured by the firm of Willis & Spears were not made in strict conformity with the specifications of patent No. 189,330, but that, at the commencement of the co-partnership, they were made after patterns furnished by the defendant, which were embraced in the sale, and were used as a part of the co-partnership property, and that from time to time alterations and improvements were made in the spout manufactured by the firm. We are unable to determine whether the principle of the invention of 1877 was ever departed from in the improvements of the spout subsequently made. But the evidence is quite conclusive that the parties understood that the patent of 1877 covered the spouts as changed from time to time. They were stamped "Pat. 1877." The firm defended an action for infringement by setting up their right acquired under the patent of 1877. The circulars issued by the firm contained a picture of the spout, substantially like the one manufactured for Millar & Son, and some of them stated that they were patented in 1877. In short, there were the most unequivocal admissions on the part of the defendant, by his acts and representations, that the spout manufactured by the firm was the spout covered by the patent of 1877. The reference to a Canadian patent, contained in the evidence, does not, so far as we can perceive, weaken the clear inference from the facts above stated, that the spouts furnished to Millar & Son were covered by the patent of 1877. Even if the fact was doubtful, the conduct of the defendant precludes him from now claiming that, in manufacturing the spouts, the firm was not engaged in the business contemplated by the partnership agreement, or that the written contract with Millar & Son, of January, 1887, did not relate to spouts covered by patent No. 189,330.

It is insisted, however, in behalf of the defendant, that, assuming that the spouts were covered by that patent, nevertheless the plaintiff acquired no interest therein, because the agreement for the transfer to him of an interest in the patent was oral, and under section 4898 of the Revised Statutes of

the United States, which provides that "every patent or any interest therein shall be assignable in law by an instrument in writing," is, in substance, a declaration that no interest in a patent can be acquired in any other way. It is to be observed that the section speaks of the method of conveying legal interests in patents. It declares that patents and interests therein shall be "assignable in law" by an instrument in writing. It does not in terms preclude the acquisition of equitable interests in patents under oral contracts. Indeed, it seems to be well settled that oral agreements for the sale of patents may be enforced in equity in the same manner and under the same conditions as oral agreements relating to any other species of personal property or intangible rights. *Burr v. De La Virgne*, 102 N. Y. 415, 7 N. E. 366; *Somerby v. Buntin*, 118 Mass. 279; *Searle v. Hill*, 73 Iowa, 367, 35 N. W. 490; *Walk. Pat. § 274*. We think the circumstances disclosed made a case for the enforcement in equity of the oral contract of assignment. The parties, on the faith of the agreement, entered into and conducted the partnership for many years, without any question being raised as to its validity. It would be manifestly inequitable to permit the defendant to deprive the plaintiff of the benefit of the agreement at this late day.

The referee, reposing upon the rule that the burden of showing payment of the purchase price of the half interest in the patent rested upon the plaintiff, found that the fact was not established, the plaintiff testifying one way, and the defendant the other. The defendant admitted the existence of the oral contract to assign, and that he had never demanded payment. But the parties acted upon the assumption that plaintiff was a half owner of the patent. The judgment provides for a credit to the defendant of the purchase money and interest on the accounting, and this, we think, was all to which the defendant was in equity entitled. The fact of non-payment, under the circumstances, ought not to defeat the right to equitable relief. The conclusion of the referee, that the plaintiff was entitled to an account of the partnership transactions from and including the year 1888, and of all dealings of the defendant under the contract with Millar & Son, of January, 1887, or under any contract in his own name in contravention thereof or substitution thereof, legitimately followed from the facts found. The contract of January, 1878, was valuable, and was an asset of the partnership. The relation between partners is fiduciary, and the strictest good faith is required in their dealings with each other, or with the partnership interests. "All the partnership property" says Judge Story (*Story, Partn. § 174*), "and partnership contracts, should be managed for the equal benefit of all partners, according to their respective shares and interests therein. If, therefore, any one partner should stipulate clandestine-

ly for any private advantage or benefit to himself, to the disadvantage or in fraud of his partners, he will, in equity, be compelled to divide such gains with them." See, also, 2 Kent, Comm. 51. We find no error in the record, and the judgment should therefore be affirmed. All concur. Judgment affirmed.

(151 N. Y. 386)

PEOPLE ex rel. GORING v. PRESIDENT,
ETC., OF VILLAGE OF WAPPING-
ERS FALLS.

(Court of Appeals of New York. Jan. 19,
1897.)

MANDAMUS—PEREMPTORY WRIT—DAMAGES—ELEC-
TION—WAIVER.

1. Though Code Civ. Proc. §§ 2082, 2088, contemplate the issuing of an alternative writ of mandamus in the first instance, and due proceedings thereunder, which result in an order for the peremptory writ, their provisions for having the relator's damages assessed in the pending proceeding apply also where the peremptory writ has been granted in the first instance. 37 N. Y. Supp. 1148, reversed.

2. Where a relator, at the time of the entry of a final order, was entitled to have his damages assessed in the proceeding as authorized by Code Civ. Proc. § 2088, if he had so elected, a subsequent stipulation of the parties, on which an order was entered appointing a referee to take proof to enable the court to assess the damages of the relator, was a waiver of the relator's failure to exercise his election in due season.

Appeal from supreme court, general term, Second department.

Application by Edward M. Goring for a writ of mandamus to compel the president and trustees of the village of Wappingers Falls to recognize relator as police justice of said city. The application was granted (30 N. Y. Supp. 285; 31 N. Y. Supp. 758; 39 N. E. 641), and relator now moves for an assessment of damages against defendants. From the affirmation of an order (37 N. Y. Supp. 1148) denying the relator's motion (35 N. Y. Supp. 213), relator appeals. Reversed.

Bernard J. Tinney, for appellant. Fred-
eric Barnard, for respondents.

BARTLETT, J. The relator was elected a police justice at the village election held in Wappingers Falls on the third Tuesday of March, 1894. The trustees of the village refused to recognize the relator, whereupon he applied for a peremptory writ of mandamus to compel them to act in the premises as required by law. The special term granted the writ, and this court affirmed the order of the general term, which slightly modified and affirmed the original order. 144 N. Y. 616, 39 N. E. 641. The relator noticed a motion for April 19, 1895, on the remittitur of this court, for the usual order in the court below, and also that he would require his damages to be assessed herein. On the return day of this motion the attorneys for the respective parties entered into a written stipulation, upon which an order was entered

appointing a referee to take proof for the purpose of enabling the court to assess the damages of the relator. The referee was directed to return the testimony, and upon the filing of his report the motion on the remittitur was to be brought to hearing on a three-days notice. The relator took his proofs, the motion was brought on for final hearing at special term August 9, 1895, and the court refused to consider the question of damages on the proofs, for the reason that, as a peremptory writ of mandamus was granted in the first instance, there was no "final order," as defined by the Code of Civil Procedure (section 2082), and that no cause of action to recover damages for a false return existed (section 2088) which permitted relator to elect to have his damages awarded to him in this proceeding. It was also held that, if the order of the special term granting the peremptory writ could be deemed a "final order," it was too late to assess the damages in this proceeding, as the relator should have indicated his election to have this done upon the making and entry of that order.

It is true that the sections of the Code of Civil Procedure referred to (sections 2082, 2088) contemplate the issuing of an alternative writ of mandamus in the first instance, and due proceedings thereunder, which result in an order for the peremptory writ; but it would be a narrow and unreasonable construction of these provisions to hold that the order granting the peremptory writ, after a litigation in the nature of an action, under section 2082, carries with it greater advantages or rights than a similar order entered upon motion. It is the evident intent of the legislature that a relator who has secured his final order for the peremptory writ ought not to be driven to his action for damages, and subjected to the delays incident to a second litigation; but, if he so elects, the court must award him his damages in the pending proceeding. The relator, under this construction of section 2088, was entitled, had he so elected at the time he entered his final order, at special term, for the peremptory writ on the 2d day of June, 1894, to an award of his damages against the defendants. It is admitted that the relator failed to avail himself of this provision in his favor, and did not seek to exercise his right of election until he moved for an order on the remittitur of this court.

We would be inclined to agree with the learned court below that it was then too late for the relator to insist upon an assessment of his damages in this proceeding, and that he should resort to his action, were it not for the stipulation, already referred to, which permitted the taking of proofs as to damages. The supreme court did not refer to this stipulation, and evidently failed to consider it, or give it any weight. The relator, relying upon the stipulation, postponed the hearing upon his motion upon the remittitur of this court

for nearly four months, and in the interval incurred the expense of taking his proofs as to damages. We think this stipulation and the action thereon, must be regarded as a waiver on the part of defendants of any right to object to the relator's failure to elect in due season to have his damages awarded in this proceeding. We agree with the counsel for the defendants that the stipulation ought not to be construed as an admission of the existence of a valid claim for damages. It is, however, an admission that the relator is entitled to have his damages, if any exist, assessed and awarded in this proceeding; and it is the duty of the special term to consider the proofs submitted.

The question as to the proper items constituting the damages which relator is entitled to recover in this proceeding, although discussed in the briefs, is not before us on this appeal. The order appealed from should be reversed, with costs, and this proceeding remitted to the special term to assess and award to the relator such damages, if any, as his proofs may warrant. All concur. Ordered accordingly.

(151 N. Y. 473)

FLANDREAU v. ELSWORTH.

(Court of Appeals of New York. Jan. 19, 1897.)

WHARFAGE — RIGHT TO COLLECT — CONSTRUCTION OF STATUTE — EVIDENCE — TRIAL.

1. The fact that the lessee of the right to collect wharfrage on a bulkhead from the city of New York compelled the dock commissioners of the city, by mandamus, to remove certain barges moored to such bulkhead, and to place him in possession, does not estop him to collect wharfrage from such barges to the time of their removal, wharfrage being a charge fixed by statute, and the right to collect it a franchise.

2. Consol. Act, § 798, authorizing the collection of wharfrage by the city of New York at certain rates, based on the tonnage of registered vessels, "and from every vessel or floating structure other than those above named, or used for transportation of freight or passengers," is to be construed as though the paragraph quoted read, "and from every vessel or floating structure, other than those above named, or other than those used for transportation of freight or passengers;" and, under such provision, an oyster barge, kept moored to a dock for use, is a floating structure, subject to wharfrage. 29 N. Y. Supp. 694, affirmed.

3. Where the charge for wharfrage is based on tonnage, it is competent to prove the tonnage of a barge, not entitled to registry, by expert testimony.

4. Where the character and structure of a barge were not in dispute, the question of whether it was subject to wharfrage under the statute was one for the court.

5. A party asking to have questions of fact arising on the evidence submitted to the jury must state in his motion the particular questions he desires submitted to render his exceptions to the ruling denying the motion of any avail.

Gray, O'Brien, and Haight, JJ., dissenting.

Appeal from superior court of New York City, general term.

Action by Frank Flandreau against Philip Elsworth to collect wharfrage. A judgment of

the trial term in favor of plaintiff was affirmed by the general term (29 N. Y. Supp. 694), and defendant appeals. Affirmed.

David McClure, for appellant. Edmund Luis Mooney, for respondent.

BARTLETT, J. This action was brought to recover wharfage. The plaintiff was the lessee or assignee of the city of New York of the right to collect wharfage on 300 feet of bulkhead northerly to the approach of Pier New 47, North river, for the term of two years from the 1st day of May, 1890, at the annual rental of \$10,250. This instrument of transfer assigned "all and singular of the wharfage which may arise, accrue, or become due for the use and occupation, in the manner and at the rates prescribed by law," of the bulkhead in question. The defendant kept moored to a portion of the bulkhead a floating structure, known as an "oyster barge," from the 1st day of May, 1890, until the 8th day of November, 1890. This action is brought to recover wharfage accruing during that period, at the rate prescribed by section 798 of the consolidation act (Laws 1882, c. 410). The facts in this case are practically undisputed, and the defense rests mainly upon the contention that section 798 of the consolidation act does not apply to the defendant's floating structure known as an "oyster barge," and that, consequently, there is no provision of law which authorizes plaintiff to collect wharfage of defendant.

The defendant, in his motion to dismiss the complaint, claimed that the plaintiff, having compelled the commissioners of docks of the city of New York, by mandamus, to put him in possession of the bulkhead leased of the city of New York, for the purpose of collecting wharfage, is precluded from bringing this action. This point may as well be disposed of before considering the important question in the case. It seems that there were some 14 floating structures known as "oyster barges," including the one owned by defendant, which were moored to the bulkhead in question on and after the 1st day of May, 1890, under arrangement with a previous lessee or assignee of the right to collect wharfage, whose lease expired May 1, 1890. The plaintiff, in this emergency, obtained a writ of peremptory mandamus commanding the commissioners of docks of the city of New York to prevent the permanent occupancy of the bulkhead by such floating structures, and to place him in actual control, so that he might collect wharfage. This was finally accomplished on the 8th of November, 1890, and the defendant is sued for wharfage from May 1, 1890, to that date. The defendant, over plaintiff's objection and exception, put in evidence the petition, order to show cause, and peremptory writ of mandamus in the proceeding referred to, and proved by defendant that he removed his floating structure after written notice from the dock com-

missioners that the mandamus had issued, and requiring him to vacate within five days. The defendant's contention is that as the plaintiff had secured the removal of these floating structures on the ground that they unlawfully prevented, permanently, the use of the bulkhead for all purposes of navigation or commerce, it estops him from collecting wharfage during the time defendant held over and occupied a portion of the bulkhead after May 1, 1890. The mandamus proceeding worked no such result, even if defendant was in a position to invoke it. The right to collect wharfage rests upon the statute. It is a franchise dependent upon a grant from the sovereign power. In *Walsh v. Dock Co.*, 77 N. Y. 448, 452, this court said (Judge Andrews writing the opinion): "The right to collect wharfage is a franchise, and depends upon a grant by the sovereign power. *Wiswall v. Hall*, 3 Paige, 313; *Houck, Rivers*, §§ 283, 284. It is given as a compensation to persons who, under the authority of law, have constructed piers and wharfs, and to remunerate them for the outlay made for the convenience and safety of vessels, and the benefit conferred thereby upon commerce and navigation. *Ex parte Easton*, 95 U. S. 73; *Mayor, etc., v. Trowbridge*, 5 Hill, 74." The statute provides that every vessel that uses or makes fast to any pier, wharf, or bulkhead within the city shall pay wharfage at a given rate per day, calculated upon tons burden, and certain floating structures double that rate. Consolidation Act, § 798. It was competent for the plaintiff to compel the city of New York to place him in possession of the bulkhead, and there was nothing in the nature of that proceeding which prevented wharfage accruing under the statute against defendant's floating structure.

We have deemed it better to consider this point on the merits, although it was a complete answer to the competency of the mandamus record that defendant was not a party to that proceeding; also, that the claimed eviction was not set up in the answer. No contract relation was proved between plaintiff and defendant, either express or implied, and the plaintiff seeks the enforcement of a purely statutory right, founded upon public policy, designed to benefit commerce and navigation. The plaintiff, under the peculiar circumstances of this case, had no action at law for damages, as defendant had violated no contract, as none existed, and plaintiff's statutory remedy was complete if it be determined that the statute authorizing the collection of wharfage applies to the floating structure of the defendant.

This brings us to the consideration of the important question in this case,—whether the consolidation act (section 798) applies to the defendant's barge. The complaint alleges that the defendant moored and kept moored to the bulkhead a certain floating structure, known as an "oyster barge." The answer states, in substance, among other averments,

that for a number of years prior to May 1, 1890, the place at which the barge of this defendant was moored was used exclusively for the purpose of the oyster business, and that other barges of a similar character were moored to the bulkhead. There is no conflict of evidence as to the character of this barge, and the purposes for which it was used. The hull was 74 feet long, 17 feet wide, calked, and rose and fell with the tide. On this hull was constructed a structure of two stories, the width of the hull and 6 feet shorter, with a flat roof. These stories were 7 or 8 feet high. The manner in which she was moored to the dock showed her to be a floating structure. She was boarded by a gang plank or platform working on a hinge, and the boom was in some sort of an adjustable joint or socket. The defendant's barge, and others of a similar character, were moored endwise to the bulkhead. These barges were used in conducting the oyster business, the boatmen who brought oysters to the city selling them to the owners of these floating structures, and discharging their cargoes on board. It is admitted that defendant's barge was not technically a vessel, as described in the first portion of the section we are about to consider; nor was she entitled to a registered tonnage under the statutes of the United States for the regulation of commerce and navigation. It is admitted this barge was nothing like a ship; had no means of propulsion, rudder, sails, mast, or deck. It is undisputed that she was a floating structure, and was capable of being towed from one point to another, although it is not claimed she was calculated to encounter rough water in safety, or transport freight or passengers as a regular business.

Section 798 of the consolidation act, so far as material, reads as follows, viz.: "It shall be lawful to charge and receive within the city of New York wharfage and dockage at the following rates, namely: From every vessel that uses or makes fast to any pier, wharf, or bulkhead within said city, * * * for every day, or part of day, * * * as follows: From every vessel of two hundred tons burden and under, two cents per ton, * * * and from every vessel or floating structure, other than those above named, or used for transportation of freight or passengers, double the first above rates, except that floating grain elevators shall pay one-half the first above rates." The stress of this case is upon the construction to be given the words "vessel or floating structure, other than those above named, or used for transportation of freight or passengers." This matter of construction has been elaborately and learnedly argued by counsel on both sides of the case, but it is impossible within the limits of an opinion to comment in detail upon the various points discussed. It must be admitted that the sentence under construction is imperfect, and to some extent ambiguous. The counsel for the defendant

reaches the conclusion that this sentence should be read in one of the following ways, viz.: "Every vessel or floating structure other than those above named, and used for the transportation of freight and passengers;" or by omitting the word "and" before the word "used," which comes to the same result. It will be observed that in either case the defendant's counsel does away with the word "or" before the word "used" in the statute as it stands, it being his contention that the legislature was only dealing with floating structures used for the transportation of freight or passengers. We are unable to adopt this construction of the statute, and are of opinion the sentence presents the case of an evident ellipsis or omission, which must be supplied, taking into consideration the circumstances under which the statute was framed, and the situation with which the legislature had to deal. The section had already dealt with vessels employed in commerce and navigation, engaged in the transportation of freight or passengers, and entitled to a tonnage register, and it then obviously sought to include vessels or floating structures not used for the transportation of freight or passengers. The proper reading of the sentence is as follows, viz.: "And every vessel or floating structure, other than those above named, or other than those used for transportation of freight or passengers, double the first above rates." We interpolate the words "other than those" immediately before the word "used." The legislature, clearly, did not intend to impose double rates of wharfage on vessels engaged in the transportation of freight or passengers, but floating structures permanently moored to a pier or bulkhead might well be compelled to pay double rates. This construction is in accord with public policy, as the law favors commerce and navigation. In May, 1891, and after the plaintiff's mandamus proceedings against the city of New York, the legislature amended section 799 of the consolidation act, which deals with vessels in the clam and oyster trade, as follows, viz.: "The department of docks may grant permits for vessels or floating structures engaged in the oyster business and used for the receipt, preparation and vending of oysters and other shellfish to remain continuously moored to any of the docks, piers and bulkheads within the city and county of New York not otherwise specially appropriated by law to the sole use of other kinds of commerce, upon such terms as to wharfage and otherwise, and subject to such regulations as said department may prescribe." This statute is significant, both in the language employed and its general import, when taken in connection with the section we are now considering.

It is further insisted on behalf of the defendant that it was improper for plaintiff to prove by an expert the tonnage of the hull of defendant's oyster barge. As this floating structure was to pay double the wharfage

rates of vessels engaged in the transportation of freight or passengers, based on tons burden, and as it was not entitled to a registered tonnage under the United States statutes, the mode of proof adopted was proper and necessary. The expert sworn was shown to be thoroughly competent to testify in the premises.

There was no question for the jury in this case. The learned counsel for the defendant insists that the nature of the craft this floating structure was, and whether it came within the terms of the statute, was a question of fact. The character of the floating structure was not disputed, and it was a question of law, upon undisputed facts, whether it was within the provisions of the statute as to the collection of wharfage. It is further insisted that the question should have been submitted to the jury whether any actual measurement had ever been made by plaintiff's expert witness of the hull of this oyster barge. The fact of such measurement rests upon uncontradicted evidence. If this were not so, however, the defendant is in no position to urge that it was error not to have submitted the question to the jury. At the close of the evidence, the defendant asked for a directed verdict in his favor; and, after the motion was denied, he asked to go to the jury upon the questions of fact arising on the evidence in the case, which motion was also denied. The failure to state any particular question of fact he desired submitted to the jury renders his exception to this ruling of no avail. *Mayer v. Dean*, 115 N. Y. 559, 22 N. E. 261; *Muller v. McKesson*, 73 N. Y. 195; *O'Neill v. James*, 43 N. Y. 93. After these motions on behalf of the defendant were made and denied, the plaintiff's counsel asked the court to direct a verdict in plaintiff's favor for a certain sum and interest, which was granted. The defendant did not except to this ruling, but moved to set aside the verdict, and for a new trial, upon all the grounds specified in the Code. This motion was denied, and exception taken. The judgment and order appealed from should be affirmed, with costs. All concur, except GRAY, O'BRIEN, and HAIGHT, JJ., dissenting. Judgment and order affirmed.

(151 N. Y. 482)

BIERMAN et al. v. CITY MILLS CO.

(Court of Appeals of New York. Jan. 19, 1897.)

SALE—IMPLIED WARRANTY BY MANUFACTURER—LATENT DEFECTS.

1. Where the seller of an article to be delivered is the manufacturer, and knows the use to be made of it by the purchaser, there is an implied warranty that it will be free from latent defects arising in the process of manufacture, and that it will be merchantable, and reasonably fit for the purpose for which it is bought. 30 N. Y. Supp. 929, reversed.

2. When a defect in the article is not discoverable on inspection, or by ordinary tests, such warranty continues after delivery and acceptance by the buyer.

Appeal from common pleas of New York city and county, general term.

Action by Isaac Bierman and others against the City Mills Company for breach of warranty on a sale of goods. A judgment for defendant on a verdict directed by the trial term was affirmed by the general term (30 N. Y. Supp. 929), and plaintiffs appeal. Reversed.

Sol. Kohn, for appellants. Edward Hinman, for respondent.

GRAY, J. The plaintiffs brought this action to recover damages of the defendant for a breach of warranty in the sale of felt cloths; and, as there was no written contract at the time, it is essential to know the facts and circumstances under which the sales were made. The plaintiffs were engaged in business in the city of New York, as manufacturers of clothing. The defendant, a Massachusetts corporation, was engaged in the business of the manufacture and sale of felt goods. The plaintiffs alleged that the defendant, through its lawfully authorized agent, had represented to them that it manufactured a certain kind of cloths, fit for their use in the manufacture of coats, and had requested them to purchase some. They further alleged that, relying on the representation, they had purchased such cloths, and had manufactured them into clothing; that they subsequently discovered that the cloths were "damaged, of an inferior quality, rotten, and unfit for any purpose whatever"; and that the defendant had concealed the defects from the plaintiffs. They alleged that the defect was a latent one, and not discoverable by inspection, and was indicated by wear; that many of the goods sold by the plaintiffs had been returned to them; and that they had on hand a number of said coats, which they had been unable to dispose of. The answer denied that the defendant had made any representations to the plaintiffs, as alleged, and denied the other allegations of the complaint respecting the cloths sold, and set up as a defense that the goods purchased by the plaintiffs were first-class articles of their kind, and suitable for the manufacture of low-priced coats. Upon the trial of the issues, the plaintiffs gave evidence that they had not purchased felt goods to be manufactured into clothing, until they made the purchases from the defendant, which occurred in the spring of 1890, at the plaintiffs' place of business in New York. The purchase was made through a Mr. Nichols, who showed them a sample of the cloth, and stated that it would make a splendid ulster, that it wore like buckskin, and that he had an ulster made from the goods which he had worn for two years. Upon these statements, and at the price of a dollar a yard, the plaintiffs told him that, "if he could warrant the goods," they could use a very large quantity. Mr. Nichols said "he would warrant it to wear," and thereupon plaintiffs told him to send in a few pieces of the goods to be made up into

a lot of ulster samples; and orders were then and subsequently given for cloths to be made up into ulsters for the fall trade, which were filled by the defendant. Plaintiffs gave evidence that they entirely relied upon Mr. Nichols' statements as to the quality of the goods, and had no knowledge regarding the wear of the cloth when manufactured into ulsters. Plaintiffs proceeded with the manufacture of these goods, through the summer months, to the extent of 1,326 ulsters, of which they sold 1,027 throughout the country. Subsequently, ulsters were returned to the plaintiffs in a damaged condition, with holes in them, or "broken," or with "tender places" in them. The number of coats returned in a damaged condition was 200. The custom of the plaintiffs, when goods were received, was to examine them before sending them out to be manufactured into garments, and then, when returned, the garments were again thoroughly examined. Witnesses familiar with felts testified as to how they were made, and that, unless made with stocks or fibers sufficiently long to hold the short stocks or fibers together, upon exposure, the stocks will "creep," or draw away from each other. They testified, upon examining the ulsters in question, that the greater proportion of the stocks from which they were made had been short stocks; that, after exposure, where the felt is not properly worked, the short stocks draw away from the long stocks; and that the breaks in these ulsters were attributable to that cause. There was also testimony by a dealer in felt goods, who was familiar with the process of manufacturing, and who had sold felt goods for overcoatings, that, if made of proper materials, they would wear well, and that the way of testing felt for durability and quality was only by actual wear, unless "you try every square inch of the goods." At the conclusion of the plaintiffs' evidence, they had shown that the felt cloths which they had purchased of the defendant, when made up into these overcoats and sold to customers, had proved, at least to a certain extent, to be so defective in their manufacture, and were such "tender" goods, that holes, or breaks, appeared in the garments; that 200 of them had been returned, and 299 were left unsold and were of no value. If their evidence is to be believed, these defects resulted from improper processes of manufacture, and were only discoverable after exposure upon being worn. On behalf of the defendant there was evidence to the effect that Nichols had never been in its employ, and, upon his examination, he denied the representations attributed to him by the plaintiffs. He admitted that he had said that this felt cloth was a good thing for an overcoat, and that he knew it was to be used for that purpose by the plaintiffs. He testified that he was not a manufacturer of felts, and that the goods he sold to the plaintiffs were to be delivered by the defendant. There was also evidence for the defendant, given by its

superintendent, that the felt delivered was a reasonably merchantable article for the price, and that there was an ordinary and easy test for detecting the tenderness of the material by pulling it in a certain way. A manufacturer of felts, examined for the defendant, testified that he attributed the "creeping" in the goods to a great extent to the rubber linings, which the plaintiffs had added to the coats in manufacturing them. When all the evidence was in, on motion of the defendant, a verdict was directed in its favor; and the request of the plaintiffs for leave to go to the jury upon the questions of fact, upon the question of whether there was an express or implied warranty, and upon the question of the damages, was denied; and an exception was taken to that denial. The general term affirmed the judgment entered at the trial term, and we are required, upon this appeal, as the main question, to consider the correctness of the disposition made of the case by the trial court.

Although the plaintiffs failed to sustain their allegation that the defendant had made certain representations to them respecting the goods, through an agent authorized to make the same, and, therefore, failed to establish an express warranty on the part of the defendant, their complaint contained by a liberal construction a sufficient cause of action for the recovery of damages for the breach of an implied warranty that the felt goods sold were fit for the plaintiffs' business in the manufacture of overcoats, and that they were merchantable, and free from any remarkable defect. The plaintiffs proved no custom to the effect that such sales were usually attended with a warranty, and, therefore, in the absence of such proof, and because of the failure to show any express authorization by the defendant to Nichols to sell, it cannot be said that any express warranty accompanied the sale. Nor did the ratification of Nichols' act, through the adoption of the sale by the delivery of the felts, bind the defendant to make good his warranty, or all of his representations. The rule is well settled that ratification must be with full knowledge of the agent's acts. Even if Nichols had been employed to sell the goods, unless he was given express power to warrant, he could not give a warranty which would bind his principal, unless the sale was one which was usually accompanied with warranty. *Smith v. Tracy*, 36 N. Y. 78. In *Walt v. Borne*, 123 N. Y. 592, 25 N. E. 1053, we held that "the idea upon which is founded the right to warrant, on the part of an agent to sell a particular article, is that he has been clothed with power to make all the common and usual contracts necessary or appropriate to accomplish the sale of the article intrusted to him. And if, in the sale of that kind or class of goods thus confided to him, it is usual in the market to give a warranty, the agent may give that warranty in order to effect a sale, and the law pre-

sumes that he has such authority. If the agent, with express authority to sell, has no actual authority to warrant, no authority can be implied where the property is of a description not usually sold with warranty." The question here, however, is one of a sale, where the seller was the manufacturer of the article sold, and, the contract being executory in its nature, and for the delivery of something of a particular kind, there was the implied warranty, or promise, that the article to be delivered should be merchantable, and free from any remarkable defect. Mellor, J., in *Jones v. Just*, L. R. 3 Q. B. 197, after reviewing decisions illustrative of when the rule of caveat emptor does or does not apply in sales, stated, as one of the results, as follows: "Where a manufacturer undertakes to supply goods, manufactured by himself, or in which he deals, but which the vendee has not had the opportunity of inspecting, it is an implied term in the contract that he shall supply a merchantable article." The same principle was laid down in *Howard v. Hoey*, 23 Wend. 350, and in *Hoe v. Sanborn*, 21 N. Y. 552, with respect to the obligation of a seller, under an executory contract to deliver an indeterminate thing of a particular kind, that it shall be free from any remarkable defect. In *Bridge Co. v. Hamilton*, 110 U. S. 108, 3 Sup. Ct. 537, after a review of the leading cases bearing upon the point, it was held that, "when the seller is the maker or manufacturer of the thing sold, the fair presumption is that he understood the process of its manufacture, and was cognizant of any latent defects caused by such process, and against which reasonable diligence might have guarded. * * * When, therefore, the buyer has no opportunity to inspect the article, or when, from the situation, inspection is impracticable or useless, it is unreasonable to suppose that he bought on his own judgment, or that he did not rely on the judgment of the seller as to latent defects of which the latter, if he used due care, must have been informed during the process of manufacture. If the buyer relied, and, under the circumstances, had reason to rely, on the judgment of the seller, who was the manufacturer or maker of the article, the law implies a warranty that it is reasonably fit for the use for which it was designed, the seller at the time being informed of the purpose to devote it to that use." Quite recently, in the case of *Carleton v. Lombard, Ayers & Co.*, 149 N. Y. 137, 43 N. E. 422, which was an action to recover damages for the breach of an executory contract for the sale of petroleum, produced by the defendant through certain manufacturing processes, we had occasion to consider the question of the liability of the seller for any latent defect arising in the process of the manufacture, and the principle of the decisions in *Hoe v. Sanborn*, supra, and in *Bridge Co. v. Hamilton*, supra, was affirmed. We held there that the maxim caveat emptor

does not apply to the case of a manufacturer who sells goods of his own manufacture, and that, in such a case, he is liable for any latent defects arising from the process of manufacture, or in the use of defective materials, upon the ground of an implied warranty. In *Hoe v. Sanborn*, supra, Selden, J., commented upon this exception to the general rule, and held it to be a just one, using this language: "Wherever the vendor, therefore, has himself manufactured the article sold, or procured it to be done by others, if honesty and fair dealing are ever to be enforced by law, a warranty should be implied." The principles of adjudged cases apply to the one before us. The defendant was the manufacturer of the article which it sold to the plaintiffs, and the circumstances of the case were such as to imply a promise on its part that the article which it manufactured and delivered to the plaintiffs should be free from any latent defect. It was under the obligation to furnish an article, not of the higher quality, necessarily, but one that was merchantable, and free from any remarkable defect arising from the process of manufacture. Although there is no evidence that Nichols was expressly empowered to represent the defendant in the transaction, the adoption of his assumed agency to sell its product charged it with knowledge of the use to which that product was to be put, and imposed the duty of delivering goods which should be merchantable and reasonably fit for that use, and a consequent liability for a failure attributable to defects in the processes of manufacture or in the materials employed.

We must differ with the general term in the supposition, as expressed in the opinion, that there was no evidence that the goods could not be made into coats which would stand the wear of ordinary felt cloths, and, therefore, that it was not shown that the goods were unmerchantable, and in the further supposition that the strength of the goods could have been tested in the ordinary manner, and that there was no latent defect discoverable upon use. The learned justices have overlooked the evidence in behalf of the plaintiffs in these respects. To be sure, that may have been the effect of the evidence introduced on behalf of the defendant; but it was in conflict with the plaintiffs' evidence. If the evidence of the plaintiffs is to be believed, the defendant improperly manufactured the felt cloth, or certainly some of it, which was delivered to the plaintiffs, by using what was called "too short stock," or "shoddy," as a consequence of which the cloth was "tender" and "uneven," and liable to separate, and "breaks," or holes would appear upon exposure by wear. The evidence tended to show, on behalf of the plaintiffs, that the defect in the cloth was not discoverable upon inspection, and could not be tested as to its durability and quality, except by actual wear. The

use of improper stock in the manufacture of the cloth might only make it tender and un-serviceable in particular places, and, therefore, this was not a case where the plaintiffs could be said to have been concluded by their acceptance and retention of the cloth for manufacturing into ulsters. The obligation of the defendant would survive the plaintiffs' acceptance of the goods, if the latent defects were not discoverable upon inspection. Upon all the evidence, the case should have been submitted to the jury, to determine whether there had been a breach of an implied warranty that the felt cloth should be merchantable. It was for them to say whether it was unmerchantable, and unfit for plaintiffs' purposes, because of the use of defective material; and, if they believed the evidence to that effect, and that the defect was not discoverable by the plaintiffs upon the usual and ordinary inspection and tests in such cases, they would be justified in awarding damages to the plaintiffs, measured by the loss shown by them to have been actually sustained, in the return upon their hands of defective ulsters, as well as in the manufactured coats left on hand, if unsalable, because valueless through defects in the material from which made. For the error, therefore, committed by the trial court in directing a verdict for the defendant, there must be a new trial of the issues, wherein the cause may be submitted to the jury upon the evidence.

Some of the rulings upon the admission and rejection of evidence are open to the criticism of excessive strictness against the plaintiffs, if not actually erroneous; but, as there must be a new trial, they will not be discussed. The judgment should be reversed, and a new trial ordered, with costs to abide the event. All concur. Judgment reversed.

(151 N. Y. 278)

HARLOW v. LA BRUM.

(Court of Appeals of New York. Jan. 19, 1897.)

FRAUD—REPRESENTATIONS AS TO VALUE—PARTNERSHIP—INDUCEMENT BY FRAUD—DISSOLUTION.

1. False representations, by the owner of a stock of goods, that the stock cost him a certain sum, made to another to induce him to enter into partnership with the former, and take one-half the stock at such valuation, are not mere expressions of opinion as to value. 31 N. Y. Supp. 487, affirmed.

2. One who is induced by fraud to enter into a partnership is entitled to a dissolution without proving pecuniary damages. 31 N. Y. Supp. 487, affirmed.

Appeal from supreme court, general term, Third department.

Action by Frederick S. Harlow against Hiram La Brum to dissolve a partnership. From a judgment of the general term, Third department (31 N. Y. Supp. 487), affirming a judgment in favor of defendant, plaintiff appeals. Affirmed.

James W. Verbeck, for appellant. Edgar T. Brackett, for respondent.

GRAY, J. The plaintiff brought this action for the dissolution of a co-partnership between the parties, and for an accounting. After the commencement of the action, the defendant discovered that a fraud had been practiced upon him, through which he had been induced to enter into the co-partnership. It consisted in fraudulent representations made by the plaintiff as to the cost of a certain stock of merchandise, which he put into the co-partnership, and the half of which, as represented, the defendant had paid in compliance with his co-partnership agreement. He thereupon interposed an answer setting up the fraud of the plaintiff, and asking judgment to the effect that there had never existed any partnership between the parties; that the agreement of partnership be set aside; and that the plaintiff be decreed to restore to him the consideration which he had paid on entering into the co-partnership. Upon trial of the issues, the court found that the representations made by the plaintiff to the defendant as to the cost of the stock of merchandise in question were false, and were made to induce the defendant to enter into the co-partnership agreement; that they were known by the plaintiff to be false when he made them; and that the defendant relied upon and believed them, and, except for the same, would not have formed such partnership. These findings were amply supported by the evidence. Judgment was directed and entered declaring the co-partnership agreement void; directing the receiver in the action, after paying the outstanding debts of the co-partnership, to pay to the defendant the money he had paid to the plaintiff, with interest thereon; and directing the plaintiff to deliver to the defendant a duebill which he held for the balance of the purchase price for a half interest in the stock of merchandise. The trial court also found that the defendant had drawn out of the firm \$6 a week for his living expenses, as was permitted by the articles to each party, but that the services of the defendant were worth \$12 per week. Upon appeal by the plaintiff from the judgment recovered by the defendant, the general term affirmed the same, and I think nothing need be added to the very satisfactory opinion rendered at the general term upon the affirmance. But, as the plaintiff, who now appeals to this court, contends that the general term erred in reasoning that the rule of law has no application to the case which requires a party, in order to successfully invoke the aid of the court, to show that he has been damaged in a financial sense, a brief expression of our views may not be inappropriate.

The question of whether a money damage has been sustained by the party who has been induced to enter into a partnership relation through fraudulent representations has noth-

ing to do with the decision of the case presented for the avoidance of the partnership agreement. The true principle by which the court is to be guided in such a case is that the party deceived has a right to have the agreement wholly set aside. If it has been obtained by fraud, he is entitled to say that the misrepresentations vitiate the contract. *Rawlins v. Wickham*, 3 De Gex & J. 304. As was said by Lord Justice Turner in that case, "We cannot assume, from what was done in ignorance of the misrepresentation, what would have been done if the misrepresentation had been detected." The relation of partners is one implying the highest degree of mutual confidence, as it was well observed in the opinion below; and, if the contract of partnership was initiated by fraud, it is thereby avoided and annulled. The person fraudulently induced to enter into the partnership is entitled to a decree canceling the partnership agreement ab initio, as he can also have an action for the deceit. 2 Bates, Partn. § 595; Pars. Partn. (2d Ed.) *p. 467. The trial court having found the making of the false representations, with the fraudulent intention to induce the defendant to enter into the partnership, no rule of law and no principle of equity stood in the way of its decreeing the cancellation of the agreement, and in its directions as to the judgment to which the defendant was entitled it followed the requirement of the rule in such cases, as it may be found laid down in the books. See *Bigelow*, Fraud, p. 629, and cases cited there. The judgment should be affirmed, with costs. All concur. Judgment affirmed.

(151 N. Y. 417)

KIMMER v. WEBER et al.

(Court of Appeals of New York. Jan. 19, 1897.)

MASTER AND SERVANT—NEGLIGENCE—DEFECTIVE APPLIANCES.

1. Defendant, who had the contract for the masonry of a building, sent masons to the building to point up the stone arches of the ceilings, and defendant's foreman directed them to make scaffoldings for themselves, with horses furnished by defendant, but instead they used a scaffold which had been used previously in the building by a gang of plumbers, working under a separate contract, one of the supports of which, after being used about 10 days, broke from the sudden fall of a heavy timber which the workmen were placing on it, causing the scaffold to fall on one of the workmen, who died from the injuries received. *Held*, that defendant was not liable for deceased's death.

2. The fact that one of the plumbers, who had been using the scaffold, called the attention of defendant's foreman to the fact that it was insufficient, would not render the foreman guilty of negligence attributable to the master in permitting the workman to use such scaffold. 30 N. Y. Supp. 1103, reversed.

Gray, J., dissenting.

Appeal from supreme court, general term, First department.

Action by Jacob Kimmer, administrator, against John Weber and others. From a judgment of the appellate division (30 N. Y.

Supp. 1103) affirming a judgment for plaintiff, defendants appeal. Reversed.

Hamilton Wallis, for appellants. E. B. Barnum, for respondent.

O'BRIEN, J. The plaintiff's intestate was an apprentice in the employ of the defendants, who were builders. This young man was killed on the 16th of February, 1891, by the falling of a scaffold used by the defendants' workmen in their business. The question was whether the accident was the result of negligence on the part of the defendants. The jury found that it was, and the inquiry is whether the proofs in the case sustain the finding. The defendants had a contract for the mason work of a brewery, which was in process of erection. There was also a gang of carpenters and a gang of plumbers at work upon the building, each under separate contracts with the owner. The plumbers engaged in fastening pipes upon the ceilings of the different floors made use of a scaffolding which had been constructed for them by one of the carpenters. It was first used in the cellar, then removed to the first floor and used for the same purpose, and then taken down and removed to the floor above. The ceiling of this floor being higher than the others, the plumbers found it necessary to raise the height of the scaffolding. They procured the same carpenter to make the change. This was done by extending the uprights by means of pieces of timber nailed to them and fastened by cleats. It seems, in that form, to have answered all the purposes of the plumbers. It consisted of three planks, supported on crosspieces fastened to the uprights, and was left by the plumbers in the room when they had completed their work. Neither the defendants nor any of their employes had anything whatever to do with the construction or use of the scaffolding. About two weeks before the accident the defendants sent a gang of masons to the building, of which the deceased was one, to point up the arches of the ceiling. The defendants' foreman gave the men instructions to make a scaffolding for themselves, with three horses furnished by defendants, by placing planks on two of them, and using the third to extend the scaffold as they passed around the room. The place furnished to the masons to do the work was, in a general sense, the room or second floor of the building, and it is not claimed that this place was in any sense unsafe. The erection of the scaffolding was a detail of the work which, it is apparent, devolved upon the workmen themselves, as they needed it to move around the room. It is not claimed that the defendants failed to provide proper material for the construction of such a scaffolding. The workmen, of whom the deceased was one, constructed the scaffold according to their own judgment. They used this plumbers' scaffold for one side of it, and placed a structure against the wall for the

other side. From this structure to the plumbers' scaffold crosspieces were placed, upon which planks rested to accommodate the workmen. The scaffolding thus constructed was used for about two weeks, and moved about the room as occasion required, all of which seems to have been done by the workmen themselves. The crosspieces, or some of them, seem to have been heavy pieces of timber, and on the day of the accident two of the workmen were engaged in putting one of these timbers in place. While so engaged one of the men let fall the end of the heavy timber that he was holding, and it crushed by its sudden fall, and broke, one of the crosspieces of the plumbers' scaffold. This caused the whole scaffold to fall, resulting in the injury and death of the plaintiff's intestate.

The accident was evidently caused by the neglect of the workmen who were handling the timber, or by some defect in the crosspiece of the plumbers' scaffold. If the accident is to be attributed to the act of the workmen who were engaged in putting the timber in place, there is nothing in the case to show that the defendants are liable for the misconduct. They were co-servants, and nothing appears to charge the defendants with negligence, either in employing them originally or in retaining them. It is not suggested that the judgment can be upheld on such grounds. The judgment must stand, if at all, upon the fact that the plumbers' scaffold was used as a part of the scaffolding for the masons, and that it was insufficient. When the case is examined in that light, it will be found, we think, that there was no proof of negligence on the part of the defendants to warrant the submission of the question to the jury. It does not appear that the defendants constructed the plumbers' scaffold, or furnished it, or directed the workmen to use it. On the contrary, it appears that this scaffold was a contrivance adopted by the workmen themselves. It does not appear that they were obliged to use it. When a gang of masons are engaged in plastering or pointing a room, the construction of proper platforms or places upon which to stand while doing the work is one of the details of the business that is generally left to the workmen themselves. The master may, it is true, take this out of their hands, and assume to do it himself; and in that case he would be bound to furnish an appliance reasonably safe and suitable for the purpose. But in this case it does not appear that the master was required to furnish the platform, or that he did furnish it, nor does it appear that there was any neglect or failure to furnish proper or suitable material for that purpose. It required horses, crosspieces, and plank, and the means to put them in place. The evidence indicates that all these things were on hand, and that they were used by the workmen according to their own judgment. In constructing the scaffolding, they made use of another, which had

been constructed previously by the plumbers for their own purposes, and which proved for them safe and sufficient. If this contrivance was defective or insufficient for the new use to which it was applied, and there is no proof of that except the fact that one of the crosspieces broke under the weight of a falling timber, it is difficult to see how the master can be held responsible. The scaffolding having been constructed by the workmen themselves, or under their direction, if the appliances which they made use of for that purpose were in any respect defective or insufficient, they had, so far as appears, the same means of knowing that fact as the defendants. It was not enough to prove that the scaffolding gave way under the circumstances, resulting in an accident, or that it was in fact defective, unless it was made to appear that this was the proximate result of some omission of duty on the part of the defendants or their foreman. If they furnished suitable materials for the construction of a proper platform, and the workmen themselves constructed it according to their own judgment, the defendants were not liable for the manner in which they used the material so furnished. *Hussey v. Coger*, 112 N. Y. 618, 20 N. E. 556; *Webber v. Piper*, 109 N. Y. 496, 17 N. E. 216; *Hogan v. Smith*, 125 N. Y. 774, 26 N. E. 742; *Cregan v. Marston*, 126 N. Y. 568, 27 N. E. 952; *Butler v. Townsend*, 126 N. Y. 105, 26 N. E. 1017; *Harley v. Manuf'g Co.*, 142 N. Y. 31, 36 N. E. 813; *McCampbell v. Steamship Co.*, 144 N. Y. 552, 39 N. E. 637. The master is not responsible for the negligent performance of some detail of the work intrusted to the servant, whatever may have been the grade of the servant who executes such detail. If it is the work of the servant, and he volunteers to perform it, and the master is not at fault in furnishing proper materials, there is no breach of duty on the part of the latter. *Cullen v. Norton*, 126 N. Y. 1, 26 N. E. 905; *Hankins v. Railroad Co.*, 142 N. Y. 416, 37 N. E. 466.

There is some evidence in the case to the effect that, when the masons were at work on this scaffolding, one of the plumbers called the attention of the defendants' foreman to the fact that the plumbers' scaffold, which was part of that used by the masons, was insufficient, and that the foreman replied that he thought it would do. This the foreman denies, and says that he was not aware that the plumbers' scaffold was in use till after the accident. But, assuming that his attention was so called to the matter, as testified to by this witness, was the foreman guilty of negligence, attributable to the master, in permitting the workmen to go on with the work upon the platform that they had erected to suit themselves? If his judgment was wrong with respect to the sufficiency of the platform, so was that of the workmen. They knew as much with respect to the safety of the place where they stood as he did. None of the masons suggested to

any one that the scaffold was unsafe. Whatever was said on that subject was by one of the plumbers, when he saw the men using their scaffold. If, under these circumstances, the foreman had refused or declined to interfere with what had been done by the workmen, and he trusted to their judgment, it was not such negligence as to charge the defendants with the result of the accident. It was, at most, but an error of judgment on the part of the foreman with respect to a detail of the work in which the masons were engaged. He concluded, as the workmen themselves did, that the place was safe; and, in determining that question, they were all co-servants.

We think that the plaintiff failed to make out a case for the consideration of the jury for these reasons: (1) It was not shown that it was the duty of the master, under the circumstances, to construct the platform on which the masons were to do the work. (2) The proof shows that this duty was assumed by the workmen as one of the details of the work. (3) It was not shown that the defendants, or their foreman, actually constructed or directed the construction of the platform. (4) It was not shown that the plumbers' scaffold, which gave way, was any part of the material furnished by the defendants or the foreman, or that they contemplated the use of it for the purpose to which it was put. It did not belong to the defendants, but was in the building; and, if the workmen made use of it for the purpose, without any direction from the defendants, or any knowledge on their part, the result is not chargeable to the master. It appears to have been in use for 10 days by the masons, who moved it about the room from place to place as the work required, and it gave way only when a large beam was allowed to fall upon it by one of the workmen. The proof, as it appears in the record, was not sufficient to warrant a finding of negligence against the defendants. The judgment should be reversed and a new trial granted, costs to abide the event. All concur, except GRAY, J., dissenting. Judgment reversed.

(151 N. Y. 403)

PEOPLE v. WILSON.

(Court of Appeals of New York. Jan. 19, 1897.)

LARCENY—POSSESSION OF STOLEN GOODS—CRIMINAL LAW—APPEAL—REVIEW JUDGMENT—JOINER OF CLAIMS—BURGLARY AND RECEIVING STOLEN GOODS.

1. Evidence that stolen goods were found in defendant's bedroom, in the drawer of a bureau, containing only men's clothing, in a purse under a paper covering the bottom of the drawer, is sufficient to show a conscious, exclusive possession by defendant, a man, though the room was also occupied by two women, especially where defendant, when arrested, was in the company of another man, charged to be his confederate, on whom a portion of the stolen goods were found. 40 N. Y. Supp. 107, affirmed.

2. Under Code Cr. Proc. § 485, requiring the

clerk to annex to the judgment roll, on a conviction, the indictment, and a copy of the minutes of the demurrer; and section 517, that on the appeal any actual decision or an intermediate order or proceeding forming a part of the judgment roll, as prescribed by section 485, may be reviewed,—the ruling on demurrer to the indictment should be reviewed, though no objection to the ruling was taken after trial.

3. Code Cr. Proc. § 278, providing that the indictment must charge but one crime, except as in the next section provided; and section 279, providing that when the acts complained of may constitute different crimes, such crimes may be charged in separate counts,—does not change the common-law rule permitting counts for burglary, larceny, and receiving stolen goods to be joined.

Bartlett and Martin, JJ., dissenting.

Appeal from supreme court, appellate division, First department.

Harry Wilson was convicted of burglary, and from a judgment of the appellate division (40 N. Y. Supp. 107) affirming the conviction, he appeals. Affirmed.

The defendant was convicted in the court of general sessions of the peace in and for the city and county of New York of the crime of burglary in the second degree, as a second offense. The indictment contained three counts. The first count, after alleging the previous conviction, charged the defendant with burglary in the first degree, second offense, in having forcibly entered the dwelling house of one Frances M. Barnes, in the nighttime, with intent to steal her property, and that he was assisted by a confederate, one William King. The second count charged the defendant with grand larceny in the first degree, second offense, in having, at the time and place designated in the first count, stolen jewelry and other personal property of Mrs. Barnes. The third count charged the defendant with criminally receiving stolen goods, as a second offense, being the same property described in the second count, and knowing the same to have been stolen. The conviction of the defendant was affirmed by the appellate division of the supreme court in the First department, and from the judgment of affirmance the present appeal is taken.

Francis L. Wellman, for appellant. John D. Lindsay, for the People.

GRAY, J. (after stating the facts). Aside from the reporter's memorandum at the foot of the opinion rendered in the appellate division, nothing in the appeal book shows whether the affirmance of the judgment upon the verdict was by a unanimous decision of the court or not. But a consideration of the evidence satisfies us that it was sufficient to support the verdict of the jury, and the opinion which was filed upon the affirmance in the appellate division carefully and satisfactorily reviews all the material questions in the case except one, to which reference will hereafter be made. The opinion of the court, with great elaboration and clearness, discusses the evidence which was relied up-

on to establish the guilt of the defendant and the questions of law which arose upon the rulings of the trial judge. Upon the question of whether the evidence was such as to satisfy the requirement of the law, that the possession by the defendant of a portion of the stolen property was a conscious and an exclusive possession, the opinion states the true rule. A diamond, which, according to the evidence given by the prosecution, was one of the articles stolen from Mrs. Barnes' house, was found by a police officer in one of the bureau drawers in the bedroom of the defendant's apartment. The drawer contained only articles of man's attire, and the diamond was found in a small purse under a newspaper, covering the bottom of the drawer. It is contended in behalf of the defendant that, as the defendant shared his apartment with two white women, that fact militated against the inference of an exclusive possession by the defendant. But the contention is without force when we consider the circumstances connected with the place and mode of concealment of the stolen property, and especially when we consider also the fact that when the defendant was arrested he was in the company of the man charged to have been his confederate, and upon whose person another diamond, part of the stolen property, was found concealed. There was enough in the evidence to throw upon the defendant the burden of explaining to the jury the possession of the property, as the opinion below well held. The rule of law is well settled that no presumption of guilt can be raised from the possession of stolen property, except where the possession is shown to be conscious and exclusive on the part of the defendant. This latter fact must be established, but, in the present case the circumstances, as shown by the evidence for the prosecution, were such as to fairly furnish to the jury an inference of a conscious and exclusive possession, which no evidence on the part of the defendant in this record goes to repel.

The important question in this case which we are called upon to consider arises upon the indictment. The defendant demurred to it for charging more than one crime, within the meaning of sections 278, 279, Code Cr. Proc. The demurrer was disallowed, and the defendant was required to plead. The appellate division refused to consider the objection to the indictment upon the ground, as expressed in the opinion, that the objection was not taken at the trial, nor presented in such form as to enable it to be considered. In this the learned justices below were mistaken, and have failed to apprehend the force of those provisions of the Code of Criminal Procedure which bear upon the subject of an appeal from a judgment of conviction. Section 485 of that Code requires the clerk to annex to the judgment roll, upon a conviction, the indictment, and a copy of the minutes of the pleading or demurrer. Section 517 provides that

upon the appeal which is allowed to the defendant to the supreme court from the judgment on a conviction any actual decision of the court in an intermediate order or proceeding, forming a part of the judgment roll, as prescribed by section 485, may be reviewed. This provision imposes upon the supreme court the duty of reviewing the determination made upon the demurrer to the indictment; and the same duty is imposed upon us by section 519, which provides for an appeal to this court from a judgment of the supreme court affirming the judgment of conviction. The Code of Criminal Procedure does not seem to require that the objection once taken by demurrer to the indictment should be also raised in some form after the trial has been entered upon. It was before the supreme court upon the defendant's appeal, and, as its judgment must be deemed to comprehend the review of the determination upon the demurrer, that question is also before us upon this appeal. The question, then, is whether this indictment was invalidated by reason of an improper joinder of crimes. Section 278 of the Code of Criminal Procedure provides that "the indictment must charge but one crime, and in one form, except as in the next section provided." The next section provides that, "where the acts complained of may constitute different crimes, such crimes may be charged in separate counts." In this indictment the defendant is charged in the first count with the crime of burglary, in forcibly entering the dwelling house of Mrs. Barnes, with intent to steal her property, assisted by a confederate. He is charged in the second count with grand larceny, committed at the same time and place; and in the third count he is charged with the crime of receiving the property described in the second count, knowing it to have been stolen. So far as the counts for burglary and for grand larceny are concerned, their joinder in the same indictment seems to be expressly authorized by section 506 of the Penal Code, which provides that "a person who, having entered a building under such circumstances as to constitute burglary in any degree, commits any crime therein, is punishable therefor, as well as for the burglary; and may be prosecuted for each crime separately, or in the same indictment." That section contemplates a state of facts similar to those set forth in this indictment; and section 279, Code Cr. Proc., obviously must also have reference to a condition of things where the evidence as to the defendant's acts may fall as proof of a forcible entry, and be insufficient to establish the crime of burglary, but would be sufficient to establish the crime of grand larceny. Section 279 was evidently designed to meet the case of a felonious transaction, to which all the counts relate, and where the evidence introduced upon the trial will determine the nature and extent of the defendant's connection with it. The evidence might satisfy the jury that the

defendant feloniously took away the property described in the indictment, and thus committed the larceny; or, if it failed to establish that he actually took it, that there was such a conscious and exclusive possession of a part of the stolen property by him, recently after the crime, as, unexplained, to warrant them in convicting him of the larceny. *Knickerbocker v. People*, 43 N. Y. 177. If the evidence satisfies the jury that the larceny was committed by some other person than the defendant, and that some part of the stolen property was found in the defendant's conscious and exclusive possession, they might convict him of the crime of receiving stolen goods, and acquit him of the crime of larceny. *People v. Infield*, 1 N. Y. Cr. Rep. 146. But we are not without precise authority that, so long as the counts relate to the same transaction, there can be no objection to their joinder in the same indictment, even though constituting offenses of different grades, and calling for different punishments. That was precisely held in *Hawker v. People*, 75 N. Y. 487, where Judge Earl remarked to the above effect, and said: "Burglary and larceny, rape and assault with intent to commit rape, larceny and receiving stolen goods, assault with intent to kill, and a simple assault, may be united; and it matters not that the offenses thus united call for different punishments." The case of *People v. Baker*, 3 Hill, 159, referred to by Judge Earl in his opinion, related to an indictment, which, like the present one, contained three counts,—one for burglary, one for grand larceny, and one for receiving stolen goods. A motion by the defendant's counsel that the district attorney be compelled to elect whether he would proceed upon the count for receiving stolen goods, or upon the others, was overruled, and upon appeal to the supreme court it was held not to have been error. The Code of Criminal Procedure has effected no change in the common-law practice, which permitted the joinder of counts for larceny and criminally receiving stolen goods. The practice was, undoubtedly, to allow it, as is evidenced by the case in 3 Hill, *supra*, and as it was held in *People v. Bruno*, 6 Parker, Cr. R. 657, a case decided at the Monroe general term in September, 1865. See, also, *Taylor v. People*, 12 Hun, at page 215. The case of *People v. Kerns*, 7 App. Div. 535, 40 N. Y. Supp. 243, to which we have been cited as holding a different view, concedes that the practice in criminal cases prior to the Code permitted the joinder in an indictment of a count for larceny with a count for receiving stolen property; but the opinion proceeds upon the theory that under the present Code the prohibition against charging more than one crime in the indictment has changed that practice, and precludes such a joinder. Whether the learned justices whose opinion in the *Kerns* Case is referred to carefully considered the effect and office of section 279, we are not informed from the opinion, and it is that section which, in our

judgment, provides such an exception to the prohibitory provision of section 278 as to permit of the continuance of the former practice in cases where the counts relate to the same transaction. As it has been held by this court, both with reference to the Penal Code and the Code of Criminal Procedure, these codes should not be deemed to have changed the rules or the procedure which previously existed, unless the language of their provisions clearly compels us so to hold. *People v. Palmer*, 109 N. Y., at page 117, 16 N. E. 529; *People v. Adler*, 140 N. Y., at page 335, 35 N. E. 644. The object of the enactment of the Code of Criminal Procedure was to simplify the procedure in the indictment and trial of persons accused of crime, and to make it plain and intelligible to the ordinary mind. It sought to promote substantial justice by securing to the accused a fair trial. It is very plain that the rights of the prisoner might be prejudiced if he was sent to trial charged with the commission of two or more crimes of a different nature, and committed at different places; but that same prejudice would not exist in a case like the present one, where, the same transaction underlying the two counts, the evidence will show either that the defendant had no connection with it, as charged in the indictment, or that he is guilty, in one or the other manner, of having been a participant in the transaction. Within the provisions of section 279, the acts complained of and disclosed by the evidence may constitute the crime of larceny or the crime of receiving stolen goods knowing them to be stolen, as charged in the count for larceny. In England, where greater strictness always prevailed as to the joinder of different offenses, it was held lawful to join in the indictment a count for feloniously stealing property with a count for feloniously receiving the same, or any part thereof, knowing it to have been stolen. *Reg. v. Beeton*, 2 Car. & K. 960. And see 2 Russ. Crimes (4th Ed., by Greaves) pp. 542-544. In that treatise it is remarked (page 544) that "it was conceived that where, from the nature of the case, it appeared to be advisable, a count charging the party accused as receiver might be joined in the same indictment with a count charging him as the thief, and that he might be convicted upon such of the counts as was supported by the evidence." In 12 Am. & Eng. Enc. Law, p. 826, it is said: "Where there is a question whether the accused is guilty of theft or of feloniously receiving stolen property, two counts may be joined in the same indictment, charging the different crimes, if they are founded upon the same transaction;" and reference is made to a number of authorities in the decisions of the courts of different states. See, to the same effect, *Whart. Cr. Pl.* § 291. There is no good reason for construing these provisions of the Code differently. Such was the previous practice; such seems to be the intent of section 279; and justice does not demand otherwise where the

acts relate to the same property, and the same evidence establishes the nature of the defendant's criminality. The judgment appealed from should be affirmed. All concur, except BARTLETT, J., who dissents on the ground that counts for the crimes of burglary and receiving stolen goods cannot be joined in the same indictment, and also on the merits; and MARTIN, J., dissenting. Judgment affirmed.

(151 N. Y. 350)

SPENCER v. KILMER.

(Court of Appeals of New York. Jan. 19, 1897.)

EASEMENTS APPURTENANT TO LAND—CONVEYANCE—DAMAGES FOR OBSTRUCTION—EVIDENCE.

1. A lessee of a part of defendant's lot built fish ponds thereon, as required by the lease, constructing reservoirs and laying pipes on the undemised part, to convey water to the ponds from springs thereon, which afforded the only supply; and defendant, with knowledge of these reservoirs and pipes, conveyed the demised premises to the lessee, "with the appurtenances thereto." *Held*, that the right to conduct the water to the ponds from the springs on defendant's land, by means of the appliance in use at the time of the conveyance, passed to the grantee.

2. Where defendant conveyed part of his land to plaintiff's predecessor, with the right to use water from the undemised part, evidence of the value of plaintiff's lot at the time of the conveyance, without such right, is not admissible to prove the damages caused by defendant's subsequent interference with the easement.

3. Where defendant, after conveying part of a tract to plaintiff's predecessor, with the right to conduct water to a fish pond thereon from springs on the undemised part, diverted the water, plaintiff can recover only what he lost in the diminished value of the use of the pond, without reference to his particular business, or the special use to which the fish were applied.

4. At the time defendant conveyed part of his land to plaintiff's predecessor, "with the appurtenances thereto," a fish pond on the part so conveyed was supplied with water conducted from springs on the adjoining lot by conduits, some of which were on land retained by defendant, and others on land which he had previously conveyed to a third person. Subsequently defendant regained title to the latter tract, and then diverted the water from the pond by destroying all the conduits. *Held*, that such act was not unlawful in respect to the conduits on the land not owned by defendant when plaintiff took his deed.

Appeal from supreme court, general term, Third department.

Action by Albert Spencer against Chauncy Kilmer for mandatory injunction to compel defendant to repair an injury to an easement, and for the recovery of damages. From a judgment for plaintiff, affirmed by the general term (30 N. Y. Supp. 1135), defendant appeals. Modified.

Edward C. James, for appellant. Charles S. Lester, for respondent.

O'BRIEN, J. The plaintiff in this action sought, through the power of a court of equity, to compel the defendant to repair a permanent and continuing injury to real property which resulted from his act, and to

make good the damages sustained up to the date of the trial. This relief has been awarded to him to the full extent demanded by the terms of the judgment. On the 29th of September, 1891, the defendant dug up, removed, and destroyed the pipes and conduits leading from reservoirs and springs that supply a fish pond upon the plaintiff's land with spring water. These acts were all done and performed by the defendant upon his own land, and within the acknowledged boundaries of his own premises; but it is claimed, in behalf of the plaintiff, that they were, nevertheless, unlawful acts, constituting an invasion of his property rights. In this claim is involved the merits of the whole controversy, and it depends upon a chain of facts conceded in the record or found by the trial court.

In the year 1866 the defendant purchased a considerable tract of vacant land in Saratoga, bounded on the south by Congress street, on the north by Spring street, on the east by Circular street, and on the west by what is called the "Wall Brook." There were then upon the premises what are described as "two fish ponds," which were supplied with running water from springs that issued from the foot of a high bank or bluff near the easterly boundaries of the tract. These ponds were of a rude structure, and appeared to have been formed by artificial embankments of earth, and were supplied with water from the springs by artificial conduits. The water thus collected was of such a character, and the surroundings were such, that fish were kept or lived in the ponds. In the year 1870 the defendant conveyed to John Morrissey the southwest corner of this tract, being a lot 140 feet on Congress street, about 244 feet deep, and bounded on the west by the Wall brook. On this lot Morrissey proceeded to erect the large clubhouse which now stands upon the premises. On September 1, 1872, Morrissey, desiring to enlarge and beautify the grounds around the clubhouse, leased from the defendant for 10 years another portion of the tract, adjoining the clubhouse lot on the east, 66 feet wide on Congress street, and 236 feet deep. The yearly rent reserved by the defendant was \$100, but, as a further consideration, Morrissey was bound by the terms of the lease to improve the lot, by fencing and making fish or ornamental ponds upon it, within one year. The lease also contained a provision that Morrissey should not allow the water of the ponds to flow over the defendant's land to the north, but that he should carry the water across his own lot by a ditch or drain to the creek or the Wall brook. When the parties entered into the lease, it was known to both of them that the only way of supplying the ponds with water was from the springs at the foot of the hill on the defendant's land, east of the lot demised; and it is found that the parties to the instrument contemplated the use of the water from these springs to

supply the ponds, and that the defendant expected and intended that Morrissey should lay such pipes and conduits, construct such reservoirs on defendant's land, and use such other devices and contrivances as might be necessary to collect the waters of the springs and convey them to the ponds. It is found as a fact that the defendant consented to the use of the water for these purposes. There was no express consent proved, but the finding is doubtless an inference from the facts and circumstances attending the transaction. It is also found that the defendant contemplated that the new pond should absorb and take the place of the old ones, which had become useless for the original purpose. The lessee could comply with the covenants of this lease by constructing any ornamental pond, but, immediately after the execution of the instrument, Morrissey proceeded to construct a fish pond $36\frac{1}{2}$ feet in diameter and $6\frac{1}{2}$ feet deep. It was located upon substantially the same spot as one of the former ponds. He collected the water from the springs on defendant's lands, by means of underground drains and sluices, in two wooden boxes or reservoirs placed upon defendant's lands, and from these the water was conducted to the pond by 8-inch terra cotta pipes, and the overflow was conducted across Morrissey's land by a drain to the Wall brook. The work was constructed with brick in a permanent manner in the fall of 1872, and the defendant saw the work of construction during its progress, and, of course, knew how the pond was supplied with water; and from that date to the time of the removal of the appliances for supplying water by the defendant, the pond was so kept and supplied with water without any objection from the defendant. On the 11th of September, 1875, the defendant conveyed the lot so leased, and the fish pond, except the front part, to the depth of 100 feet from Congress street, to Morrissey for \$3,000. The deed contained the usual covenants of warranty and quiet possession. The part of the lot so conveyed was described in the deed by metes and bounds and conveyed "with the appurtenances thereto"; and it is upon the use of these words in the conveyance that the right claimed by the plaintiff has been sustained in the courts below. At the time of the conveyance, the boxes or reservoirs on the defendant's land, in which the water from the springs was collected for the purpose of supplying the fish pond, through the pipes, were plainly visible to the defendant, and he in fact knew of the existence of the same, and they all were then, and for some time before had been, in use by the grantee, under his lease for that purpose, and without such use the fish pond could not have been used for the purpose for which it had been constructed; that is, for the propagation of fish.

We have examined the case in view of the contention of the learned counsel for the defendant that some of these findings of fact

are not supported by evidence. Without discussing this objection in detail, it is quite sufficient to say, generally, that the material findings are sustained by the proof. Some of them, it is true, are inferences, but they are drawn from the situation of the property, the relations of the parties to it and to each other, and from other facts and circumstances preceding and surrounding the transaction. Such inferences as the learned trial court drew without other proof were reasonable and legitimate, and only an exercise of that legal process which presumes certain facts from the existence of certain other facts. The facts not proven by the testimony of witnesses were properly inferred from others, or from circumstances conceded or established in the case. It is further found that the principal value of the lot so conveyed consisted of the fish pond, and the existence of that depended upon the supply of water from the spring. In consequence of the destruction by the defendant of the reservoirs, conduits, and pipes, and the diversion of the water, many of the fish kept therein died or were lost, and the use of the pond was permanently impaired, to the damage of the plaintiff. The question, therefore, arises whether, under these circumstances, the right to use the water from the springs on defendant's land, as it was used when the conveyance was made, was so appurtenant to the thing granted that it was carried to the grantee by the terms of the deed.

There is another fact in the case that has some bearing on that question. It appears that, two years before the deed to Morrissey of the fish-pond lot, and on July 1, 1873, the defendant conveyed to one Southgate the front part of the lot embraced in the lease, or, rather, 100 feet of the same from Congress street northerly, subject to the lease, and also all the vacant land upon the east in range with this lot to Circular street. This was the situation when Morrissey purchased the remainder of the leased lot; that is to say, 136 feet in the rear, with the fish pond on it, and then in full operation. Some of the conduits for supplying the spring were upon the land conveyed to Southgate, east of the leased lot, but the judgment in this case does not require the defendant to restore anything that he may have disturbed upon this land. When it was conveyed to Southgate, the defendant took back a purchase-money mortgage, which he subsequently foreclosed, and, at the time of the commission of the trespass complained of, he had become reinvested with the title. It is argued from this that, inasmuch as the defendant, at the time he conveyed the fish-pond lot to Morrissey, did not own all the land containing the conduits or means for supplying the pond with water, he could not have intended to convey any such right by the use of the word "appurtenances." We do not think that such a conclusion follows from the fact as an absolute legal conse-

quence. It was, doubtless, a circumstance to be considered; but the mere fact that, at the time of the conveyance, the defendant was not the owner of all the land upon which the easements in question were situated, does not prove that he did not intend to convey the right to the use of the water from the land which he did own adjoining and directly east of the fish-pond lot. That was the original and principal source of supply, which the parties must be deemed to have had in mind when the conveyance was made. The defendant certainly had the power to convey the right to the use of the water for the pond from the lands on the east that remained unsold, and the only question is whether he did so convey. This depends upon the construction which should be given to the deed, having due regard, always, to the circumstances under which it was given. Whatever rights vested in Morrissey under his deed have been carried to the plaintiff through various mesne conveyances from which his title is derived.

The fish pond upon the land conveyed to the plaintiff's predecessor in title, with the artificial appliances for its maintenance, having been placed there, not only with the defendant's knowledge, but also in pursuance of an express provision in the lease, to which he was a party, all the legal consequences arise from the present situation that would had he constructed the work himself. The principles of law applicable to the facts of the case are quite well settled. When the owner of a tract of land conveys a distinct part of it to another, he impliedly grants all those apparent and visible easements which, at the time of the grant, were in use by the owner for the benefit of the part so granted, and which are essential to a reasonable use and enjoyment of the estate conveyed. The rule is not limited to continuous easements, or to cases where the use is absolutely necessary to the enjoyment of the thing granted. It applies to those artificial arrangements which openly exist at the time of the sale, and materially affect the value of the thing granted (*Paine v. Chandler*, 134 N. Y. 385, 32 N. E. 18); or, to state the rule in the language of an earlier case, where the owner of land has, by any artificial arrangement, effected an advantage for one portion, to the burdening of the other, upon a severance of the ownership, the holders of the two portions take them, respectively, charged with the servitude and entitled to the benefit openly and visibly attached at the time of the conveyance of the portion first granted. *Lampman v. Milks*, 21 N. Y. 505. The purchaser will take the estate, with all the incidents and appurtenances which appear to belong to it at the time of the grant, as between it and the portion retained, though not then in actual use, providing the grantor has knowledge of their existence, and they are open and visible. *Simmons v. Cloonan*, 81 N. Y. 557. But no right or easement will

pass which the grantor was not, at the time of the conveyance, authorized to impose upon adjoining lands. Only such appurtenances will pass as the grantor at the time had the right to convey. *Green v. Collins*, 86 N. Y. 246. These principles have been applied by this court in a great variety of cases, possessing some, if not all, the essential features of the case at bar. *Curtiss v. Ayrault*, 47 N. Y. 73; *Adams v. Conover*, 87 N. Y. 422; *Scriver v. Smith*, 100 N. Y. 471, 3 N. E. 675; *Voorhees v. Burchard*, 55 N. Y. 98; *Huttemeier v. Albro*, 18 N. Y. 48; *Comstock v. Johnson*, 46 N. Y. 620; *Huntington v. Asher*, 96 N. Y. 604; *Furner v. Seabury*, 135 N. Y. 50, 31 N. E. 1004. The thing which the defendant granted was the lot with the fish pond then in use, constituting a very important element in the value of the property. The principal appliances for maintaining it by supplying the water were open and visible, and the defendant knew that there was no reasonable way to maintain it without them. His grant to Morrissey, we think, carried with it the right to collect the water from the springs on the land of the defendant to the east that was still unsold, and conduct the same by means of conduits and pipes to the pond, and to maintain the appliances in use for that purpose at the time of the grant. It follows that the act of the defendant in destroying or removing them was unlawful, and that the plaintiff was entitled to recover his damages, and to have the equitable remedies awarded by the judgment.

There are one or two exceptions in the case, however, which call for examination. The court awarded to the plaintiff, in addition to the value of the fish lost by the diversion of the water, the sum of \$2,000 damages for the diminished value of the use of the property. The plaintiff was not entitled to any damages, except the natural and proximate loss resulting from the defendant's acts from the date of the trespass, on September 29, 1891, to the time of the trial, which was not later than July 12, 1893, when the judgment was entered, a period of less than two years. The defendant gave no evidence on the question of damages, and that of the plaintiff is exceedingly meagre and unsatisfactory. The plaintiff called a witness at the trial, and propounded to him the question as to the value of the fish-pond lot in 1875, without the right to use the water from the adjoining premises of the defendant. This question was objected to by the defendant's counsel as incompetent, and calling for an improper measure of damages. The objection was overruled, and the defendant excepted. It was probably competent for the plaintiff to show how far the fish pond, as used at the time of the conveyance, constituted an element of value, and the relations that its value bore to the whole purchase price; but the question was not admissible for the purpose of proving damages. The value of the lot in 1875, with or without the easement on the adjoining land, had no

bearing on the question of the damage which the plaintiff sustained by the defendant's trespass in 1891. And, since the question was admitted against the specific objection of the defendant that it called for an improper measure of damages, we cannot say that it may not have been considered upon that question to the prejudice of the defendant. Had the inquiry been limited to the importance of the fish pond as an element of the value of the whole thing granted, the ruling could, we think, be sustained; but it is impossible to say, from the record, that such was the purpose for which it was offered by counsel or received by the court.

Another witness, who was shown to have had charge of the clubhouse for 13 years, was asked to express his opinion as to the value of the fish-pond lot without the right of supplying the pond with water from defendant's land. The question was objected to by the defendant as immaterial and irrelevant, and on the further ground that the witness was not shown to be competent. The objection was overruled, and the defendant excepted. The answer was that it might be worth \$1,000 to \$1,200. Since the plaintiff was awarded the equitable relief demanded, which was a mandatory injunction requiring the defendant to restore the appliances for the conduct of the water from the springs to the pond, he was not entitled to recover any fee damages, and yet this question seems to have been directed to that end. It does not appear to what date or period of time the opinion of the witness referred, but that the inquiry was made with reference to the question of damages is quite obvious from the fact that, as a part of his answer, he stated the effect of the loss of water to the pond, and the value of the annual use of the pond with and without the supply of water from the springs. His opinion as to the value of the use of the pond as it was before the defendant disturbed the water supply was evidently based upon two improper assumptions: (1) That the plaintiff was entitled to recover for the loss of the supply from the Southgate lot, as well as from the lot directly east of the pond; (2) that the plaintiff was entitled to recover for the loss of profits in the clubhouse by reason of the defendant's act in diminishing the supply of trout from the pond. But, as there was no specific objection to this testimony, or motion to strike it out, the defendant is, perhaps, in no condition now to complain if it stood alone. The plaintiff, as already observed, could recover only what he lost in the diminished value of the use of the pond, without reference to his particular business, or the special uses to which the products might be applied. But the inquiry as to the fee value of the property with and without the easements, as above described, was not admissible on the question of damages, and, as the objections made were sufficient, we cannot say that the error did not operate to the prejudice of the defendant.

The amount of the damages, and the vague character of the proof on that subject, entitles the defendant to the benefit of any tenable exception taken to rulings on that subject.

The defendant's counsel requested the court to decide that no right was conveyed by the deed to Morrissey to the use of water from springs upon that part of the defendant's land which he did not own at that time, and which had been previously conveyed to Southgate, or any right to maintain drains, conduits, or reservoirs thereon for the use of the fish pond. This request was refused by the court, and the defendant excepted. We think that the principle embodied in this request was correct, and, as it is impossible to say to what extent the omission to discriminate between easements which the defendant had no power to grant and those that he could lawfully convey may have influenced the question of damages, the error must be regarded as material. This is not an action upon any of the covenants in the deed, but proceeds upon the theory that all attachments in use at the time the defendant conveyed the fish-pond lot to Morrissey for the benefit of the pond, whether upon lands which the defendant then owned or had previously conveyed to Southgate, passed to the grantee as appurtenant to the estate granted. The deed to Morrissey describes the premises conveyed as bounded on the south by lands conveyed to Southgate, so that the plaintiff's remote grantee, under whom he claimed, had notice from his deed, if not otherwise, that there was no intention to convey any easement over lands which the defendant had conveyed to another two years before. The fact that the Southgate property was subsequently transferred to the defendant, and that he owned the same at the time of the alleged trespass by virtue of his judgment of foreclosure of the purchase-money mortgage, does not affect the questions in this case. The question now is solely with respect to the rights which passed to Morrissey under his deed, and not such rights as he might acquire in equity or assert through the covenants in his deed. Since he did not acquire by his deed any easement in lands which then, to the knowledge of all the parties, belonged to another, and which his grantor had no power to convey, the defendant's acts, so far as they were confined to this land, were not unlawful, whatever liability might arise from the covenants. The request called upon the court to define the plaintiff's rights in an action founded upon a trespass with respect to easements, some of which were upon the defendant's land, which he conveyed to Morrissey, and, therefore, had the power to grant, and others upon land which he did not own, and had no power to grant. The defendant's liability could not have been fixed with precision without discriminating between the two pieces of property, and hence the request should have been granted.

The judgment should be reversed, and a new trial granted, costs to abide the event, unless the plaintiff shall, within 20 days from the service of the order, stipulate to strike out from the judgment the sum of \$2,000 and the interest thereon from date of entry. If such stipulation be given, the judgment, as thus modified, should be affirmed, without costs to either party. All concur, except VANN, J., not voting. Judgment accordingly.

(151 N. Y. 263)

KINKELE et al. v. WILSON.

(Court of Appeals of New York. Jan. 19, 1897.)

WILLS—CONSTRUCTION—PUNCTUATION AND CAPITAL LETTERS.

1. A will provided that testator's widow should have the entire income of the estate during widowhood, but, in case she remarried, an annuity was to be paid her in lieu of the income. Subject to such provision, testator devised his estate in equal shares to plaintiffs and two nieces. By a codicil, he gave the widow, "in addition to the provisions" already made for her, all his personal property "absolutely, * * * to be at her own disposal: And also" one equal third of the real estate in fee simple, and then revoked the devise to the nieces, giving their shares to plaintiffs, "saving and excepting therefrom the one equal third part of my real estate" and the personal estate "which I have herein given, devised, and bequeathed to my said wife." *Held*, that the widow took one-third of the real estate absolutely, the annuity provided in case she remarried being chargeable wholly on plaintiffs' share of the realty. 29 N. Y. Supp. 27, reversed.

2. Where the punctuation in a will accords with the natural sense in which the words are used, the use of a capital in the middle of a sentence will be regarded as accidental.

Appeal from common pleas of New York city and county, general term.

Action by John G. Kinkele and another against Emma Giles Wilson for an accounting. From a judgment of the general term 29 N. Y. Supp. 27), reversing a judgment for defendant entered on the report of a referee, defendant appeals. Reversed.

Henry C. Giles died April 27, 1887, leaving a last will and a codicil thereto, which in due time and form were admitted to probate by the surrogate of the county of New York. By the first three paragraphs of his will, which was dated August 7, 1885, he directed the payment of his debts and funeral expenses, revoked all other wills by him made, and appointed his wife, Emma Giles, as executrix (but she did not qualify), and his friend George B. Patterson as executor (who did qualify). The remaining paragraph is as follows:

"Fourth. I do give, devise and bequeath unto my said wife, Emma, the rents and income of all my estate, property and effects remaining after the payment of my debts and my funeral and testamentary charges and expenses, so long during her natural life as she shall remain my widow and unmarried. But if my said wife shall at any time see fit to and do remarry, therefrom and aft-

er such remarriage, in lieu and instead of the use, rents and income of my entire estate, I do give and bequeath unto her the annual sum of two thousand dollars in each and every year during the residue of her natural life, to be paid to her in quarterly or semi-annual installments, as may be most practicable or convenient for my estate.

"And subject to this provision for my said wife, I do give, devise and bequeath my said estates unto my brother, William P. Giles, my nephew John G. Kinkele, my niece Anne Gilbert, now the wife of William E. Gilbert, and my niece Bella Giles, daughter of my brother John G. Giles, in equal shares; provided, however, that if any of them shall have died before my death, leaving issue who shall survive me, the share of such deceased shall pass to and vest in the child, children or issue of any of them, my said brother, nephew or nieces, respectively. But if any of them shall die leaving no issue, such share of the decedent shall pass to and vest in the survivors of my said brother, nephew and nieces and the children or issue of any of them who shall have died leaving issue. Such issue, if any, taking the deceased parents' share amongst them in equal portions.

"The provisions herein made for my said wife Emma Giles are so made, and if accepted by her shall be deemed and taken to be, in lieu and bar of all dower and rights of dower, and of every other right or interest in my estate."

His codicil was dated February 11th, 1887, and, the formal parts being excepted, is in these words:

"In addition to the provisions which in and by my said will I have made for the benefit of my beloved wife Emma Giles, I do give and bequeath unto her all my household goods and furniture absolutely, as and for her own property, and to be at her own disposal: And also I do give, devise and bequeath unto my said wife, in fee simple, all the one equal third part of my real estate, whether the same be situate in the City of New York or in any other part of the State of New York, or elsewhere in the United States of America, and these gifts are to take effect whether or not she shall remarry after my death, if she shall survive me.

"I do revoke and annul every gift and every devise to my two nieces, Anne Gilbert and Bella Giles, named in my said will, or to either of them, and to any child, children or issue of theirs or of either of them. Hereby declaring that it is my will that my brother William P. Giles and my nephew John G. Kinkele shall take in equal shares the portion of my estates which in and by my said will is given, devised and bequeathed to them and my said two nieces Anne Gilbert and Bella Giles, saving and excepting therefrom the one equal third part of my real estate and the household goods and furniture which I have herein given, devised

and bequeathed to my said wife, Emma Giles.

"Provided, however, that if either of them, my said brother William P. Giles and my said nephew John G. Kinkle, shall have died before my death leaving issue who shall survive me, the share of such deceased shall pass to and vest in the child, children or issue of such decedent. But, if either of them shall die leaving no such issue, such share of the decedent shall pass to and vest in the survivor of my said brother or nephew as the case may be.

"Except as altered by this codicil I do confirm and republish my said will."

He left a small amount of personal property and certain real estate, known as Nos. 163, 165, and 175 Canal street, in the city of New York, upon which there was a mortgage for \$15,000, and the entire rents thereof, amounting, after deducting all expenses, to about \$4,500 per annum, were paid by the executor to Mrs. Giles, until she remarried, on the 11th of February, 1891. Since May 1, 1891, when the executor first learned of the marriage, he has paid her but \$2,000 a year, and the remainder of the rents are still in his possession. This action was brought in form for an accounting, but the pleadings put at issue the construction of said will and codicil.

The plaintiffs claim that they, respectively, and the defendant, each took one equal third of the real estate in fee simple, subject to the charge of \$2,000 per annum, payable to the defendant, since her remarriage, during her lifetime. The defendant claims that she took one-third of the real estate absolutely, and that she is also entitled to receive \$2,000 a year from the rents of the other two-thirds. The referee sustained the defendant's contention, and rendered judgment accordingly; but the general term reversed it, and awarded judgment in favor of the plaintiffs, and in accordance with their theory. The defendant appeals to this court.

Joseph Potter, for appellant. Wm. W. Buckley, for respondents.

VANN, J. (after stating the facts). The scheme of the will was that the defendant should not take the title to any of the property left by the testator, either real or personal, but that she should have the entire income from all of it so long as she lived and remained his widow. In case of her remarriage, however, instead of the entire income, he gave her simply an annuity of \$2,000. Whether she remarried or not, these provisions were made, and, if accepted by her, were to be in lieu of dower and every other interest in his estate. All that he did not give to his wife he gave to his four residuary legatees, being a brother, a nephew, and two nieces. In other words, he gave the income to her during life, and the title to them, except that, upon the contingency of her mar-

rying again, he gave her a part only of the income during life, and all the rest of his estate, including both title and the remainder of the income, to them. The scheme of the codicil, made 17 months later, was not to take anything away from his wife that he had given to her by his will, but to give her something more. Hitherto he had given her simply income, but now he proposed to give her the title to a part of his property, "in addition to the provision" made for her benefit in the will. Accordingly, by apt words to effect his purpose, he bequeathed to her all of his "household goods and furniture absolutely, as and for her own property, and to be at her own disposal." This included all of his personal property, which was of no great value. But he did not stop there, for he wanted to give her the title to a part of his real estate in the same way that he had given her the title to all of his personal property. Accordingly, he said, as a part of the same sentence (for no period intervenes, and the sense is continuous): "And also I do give, devise and bequeath unto my said wife, in fee simple, all the one equal third part of my real estate," and directed that these gifts should take effect whether she remarried or not. He then revoked the gift made by the will to his two nieces, and gave their shares to his brother and nephew, the plaintiffs in this action; but, for greater precaution, he added, "saving and excepting therefrom the one equal third part of my real estate and the household goods and furniture which I have herein given, devised and bequeathed to my said wife, Emma Giles;" thus treating the gifts of real and personal as alike in character and extent. Except as altered by the codicil, he confirmed and republished his will.

As the widow remarried, the question arises whether she took the title to one-third of the real estate charged, in connection with the other two-thirds thereof, with the provision for her annuity, or whether she took it the same as she did the personal property, "absolutely, as and for her own property, and to be at her own disposal." The argument in favor of the existence of the charge rests primarily upon the opening words of the residuary clause of the will, which are as follows: "And subject to this provision for my said wife, I do give, devise and bequeath my said estates to my brother," etc. There was clearly no express charge, and, in view of the scheme of the will as remodeled and enlarged by the codicil for the benefit of the widow, and considering the nature and extent of his property in connection with the words used in amplifying the gift to her, we think that any implied charge was removed from the real estate devised to her. While a devise subject to a charge in favor of a third person is very common, a devise subject to a charge in favor of the devisee is such an unusual method of giving away property as to raise the question at once

whether that was the actual intention. In this case it would be hostile to the general plan of the testator, when the object of the will is compared with that of the codicil. The object of his will was to provide for the support of his wife without giving her the title to anything. The object of the codicil was to continue the provision for her support, and at the same time to make gifts absolute and outright to her. In a single sentence he gave her two kinds of property, "in addition to the provisions" for her benefit in the will. In giving her the first kind, which happened to be personal, he wished to leave no doubt of his intention to no longer limit her to the income, but to give her the property itself free from any charge thereon, and accordingly he bequeathed it to her "absolutely, as and for her own property, and to be at her own disposal." Having thus disposed of the personal property, he took up the other kind, and disposed of a portion of that, saying: "And also I do give, devise and bequeath unto my said wife, in fee simple, all the one equal third part of my real estate." There is nothing to show an intention to discriminate as to the nature or extent of the two gifts, except as the gift of the personal was by bequest, absolutely, and the gift of the realty was by devise in fee simple. The language used was appropriate to confer the highest title to both kinds of property, and, by connecting the two gifts in the same sentence by the words "and also," he indicated, as we think, when the general scheme of his will is taken into account, an intention to make the latter gift in the same manner as the former. The primary meaning given by most lexicographers to the word "also," when used as an adverb (as it is here, because two conjunctions would not be used together), is "in the same manner," or "in like manner," or "likewise." It is also used with the meaning of "too," "further," and "in addition to"; but, as the testator had already introduced the sentence by using the words "in addition to," it is probable that "also" was here used with the meaning first suggested. This is rendered still more probable by the keynote of the codicil, which is the intention of the testator to give the absolute title, instead of merely the income, as previously given. As his estate was situated, the gift of one-third of the realty, subject to the charge of his wife's annuity upon the whole, would have been of slight practical value, and an unimportant addition to the gift made by the will, as the entire benefit thereof might have been withheld from her during her lifetime. Its present and absolute enjoyment seems so inseparably connected with that of the personal property as to show an intention to give both in the same way, without discriminating in favor of or against either kind. He had no children, and both the will and codicil show that his first object was to provide for his wife. When he made his will, the apprehension

that she might remarry induced him to greatly reduce the provision for her benefit, if that contingency should happen; but, when he made his codicil, this apprehension was less active. He then wanted to be more generous to her, whether she married again or not; so he gave, "in addition" to his first gift, the personal property absolutely, "and also" one-third of his real estate in fee simple. He thereby carried forward to the devise the words used to qualify the bequest, and thus measured the extent of the gift.

We do not agree with the learned general term that "some error has crept into the codicil as it stands," or that the colon which separates the bequest from the devise was intended for a period, even if the word "And," with which the latter is said to begin, was written with a capital "A," because the words used indicate one continuous sentence, which is confirmed by the punctuation, as the testator left it. There is no occasion for changing the punctuation marks as he made them. The natural sense in which words are used, as it appears from judicial inspection, always prevails over both punctuation and capitals, which are regarded as such uncertain aids in the interpretation of written instruments as to be resorted to only when all other means fail. *Ewing v. Burnet*, 11 Pet. 41, 54. When, as in the will before us, the punctuation accords with the sense, the use of a capital in the middle of a sentence must be regarded as accidental, and should not be permitted to confuse a construction otherwise reasonably clear. A capital letter so used in a holograph will would have more significance than in one written, as this is said to have been, by a draftsman, and read to the testator, who could not, of course, detect the difference from the sound.

The general term placed great reliance upon *Redfield v. Redfield*, 126 N. Y. 466, 27 N. E. 1032, where it was held that a codicil will not operate as a revocation of a previous testamentary disposition beyond the clear import of its language. In that case the object of the testator was to induce his wife, from whom he had separated, to release her claim of dower, as well as an agreement for her support; and it was accordingly held that an annuity given to her by will for that purpose, and charged upon certain land, was not revoked by a change of the devisees in remainder, as there was no express language to that effect, and no substitute for the annuity, "which was to furnish the consideration for a release of her dower, and was to be a substitute for his obligation to pay her \$400 per year." The distinction between that case and this resides in the manifest intention of the testator and the object that he wished to accomplish. That was in the nature of an attempt to buy off a discarded wife, while this was a further provision for one, whom the testator termed "his beloved wife." In that case the codicil was not made

with reference to the wife, for her name does not appear in it, but in this case the purpose of the codicil was to benefit the wife by giving her something "in addition to" the gift already made in the will. Nothing was taken back, but something was added, both of real and personal property; and each kind was given, as we think, in the same manner, as an out and out gift, free from any charge, for the benefit of the donee. The judgment entered upon the decision of the general term should therefore be reversed, and the judgment entered upon the report of the referee affirmed, with costs. All concur. Judgment accordingly.

(151 N. Y. 502)

AREND v. SMITH.

(Court of Appeals of New York. Jan. 19, 1897.)

CONSIDERATION—PAYMENT OF PAST-DUE DEBT.

A promise to renew a note to be given by a debtor in payment of a past-due debt is without consideration.

Appeal from supreme court, general term, Fifth department.

Action by L. F. W. Arend against Christopher Smith. From a judgment of the general term (30 N. Y. Supp. 1129) affirming a judgment for plaintiff, defendant appeals. Affirmed.

Stephen Lockwood, for appellant. Edward C. Mason, for respondent.

VANN, J. On the 17th of February, 1893, the plaintiff was president of a railroad corporation to which the defendant was indebted in the sum of \$1,000, then past due, upon a subscription for stock issued to him by the company. The plaintiff, as president, demanded payment of the sum subscribed, and threatened suit by the company in case it was not paid, as he had on one occasion about a month before. The defendant said that he had plenty of property, but, owing to the hard times, he had no money, and could not then pay the debt. The plaintiff asked him for his note, and said that he could get it discounted, and the defendant replied that, when the note fell due, he would not be able to pay it. The plaintiff then said that, when the note became due, he would "renew it and renew it again," if the defendant so desired. The defendant thereupon made his promissory note for \$500 at three months, and delivered it to the plaintiff, who at once indorsed it, procured it to be discounted at a bank, and paid the proceeds over to the railroad company to apply upon the debt of the defendant, who himself paid the sum charged by the bank for discounting the note. The plaintiff had no pecuniary interest in the debt or the note, except as an indorser for the accommodation of the defendant. On the 22d of May, 1893, when the note became due, the defendant could not pay it, and so informed the

plaintiff, who told him to make out a new note, and added that he had better make it for \$1,000, so as to pay the balance of the subscription, and that he, the plaintiff, would get it discounted. The new note was accordingly made for that amount, and delivered to the plaintiff by the defendant, who promised to pay the sum charged as discount as soon as it could be ascertained. Owing to stringency in the money market, the banks refused to discount the note, and the plaintiff notified the defendant that he must take care of the first note, but he omitted to do so. On the 6th of June the second note was returned to the defendant, who accepted it, and has retained it ever since. The plaintiff was compelled to pay the bank the amount of the first note, which was thereupon delivered to him, and this action was brought to recover the sum so paid from the defendant. The answer sets up as a defense the agreement to renew; and the violation thereof by the plaintiff, and the only question presented for decision is whether that agreement was supported by a sufficient consideration.

When the agreement in question was made, the defendant owed the plaintiff nothing, but he owed the railroad company \$1,000, that was then due. He was under a lawful obligation to pay that debt, and the giving of a note to raise money for that purpose was an advantage to him only, as it extended the time of payment. As he did no more than his duty, no consideration could arise from the act. The payment of a valid and admitted debt by the one who owes it is no foundation for a promise, even by the creditor, let alone a stranger to the original consideration. The defendant parted with nothing that the law recognizes as of value, and suffered nothing that the law recognizes as an injury. He virtually borrowed the credit of the plaintiff to pay a precedent debt that he owed to a third party. When the note was delivered to the plaintiff, he had no title to it, but simply held it as the agent of the defendant, for the purpose of procuring it to be discounted for his benefit. While he requested payment of the debt, it was only as president that he did so, and in that capacity he had the right to demand it. As the defendant did not have the money, the plaintiff requested him to give a note, not for his own advantage, but in order to raise money for the accommodation of the defendant himself. Under these circumstances the promise of the plaintiff was a naked engagement that involved no legal obligation, but rested wholly upon the integrity and good faith of the one who made it, with no power in the courts to compel performance, or to award damages for nonperformance. As was well observed by one who wrote almost the first work upon the Common Law that is now extant: "A nude or naked promise is where a man promiseth another to give him certain money such a day, or to

build a house, or to do him such certain service, and nothing is assigned for the money, or for the building, or for the service. These he called 'naked promises,' because there is nothing assigned why they should be made, and no action lieth in these cases, though they be not performed." Doct. & Stud. dial. 2, c. 24. Although the promise in this case was made to induce performance, as the act performed was less than the legal duty already resting upon the defendant, it was incapable of sustaining an action or maintaining a defense. While the plaintiff was doubtless interested in the corporation, and thus indirectly interested in the debt owing it by the defendant, still he owned no part of that debt, for it belonged wholly to the railroad company. Even if he had owned it all, however, his promise would, notwithstanding, have been without consideration; for, at the most, he simply induced the defendant to do indirectly what the law required him to do directly, and that was to pay his own debt. No consideration can arise simply from the method of doing an act which it is one's duty to do. The subject does not admit of extended discussion, for it has been a principle of the common law from the earliest times that a promise without a legal consideration as an equivalent cannot be enforced, and it is well settled that "the performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract." *Robinson v. Jewett*, 116 N. Y. 40, 22 N. E. 224. The judgment should be affirmed, with costs. All concur, except HAIGHT, J., not sitting. Judgment affirmed.

(151 N. Y. 372)

O'BEIRNE v. ALLEGHENY & K. R. CO.
et al.

(Court of Appeals of New York. Jan. 19,
1897.)

**PARTIES—SPECIFIC PERFORMANCE—SUIT BY BOND-
HOLDERS.**

1. Defendants, the owners of all the stock in three partly completed railroads, contracted with N. to consolidate the railroads, and to mortgage the franchises and property of the companies and certain land alleged to be owned by defendants, to secure bonds to be issued by the new company and negotiated by N. A deed of trust was made, purporting to comply with the contract, but by fraud other lands were substituted, which were valueless. *Held*, that on refusal of the trustee to sue for specific performance of the contract, or damages for its breach, a bondholder in behalf of himself and all other bondholders could sue therefor. 38 N. Y. Supp. 4, affirmed.

2. The railroad company was a necessary party to such an action.

Appeal from supreme court, appellate division, First department.

Action by James R. O'Beirne against S. Bullis and others. From a judgment of the appellate division (38 N. Y. Supp. 4) affirming a judgment for plaintiff, defendant the

Allegheny & Kinzua Railroad Company appeals. Affirmed.

Adelbert Moot, for appellant. Frank Sullivan Smith, for respondent.

GRAY, J. The plaintiff, on behalf of himself, as a bondholder of the defendant railroad company, and of all other bondholders similarly situated, brought this action to compel the specific performance of certain agreements, whereby some 46,000 acres of timber land, in the aggregate, contiguous or tributary to the line of the railroad, were to be conveyed to the trustee in the mortgage made by the railroad company; or to compel the defendants to pay the trustee, for the security of the bondholders, the value of said lands. The defendants against whom this relief is prayed for are the Allegheny & Kinzua Railroad Company and two certain persons named Bullis and Barse. It seems that in 1889 there were two partially completed railroads in Pennsylvania operated by the Bradford & Corydon Railroad Company and the Allegheny & Kinzua Railroad Company. There was also in New York a partially completed railroad operated by a corporation of the same name as the one in Pennsylvania, viz. the Allegheny & Kinzua Railroad Company. Of these three railroad companies the defendants Bullis and Barse owned and held all the capital stock. These railroads penetrated a large tract of timber land in McKean county, Pa. Bullis and Barse devised a scheme, in connection with a firm of New York brokers styled Newcombe & Co., for the reorganization of the two Pennsylvania companies, and in pursuance thereof an agreement was entered into between them on October 8, 1889, which recited that Bullis and Barse were the owners and holders of the capital stock of the companies, and that they were also owners of or controlled 30,000 acres of land in McKean county, on which were extensive and valuable tracts of timber, the product of which they were desirous of marketing through the completion of the railroads. It provided that Bullis and Barse should cause to be executed a mortgage or deed of trust upon the property and franchises of the railroad companies and upon these 30,000 acres of land to the Central Trust Company, as trustee, for the purpose of securing bonds to the amount of \$250,000, which Newcombe & Co. agreed to sell upon certain terms. Bullis and Barse were to place the ownership and control of the railroad property and franchises and of the 30,000 acres of land in a new corporation, to be created under the laws of Pennsylvania. The lands so to be owned by the corporation and covered by the lien of the mortgage or deed of trust were to be contiguous or tributary to one or the other of the railroads, and should be timbered and profitable to the corporation. Subsequently engineers were sent out, at the request of Bullis and Barse, by Newcombe & Co. and

another concern, whom they had brought the matter before, who visited and inspected the timber lands in McKean county. In consequence of their report and suggestions, the October plan was changed, and a new and larger scheme was resolved upon on December 9, 1889. Upon the visit of the engineers to the timber lands, Bullis had accompanied them, and had pointed out, somewhat indefinitely, what would be the boundaries of the 30,000 acres. All the lands shown were well timbered, and were situated on either side of the line of the railroad. The agreement of December 9th, modifying that of October 8th, between Newcombe & Co. and Bullis and Barse, recited the ownership of the capital stock of the Allegany & Kinzua Railroad Company (the New York corporation) by Bullis and Barse, and that it was proposed to consolidate it with the two Pennsylvania companies mentioned in the October agreement. Bullis and Barse were to cause the merger and consolidation of the three companies to be effected, with a capitalization of \$500,000 of stock and with a bonded debt of \$500,000, secured by a mortgage to the Central Trust Company, as trustee, which should be a first lien upon the properties and franchises of the new corporation, and should include 30,000 acres of timber land for the first 46 miles of railroad constructed and completed, and 16,000 acres for the additional 24 miles of railroad to be constructed. Only \$300,000 at par value of the bonds were to be put upon the market at first, representing 46 miles of the said railroads, and the remaining \$200,000 were reserved for the purpose of completing the extensions of the roads. Newcombe & Co. were to negotiate the sale of bonds at par upon certain terms and conditions. Bullis and Barse were to cause a contract to be entered into with the Interior Construction & Improvement Company, a New Jersey corporation, for the purpose of effecting the proposed merger and consolidation of the several railroads, and the issue by the new corporation of said capital stock and bonds. On the same day, accordingly, there was an agreement made between the Interior Construction & Improvement Company and the New York corporation of the Allegany & Kinzua Railroad Company, whereby the former company agreed to effect the proposed consolidation, to complete the construction of the railroads without delay, and to extend them so that the consolidated company should own a completed road of 70 miles in length. This agreement provided for the issuance by the consolidated company of \$500,000 in bonds, to be secured by a mortgage which was to cover, in addition to the railroad properties and franchises, 1,000 acres of timber land for each mile of railroad constructed and completed, contiguous or tributary to the consolidated railroad, in this manner, viz.: For the first 46 miles of railroad so completed, 30,000 acres, and for the additional 24 miles

of railroad to be completed, 16,000 acres. This agreement was executed on behalf of the railroad company by the defendant Bullis, as its president. On the same day another and third agreement was made between the Interior Construction & Improvement Company and Bullis and Barse, which refers to the previous agreement, and states the disposition to be made by the Interior Construction & Improvement Company of the bonds and stock of the new corporation. By that agreement Bullis and Barse, among other things, agreed "to cause the proper amount of timber land to be placed under the lien of said mortgage or deed of trust to be executed by said merged and consolidated corporation, as provided in said agreement"; thereby referring to the one previously described between the construction company and the Allegany & Kinzua Railroad Company of New York. The consolidation of these three railroad corporations was effected in February, 1890, under the name of the present defendant the Allegheny & Kinzua Railroad Company, and thereupon the new company executed and delivered to the defendant the Central Trust Company, as trustee, its mortgage to secure bonds for the aggregate amount of \$500,000, par value. This mortgage, by its terms, covered all the railroad properties and franchises, and the defendant Bullis and his wife united in its execution, as it is expressly found, "with the knowledge and approval of the defendant Barse." There was a recital in the mortgage that Bullis was the owner in fee of the real estate thereafter described, and it purported to convey to the trustee, on the part of Bullis and his wife, numerous tracts and parcels of land, to the extent of 30,954.19 acres. There was also a covenant by the mortgagors that the railroad company should cause to be conveyed to the trustee, in addition to the 30,000 acres of timber land conveyed by that instrument, 16,000 more acres, as a further security for the payment of the bonds upon the completion by the railroad company of the 70 miles of railroad. It was found as a fact by the trial judge that the execution of this mortgage by Bullis and wife was in apparent and partial performance of the undertakings and contracts contained in the earlier agreements, and of the scheme of consolidation and extensions. The bonds were executed and delivered by the railroad company to the trustee, and of the \$300,000, which were to be presently disposed of, all but \$40,000, which Newcombe & Co. retained for their commissions, were duly sold by that firm to the plaintiff and his co-bondholders in good faith; and the finding further is that the proceeds of these \$260,000 of bonds were applied to the extinguishment of liens and to the construction of 46 miles of railroad. \$125,000—being the proceeds of the sale at par of \$125,000 of these bonds—were paid over to the defendants Bullis and Barse for the purpose of ex-

tinguishing liens and incumbrances upon the properties of the various constituent companies. It was also found as a fact that the bonds were retained and sold by Newcombe & Co. "with full knowledge and reliance upon the said several agreements, * * * and particularly upon the provisions contained therein for the conveyance to the defendant trust company of 30,000 acres of timber land as a further security for said bonds, of the character described in said agreements, and of the kind and value stated and described by said defendants Bullis and Barse." It was also found, in substance, that the defendants Bullis and Barse, at the time of the agreements which have been described, had represented to Newcombe & Co. that the said 30,000 acres of land were timbered, clear of incumbrances, contiguous to the line of railroad as the same was constructed and projected, and that said land was covered by merchantable timber sufficient to provide a railroad with at least 70 tons of freight to the acre for conveyance over the railroad at certain rates. It is also found that Newcombe & Co. approved and accepted the said mortgage relying upon the representations of Bullis that he was the owner of the tracts of land described therein, and believed that by reason of such representations Bullis and Barse were in good faith performing their covenants and agreements in that behalf, and in reliance thereon they proceeded to perform their agreements with said Bullis and Barse. Bullis and Barse failed and refused to continue the work of construction in August, 1890. Certain findings of fact show that of the lands mentioned and described in the mortgage some portions were not owned by Bullis at the date of its execution; that some portions were not timbered, or had all the timber removed from them; that Bullis did not have the title to the soil of some portions; that he did not have free and unincumbered title as to certain portions, and that "of the lands mentioned and described in the said mortgage 1,900 acres thereof * * * were owned by said Bullis at the date of said mortgage." The finding also is that Bullis has not since acquired good and sufficient title to the land described in the mortgage. These findings have ample support in the evidence; but the court at special term dismissed the complaint, holding that a specific performance could not be decreed, because there was no proof as to what lands were owned or controlled by the defendants Bullis and Barse, except the lands described in the mortgage. Upon appeal to the general term, that court agreed with the trial court that specific performance of the contracts could not be decreed, but held that the damages sustained by the plaintiff might be recovered in such an action, where it appeared that, though he was entitled to equitable relief, yet it would be unavailing if granted, because of the defendants' inability to perform. The general term assumed, in

the absence of any explanation appearing in the record, that the trial court must have dismissed the complaint upon the theory that, as equitable relief could not be granted, the plaintiff was not entitled to legal relief,—an assumption which, it must be conceded, is the only one permissible upon the case. The general term was undoubtedly right in holding as they did. The plaintiff has set forth in his complaint all the facts constituting a cause of action for specific performance, and, upon it appearing that that relief could not be granted, he had at least the right to a new trial wherein he might establish his claim for the damages sustained by a breach of the covenants and agreements relied upon. *Sternberger v. McGovern*, 56 N. Y. 12; *Margraf v. Muir*, 57 N. Y., at page 159. The trial court might have retained the cause, to grant such legal relief as might be just. *Cuff v. Dorland*, 55 Barb. 481.

The situation of the case is somewhat singular. The defendants Bullis and Barse have apparently gone back to take the new trial awarded them below, but the railroad company, for some reason which does not appear, has elected to appeal to this court, although its natural course would seem to have been to take the new trial, in conjunction with the other defendants. Not having done so, we are brought to consider the plaintiff's relations to the defendant railroad company, and his right to maintain this action. It appears, and it is so found, that prior to the commencement of this action the plaintiff, on behalf of himself and of all bondholders similarly situated, had applied to his trustee, the defendant the Central Trust Company, and had requested it, for the protection of the bondholders, to institute this suit, and that the trust company had refused to bring this action, or any other suit, for such purpose. In view of this attitude of the trustee, I do not think that there is any doubt but that the plaintiff, as a bondholder of the railroad company, had the right to bring and to maintain the action. If this were not permitted in such cases, bondholders would be wholly without protection. Although the mortgage and its agreements are made to and with the Central Trust Company, as trustee, yet the promise of the railroad company is for the payment of money to the holder of its bonds, and it was to furnish security for the performance of that promise that the mortgage instrument was executed and delivered. The bondholders are the beneficiaries of the mortgage or deed of trust, and that instrument contains, in effect, a contract made for their benefit through a trustee as a convenient intermediary. It is upon that principle that such an action as this is permitted. *Beveridge v. Railroad Co.*, 112 N. Y. 1, 28, 19 N. E. 489. Whatever rights were vested in the trustee through the mortgage instrument, as against the mortgagors, inured to the benefit of the bondholder as the beneficiary, and are enforceable by him in

the case of refusal or neglect on the part of his trustee to act for him upon his making the proper request.

Although the action was intended to compel the performance by Bullis and Barse of agreements relating to the extent and quality of the lands, which were to constitute part of the security for the payment of the bonds issued by the railroad company, it was not only proper, but necessary, that the railroad corporation should be joined as a defendant. The subject-matter of the suit related to a contract of the railroad company, namely, that which was in the deed of trust concerning the conveyance of lands to the trustee; and the company was obviously materially interested in, and would be affected by, the result of a suit whose object was to cause that security to be furnished which it was contemplated and agreed the bondholders should have. No decree granting relief in the action would be complete unless it operated upon the mortgagor as well as the other parties who are alleged to have become obligated with it.

The theory of the complaint and the tendency of the proof upon the trial were that a fraudulent scheme was devised by Bullis and Barse, having for its object the consolidation of certain railroad properties owned and controlled by them, and the issuance of a large number of bonds by the consolidated company, which should be placed with the public at par, through the co-operation of Newcombe & Co., whose assistance to the scheme, in the negotiation of the bonds, should be gained by representations and agreements of such a nature as to the timber tracts to be furnished as additional security under the mortgage that the bonds would appear to be attractive and salable securities. We are not called upon, at the present time, to pass upon the liability of Bullis and Barse for the parts they have played in the development and consummation of this scheme, inasmuch as they have gone back to a new trial; but, on the face of this record, that the evidence amply warranted the findings by the trial court is not to be denied, and it would have justified the granting of relief to the plaintiff had the case been in a shape to make that possible. If that be true as to the defendants Bullis and Barse, then this appellant, the railroad company, must be bound by the findings as to the nature and extent of the security to be given to the holders of its bonds. That is enough for the purpose of this appeal, and it is unnecessary to discuss other questions which are argued and which bear upon the right of the plaintiff to maintain the action as against Bullis and Barse. They are not here, and therefore, if those questions have any gravity, they must be dealt with at another time, and in the light of such evidence as may be adduced; but that a judgment against the railroad company is fully warranted by the evidence needs no extended discussion.

The appellant contends that upon the record it was innocent of any acts for which the plaintiff could maintain the action against it. In that contention I am unable to agree. For reasons that have been before stated, the railroad company was a proper and necessary party defendant. Its agreements in the mortgage or deed of trust with respect to the security to be furnished in addition to its properties and franchises were made jointly with others. It was formed by the consolidation of three railroad companies in New York and Pennsylvania, whose capital stock was owned by Bullis and Barse, and in issuing the bonds agreed upon, and in executing and delivering the mortgage for their security, it was an instrumentality of those parties. It is no valid objection to this action, as against the railroad company, that the plaintiff has a remedy by way of a foreclosure of the mortgage securing his bonds, if they are not paid according to their terms. When this action was brought, there had been no default in the payment of interest on the bonds; but when it appeared that the underlying security for the payment of the bonds had not been furnished as agreed, the trustee was entitled, or, in the event of its refusal to do so, the bondholders were entitled, upon the plainest principles of equity, to ask that the obligor in the bond, and the other parties who are alleged to have made themselves jointly liable with it with respect to the security to be mortgaged for the payment of the bonds, be compelled to perform what they ought to have done; and if performance, for any reason, may not be decreed, that the court should award such relief against them as upon the facts it should deem the plaintiff to be entitled to. I see no reason for reversing the order of the general term, and therefore I advise its affirmance, and, under the stipulation given by the appellant, that judgment absolute should be ordered against it, with costs. All concur. Judgment affirmed.

(151 N. Y. 282)

TRUSTEES OF AMHERST COLLEGE
et al. v. RITCH et al.

(Court of Appeals of New York. Jan. 19,
1897.)

APPEAL AND ERROR—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE—FRAUD—ESTATE OF LEGATEES—PROMISE TO HOLD FOR ANOTHER—BEQUESTS TO CHARITY—VALIDITY—ASSIGNMENT—ESTOPPEL IN PAIS—JUDGMENT—RES JUDICATA.

1. Code Civ. Pro. § 1022, provides that the decision on the whole issue of fact may state separately the facts found and the conclusions of law, and direct the judgment to be entered thereon, or state the grounds on which the issues have been decided, and direct judgment. *Held*, that where the decision of the special term does not state the facts found, and the judgment entered thereon is affirmed by the general term, on appeal to the court of appeals, all the facts warranted by the evidence and necessary to support the judgments below are presumed to have been found, and the court of appeals has no more control over the facts

than it has when specific findings are made by the special term and affirmed by the general term.

2. Testator, after bequests to his wife and others, gave certain sums to colleges named, and the residue absolutely to persons named. The bequest to the residuary legatees was upon a secret trust for the benefit of such colleges. Pending a contest of the will by the widow and next of kin, the latter, for valuable consideration, executed releases to the residuary legatees, who did not state that there was a secret trust which, being void, would vest in the widow and next of kin the bulk of the residuary estate. Substantially all the material facts had been disclosed in the contest, the residuary legatees being examined at length by the counsel for the widow and next of kin. The former took the position, on the trial, that the gift to them was absolute; but the counsel for the latter claimed that there was a secret trust, which was invalid, and that their clients were entitled to the residuary estate. *Held*, that the fact that the residuary legatees did not state that there was a secret trust when they obtained the releases did not conclusively prove fraud, so as to make the failure to find fraud a question of law and reviewable.

3. Where a testator gives his residuary estate to persons absolutely, but relying on the express promise, made by one of the legatees, on behalf of himself and his co-tenants, that they will distribute the same among certain beneficiaries named in the will, the residuary legatees take it as trustees, and acquire no personal interest in it. 36 N. Y. Supp. 578, affirmed.

4. Testator gave certain sums to colleges named, and the residue of his estate to certain persons in trust for the benefit of the same colleges. He made several codicils, and, after the first, the trust remained the same though it was secret. So far as any writing signed by testator showed, it always remained the same, unless modified by an advisory memorandum given one of the trustees. *Held*, that a judgment of the general term, affirming a judgment of the special term, that the beneficiaries of the secret trust were limited to the colleges originally named, should not be disturbed, there being no other evidence of a contrary intent except the testimony of one of the trustees, which, the presumption is, the court for sufficient reasons did not believe.

5. Laws 1860, c. 360, forbidding a testator, having a husband, wife, child, or parent, to give to any charitable corporation, etc., more than one-half the estate, after payment of debts, applies where a testator, leaving a wife, gives by his will more than half his estate to certain persons absolutely, but the gift is in fact upon a secret trust for the benefit of charitable corporations.

6. Laws 1860, c. 360, forbidding a testator, having a husband, wife, child, or parent, to give to any charitable corporation, etc., more than one-half the estate after payment of debts, is for the protection of the class of persons specified therein and those benefited through them; and if they, for valuable consideration, voluntarily release their interests under the will, no one else can impeach its validity. *Andrews, C. J.*, dissenting. 36 N. Y. Supp. 576, affirmed.

7. Pending a contest of the will, the widow and next of kin executed to the trustees a preliminary instrument, which, after withdrawing all objections to the probate of the will, contained a covenant not to sue for a construction of it, or to set it aside, and not to make any claim on the residuary legatees as such or as executors, and an agreement to "execute a general release of all claims," both to the executors and their donees, under a deed of gift, referred to, to certain charitable corporations, previously executed by the residuary legatees, as well as to the persons named as residuary legatees, individually. After payment of the consideration provided for in such instrument, the widow

and next of kin executed another, running to such persons as executors, trustees, individuals, and representatives of the donees under the deed of gift, which recited that the amount paid was "in compromise and full settlement" of all contests of the will, or concerning the estate, and each covenantor then "remised, released, and forever discharged" said persons, in their said several capacities, "and also the said donees," named in the deed of gift, of and from all manner of actions and demands whatsoever, in law or in equity, which "the covenantors ever had," etc. *Held*, that such instruments did not operate as transfers or assignments, but were releases of the interests of the covenantors to which they were entitled under Laws 1860, c. 360. *Andrews, O. J.*, dissenting.

8. If such instruments operated as a transfer to the persons named as residuary legatees, individually, whatever interest they acquired was held in trust for the benefit of the beneficiaries of the secret trust. *Andrews, C. J.*, dissenting.

9. Testator, who had a wife, by the ninth article of his will, gave certain sums to colleges named. By the residuary clause he gave over half of his estate to persons named, absolutely; but, in fact, the gift was upon a secret trust for the same colleges. The residuary legatees, claiming absolute title, made a deed of gift to certain other charitable corporations, and obtained from the widow and next of kin, pending a contest of the will by the latter, releases of their claims, etc. The colleges had no connection with the making of the deed of gift or the releases. After their execution, the consent of the colleges was given to the postponement of payment of their specific legacies "to the payment of the amount" the widow and next of kin had agreed to accept in release of their claims. *Held*, that such colleges were not estopped, as against the charitable corporations named in the deed of gift and the donors, from claiming the money given thereby, because they did not disclose their intention to claim it pending or at the time of the settlement by the donors with the widow and next of kin; and the fact that, owing to such consent, the residuary legatees had paid a large proportion of the specific legacies to the colleges was immaterial.

10. A will gave certain sums to colleges named, and by a residuary clause gave a large sum to certain persons upon a secret trust for the benefit of the same colleges. The residuary legatees, claiming absolute title, executed a deed of gift to certain other charitable corporations, and obtained releases from testator's widow and next of kin. *Held*, that an action by such colleges, against the residuary legatees and such charitable corporations, to recover the residuary estate under the secret trust, was not barred by an order of the surrogate that testator bequeathed a certain sum, which was one-third the total amount which passed by the residuary clause, to each of the three residuary legatees, in a proceeding to ascertain what amount of property passing under the will was subject to taxation, and to fix the amount of the tax.

Appeal from supreme court, general term, First department.

Action by the trustees of Amherst College and others against Thomas G. Ritch and others, to establish and enforce a secret trust for the benefit of plaintiffs under the will of Daniel B. Fayerweather, deceased, of which defendants Thomas G. Ritch, Justus L. Bulkley, and Henry B. Vaughan were executors, etc. The other defendants were testator's next of kin, and the executors of the estate of Lucy Fayerweather, deceased, widow of the testator, and certain literary and charitable corporations which claimed under such secret trust and a deed of gift by Thom-

as G. Ritch and others, as executors, trustees, and residuary legatees. From a judgment of the general term (36 N. Y. Supp. 576) affirming a judgment of the special term (31 N. Y. Supp. 885) in favor of plaintiffs, defendants appeal. Affirmed.

Daniel B. Fayerweather, an old resident of the city of New York, died on the 15th of November, 1890, leaving a will, four codicils, an estate of several millions, consisting chiefly of personal property, and debts amounting to less than \$10,000. He left neither child nor descendant, but a widow and three nieces, his only heirs at law and next of kin, survived him. By the first and second articles of his will, which is dated October 6, 1884, he revoked all prior wills by him made and provided for the payment of his debts, funeral expenses, and the costs and charges attending the administration of his estate. By the third article he bequeathed to his wife the sum of \$10,000, and by the fourth he devised to her his dwelling house and the furniture therein, his stable, horses, carriages, and the like. By the fifth article he gave his wife an annuity of \$15,000 during her life, and directed that the provisions in his will for her benefit should be in lieu of dower or other interest in his estate. By the sixth article he gave to Anna Amelia Joyce an annuity of \$1,000 during her life, or so long as she should remain unmarried; and by the seventh he gave to Lucy J. Beardsley \$100,000, to Mary W. Achter and Emma S. Drury \$10,000 each, and to Charles Hennessey, a porter in his store, \$1,000. The eighth, ninth, and tenth articles are as follows: "Eighth. After the payment of the legacies and bequests hereinbefore made, I give and bequeath to the Presbyterian Hospital, located in the city of New York, the sum of \$25,000; to St. Luke's Hospital, in said city, \$25,000; to the Manhattan Eye and Ear Infirmary, in said city, \$25,000; to the Women's Hospital, in said city, \$10,000; to Mount Sinai Hospital, in said city, \$10,000. Ninth. Subject to the conditions and limitations in this paragraph herein-after contained, I give and bequeath to Bowdoin College, at Brunswick, Maine, the sum of \$100,000; to Dartmouth College, at Hanover, New Hampshire, the sum of \$100,000; to Williams College, at Williamstown, Massachusetts, the sum of \$100,000; to Amherst College, at Amherst, Massachusetts, the sum of \$100,000; to Wesleyan University, at Middletown, Connecticut, \$100,000; to Yale College, at New Haven, Connecticut, \$300,000, of which \$100,000 shall be used for the purposes of the Sheffield Scientific School, connected with said college; to Columbia College, in the city of New York, \$200,000; to Union Theological Seminary, in the city of New York, the sum of \$50,000 as a special fund, to be used for the endowment of what are known as cadetships, such use, however, being subject to the discretion of the board

of directors of such institution. I also give and bequeath unto Hamilton College, at Clinton, New York, \$100,000; to the University of Rochester, at Rochester, New York, \$100,000; to Cornell University, at Ithaca, New York, \$200,000; to Lafayette College, at Easton, Pennsylvania, \$50,000; to Lincoln University, at Lower Oxford, Pennsylvania, \$100,000; to the University of Virginia, at Charlottesville, Virginia, \$100,000; to Hampton University, at Hampton, Virginia, \$100,000; to Maryville College, Maryville, Tennessee, \$100,000; to Marietta College, at Marietta, Ohio, \$50,000; to Adelbert College, at Cleveland, Ohio, \$50,000; to Wabash College, at Crawfordsville, Indiana, \$50,000; to Park College, at Parkville, Missouri, \$50,000. In case the condition and circumstances of any of the institutions named in this paragraph of my will shall be so changed that, in the judgment of my executors, it is not expedient to pay over all or any of said moneys to such institutions, I authorize and empower my executors, in the exercise of their discretion, to withhold or reduce the amounts herein directed to be given. If my estate shall not be sufficient to pay in full all the legacies and bequests in this, my will, contained, the legacies and bequests provided for prior to this paragraph of my will shall be first paid in full, and the bequests in this paragraph contained shall be paid pro rata. Tenth. All the rest, residue, and remainder of my estate, real and personal, of which I shall die possessed; I give, devise, and bequeath unto my executors, to have and to hold the same, in trust nevertheless, to sell and convert into cash, and divide the same equally among the several corporations mentioned in the ninth paragraph of this, my will, share and share alike." By the eleventh and last article he appointed Justus L. Bulkley and Thomas G. Ritch executors of his will and trustees of his estate, with authority to sell and convey, and to do any and all acts in their discretion expedient or necessary to the full execution of the provisions of his will.

Anna Amelia Joyce, who is named in the sixth article, was a sister of Mrs. Fayerweather, and lived in the family of the testator, for whom she occasionally acted as an amanuensis. She subsequently married, and is now Mrs. John B. Reynolds. Lucy J. Beardsley, Mary W. Achter, and Emma S. Drury, mentioned in the seventh article, are the heirs at law and next of kin of the testator. Mrs. Drury, having obtained a divorce, resumed her maiden name, and is now known as Emma S. Fayerweather. The property given to the widow by the fourth clause of the will was worth about \$100,000. In early life Mr. Fayerweather spent some time in the neighborhood of the University of Virginia, and his experience and associations at that time awakened an interest in college education. His instructions to Mr. Thomas G. Ritch, his legal advisor, who

drew this will, were that he wished to dispose of his property in the same general way as in previous wills made by him. In 1875 he executed a will, the contents of which were not disclosed by the evidence, except that it showed an interest in educational institutions. This interest appeared more plainly in a will made in 1880, by which he gave \$1,600,000 to 14 colleges, including 12 of those named in the ninth article of the will that is now the subject of controversy. The residuary clause of the will of 1880 was substantially like the tenth article of his last will, made in 1884, except that the beneficiaries were the same 14 colleges to which he had given specific legacies to the amount of \$1,600,000, as aforesaid.

On the same day that the will in question was executed, the testator signed a paper of even date, the body of which is as follows: "This certifies that I have executed my will of this date, having been advised by my counsel of the provisions and restrictions of the law of this state relative to benevolent corporations. I trust my heirs will permit the provisions of this, my will, to be carried into effect." Both the will and this paper were prepared under the direction of Mr. Ritch, and were given to him for safe-keeping as soon as they were executed. The only statutes of this state imposing restrictions upon the disposition of property that are applicable to this will are chapter 319 of the Laws of 1848, as amended, which relates to the amount of property that benevolent corporations can receive by devise, and chapter 360 of the Laws of 1860, which forbids a testator, having a wife, child, or parent, to give more than one half of his estate to charitable, benevolent, or literary institutions. The bequests to the 5 hospitals named in the eighth clause amount to \$95,000, while those to the 20 colleges named in the ninth clause amount to \$2,100,000, so that, under the operation of the statute last named, the tenth clause of the will was valid only to the extent of the difference between \$2,195,000 and one-half of the estate remaining after the payment of debts.

About two months after he made his will, Mr. Fayerweather executed his first codicil, dated December 13, 1884, the disposing part of which is in these words: "(1) I hereby ratify and confirm my said will in every respect, except so far as the same is modified by this codicil. (2) I hereby revoke the tenth paragraph of my said will, which is in the words following: [That paragraph was here quoted literally and inclosed by quotation marks.] (3) All the rest and residue of my estate, of whatsoever character, and wheresoever situated the same may be, of which I shall die possessed, and remaining after the provisions of the first nine paragraphs of my will have been duly complied with and carried into effect, I give, devise, and bequeath to Justus L. Bulkley and Thomas G. Ritch, named in the eleventh

paragraph of my said will, to them and their heirs forever." Mr. Ritch, who prepared this codicil, also prepared a paper, which was substantially copied by the testator and signed by him, bearing the date of December 11, 1884, and headed "Private Memorandum," of which the following is a copy: "I have made Messrs. Bulkley and Ritch my residuary legatees, in the confidence that thereby my intentions as expressed in my will shall be carried into effect, and without litigations on the part of any person or persons interested. In case of my death, I trust they will take such steps, by will or otherwise, as will protect my estate against the contingency of the death of either before my estate is settled and distributed." This paper was placed in an envelope, which was indorsed, "Messrs. J. L. Bulkley and T. G. Ritch, to be Opened in Case of My Death," and was handed by Mr. Fayerweather, together with the codicil, to Mr. Ritch for safe-keeping.

Several years passed, when, on the 7th of January, 1888, Mr. Fayerweather executed a second codicil to his will, by which, after making some bequests to persons employed by his firm, he provided as follows: "Second. I hereby nominate and appoint my friend, Henry B. Vaughan, of Elizabeth, New Jersey, an executor of my will and trustee of my estate, in addition to Justus L. Bulkley and Thomas G. Ritch, named as executors and trustees in my said will, and I give to said Vaughan the same powers and authority in every respect as are conferred on said Bulkley and Ritch in and by the eleventh paragraph of my will. I order and direct that no bonds or other security of any kind be required to be given by him as executor or trustee. Third. In all respects, except as herein modified, I ratify and confirm my said will, and the first codicil thereto."

Fourteen months later, and on March 19, 1884, he executed a third codicil, whereby he increased the amount of the legacies previously given to Anna Amella Joyce, Mary W. Achter; and Emma S. Drury, provided for the purchase of a burial lot and the erection of a monument, and made bequests to a number of persons in his employment. There were several interviews between the testator and his said counsel a short time before the execution of the third codicil, during which the private memorandum dated December 11, 1884, was produced by Mr. Ritch, and placed before Mr. Fayerweather. In the course of these interviews another paper was signed by Mr. Fayerweather, and left with Mr. Ritch, dated March 22, 1889, of which the following is a copy: "Private Memorandum. Having made inquiries with regard to Hampton and Lincoln Universities, it is my judgment that the bequests to them should be withheld. I think the bequest to Cornell University should not exceed \$100,000. If the Northwestern University, at Evanston, Illinois, is in a prosperous condition, I should

recommend that \$100,000 be given to it. If the following persons are in my employ at the time of my death, I suggest that they receive the following sums: Rogers and Clark, \$500 each; Gould, Campbell, and Stone, \$300 each, and Carpenter, \$250; also, James, who now opens and closes the store, \$100; John Dixon, \$200. I also wish that \$1,000 be given to Miss Joyce immediately after my decease, in addition to the provision made for her by my will." Mr. Ritch testified that, when this paper was signed, several suggestions were made to him by Mr. Fayerweather in relation to various colleges named in the ninth article of his will, and, speaking "generally, with regard to institutions," he said to Mr. Ritch, in substance, that he and Mr. Bulkley must use their best judgment in regard to what came into their hands.

About a year and a half later, and after Mr. Fayerweather's health had begun to fail, he wrote a note to Mr. Ritch, dated November 3, 1890, requesting him to bring him "the balance of the copy of" his "will," doubtless referring to the second and third codicils, and Mr. Ritch did so about four days later. November 10, 1890, Mr. Vaughan, who had been appointed by the second codicil as one of the executors and trustees, but who was not then a legatee or devisee, had an interview with Mr. Fayerweather, who produced a copy of the will and three codicils, which Mr. Vaughan read aloud to him at his request. Until then Mr. Vaughan did not know that the residuary estate had been given to Messrs. Bulkley and Ritch, and he did not even then learn of the three memoranda above referred to. He knew that Mr. Fayerweather wanted his residuary estate to go to institutions, and, in view of the absolute nature of the residuary gift, he entertained some misgivings as to what might become of it. He asked an explanation from Mr. Fayerweather, who said that he believed his wishes would be carried out. As a result of the conversation Mr. Vaughan went to his lawyer, Mr. Prescott Hall Butler, who prepared another codicil, revoking the devise and bequest of the residuary estate made to Messrs. Bulkley and Ritch, individually, by the first codicil, and restoring the tenth article of the will. On the same day Mr. Vaughan read the draft of this codicil to Mr. Fayerweather, who approved it, and the next day executed it, and placed it in the hands of Mr. Vaughan for safe-keeping. Mr. Ritch knew nothing about this. On the 13th of November, 1890, Mr. Vaughan had another interview with Mr. Fayerweather, during which two letters were signed by the latter, and given to the former, to be delivered to Mr. Ritch, one after the other, as if the second had not been written until after the first had been answered. In the first of these letters, which was in the handwriting of Miss Joyce, he requested Mr. Ritch to deliver to

Mr. Vaughan the original will and the first, second, and third codicils thereto, stating that he wished to examine them with Mr. Vaughan in connection with the copies already furnished. In the second letter, which was written by Mr. Vaughan, but signed by Mr. Fayerweather, the latter said: "I have examined my original will, and the first, second, and third codicils thereto, handed by you to Mr. Vaughan at my request. By the tenth article of my will I left my residuary estate to my executors in trust, to be equally divided among certain corporations and institutions. By the first codicil it seems that I revoked this tenth article of my will, and then made the following disposition of my residuary estate,"—quoting in full the devise made by the third paragraph of the first codicil to Messrs. Bulkley and Ritch. "Please advise me at once, in writing, what is the legal effect of this clause, and to whom and how would my residuary estate go in case of my death, supposing this first codicil to remain in force." On the same day Mr. Vaughan delivered the first letter to Mr. Ritch, received from him the will and codicils called for, and told him that Mr. Fayerweather was too ill to be seen, although he had himself seen him and transacted business with him that day, but he retained in his possession the second letter until the next day, when he delivered that also. Mr. Ritch at once dictated to his typewriter, and read to Mr. Vaughan, a letter to Mr. Fayerweather, saying: "The intention of the change in question was to enable Mr. Bulkley and myself to carry out the intentions of the will as modified by the various private memoranda in my possession. Neither Mr. Bulkley nor myself would have any moral right to treat any portion of your estate otherwise than as we know would conform to your wishes. I suggest that I call on you with these, and, if still approved by you, that they be left in a sealed package with Miss Joyce, or any one named by you. The legal effect of the clause in question is to vest the title to the residuary estate in Messrs. Bulkley and myself; but, as I have said, neither Mr. Bulkley nor I would wish to derive any personal benefit under this codicil." Mr. Vaughan thereupon asked what those private memoranda were, and Mr. Ritch had copies prepared, and handed them to him, and he took them away with the letter. On the same day Mr. Ritch, who, during all this time, knew nothing of the Butler codicil, wrote a letter to Miss Joyce, in which he stated: "I have had two long talks with Mr. Vaughan to-day and yesterday, and I fear Mr. Fayerweather is worrying over his business matters. Mr. Vaughan says that Mr. F. is too ill to be seen, and so I would be glad to have you say to him, if you think it well, that I will execute any paper, or say anything in your presence, or in that of any one else, that will enable him to feel that

his wishes will be carried out to the letter. It would be a misfortune, indeed, to me, to lose his confidence, after so many years, through any misunderstanding now. The will and codicils provide carefully for the institutions in which he was interested, and for the relatives and friends to whom he was attached, and I know that, at the time the papers were drawn, the reasons for each paragraph were considered and approved by him, the object being to prevent any contests. I write thus freely to you, because you have known of Mr. Fayerweather's affairs, and I believe that you, as well as he, believe that I have only tried to do my duty. If at any time you or Mr. F. would like to see me, I will call." This letter was received by Miss Joyce early in the evening of the same day, and, immediately after reading it herself, she read it to Mr. Fayerweather, who requested her to hand it to Mr. Vaughan, and she did so the next morning. At the same time she read to him a letter, written to her that day by Mr. Vaughan, which, omitting date, address, and signature, is as follows: "Will you please explain to Mr. Fayerweather that I obtained the papers from Mr. Ritch. At first Mr. Ritch stated that he would take the papers to Mr. F., but I reminded him that the letter read to give them to me, and he said he would do it. He grew as white, however, as the paper upon which I am writing. I will deliver the second letter to-morrow. There is, however, but little use of this, as I am convinced from his manner that Mr. Ritch knew exactly what he was doing."

On the next day, which was Saturday, November 15th, Mr. Vaughan called upon Mr. Fayerweather at about 10 o'clock in the forenoon and remained with him until between 11 and 12. During this period they conversed about another codicil, and Mr. Vaughan was instructed to have one prepared. Mr. Vaughan testified that he did not show the letter which Mr. Ritch had given him for Mr. Fayerweather, or acquaint him with its contents, or even disclose its existence, and that, instead of telling what had taken place between himself and Mr. Ritch, he told him that the latter was "all right." Although he had with him copies of the private memoranda that he had obtained from Mr. Ritch, he did not so inform Mr. Fayerweather. He further testified that he made a memorandum upon the envelope containing the private memoranda above referred to, of which the following is a copy: "Clause about Miss Joyce. About the men being with him. More institutions for benefit. Mrs. Beardsley, amount \$100,000 in bonds. Strike out about servants in his employ." This, according to Vaughan's statement, was a record of the suggestions made by Mr. Fayerweather, who carried out one of them at once, by writing a letter to Mr. Myrick, his confidential man of business, directing him to give \$100,000 in certain securities to Mrs. Lucy J. Beards-

ley, which was done forthwith. Mr. Fayerweather, as Mr. Vaughan says, referred to his competency in selecting institutions for benefit, and stated that he was not very well fitted for that work; that he had used his best endeavors, and obtained the best advice that he could get, but there would have to be others found to which the rest of the money should be given; and that further selections would have to be made. Although Mr. Vaughan testified that this conversation and others of like character were had during that forenoon, and that he then made the memorandum on the back of the envelope, he never disclosed either fact until the trial of this action, although there were prior occasions when it was his duty to do so. At this time it was supposed that Mr. Fayerweather, although far gone with consumption, would live until spring, but Dr. Vedder, the attending physician, who called at about 12 o'clock, told Mr. Vaughan that if there were any papers which he wished Mr. Fayerweather to sign, that he had better have him sign them at once; that Monday would not answer, but "they had better be done" that day. Mr. Vaughan at once went to Mr. Ritch's office and had another codicil prepared, now known as the fourth, and returned with it to Mr. Fayerweather's house between 1 and 2 o'clock in the afternoon, when it was executed. Omitting the formal parts, it is as follows: "First. In all respects, except as hereinafter modified, I ratify and confirm my said will and the codicils thereto. Second. I hereby confirm the revocation of the tenth paragraph of my said will. Third. I hereby amend and change the third paragraph of the codicil, dated and made December 13, 1884, so as to read as follows: 'All the rest and residue of my estate, of whatsoever character, and wheresoever situated the same may be, of which I shall die possessed, and remaining after all the specific legacies in my said will and the several codicils thereto have been paid, and all the provisions of said will and codicils have been fully complied with and carried into effect, I give, devise, and bequeath to Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, to them and their heirs, forever.'"

About an hour after the execution of this codicil, Mr. Vaughan, by direction of Mr. Fayerweather, given by a nod of the head in response to a question, caused the codicil prepared by Mr. Butler, and executed on the 11th, to be destroyed. He did not disclose the fact of the execution of that codicil until after Mr. Fayerweather's death, nor did he fully disclose the contents of it until the trial of this action. Mr. Vaughan also testified that, after the execution of the fourth codicil, Mr. Fayerweather said to him that "we were to put our heads together and find some other places for the money," although upon another legal proceeding, when testifying upon the same subject, he omitted the word "other." Miss Joyce testified that she was in Mr. Fay-

erweather's room at all times while Mr. Vaughan was there on this occasion, and that no such remark was made. Not long after the execution of the last codicil, Mr. Fayerweather became in articulo mortis, lingered a few hours, and died that night. Mr. Ritch testified that, although he had a thorough knowledge of Mr. Fayerweather's wishes in respect to his estate, he never mentioned to him the name of any institutions, outside of the will and codicils and the memorandum of March 22, 1889, as objects to which he desired to make a gift, nor did he ever express any wish to have his property given to the colleges and hospitals to whom the executors afterwards transferred a large portion of it by a so-called "deed of gift," hereinafter described. He also testified that he never told Mr. Fayerweather that he would not carry out his wishes as expressed in the will.

The executors promptly presented the will and codicils for probate, but the widow and nieces filed objections, based upon the usual grounds of defective execution, unsound mind, undue influence, and fraud. The contestants were represented by Mr. Frederick R. Coudert, Mr. Daniel G. Rollins, and others. The trial of the issues began on the 2d of February, 1891. The notes, letters, and memoranda were read in evidence; Messrs. Ritch, Vaughan, and others examined as witnesses; and on the 17th the surrogate announced his intention to admit the will to probate, leaving the contest over the codicils to continue. On the 14th of February, 1891, Mr. John E. Parsons, who represented the residuary legatees, wrote to Mr. Coudert that Messrs. Bulkley, Ritch, and Vaughan did not intend to retain for their "personal purposes" the residuary estate. On the 24th of the same month the residuary legatees executed an instrument, known in this controversy as the "deed of gift," whereby, after reciting that they were prompted by the determination not to retain for their own use any part of the residuary estate left to them by the will, and by the desire to make such use of the residuary estate as in their judgment would best honor the memory of Mr. Fayerweather, they disposed of the same as follows: They reserved the power to make, and retained the right to assent to, any enlargement of the provisions made by the will for Mrs. Fayerweather, Mrs. Achter, and Mrs. Drury, in case they should be satisfied that such enlargement would not be against the wishes of Mr. Fayerweather. They gave Mrs. Beardsley \$100,000, to Miss Joyce and others certain amounts, including the sum of \$100,000 to the Northwestern University. They then gave \$465,000 to 11 hospitals, including the sum of \$200,000 additional to the Women's Hospital. To 21 colleges they gave \$1,570,000, and directed that the amount in each case should be used as a Fayerweather fund in some distinctive manner, either for the erection of buildings, the establishment of scholarships, or other use which, in the

judgment of the authorities, would be of the greatest practical benefit; but the mode of use was to be subject to the approval of the donors. All the rest of the residuary estate, after payment in full of the foregoing, they divided into ten parts, and gave five to the Women's Hospital, one to the Presbyterian Hospital and one to each of four colleges, two of which were named in the will. They closed the instrument as follows: "We execute this instrument, recognizing that there is pending a contest in proceedings for the probate of Mr. Fayerweather's will, and recognizing, further, that if such contest shall not prevail, a question may be made about our legal rights as devisees and legatees. We assume no responsibility for the result of such contest, or of any such question, or for the acts or omissions of each other, or for the amount of or title to any of said residuary estate. Our object is, each for himself, to give away whatever may come to us as residuary devisees and legatees under Mr. Fayerweather's will. This instrument is to have only that effect. To make the same as effectual as we can, we deliver this instrument to Stephen P. Nash, Esq., of the city of New York, and Hon. Henry Stoddard, of New Haven, Conn., to hold for the said donees. In witness whereof, we have hereunto set our hands and seals, and we, the said Henry Stoddard and Stephen P. Nash, in evidence of our acceptance of delivery of said instrument, have subscribed our names, the 24th day of February, 1891."

Messrs. Nash and Stoddard accepted delivery of this instrument on the same day that it was executed. Of the 11 hospitals and 21 colleges named therein, only 5 of the former and 6 of the latter were mentioned in the will. The contest over the codicils continued, and some feeling was aroused. During the progress of the trial, Mr. Vaughan approached Miss Joyce, and, shaking his fist in her face, said: "Miss Joyce, I will fight this thing as long as there is a dollar left of the Fayerweather money, and as long as I have a dollar of my own private fortune; and I want you to tell Mrs. Fayerweather this, and I mean every word I say." Miss Joyce testified that she told this to Mrs. Fayerweather, who had been an invalid for many years, and that as the result she was confined to her bed for several days. She was weak, nervous, and easily disturbed.

On the 5th of March, as the result of negotiations for a settlement of the contest pending before the surrogate, the widow and next of kin executed a paper, of which the following is a copy: "In consideration of the instrument of even date herewith, executed by Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, residuary devisees and legatees under the will, meaning thereby the original will and the subsequent codicils of Daniel B. Fayerweather, late of the city of New York, deceased, and of its delivery to Henry Stoddard and Stephen P. Nash, we,

the undersigned, being the widow and all of the next of kin of the said Daniel B. Fayerweather, do hereby severally agree for ourselves, our and each of our heirs, executors, and administrators, as follows: (1) All objections to the probate of the will and four codicils of the late Daniel B. Fayerweather, offered for probate to the surrogate of the county of New York, are hereby withdrawn, and we consent to the probate of the same. (2) No suit shall hereafter be brought for the construction of the said will and codicils, or either of them, or to set aside the will and codicils, or either of them, and we further agree not to make any claim upon the said Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, or either of them, or against their heirs or personal representatives, or either against them, the said Bulkley, Ritch, and Vaughan, as executors, or as residuary legatees, other than for the amounts left to us by the will and codicils aforesaid, and the deed of gift executed by the said Bulkley, Ritch, and Vaughan on the 24th day of February, 1891, and the instrument dated on the 5th day of March, 1891. (3) Upon the payment to the undersigned, respectively, of the several amounts mentioned in said deed of gift and said instrument, we will severally execute a general release of all claims, except those arising under the will and codicils, both to the executors and to the donees mentioned in the deed of gift dated on the 24th day of February, 1891, and to the said Bulkley, Ritch, and Vaughan, individually." The instrument of even date referred to in this paper was executed by Messrs. Bulkley, Ritch, and Vaughan on the 5th of March, and on the same day accepted by Messrs. Nash and Stoddard, whereby, under the power reserved by the deed of gift, they gave to Mrs. Fayerweather \$225,000, to be at her absolute disposal, and increased her annuity from \$15,000 to \$25,000. They also agreed to give her a deed of the lot in Woodlawn Cemetery intended for the remains of her husband. They gave to Mrs. Achter \$42,500, and to Mrs. Drury the same amount, and directed that all these gifts should be subject to the last paragraph of the deed of gift. At the same time the following paper was prepared, and between March 22 and June 6, 1891, executed, by the officers of the various institutions named in the eighth and ninth clauses of the will, with one exception: "Whereas, a contest has been proceeding in the court of the surrogate of the county of New York against the probate of the last will and testament and four codicils thereto, propounded by the executors of Daniel B. Fayerweather, deceased, and certain other proceedings have been threatened concerning the construction and validity of the will; and whereas, the undersigned are legatees named in said will, and it is to their interest to have the pending controversy settled, and the threatened controversy abandoned; and whereas, a settlement of all the controver-

sies has been agreed to, whereby the widow and next of kin have agreed to accept the sum of \$310,000, and, in consideration thereof, have consented to the probate of the will and codicils as propounded, and agreed to release the estate of said Fayerweather from all claims, excepting those to which the said widow and next of kin are respectively entitled by the provisions of the will and codicils aforesaid: Now, in consideration of the foregoing, and to enable the provisions of said settlement to be carried out, it is agreed by the undersigned that the sum of \$310,000 be paid by the executors of the last will and testament of Daniel B. Fayerweather, deceased, prior to and in preference to the payments to the undersigned, respectively, of the amounts of the legacies in the will contained, and we each, for ourselves, agree that our respective legacies shall be postponed to the payment of the amount above mentioned."

On the 24th of March, 1891, the codicils were admitted to probate upon a written consent signed by the attorneys for all the parties to the contest. On the 12th of June Mrs. Fayerweather executed a release, of which the following is a copy: "To all to whom these presents shall come or may concern, greeting: Know ye that I, Lucy Fayerweather, widow of Daniel B. Fayerweather, of the city of New York, for and in consideration of the sum of \$225,000, lawful money of the United States, to me in hand paid by Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, as executors and trustees under the last will and testament of Daniel B. Fayerweather, deceased, and individually, and as the representatives of the persons or corporations hereinafter named, forming a class known as donees under the deed of gift executed by the said Bulkley, Ritch, and Vaughan on February 24th, 1891, which sum is in compromise and full settlement of any and all contests on my part of the will of said Daniel B. Fayerweather, deceased, or concerning his estate, have remised, released, and forever discharged, and by these presents do, for myself and for my heirs, administrators, and executors, remise, release, and forever discharge, the said Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, as executors and trustees aforesaid, as individuals and as representatives of the said donees, constituting a class, and also the said donees, to wit, the persons and corporations mentioned in a certain deed of gift, duly delivered, made by Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan on the 24th day of February, 1891, which deed of gift was introduced in evidence in the probate proceedings of the last will and testament of Daniel B. Fayerweather, deceased, and marked 'Exhibit No. 7,' contestants, and which said deed of gift is hereby made a part of this release, in order that the persons constituting said class of donees, and to whom this release runs, may be more fully

known, and also the legal successors, assigns, heirs, executors, and administrators of all the aforesaid persons and corporations, of and from and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims and demands whatsoever, in law or in equity, which against the said persons or corporations, or any of them, I ever had, or now have, or which I or my heirs, executors, or administrators hereinafter shall, can, or may have, for, upon, or by reason of any matter, cause, or thing whatsoever, except my claim for the annuity given me by the will and codicils thereto of said Daniel B. Fayerweather, deceased, and also my claim for the increased annuity mentioned in the agreement dated March 5th, 1891, and made pursuant to the deed of gift above referred to."

Similar releases were, at the same time, executed by or in behalf of the next of kin. Payments were promptly made by the executors from the funds of the estate to the widow and next of kin on the basis of the settlement. During the course of a year the executors also paid 80 per cent. of the specific legacies made to hospitals and colleges in the eighth and ninth articles of the will, but they have made no payment to any college or hospital from the residuary estate, so that they still hold all that part of the property that is involved in this action, amounting, with accumulations, to nearly \$3,000,000. When his will was made, Mr. Fayerweather was worth about \$3,000,000; at the time of his death about \$5,000,000; and the entire estate, including payments already made, is now supposed to amount to about \$6,000,000. As the specific gifts made by the deed of gift are "all without interest," one-half of the increase, according to that instrument, as well as \$200,000 besides, would go to the Women's Hospital, to whom the testator had given by his will only \$10,000. Mrs. Fayerweather, the widow, died July 16, 1892, of the disease by which for many years she had been afflicted, leaving a will, whereby she gave the bulk of her estate to her sister, Miss Joyce. Before her death she brought an action against Messrs. Ritch, Bulkley, and Vaughan to set aside the releases, and to establish a trust in favor of herself and her nieces. The plaintiffs in this action were made defendants, and they set up by way of counterclaim, in substance, the matters upon which they now base their demand for relief. That action was continued by her executors after her decease, but the complaint was finally dismissed by default. The present plaintiffs, however, promptly notified the executors of Mr. Fayerweather's will that they should insist that the residuary estate was charged with a trust in favor of the institutions named in the ninth article, and that, unless there was a voluntary recognition of this claim, an action would be brought to enforce it. As the executors refused to rec-

ognize the claim, this action was brought in behalf of five out of the twenty colleges named in the ninth article, against all those interested in the will, the deed of gift, or otherwise, nearly all of whom appeared, and the most of them answered. The theory of the complaint is that the apparently absolute gift in the fourth codicil to Messrs. Ritch, Bulkley, and Vaughan, individually, was really made upon a secret trust for the benefit of the plaintiffs and their associates in the ninth article of the will. No question was raised by any party as to the competency of the testator to make the will and codicils, all of which are conceded to have been properly admitted to probate, but various positions were taken in regard to the effect of those instruments under all the circumstances. After a trial at special term the court filed a decision stating concisely the grounds upon which the issues had been decided, without making findings in detail. The grounds stated were, in substance, that Messrs. Ritch and Vaughan, for themselves and Mr. Bulkley, promised the testator, and induced him to believe, that if he would make them the residuary legatees of his estate, they would convert it into cash, and divide it equally among the 20 corporations mentioned in the ninth article after paying \$100,000 to the Northwestern University; that Mr. Fayerweather made those gentlemen his residuary legatees in reliance upon that promise, and died in the belief induced by them that they would act accordingly; but that they had attempted to dispose of the residuary estate in violation of the promise. The judgment directed was that Messrs. Ritch, Bulkley, and Vaughan received the residuary estate devised to them in trust for the ninth-article colleges as well as for the Northwestern University to the extent of \$100,000, and that distribution should be made accordingly. This was in substantial accord with the theory of the plaintiffs and the relief demanded in the complaint. Upon appeal the general term held that the facts found by the special term were amply supported by the evidence; that Messrs. Ritch and Vaughan definitely promised the testator to dispose of the residuary estate bequeathed to them in accordance with the provisions of the tenth clause of the will, and that there was an understanding between Mr. Bulkley and the testator that the estate should be so disposed of; that the statutory disability against devising or bequeathing more than one-half of a net estate to any corporation named in chapter 360 of the Laws of 1860 operates only for the benefit of the relatives in that act named, and not for the benefit of the heirs or next of kin; that, as the testator left him surviving a widow as the only person who could invoke the protection of the statute, and she had, as an incident to the settlement of the contest of the will, released to the executors all claims to the estate, they took the residuary estate

as trustees for the benefit of the ninth-article colleges; and that under the circumstances such trust was not rendered invalid by the statute, but should be upheld and carried into effect. The executors of the widow and two of the next of kin, Mrs. Beardsley not having answered, Mr. Ritch individually and as executor and trustee, Messrs. Bulkley and Vaughan as executors, and the most of the donees under the deed of gift, appeal to this court.

James C. Carter and Brownell & Lathrop, for appellants donees under deed of gift. John E. Parsons, for appellants Justus L. Bulkley and Henry B. Vaughan. C. N. Bovee, Jr., and Stewart L. Woodford, for appellant Thomas G. Ritch. Edward C. James and William Blaikie, for appellants widow's executors, etc. Harry Van Ness Philip and Edward Winslow Paige, for appellant Union College. Charles M. Earle, for appellant Manhattan Dispensary. Martin W. Cooke, James L. Bishop, Horace Russell, Elihu Root, and William B. Putney, for respondents. Wm. B. Hornblower, Howard A. Taylor, and McCready Sykes, for respondent Lincoln University. Redding & Kiddle, for respondent Northwestern University.

VANN, J. (after stating the facts). The appellants are of two classes, each hostile to the other, and both hostile to the plaintiffs, who, with certain of the defendants, are respondents. One class comprises the executors of the widow and the next of kin, with the exception of Mrs. Beardsley, who unite in claiming that there was a secret trust in favor of the colleges named in the ninth article of the will, or of beneficiaries to be appointed by Messrs. Ritch, Bulkley, and Vaughan, created by the gift of the residuary estate to those gentlemen in connection with their promise to the testator to turn over their legacy to such colleges or beneficiaries; that this trust was void, as an evasion of the statute of 1860, or for indefiniteness, or both, except to the extent of the difference between the sum of \$2,195,000, specifically given to colleges and hospitals, and one-half of the estate after payment of debts; that the deed of gift was void as a fraud upon the testator, the 20 colleges, the act of 1860, and the widow and next of kin; that the releases executed by the widow and next of kin were void, because they were procured by fraud; and that hence the executors of the widow and the next of kin are entitled to that part of the residuary estate which, owing to the partial failure of the secret trust, was not disposed of by the will or codicils, but passed under the statutes of descents and distributions as assets neither devised nor bequeathed. The other class of appellants includes the residuary legatees and their donees under the deed of gift, who claim that the legacy in the tenth article was absolute, although made with an expectation on the

part of the testator that the residuary legatees would apply it in accordance with what they believed to be his wishes; and that hence the deed of gift was effective, and the donees thereunder entitled to receive accordingly. Said donees further claim for themselves that, if the residuary legatees were guilty of fraud, express or implied, in procuring the will, and were thereby precluded from taking an absolute title, they held the gift for the benefit of the widow and next of kin, to whom it equitably belonged, and that the law would not fasten upon the fund an equitable obligation or trust to devote it to a purpose in violation of the law itself as expressed in the act of 1860; that the releases executed by the widow and next of kin to the residuary legatees operated as transfers, and not only made the original title of the latter complete, but confirmed the title conferred by them upon the donees under the deed of gift. They also insist that the plaintiffs are estopped, by encouraging and uniting in a settlement made with the widow and next of kin, from asserting a claim that would render that settlement of no value to those who parted with value in order to make it, and that an adjudication of the surrogate, made in a special proceeding under the collateral inheritance act, is a bar to this action.

The respondents, being the plaintiffs and certain defendants who stand with them, are, with some exceptions, the colleges named in the ninth article of the will. Their claim is that the testator intended that the residuum of his estate should go to those colleges; that he would not have made the gift to the residuary legatees had he not been assured by them, or in their behalf, that they would thus dispose of their legacy; that hence the residuary legatees were under an equitable obligation to so dispose of it; that they had no right to disappoint his belief, based on their promises, which induced him to thus make his will, by disposing of the property through the deed of gift, which is, therefore, of no effect; that there was no violation of the statute of 1860 in fact, but, if there was, no one can take advantage of it but the widow and next of kin, who, by their releases, waived all the rights derived from that statute, and hence that the settlement made with them inures to the benefit of the colleges named in the ninth article of the will, which thus became entitled to the residuary estate.

1. The first question presented for decision is, what facts may we assume to have been found by the courts below, whether expressed in words or not? The Code of Civil Procedure provides that "the decision of the court, or the report of a referee, upon the trial of the whole issues of fact, may state separately the facts found and the conclusions of law and direct the judgment to be entered thereon; or the court or referee may file a decision stating concisely the grounds

upon which the issues have been decided and direct the judgment to be entered thereon." Code Civ. Proc. § 1022. Although the decision by the special term and the affirmance by the general term were general in form, necessarily some facts were found by those courts, even if they are not specified in the record; otherwise the burden of deciding questions of fact would be cast upon this court, which has jurisdiction to decide only questions of law. We think that the effect of a decision by the trial court without expressing the facts found is the same as if there had been a general verdict rendered by a jury, and that the same presumptions arise in its support. When a judgment entered upon a verdict has been affirmed by the general term, this court can look into the evidence only to ascertain whether there were any facts proved upon which the jury could base their verdict. *Hazman v. Improvement Co.*, 50 N. Y. 53-55. If, upon such examination, the court finds that there is some evidence to sustain the verdict, and that upon any view of the facts the verdict can be upheld, it will not interfere with the determination of the general term affirming the judgment, even when it might, if it had the power to determine the questions of fact embraced in the verdict, have reached a conclusion other than that reached by the jury. *Maher v. Railroad Co.*, 67 N. Y. 52-55. Where the affirmance is by an appellate division, and is unanimous, we have no power to examine the record, even to see if there is any evidence to sustain the verdict. *Szuchy v. Iron Co.*, 150 N. Y. 219-222, 44 N. E. 974. We are of the opinion, therefore, that where the decision of the special term does not state the facts found, and the judgment entered thereon has been affirmed by the general term, upon an appeal to this court all the facts warranted by the evidence and necessary to support the judgments below are presumed to have been found. Hence, upon such an appeal, we have no more control over the facts than we have when specific findings are made by the special term and affirmed by the general term. This conclusion takes the question as to the fraud alleged to have been practiced by the residuary legatees upon the widow and next of kin in procuring the releases out of the case, for it cannot be said on the record before us that the evidence tending to show fraud is so irresistible as to make the omission to find fraud an error of law. Assuming that there was evidence enough to warrant the inference of fraud, there was also ample evidence to warrant the inference that there was no fraud. A question of fact was thus presented which is beyond our power of review. The only ground upon which it is claimed that the alleged fraud was so conclusively proved as not to involve a question of fact, is that the residuary legatees did not state that there was a secret trust in favor of the colleges named in the ninth article of

the will, and that the effect of that trust was to vest the bulk of the residuary estate in the widow and next of kin. What are the facts? The residuary legatees were engaged in settling a lawsuit with hostile parties towards whom they sustained no fiduciary relation, and who were represented by counsel of the highest standing and ability. Substantially all of the material facts had been disclosed by the evidence taken during the trial, in which both parties to the releases were then engaged. The residuary legatees had been examined at length upon the witness stand by counsel for the widow and next of kin, who had ample opportunity to make full discovery. While they took the position—to which they still adhere—that the gift to them was absolute, that position was not acquiesced in by the widow and nieces, for their counsel openly claimed and argued in surrogate's court that there was a secret trust, which was invalid, and that their clients were entitled to the residuary estate. While there may have been concealment of opinions, there was no concealment of the facts upon which those opinions were based. The residuary legatees were not bound to volunteer their opinions, even if they then thought there was a secret trust. One who is trying to settle litigation has the right to keep his opinion on the merits to himself. The controversy as to whether there was a secret trust or not, as well as the contest over the probate of the will, was fairly covered by the terms of the releases, so far as the parties to those instruments were concerned. They dealt with each other at arm's length, as adversary parties, knowing the substantial facts; and they are presumed to have had them in mind when the releases were executed, and to have covered by the language used all questions to which those facts could give rise. Even if we hold, when we reach the question, that there was a secret trust, that will not convict the residuary legatees of fraud in claiming the contrary before the surrogate, for one who neither withholds nor misstates the facts cannot be adjudged guilty of fraud simply because the courts finally decide the law to be other than he claimed it to be while engaged in litigation over the subject. Such a rule would make nearly every unsuccessful litigant guilty of fraud. From this statement it is obvious that there was no such concealment as would require the court, if the trial were before a jury, to direct a verdict on the basis of fraud proved beyond question. Our conclusion is that the executors of the widow and the nieces have no standing upon this appeal; so that the contest is narrowed to the other conflicting claimants, one class resting their claims upon the deed of gift and the releases, and the other upon the will, the secret trust, and the releases.

2. The next question in the natural order of discussion is whether there was a secret

trust. While a testator may make a gift to a legatee solely for the purpose of enabling him, if he sees fit, to dispose of it in a particular way, still if there is no promise by him, either express or implied, to so dispose of it, and the matter is left wholly to his will and discretion, no secret trust is created, and he may, if he chooses, apply the legacy to his own use. When it clearly appears that no trust was intended, even if it is equally clear that the testator expected that the gift would be applied in accordance with his known wishes, the legatee, if he has made no promise, and none has been made in his behalf, takes an absolute title, and can do what he pleases with the gift. Whatever moral obligation there may be, no legal obligation rests upon him. On the other hand, if the testator is induced either to make a will or not to change one after it is made, by a promise, express or implied, on the part of a legatee that he will devote his legacy to a certain lawful purpose, a secret trust is created, and equity will compel him to apply property thus obtained in accordance with his promise. *O'Hara v. Dudley*, 95 N. Y. 403; *Brown v. Lynch*, 1 Paige, 147; *Dowd v. Tucker*, 41 Conn. 197; *De Laurencel v. De Boom*, 48 Cal. 581; *Browne v. Browne*, 1 Har. & J. 430; *Church v. Ruland*, 64 Pa. St. 442; *Towles v. Burton*, 24 Am. Dec. 409; *McLellan v. McLean*, 2 Head, 684; *Russell v. Jackson*, 10 Hare, 204; *Thynn v. Thynn*, 1 Vern. 296; *Reech v. Kennegal*, 1 Ves. Sr. 124; *Wallgrave v. Tebbs*, 2 Kay & J. 321; *McCormick v. Grogan*, L. R. 4 H. L. 82. The trust springs from the intention of the testator and the promise of the legatee. The same rule applies to heirs and next of kin who induce their ancestor or relative not to make a will by promising, in case his property falls to them through intestacy, to dispose of it, or a part of it, in the manner indicated by him. *Williams v. Fitch*, 18 N. Y. 546; *Grant v. Bradstreet*, 87 Me. 583, 33 Atl. 165; *Gilpatrick v. Glidden*, 81 Me. 137, 16 Atl. 464. The rule is founded on the principle that the legacy would not have been given, or intestacy allowed to ensue, unless the promise had been made; and hence the person promising is bound, in equity, to keep it, as to violate it would be fraud. While a promise is essential, it need not be expressly made, for active co-operation or silent acquiescence may have the same effect as an express promise. If a legatee knows what the testator expects of him, and, having an opportunity to speak, says nothing, it may be equivalent to a promise, provided the testator acts upon it. Whenever it appears that the testator was prevented from action by the action or silence of a legatee, who knew the facts in time to act or speak, he will not be permitted to apply the legacy to his own use when that would defeat the expectations of the testator. As was said by this court in the *O'Hara Case*, supra: "It

matters little that McCue did not make in words a formal and express promise. Everything that he said and everything that he did was full of that interpretation. When the testatrix was told that the legal effect of the will was such that the legatees could divert the fund to their own use, which was a statement of their power, she was told also that she would only have their honor and conscience on which to rely, and answered that she could trust them, which was an assertion of their duty. Where, in such cases, the legatee, even by silent acquiescence, encourages the testatrix to make a bequest to him, to be by him applied for the benefit of others, it has all the force and effect of an express promise." The trust does not act directly upon the will by modifying the gift, for the law requires wills to be wholly in writing, but it acts upon the gift itself as it reaches the possession of the legatee, or as soon as he is entitled to receive it. The theory is that the will has full effect, by passing an absolute legacy to the legatee, and that then equity, in order to defeat fraud, raises a trust in favor of those intended to be benefited by the testator, and compels the legatee, as a trustee *ex maleficio*, to turn over the gift to them. The law, not the will, fastens the trust upon the fund, by requiring the legatee to act in accordance with the instructions of the testator and his own promise. Neither the statute of frauds nor the statute of wills applies, because the will takes effect as written and proved; but, to promote justice and prevent wrong, the courts compel the legatee to dispose of his gift in accordance with equity and good conscience. As was well said in *Wallgrave v. Tebbs*, supra: "Where a person knowing that a testator, in making a disposition in his favor, intends it to be applied for purposes other than his own benefit, either expressly promises or by silence implies that he will carry the testator's intention into effect, and the property is left to him upon the faith of that promise or undertaking, it is, in effect, a case of trust; and in such a case the court will not allow the devisee to set up the statute of frauds, or rather the statute of wills, by which the statute of frauds is now in this respect superseded, and for the reason that the devisee by his conduct has induced the testator to leave him the property; and, as Lord Justice Turner says in *Russell v. Jackson*, no one can doubt that, if the devisee had stated that he would not carry into effect the intentions of the testator, the disposition in his favor would not have been found in the will. But in this the court does not violate the spirit of the statute, but, for the same end,—namely, prevention of fraud,—ingrafts the trust on the devise by admitting evidence which the statute would in terms exclude, in order to prevent a party from applying property to a purpose foreign to that for which he undertook to hold it."

When these rules are applied to the case before us, it can hardly be open to question that there was a secret trust attached to the gift of the residuary legatees. The testator, by the tenth article of his will, created an express trust for the benefit of the colleges named in the ninth. He knew, however, that that trust could not be carried into effect if his widow and nieces tried to prevent it. He therefore appealed to their forbearance by means of the first memorandum, in which he speaks of making his will after advice from counsel as to the restrictions imposed by the law of this state in regard to benevolent corporations. He evidently referred to the statute of 1860, and acting upon the belief that it would render the tenth article inoperative, except through their mercy, he begged them "to permit the provisions of" his "will to be carried into effect." In a few months he became convinced that the mercy of his heirs was a frail reliance; so, by his first codicil, he revoked the tenth article, and substituted in its place an absolute gift to Messrs. Bulkley and Ritch. Having withdrawn his appeal to the forbearance of his heirs, he next appealed to the honor of his residuary legatees, by preparing a second memorandum, in which he said that he had made them such, "in the confidence that thereby" his intentions as expressed in his will would be carried into effect, without litigation on the part of any one. The circumstances show that, by his intentions as expressed in his will, he meant his intentions as expressed in the tenth article thereof, and that the word "thereby" refers to the gift, absolute in form, made by the first codicil. This is made clear by the last sentence of the memorandum, in which he asks the residuary legatees to "take such steps, by will or otherwise, as will protect" his "estate against the contingency of the death of either before" his "estate is settled and distributed." If the gift was absolute, as it purported to be, what protection did his estate need in case either of the residuary legatees should die? Did he not mean that, while he was willing to trust them, he was not willing to trust their heirs, and hence wanted the protection of a will? By the third memorandum, made several years later, he assumed that there was an obligation on the part of the residuary legatees to dispose of their gift in accordance with his wishes. This appears on the face of the paper itself, though he was careful not to give directions, but only to make suggestions. They related, however, to his property, and in part to the method of distributing that portion which he had apparently given to them absolutely. He showed no change of intention when he made the Butler codicil, restoring the express trust as created by the tenth article; nor when he made his fourth codicil, a few days later, renewing the absolute gift, and adding Mr. Vaughan as one of the residuary legatees. The final gift,

whether absolute in form or expressly in trust, was always to the same end. The changes made emphasize the intention, and point to a single object. No satisfactory reason has been given for making those changes, except that at different times he preferred different methods to accomplish the same thing. By every line he ever wrote, and by every word he ever spoke, so far as the courts below permit us to hear them, he showed the same persistent, steadfast, and unchangeable purpose to benefit the 20 colleges named in the ninth article of the will, except as he may have modified his original purpose by an extension of the trust so as to include the Northwestern University, as indicated in the last memorandum. The will, codicils, and memoranda, the letter to Mr. Ritch asking how his residuary estate would go in case of his death, and all the facts, as they are presumed to have been found by the courts below, establish the same fixed and constant purpose. Those facts appear so fully in their chronological order, in the statement annexed to this opinion, that further allusion to them will not now be made.

The intention of the testator being thus clear, the secret trust was completed by the promise made by or on behalf of the residuary legatees. As the gift was to them as tenants in common, a promise that bound all was necessary in order to include each of the three shares. That Mr. Ritch and Mr. Vaughan duly promised appears so conclusively from their conduct, letters, and statements to the testator that we do not regard any further expression of our views upon the subject as necessary. It is, however, strenuously urged that Mr. Bulkley made no promise, and hence that the secret trust did not extend to his share of the gift. If he were the only residuary legatee, the question would be more serious, but he was not. The trial court found that Messrs. Ritch and Vaughan promised for themselves and for Mr. Bulkley, and the evidence plainly warrants this conclusion. The general term, in its opinion, went further, and declared that there was an understanding between Mr. Bulkley and the testator to the same effect; but the evidence to sustain this conclusion is meager, although we do not hold it was insufficient. Assuming, however, that Mr. Bulkley made no promise, still we think that he was bound, under the circumstances, by the promise made in his behalf, and that he cannot profit by the action of his co-tenants in making the promise for him, as that would be a fraud. He was not a purchaser. He furnished no consideration. There was no contract for his benefit. He was in the attitude of accepting a gift, pure and simple; but that gift was made in reliance upon a promise given in his behalf. Can he violate the promise, and fairly take that which came to him solely on account of the promise, even if it was not made or authorized by him? We think not, because his title came

through the promise, and by accepting the gift he ratified the promise. He must repudiate the gift, or accept the responsibility. While the cases are not uniform, the weight of authority sustains this conclusion. *Hooker v. Axford*, 33 Mich. 453; *Moss v. Cooper*, 1 Johns. & H. 367; *Tee v. Ferris*, 2 Kay & J. 357; *In re King's Estate*, L. R. Ir. 21 Ch. Div. 273; *O'Hara v. Dudley*, *supra*. In the case last cited, this court said: "So far, then, as McCue is concerned, he stands in the attitude of having procured and induced the testatrix to make a devise or bequest to himself and his associates by asserting its necessity, and promising faithfully to carry out the charitable purposes for which it was made; and whether his associates knew or promised, or did not, makes no difference, where the devise is to them as joint tenants, and all must get their rights through the result accomplished by one." Although the devise in that case was to joint tenants, the principle that "all must get their rights through the result accomplished by one" is broad and equitable, and should not be limited to the technicality of a joint tenancy, as distinguished from a tenancy in common, where, as in this case, the promise was made by two in behalf of themselves and another, and a devise thus obtained to the three. This rule prevents fraud, which is the primary object of the courts in enforcing secret trusts, while any other would promote fraud. We thus reach the conclusion that there was a secret trust that bound all the residuary legatees.

3. What was the trust? While at first, by the will, it was expressly for the benefit of the ninth article colleges, after the first codicil, although not so expressed, it was for the benefit of the same. So far as any writing signed by the testator shows, it always continued so, except as it may have been modified by the private memorandum of March 22, 1889, in relation to the Northwestern University and others. That does not purport to do away with prior instructions, but is in the nature of suggestions to guide under the discretionary clause to withhold or reduce, in the ninth article of the will. It is advisory, but not obligatory. There are no words of direction, but all are of opinion, judgment, and desire, as if the writer was making a recommendation for consideration, but not necessarily for action. Thus he says: "It is my judgment," "I think," "I would recommend," "I suggest," and "I also wish." If he intended to give directions, why did he not embody them in one of the two codicils that he made after the date of the memorandum in question? But, whether the words are regarded as absolute or discretionary, they do not invalidate the original promise, nor do they render the trust indefinite. The promise of the legatees kept pace with the testator's instructions, and is to be considered in the light of all that transpired, not only on the

last occasion, but on all previous occasions. When Mr. Fayerweather handed the memorandum to Mr. Ritch, who knew its contents, his silence under the circumstances was a promise to conform to whatever directions it may have contained, because, if he did not intend to comply, it was his duty to say so. If it operates as an extension of the trust, as held by the courts below, and of which no complaint is made by any party to this appeal, still the modification is clear and definite, and in no way affects the validity of the trust. It acts as a modification simply. We, therefore, have a trust for the benefit of the ninth article colleges, as modified, perhaps, by the last memorandum, with definite beneficiaries each capable of asserting itself as such.

It is, however, insisted that the testator, in certain conversations with Mr. Ritch and Mr. Vaughan, so modified his instructions, which their implied promise would follow, as to include other institutions of learning that were to be selected by the residuary legatees. If such a modification was made, it rendered the trust void for indefiniteness, because it would be incapable of enforcement, through the want of specified beneficiaries, who could call upon the executors for performance. There is no conversation with Mr. Ritch, appearing in the record, which compels the conclusion, in view of the action of the courts below, that any modification was made by Mr. Fayerweather. A change of intention should appear with the utmost clearness in order to destroy the legal effect of writings signed by the testator, and filed for preservation. Such a change will not be sought for in a loose and general conversation, especially when it does not appear in writings upon the subject subsequently made. Some conversations were sworn to by Mr. Vaughan, which would justify a finding that instructions were given making the secret trust indefinite; but they would also justify the finding that they were merely instructions for still another codicil, not drawn, because death came so soon, the last having been hurriedly made to effect the main purpose, or a suggestion as to a change of existing beneficiaries, or the addition of others to be thereafter specified, but not then determined upon. The presumption is that the trial court drew the latter inference; but there is a more radical answer to the claim that the secret trust was made indefinite by conversations with Mr. Vaughan, because the trial court was not bound to believe, and from the record before us is presumed not to have believed, that the alleged conversations ever took place. Mr. Vaughan, although without mercenary interest, was an interested party, under the temptation to so testify as to relieve himself from the obligation to comply with the secret trust, and to justify his action in executing the deed of gift. He rested under the imputa-

tion of selfishly raising suspicions in the mind of the testator against Mr. Ritch, until he was himself made one of the legatees, when he suddenly became satisfied with Mr. Ritch's honesty, and proclaimed that he was "all right." He was not entirely candid either with Mr. Ritch or Mr. Fayerweather. He told Mr. Ritch, on an important occasion, that the testator was too ill to be seen, when that served his own purpose, although he himself saw him almost every day on business of the utmost moment; and he did not deliver Mr. Ritch's honorable and specific letter to Mr. Fayerweather, when he had impliedly undertaken to do so. He did not produce the envelope upon which the memorandum as to "more institutions for benefit" is said to have been made, until a late day; nor did he swear, upon the trial before the surrogate, to the conversation alleged to have been had with the testator during his last hours. He was contradicted by Miss Joyce, who denied, in effect, that that conversation took place, and his conduct towards that lady when he shook his fist in her face, and said that he would spend the entire estate, together with his own fortune, if necessary, to succeed in the litigation then pending, shows the deep interest that he took in the will, and the rights that he claimed under it. There was not such clearness of memory, frankness of disclosure, or freedom from interest as to make his testimony conclusive. Under these circumstances, the trial court was not bound by Mr. Vaughan's testimony, and the presumption is that the courts below rejected it, so far as that presumption is necessary to sustain the judgments that they rendered. We thus have a secret trust created by the instructions of the testator, and the promise of the legatees based thereon, with definite beneficiaries, and in every respect capable of enforcement, but for the act of 1860, entitled, "An act relating to wills," which provides as follows: "No person having a husband, wife, child, or parent shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious, or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate after the payment of his or her debts, and such devise or bequest shall be valid to the extent of one-half and no more. All laws and parts of laws inconsistent with this act are hereby repealed." Laws 1860, c. 360. The manifest effect of this statute was to arrest the design of Mr. Fayerweather, and to prevent it from being carried into effect, at least without the consent of his widow or nieces. The legal title to the residuary gift was still in the legatees, however, for the will stood as proved, and, as proved, the gift was absolute in form. There was nothing in the will itself to confer an equitable title upon any one. Owing to facts outside of the will, a secret trust

for the 20 colleges arose, but their equitable title was interfered with by the statute. The rights of the widow and next of kin, founded on the statute, sprang into being, and an equitable title became vested in them, so that they could call upon the residuary legatees to account for that part of the residuary estate which, by command of the law, Mr. Fayerweather could not give to literary corporations by will so long as he had a wife.

4. The effect of the releases in connection with the statute of 1860 now requires consideration.

There are authorities which hold that the rights arising from such a secret trust as we have been discussing are not testamentary in character, because the trust does not act upon the will, but on the fund after it reaches the hands of the legatees. *Harris v. Howell*, Gilb. Eq. 11; *Addington v. Cann*, 3 Atk. 141; *Rookwood's Case*, Cro. Eliz. 164; *Chester v. Urwick*, 23 Beav. 407; *In re Boyes*, 26 Ch. Div. 531; *Attorney General v. Cullen*, 14 Ir. C. L. 137; *Olliffe v. Wells*, 130 Mass. 221; *Hoge v. Hoge*, 1 Watts, 163; *In re Keleman*, 126 N. Y. 73, 26 N. E. 968; *Williams v. Fitch*, supra. Founded on these authorities, the argument is made by some of the respondents that the statute does not apply to this case, because the colleges do not claim under the will, or anything found in it, but on facts wholly outside of it. They insist that the same reason that takes a secret trust away from the statute of wills and of frauds takes it away from the act of 1860, and that their rights do not spring from the mode of changing title, but out of the duty of those who hold the title. They illustrate their argument by saying that if A. wills B. \$10,000, and writes him a letter saying that the legacy is in trust for C., but the letter is not delivered until after A.'s death, there is no trust; but if the letter is delivered before A. dies, and B. promises to perform, there is a trust. Although the will is the same in both cases, in the one B. takes, and in the other C., because the former takes from the will, and the latter from the trust. The argument is not without force when applied to a trust that does not run foul of a statute. When, however, as in this case, the trust is a manifest evasion of a statute, sound public policy forbids that the testator should be permitted to effect indirectly that which he could not effect directly, at least until all intervening rights derived from the statute have been lawfully cleared away. We think that the act of 1860 applies, but to what extent, and how it was affected by the releases, we will proceed to consider.

The statute in question is not a mortmain act. The policy of the state upon that subject appears in a few general and many special statutes passed at various times. The Revised Statutes present an example of the former, when they provide that "no devise to a corporation shall be valid unless such

corporation be expressly authorized by its charter or by statute to take by devise." 2 Rev. St. p. 57, § 3. The charters of various corporations illustrate the other class of legislation by limiting the amount they can take by devise or otherwise. In *re McGraw's Estate*, 111 N. Y. 66, 107, 19 N. E. 233. The object of all these statutes is to "prevent accumulations of property in the hands of institutions which take no part in the productive activity of the community." They act upon the power of corporations to take and hold, not on the power of a testator to give. The authorities relied upon by the appellants are, to a great extent, judgments pronounced when these statutes, thus expressing the policy of the state against the concentration of wealth in mortua manu, were under consideration by the courts. The decisions under the mortmain acts of England are equally inapplicable, when the difference between those acts and the act of 1860 is borne in mind. That statute is of a different character from any of those mentioned. It does not prevent charitable corporations from taking, but forbids a testator who has a wife, child, or parent from giving more than one-half of his estate after the payment of his debts. *Chamberlain v. Chamberlain*, 43 N. Y. 424, 440. It does not prohibit charitable gifts altogether, but only under certain circumstances, to a certain extent, and by a certain method. If the gift is not made by will, or if made by will, and the testator leaves no surviving relative of the degree named, or it is to charities other than those mentioned, there is no prohibition. It does not compel a testator to leave his property, or any part thereof, to relatives. It does not prevent him from giving all that he has to charity during his lifetime. It is aimed simply at the giving of an undue proportion to charity by will, when certain near relations have, in the opinion of the legislature, a better claim. As was said by Judge Allen in *Chamberlain v. Chamberlain*, 43 N. Y. 424-440, its object "was to prevent a person, upon whom others standing in near relation had claims, from disappointing their just expectations, and disinheriting them, from pious or philanthropic motives; and the intent was to include all public objects, whether religious, charitable, or literary." Its theory is not to keep property away from charitable corporations, but to prevent a testator from giving them more than one-half of his net estate at the expense of his wife, child, or parent. Its sole purpose is to protect those natural objects of his bounty from improvident gifts to their neglect. It does not attempt to prescribe the amount or kind of property that the corporations can hold, or to place any limit upon their corporate powers. Its mandate is addressed to testators, not to corporations, which are mentioned only to partly measure the extent of the command. It points towards no public interest, but towards the prevention of what the legisla-

ture regarded as a private wrong. It was passed for the benefit of the persons named in it, not for the benefit of the people at large, as a measure of state policy. Indeed, the state has no policy against institutions of charity or learning. Throughout its history it has shown a deep interest in promoting such objects, and in encouraging its citizens to help them. Aid to education has always been a prominent feature in its legislation. Never has it repelled, and uniformly has it invited, the co-operation of individuals and corporations to that end. As was said by this court in a late case: "It is not against public policy to allow gifts to charitable, benevolent, scientific, or educational institutions. The law allows and encourages such gifts, and those who make them are commended as the benefactors of their race. Such institutions, dotted all over our land, to succor, elevate, educate men, and ameliorate their condition, are distinguishing features of our modern civilization." *Hollis v. Theological Seminary*, 95 N. Y. 166-172.

We are led by this reasoning, based upon an analysis of the statute, and a comparison of its provisions with those of mortmain statutes, to the conclusion, which is in substantial accord with the authorities, so far as they have been called to our attention, that only the persons named in the act, and those benefited through them, can invoke its protection. The state, through its attorney general, cannot, by legal proceedings, raise the question, or prevent the gift from taking effect in accordance with the wishes of the testator. The rights springing from the statute are personal, the same as the rights of a borrower under the statute of usury, and they can be waived or relinquished in the same way. *Williams v. Tilt*, 36 N. Y. 319, 325; *Smith v. Marvin*, 27 N. Y. 137, 143. While the one was passed to protect the family of the testator, and the other to protect the estate of the borrower, and both prohibit certain acts, we see no reason why the benefit derived from the prohibition may not be abandoned in the one case the same as in the other. *End. Interp. St.* 360. The command that the gift shall not be "valid" is no more imperative than the declaration that the usurious security shall be "void." While it has been held that the prohibition of the statute of 1860 may be insisted upon by any person who would derive a benefit therefrom, although not one of those named therein, this simply extends the list of such as have rights to waive or retain at their election. *Harris v. Society*, 4 Abb. Prac. (N. S.) 421. The widow and next of kin for whose benefit the statute, as applied to this case, was passed, could, prior to the execution of the releases by them, have asked the courts to enforce it and award them their equitable rights against the residuary legatees, as their trustees. No one else could set the courts in motion or the statute in operation. The residuary legatees could not, either in their

own interest, or in the interest of those to whom they had assumed to give nearly one-half of the estate left by the testator, in violation of their promise to him and the secret trust resulting therefrom. That would make the statute an aid to fraud, and would defeat both its own purpose and that of the testator. *Ryan v. Dox*, 34 N. Y. 307, 312. The donees under the deed of gift are in no better position than the donors, for they stand in the same shoes. There was nothing, therefore, to prevent the widow and next of kin from reviving the secret trust by settling with the trustees and canceling their own claims. Whether they did so or not depends upon the nature of the releases, which were of two kinds, one preliminary, the other permanent, but both having the same object. The first, after withdrawing all objections to the probate of the will, contains a covenant not to sue for a construction of the will or to set the will aside, and not to make any claim upon the residuary legatees, as such, or as executors. It also contains an agreement to "execute a general release of all claims," both to the executors and their donees, under the deed of gift, as well as to Messrs. Bulkley, Ritch, and Vaughan individually. The second, which was executed after payment of the consideration provided for by the first, runs to the persons last named, as executors, trustees, individuals, and as representatives of the donees under the deed of gift, and after reciting that the amount paid "is in compromise and full settlement of any and all contests * * * of the will of said Daniel B. Fayerweather, or concerning his estate," each covenantor says, "I have remised, released, and forever discharged, and by these presents do, for myself, and for my heirs, administrators, and executors, remise, release, and forever discharge," the said persons, in their said several capacities, "and also the said donees" mentioned in the deed of gift, "of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claim and demands whatsoever, in law or in equity, which against the said persons or corporations, or any of them, I ever had, or now have, or which I, or my heirs, executors, or administrators hereinafter shall, can, or may have, for, upon, or by reason of any matter, cause, or thing whatsoever."

Two theories are pressed upon our attention as to the effect of these instruments. One is that they operate, not only as releases, but also as transfers, and the other that they are releases, pure and simple. The theory of the donees under the deed of gift, that either paper is an assignment, seems to be an afterthought; for it is not set up in their answers, and is said not to have been suggested before either of the courts below. The answers deny the facts out of which a resulting interest for the widow and nieces arises, and the most of them allege affirmatively that "said Ritch, Bulkley, and

Vaughan were and are absolute devisees and legatees in their own right, as individuals, of the entire residuary estate of said Mr. Fayerweather, and could dispose of the same as they saw fit; that the deed of gift mentioned in the complaint was duly made, executed, and delivered, and is a valid instrument, and in fact and in law passed to the various persons and institutions named therein all that said Bulkley, Ritch, and Vaughan took as aforesaid as absolute devisees and legatees." While reviewing courts have power, on appeal, to so amend the pleadings as to conform to the proofs, in order to affirm a judgment, no such power exists for the purpose of reversing a judgment. *Volkening v. De Graaf*, 81 N. Y. 268-272. An analysis of the instruments of release, which are quite full and formal, as releases, shows that they contain no word ordinarily used to effect an assignment or transfer. The first, which is operative without the second, contains no word that is ever used for that purpose, when the connection in which it appears is taken into account. On the other hand, its language is precisely adapted to effect a settlement of the litigation pending and threatened when it was executed, by terminating the contest over the will, and providing that no other contest for any purpose should be begun by those signing the paper. The situation then was that the legal title to the residuary estate was in Messrs. Bulkley, Ritch, and Vaughan, and that, by virtue of the secret trust and the act of 1860, the widow and next of kin had the right to call upon those gentlemen to account for the residuary estate, or, in other words, to bring a suit in equity against them, as trustees *ex maleficio*, for an accounting. The words used in the first paper, therefore, were fit and proper to waive and extinguish the right of the widow and next of kin to bring such a suit in equity, but were neither fit nor proper, nor can they, by any reasonable construction, be said to have the effect, to transfer or assign anything to any one. The concluding words corroborate this theory, for they are a promise "to execute a general release of all claims" to the executors and to their donees, but not to transfer anything to either. While the word "release" is sometimes used in conveyancing to transfer a title, its general meaning is to surrender a right or to discharge a liability; and when it is used in connection with the word "claims," as it is in the paper under consideration, it never has any other meaning than that of waiver, surrender, or relinquishment. No right of action can pass by a release of all causes of action.

Since the first paper was effective as a release, and as a release only, all the rights springing from it came into existence at once upon its execution and delivery, and could not be changed or cut down by any paper subsequently executed by the widow and nieces. They had extinguished their claims forever.

and the agreement to execute a general release did not permit—at least as to third parties, whose rights had intervened—the insertion of words therein changing, or purporting to change, the effect of the first instrument, and we do not think that any attempt was made to do so. The second paper was “in compromise and full settlement” of all contests connected with the will, or concerning the estate. That was the object of the paper, as stated in connection with the consideration, which was not meritorious as to the donees under the deed of gift, but was furnished indirectly by the ninth article colleges. In order to effect this object, the releasors “remised, released, and forever discharged” the persons and corporations named. But what do they remise, release, and discharge them from? for they do not remise or release any property “to” any one, as is usual when a transfer is made. The answer is found in these words of the instrument, viz.: “Of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims and demands whatsoever, in law or in equity,” etc. So far as the intention of the parties to these writings is a question of fact, or is at all dependent on extrinsic facts subject to opposing inferences, it is presumed to have been found in favor of the respondents. Do the parties to a full and formal instrument intend to assign, when they use no word importing an assignment? Is it probable that there was an intention to assign anything to the same persons in four different capacities,—as individuals, executors, trustees, and as representatives of the donees? How could such an assignment be enforced? A release, however, to them in all those capacities, was precisely what they needed in order to be fully protected. “In a struggle between the heir or trustees whom the testator obviously did not intend to benefit, and a charity which he confessedly designed to endow, a court of equity will lend its aid, to the extent of its legitimate power, to uphold the devise, and to effectuate the laudable and meritorious purpose of the testator.” *McCartee v. Society*, 9 Cow. 437-442. We think that both of these papers were intended by the parties thereto, at the time of their execution, as releases of claims, in the ordinary sense of those words, and not in any sense as assignments or transfers. *Colton v. Field*, 131 Ill. 308, 22 N. E. 545; *Crum v. Sawyer*, 132 Ill. 443, 24 N. E. 956.

But, aside from these considerations, and upon the assumption that the releases operate as transfers, how does the matter stand? Messrs. Bulkley, Ritch, and Vaughan were trustees in two capacities with reference to the same fund,—one, however, subordinate to the other. They were trustees, as we have seen, for the benefit of the ninth article colleges under the secret trust; and, owing to the statute of 1860, they were also trustees for the widow and next of kin, and the lat-

ter trust was paramount to the former. If, therefore, these gentlemen bought the rights of the widow and next of kin, for whose benefit did they take them? Not for their own, nor for the benefit of their donees, who stood in no better position, but for the benefit of the 20 colleges. *Torrey v. Bank*, 9 Paige, 648; *Fulton v. Whitney*, 66 N. Y. 548. Under no circumstances is a trustee allowed to set up a title adverse to his cestui que trust. *Perry, Trusts*, § 433; *Lewin, Trusts*, p. 285. The paramount trust having been bought in by the trustees, the other trust then became effective. Unless this position is true, a trustee may purchase outstanding titles against his trust estate, for his own benefit, and to the injury of the cestui que trust, and thus speculate with the subject of his trust. We are of the opinion, therefore, that, whether the residuary legatees, by the releases, extinguished or acquired the rights of the widow and next of kin, the result is the same. Upon either theory the widow and nieces had placed themselves in such a position, by their instruments of release, perhaps without foreseeing all the consequences, that they could not demand of the residuary legatees, as trustees, their equitable rights, and therefore the statute of 1860 at once ceased to apply. *Harbeck v. Pupin*, 145 N. Y. 70, 77, 39 N. E. 722. It became as inoperative as if the widow had died before the testator. All persons for whose benefit the statute was passed having waived their rights, the result was the same as if it had never had an existence. The donees under the deed of gift had no greater rights than they would have had if there had been no widow to set the statute in motion. As the statutory claim of the widow and next of kin was all that could lawfully prevent the execution of the secret trust, when they voluntarily abandoned that claim it became the duty of the residuary legatees, as trustees, to carry out the testator's instructions in accordance with the promise made to him. Whatever interest they acquired by virtue of the releases inured to the benefit of the respondents, who thus stand before the court entitled to the fund in controversy, unless they are estopped in equity, by their conduct, or at law, by a judgment, from asserting the claim presented.

5. The claim that there is an equitable estoppel rests mainly upon the allegation that the respondents kept silent concerning their intentions while promoting and aiding the settlement with the widow and next of kin. So far as this depends upon a question of fact, the final decision has already passed against the appellants by the united action of the courts below. The ninth article colleges had no connection with the making of the deed of gift or the instruments of March 5, 1891. After these agreements of settlement had been executed, the consent of those colleges was asked, not to the settlement, but to postpone the payment of their specific legacies “to the payment of the amount” that the widow and

next of kin had agreed to accept. This is all they were asked to consent to, and all that they did consent to, as a careful reading of the instrument signed by them will show. They did not abandon any claim that they might make against the estate, other than as thus specified. The effect was simply that the respondents could not claim that the executors wrongfully paid out the \$310,000, and we see no other element of estoppel against them arising from the facts. The claim of the residuary legatees that, owing to the instrument of "consent," they have paid a large proportion of the specific legacies to the 20 colleges, has no bearing, because they could not make a commercial use of the discretion confided to them by the ninth article of the will with reference to paying or withholding the specific legacies therein given. They were bound to exercise that discretion according to their honest judgment, and not to make it the subject of barter. No payment was made to the respondents, except such as it is conceded they were entitled to receive. Moreover, it is unreasonable to believe that they were consenting to surrender and abandon \$305,000, being the difference between \$2,195,000, the aggregate amount of the specific legacies to colleges and hospitals, and \$2,500,000, being one-half of the conceded value of the estate at the time of the testator's death. When the paper signed by them is considered in the light of such facts only as, according to the decisions of the courts below, they are presumed to have known at the time, we think that it should be construed as a consent to the payment of the money, and not to the settlement as such.

6. The only point remaining that requires the expression of consideration is whether the adjudication by the surrogate in proceedings under the collateral inheritance act is a bar to this action. An appraiser was appointed, who, after giving notice to all parties interested, reported, among other things, that he was "not satisfied from the evidence submitted to report in favor of the claim that decedent's residuary property is charged with a trust in favor of Hamilton College and other corporations"; and he therefore concluded that the property passed as provided by the will and codicils, as proved. Upon this report an order was made by the surrogate that the testator bequeathed the sum of \$717,398.69 to each of the three residuary legatees. This was a special proceeding instituted by the comptroller of the city and county of New York with the sole object of ascertaining what amount of property passing under Mr. Fayerweather's will was subject to taxation, and to fix the amount of the tax. The decree of the surrogate should be construed solely with reference to that object, and, as thus construed, the adjudication was that, for the purposes of taxation under the act in question, a certain amount of property passed to the residuary legatees under the will. Legitimate

inquiry necessarily stopped at that point; for it was immaterial, so far as that statute was concerned, whether the fund became impressed with a trust after it reached the residuary legatees, as the tax would be the same whether it did or not. They took the legal title, as we have held; and hence their legacy was subject to taxation, without reference to what it became their duty to do with it. The adjudication was necessarily limited to the subject of taxation, and, if conclusive at all as a bar, it was not conclusive upon the rights of the parties arising from matters outside of the will. The surrogate was acting simply as an assessing and taxing officer, and represented the state for those purposes. In *re Wolfe*, 137 N. Y. 205, 211, 33 N. E. 156. As was said by this court in *Re Ullmann*, 137 N. Y. 403, 407, 33 N. E. 480, 481: "Every officer charged with the duty of executing the taxing power, whether it be a surrogate or a town assessor, must necessarily decide, in a judicial capacity, important questions of law, in order to perform the duties of his office. Ordinarily, such decisions do not, like judgments in actions, conclude the parties as to the same question in subsequent proceedings instituted for some other purpose, although in all such proceedings for the assessment of the tax it ought to, and doubtless would, until reversed and set aside." We think this foreshadowed the correct rule, and that the adjudication of the surrogate was binding upon the question of taxation only. We thus reach the final conclusion that all obstacles to the enforcement of the secret trust were lawfully removed, and that it is the duty of the courts to give full effect to that trust in accordance with the intention of the testator and the promise of his residuary legatees. In announcing this result, which is the nearest approach to justice that we are able to make, it is a satisfaction to believe that the vast fortune involved will be distributed in accordance with the controlling thought and noble purpose of the man who made it. The judgment should be affirmed, with costs to all parties appearing by separate attorneys, payable out of the estate.

ANDREWS, C. J. (dissenting). I deem it proper to state the reasons for my dissent from the conclusion reached by the majority of the court.

The testator, by the ninth clause of his will, bequeathed to 20 colleges therein named legacies to a large amount, aggregating approximately a sum equal to one-half of his estate as it existed at the time of his death, on the 15th day of November, 1890. By the tenth clause he gave to his executors all the rest and residue of his estate in trust, to convert the same into money, and to divide the same equally between the same 20 colleges named in the ninth clause. If the will had remained unchanged, it is clear

that, under the statute of 1860, the gifts to the 20 colleges by the ninth and tenth clauses would have been ineffective and void, so far as they exceeded one-half of the testator's estate. The testator left a wife surviving him, and the statute prohibits a devise or bequest by a testator, having a husband, wife, child, or parent, to any corporation of the classes therein enumerated, of more than one-half of his estate; and, where such devise or bequest exceeding one-half of the estate shall have been made, the statute declares that "such devise or bequest shall be valid to the extent of one-half, and no more." The statute is aimed at and takes away the power of a testator in the respect mentioned. In *Chamberlain v. Chamberlain*, 43 N. Y. 424, Judge Allen, referring to the statute of 1860, says, "The prohibition operates upon the testator's capacity to give, rather than upon the power of the legatees to take"; and Rapallo, J., in *Stephenson v. Short*, 92 N. Y. 433, referring to the cognate section in the act of 1848, says, "The second [section] restricts the power of a testator to devise or bequeath to such corporation in certain cases, and prohibits a testator who leaves a wife, child, or parent from devising or bequeathing to such corporation more than one-fourth of his estate." In the earlier case of *Bascom v. Albertson*, 34 N. Y. 584, the court, referring to the act of 1860, although the construction of the act was not then in question, said, "It was designed to regulate and restrict the power of testators." There are other authorities in the state to the same purport, but it is unnecessary to cite them, because there can be no doubt, upon the plain language of the statute, that it was intended to limit the power of testators, and invalidate any testamentary disposition to corporations mentioned in the act, in excess of one-half of testator's estate, but sustaining it up to that point. The language, "shall be valid to the extent of one-half and no more," is too plain for argument or construction. I deem it important, in view of the interpretation placed on the codicils and the releases of the widow and next of kin, to proceed somewhat further upon the assumption that the original will had remained unaltered, and to consider what would have been their rights if the testator had died without having changed the original will. I can entertain no doubt that in that event the portion of the estate beyond the one-half part, to which the 20 colleges would be entitled under the ninth and tenth clauses of the will, would, although given by the will to the 20 colleges, nevertheless go to the widow and next of kin, and descend and be distributable under the statute of descents or distributions, as in case of intestacy. No other conclusion is possible. The devise or bequest to the 20 colleges was invalid as to the excess, for so the statute declares. It could not go to the residuary legatees, because they took in

trust for the corporations. The intention of the testator could not be enforced, because the disposition he attempted to make was illegal. The corporations could not stand upon the devise and bequest in their favor, because the statute which prohibited the gift necessarily precluded them from insisting upon the validity of the disposition. In all cases, upon the death of the owner of property, the title devolves upon some one, either under his will, or upon his heirs or next of kin, or escheats to the state. If he undertakes by will to dispose of his property in a mode or for purposes which the law prohibits, the attempted disposition is void, and, in the absence of any alternative valid disposition by the will, it goes to his heirs and next of kin, by operation of law. For no moment of time is the title suspended. In the case just supposed the rights of the heirs and next of kin attach immediately upon the death of the testator, and the will at most is a mere cloud upon their title. Their right would vest immediately without the intervention of any court, and an appeal to the court would be necessary only to put them in possession of their right in case it was denied or withheld. If any authority is needed to establish the proposition that a devise or bequest made in contravention of the statute of 1860 is void, and that the part of the estate devised to charity, in excess of the one-half part thereof, devolves upon the heirs and next of kin, as in case of intestacy, in the absence of any valid alternative disposition, the case of *Chamberlain v. Chamberlain* is decisive. There the residuary estate, comprising more than one-half of the testator's estate, was devised and bequeathed, after the enactment of the statute, to two corporations within the act, and it was adjudged by the judgment entered in the supreme court, and in this court, that the gift, in excess of the one-half part of the estate given by the will to the two corporations, devolved upon the heirs and next of kin. The testator, when he made the will, was under no misconception as to the invalidity of the will under the act of 1860, so far as it gave to the 20 colleges more than one-half of his estate, nor as to the resulting rights of his heirs and next of kin. He was fully apprised by counsel of the restriction in the law of 1860, and, in the memorandum which he delivered with the will to one of his executors, he recognized that his purpose to give the bulk of his estate to the 20 colleges could not be effectual, except through the forbearance and acquiescence of his heirs after his death. But after the execution of his will he came to appreciate the danger that his purpose might be defeated by the refusal of his heirs to consent to forego their rights, or to waive any objection under the statute of 1860. This led to the execution of the codicil, by which he revoked the tenth clause of his will, substituting therefor a new residuary

clause, whereby he constituted Bulkley, Ritch, and Vaughan his residuary legatees, and devised and bequeathed to "them and their heirs, forever," his whole residuary estate,—in form an absolute gift, subject on its face to no trust or condition whatever. It is out of the secret understanding found to have existed between the testator and the residuary legatees in respect to the disposition to be made of the residue that one of the most important questions in the case arises. It was found by the trial court that Bulkley, Ritch, and Vaughan were made residuary legatees under the codicil by reason of the promise of Ritch and Vaughan, made to the testator, for themselves and on the part of Bulkley, that they would sell and convert the residuary estate into money, and divide the same equally, share and share alike, among the 20 colleges mentioned in the ninth clause of the will. That this was the general purpose of Fayerweather in making this disposition is rendered clear by the memorandum of December 11, 1884, deposited with Ritch, in which the testator declares that he had made Messrs. Ritch and Bulkley his residuary legatees, "in the confidence that thereby my intentions, as expressed in my will, shall be carried into effect." By a codicil subsequent to the date of this memorandum, Vaughan was joined as legatee with Bulkley and Ritch.

I assume that the finding of the trial court, heretofore stated, is supported by evidence. The judgment in this case awards to the 20 colleges named in the ninth clause of the will the whole of the residuary estate remaining in the hands of Bulkley, Ritch, and Vaughan, who were executors of the will as well as residuary legatees. Independently of other grounds urged in support of the judgment, it is claimed that the promise of the residuary legatees, which was the inducement operating upon the mind of the testator to make the residuary gift, is enforceable in a court of equity as an equitable obligation binding in conscience, and which the legatees were bound to perform. The law, it is insisted, raises out of the transaction a trust in favor of the real objects of the testator's bounty, which a court of equity, proceeding upon its established principles, will compel the legatees to observe and perform. If the correctness of the judgment below turned upon the question who were the parties intended by the testator to be benefited, and what colleges or institutions he intended should receive the residuary fund, I should have little hesitation in reaching the conclusion that they were the 20 colleges mentioned in the ninth clause of the will, and that a distribution made under the so-called deed of gift, or a devolution of the residue upon his heirs or next of kin, would disappoint his expectations in making the codicil. But this is to be said of every case where the disposition made by a will falls from some inherent de-

fect in the disposition itself. "It is not sufficient," says the chancellor in *Haxtun v. Corse*, 2 Barb. Ch. 521, "to deprive an heir at law or distributee of what comes to him by operation of law, as property not effectually disposed of by will, that the testator should have signified his intention by his will that his heir or distributee should not inherit any part of his estate. But, to deprive an heir or distributee of his share of the property which the law gives him in case of intestacy, the testator must make a valid and effectual disposition thereof to some other person." The cases are numerous in which courts of equity have fastened constructive trusts upon the legal title to real or personal property in the hands of nominal owners, in favor of persons to whom the owner owes an equitable duty, in respect of the property in his hands, inconsistent with his retention of an absolute title. The foundation of this jurisdiction is in every case the incapacity of courts of law to give any, or to give adequate, relief, and, from its very nature, can never be invoked except for the promotion of justice and the prevention of fraud. The trust may be raised from circumstances, but for these purposes, and for no others. It would be a solecism for a court of equity to imply an equitable obligation to do that which its own principles condemn, or to enforce an express trust in contravention of the law. The beneficent jurisdiction of courts of equity to raise and enforce constructive trusts has no more signal illustration than in cases of devises or bequests procured to be made, absolute in form, upon the promise of the devisee or legatee to make some provision out of the property devised or bequeathed for some other person or object, or to appropriate it in a particular way; and where it may be gathered that, except for the promise, the devise or bequest would not have been made. In such a case the courts enforce the promise to prevent a double fraud,—a fraud upon the testator, and a fraud upon the person for whose benefit the promise was made. It is unnecessary to cite the cases which support this equitable principle. The subject is treated at length in the very able opinion of Judge Finch in the case of *O'Hara v. Dudley*, 95 N. Y. 403, and no other authority need be cited. But the principle, however broadly stated, must, from the nature of the case, and the constitution of the court called upon to apply it, be always subject to the limitation that the promise must be to do a lawful, and not an unlawful thing. The purpose to which the devisee or legatee undertakes to apply the money must be lawful, and, although the purpose may be lawful, the promise may be illegal by reason of some prohibition of law disabling the testator from making a posthumous gift to the beneficiary, under the circumstances, or in the mode adopted. In either case, I conceive, a court of equity cannot and will not imply a trust against the

devisee or legatee for the purpose of enforcing the promise. The case of *O'Hara v. Dudley* is a direct authority on the first proposition in the preceding paragraph, and the cases under Act 9 Geo. II. c. 36, improperly called a "mortmain act," cited in Judge Finch's opinion, sustain, I think, the second proposition. In the case of *O'Hara v. Dudley*, and in the English cases under the act of Geo. II., the courts refused to sustain a trust for the purposes intended by the parties, but adjudged that there was a resulting trust in favor of the heirs and next of kin of the testator in the property held by the devisee or legatee under a gift absolute in form.

I have no doubt that under the facts found a court of equity, proceeding according to its settled principles, would raise a constructive trust, as against the residuary legatee, in favor of the 20 colleges. But this, subject to the necessary limitation that the trust so constituted was lawful. If it was unlawful under the act of 1860, and if performance would violate that statute, then, clearly, a court of equity would not raise a trust in order to give effect to the proposed illegal disposition. I am of opinion that the arrangement between the testator and the residuary legatee was in contravention of that statute. It is not denied that, if the constructive trust sought to be raised in favor of the 20 colleges had been written out on the face of the will, the trust would be void, under the statute. The statute prohibits a devise or bequest contrary to its provisions, "in trust or otherwise,"—a prohibition of the broadest and most sweeping character. But the claim is that the 20 colleges to which the residuary estate has been awarded do not take under the will, or under any devise in the will, or through any testamentary act, but outside of, and independently of, the will, through and by virtue of the conscientious obligation created by transactions dehors the will, and that the case is not, therefore, within the statute. The same result, concededly, is attained as though the trust was written in the will; but this, it is claimed, is no objection to its enforcement, because a trust outside of the will, arising by construction, is not prohibited, and although the scheme adopted by the testator, and assented to by the residuary legatees, was for the purpose of evading the law, an evasion of a statute is not, or may not be, a violation of the statute evaded.

I do not adopt the radical view of one of the learned counsel for the appellants, that a court of equity will not raise a constructive trust in favor of the 20 colleges, and will not lend its aid to enforce a transaction in evasion of the statute of 1860, although the transaction is not prohibited thereby. The residuary legatees, concededly, upon the facts found, are not entitled to retain the property for their own benefit;

and the heirs and next of kin have no title, if it was legally disposed of by the will, and the secret trust was not illegal. It would not be unconscientious for the court to award the fund to the institutions for whose benefit it was really given, on the mere ground that the testator intended to circumvent the law, provided the method he adopted was not a violation of the statute, although it tended to thwart its general policy. But, as I have intimated, the arrangement between the testator and the residuary legatee was prohibited by the statute of 1860. That statute was not prompted by any hostility to charities, or to religious or educational institutions. It did not restrict gifts *inter vivos* to the corporations mentioned, however large, even to the whole of the donor's property, and the only restriction upon such gifts would arise out of the incapacity of the donee to take under its charter. What the statute plainly did intend was to prohibit one form of donation to corporations described in the act, which should exceed one-half of the donor's estate, namely, a donation by will. The donor was not permitted by will to give to the charities mentioned beyond the prescribed amount. The statute regulated and restricted testamentary donations, and no others. It is to be observed, also, that all corporations are not included. The testator might have given by will all his property to corporations not of the class enumerated, and their capacity to take would be the only question. Nor is a testator prohibited from giving all his property by will to the corporations mentioned in the act, when he leaves no wife, children, or parent surviving. The corporations enumerated in the statute were those to which, in the last days of life, a man, acting under mistaken notions of duty, might voluntarily, or through persuasion, be induced to give his property in disregard of the just claims of kindred. The felicitous language of Comstock, C. J., in *Downing v. Marshall*, 23 N. Y. 366, frequently quoted, used in considering the general policy of the restriction upon devises to corporations contained in the general statute, is peculiarly applicable here. Speaking of the policy and necessity of the restriction in the Revised Statutes, he says: "Nor is this necessity by any means a fanciful one. It is eminently praiseworthy to give in the interest of charity and religion. But, in the last hours of life, exaggerated impressions of charitable or religious duty often obscure the judgments of men, and subject them to undue influence and persuasion. Against these the statute is intended to guard, because it is in behalf of associations incorporated for pious and benevolent purposes that the sentiments of men in such situations are most generally appealed to. The enactment is therefore prohibitory, and it ought to be expounded and applied in that sense." The English statute

of Geo. II. before referred to, although more radical than the statute of 1860, is founded on the same policy. It prohibits all devises of lands, or of funds to be laid out in lands, to charities; but it does not prevent the owner of property, in his lifetime, to convey to charities all his property by deed, affixing only the restriction that it shall have been executed 12 months before his death, and enrolled at least 6 months prior to that event,—restrictions intended manifestly to prevent even this method of gift, when made in prospect of, or under the shadow of, impending death. The court is asked to hold in this case that a scheme contrived by the testator and his residuary legatees for the purpose of circumventing the statute of 1860, and to make a posthumous gift of a very large estate to corporations to which the testator could not give it directly by will, through the device of a constructive trust, is not in contravention of the statute of 1860. I cannot assent to this proposition. It has, in my judgment, neither reason nor authority in its favor. The language of Lord Eldon in *Stickland v. Aldridge*, 9 Ves. 516, is applicable to this case. "It would," he said, "be a strong proposition that the providence of the legislature, having attempted expressly to prevent a disposition of land for purposes of this sort, was so short as to be baffled by such a transaction as is stated by this bill." The attempt here is to separate the strictly testamentary act from the secret arrangement, and to refer the right of the 20 colleges exclusively to the latter. But the will is a necessary and indispensable element in establishing the alleged trust. The testamentary gift and the secret arrangement are inseparably conjoined. The plaintiffs cannot proceed a step without showing the will and the testamentary gift. It is only by attaching to this the promise of the residuary legatees that it can be pretended that any trust in their favor arises. The statute of wills, which requires wills to be in writing, was an obstacle to be overcome when originally the attempt was made to establish a parol trust in contradiction of the testamentary instrument. But the court solved the difficulty by treating the two transactions as separate. The will, it was said, was not changed, but the right might be grafted onto the parol promise, and so, technically, the devise was not changed. But this subtle distinction was sustained for the purpose of preventing fraud, and never to overreach or subvert the law. In numerous cases under the statute of Geo. II., the English courts have held that a secret trust for charity, ingrafted on a devise absolute in form, was void. It is said that these cases are sustainable on the broad words of the statute. But the English statute is, I think, no broader than the statute of 1860. This statute prohibits all bequests or devises to corporations named therein, beyond the permitted

amount, "in trust or otherwise,"—that is, as I construe it, "in trust for the corporation or in any other manner,"—and it would, I think, be a narrow and misleading view to hold that it does not prohibit the device resorted to in the case before us.

If I am right up to this point, it necessarily follows that immediately on the death of the testator a resulting trust in the residue of the estate sprang into existence, in favor of the widow and next of kin, which the court would transform into a legal estate by compelling a transfer by the residuary legatees to them of the legal title. They could not, under the findings, retain the property for their own benefit; the 20 colleges could not enforce the illegal trust attempted to be created in their favor; and the only other alternative was a resulting trust in favor of the widow and next of kin. This trust, so instant on the death of the testator, displaced the unlawful trust attempted to be created in favor of the 20 colleges. It was therefore essential, to support a claim by the 20 colleges to the fund, that they should be able to show a right thereto derived from the widow and next of kin. They were the equitable beneficial owners, and their interest, under well-settled rules prevailing in this state, was assignable. They, as owners, could transfer their rights and interests to the 20 colleges, or to any other persons or corporations, by an act *inter vivos*. It would be a transfer of their own property, not within the act of 1860. But it would not be enough to establish the title of the 20 colleges for them to show that the widow and next of kin had divested themselves of their interest. It must appear that it had been acquired by the 20 colleges, or that an assignment was made to some other person or persons, which, by the terms of the assignment, or by operation of law, inured to their benefit. I repeat, the attempted trust in favor of the 20 colleges being void, and the resulting trust in favor of the widow and next of kin attaching to the fund, no title thereto can be asserted by any person or corporation, except a title derived from or under the widow and next of kin. The learned counsel for the 20 colleges, appreciating the stress of this view, seeks to sustain their title by the claim that the residuary fund was vested in them by force of the instruments called "releases," executed by the widow and next of kin, bearing date March 5, 1891, and June 12, 1891. These instruments, it is insisted, extinguished all claim of the widow and next of kin in the fund now in question, and, their claim being out of the way, the residuary legatees held the fund subject to the original trust, freed from any infirmity, by reason of the act of 1860. The construction sought to be placed on the instruments of release by the learned counsel for the 20 colleges, namely, that they operated merely as a surrender to the residuary legatees, and an extinguish-

ment of the rights and claims of the widow and next of kin to the residuary estate, is in my judgment wholly inadmissible. This construction ignores the evident intention of the parties to the instruments, and contradicts their plain language and meaning, when read in the light of the surrounding circumstances. The so-called deed of gift to the 20 or more colleges and institutions, executed by the residuary legatees February 24, 1891, purported to give the residuary fund to the beneficiaries therein named, with a reservation to Bulkley, Ritch, and Vaughan of the right, out of the fund, to make additional provision for the widow and next of kin beyond that contained in the will. On the 5th of March, 1891, while the contest as to the probate of the codicils was pending, two instruments were executed, one by Bulkley, Ritch, and Vaughan to the widow and next of kin, which referred to the deed of gift of the 24th day of February, 1891, and the reservation therein, whereby they added to the annuity to the widow the sum of \$10,000 beyond that given her by the will, and gave to the widow and next of kin, out of the residuary estate, further sums aggregating \$310,000. The other instrument was the so-called first deed of release, in which the widow and next of kin, "in consideration of the instrument of even date herewith" (above referred to), bound themselves to make no claim upon Messrs. Bulkley, Ritch, and Vaughan, other than for the "amounts left us by the will and codicils, and the deed of gift executed by the said Bulkley, Ritch, and Vaughan on the 24th day of February, 1891, and the instrument dated on the 5th day of March, 1891"; and they further bound themselves, upon payment to them, respectively, of the several amounts mentioned in "said deed of gift and said instruments, to severally execute a general release of all claims, except those arising under the will and codicils, both to the executors and to the donees mentioned in the deed of gift dated on the 24th day of February, 1891, and to said Bulkley, Ritch, and Vaughan individually." On the 12th day of June, 1891, the widow and next of kin severally executed the formal deeds of release provided for in their deed of March 5, 1891. The release of Mrs. Fayerweather first acknowledges the receipt of the \$225,000, to which she was entitled under the instrument executed by Bulkley, Ritch, and Vaughan March 5, 1891. The language is: "For and in consideration of the sum of two hundred and twenty-five thousand dollars, lawful money of the United States, to me in hand paid by Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, as executors and trustees under the last will and testament of Daniel B. Fayerweather, deceased, and individually and as the representatives of the persons and corporations hereinafter named, forming a class known as donees under the deed of gift executed by the said Bulkley, Ritch, and

Vaughan on February 24, 1891." She next acknowledges that sum to be "in compromise and full settlement of any and all contests on my part of the will of said Daniel B. Fayerweather, deceased, or concerning his estate." Following the statement of the consideration, and that the sum received was in full compromise and settlement, are the operative words of the instrument, namely, "have remised, released, and forever discharged, and by these presents do, for myself, and for my heirs, administrators, and executors, remise, release, and forever discharge, the said Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan, as executors and trustees aforesaid, as individuals and as representatives of the said donees constituting a class, and also the said donees, to wit, the persons and corporations mentioned in a certain deed of gift, duly delivered, made by Justus L. Bulkley, Thomas G. Ritch, and Henry B. Vaughan on the 24th day of February, 1891, which deed of gift was introduced in evidence in the probate proceedings of the last will and testament of Daniel B. Fayerweather, deceased (and marked 'Exhibit No. 7, contestants'), and which said deed of gift is hereby made a part of this release, in order that the persons constituting said class of donees, and to whom this release runs, may be more fully known, and also the legal successors, assigns, heirs, executors, and administrators of all the aforesaid persons and corporations, of and from all and all manner of action and actions, cause and causes of action, suits, debts, dues, sums of money, claims, and demands whatsoever, in law or in equity", etc., concluding by an exception of her claim for the annuity mentioned in the agreement of March 5, 1891, "made pursuant to the deed of gift above referred to." The releases by the next of kin were of the same purport.

It seems impossible to read these releases, in view of the circumstances which led to their execution, without being forced to the conclusion that they were executed with the intention, and for the sole purpose, of giving effect to and confirming the deed of gift of February 24, 1891. They acknowledge the receipt of the consideration from Bulkley, Ritch, and Vaughan, as representatives of the donees under the deed of gift. They "remise and release" to the donees under the deed of gift, and to Messrs. Bulkley, Ritch, and Vaughan, "as representatives of said donees." They annex the deed of gift to the release in order that the persons "to whom the release runs" may be identified. This transaction, if it has any meaning, was to make good the deed of gift, which, without the confirmation of the widow and next of kin, would be ineffectual, and give no title to the donees. The absence of specific words of transfer or sale is of little moment, if the intention is plain. The intention is the cardinal fact in the construction of written instruments. Where the words permit an instrument to operate in

either of two ways, it is effective for the way at which the intention points, when that can be ascertained by reading the instrument in the light of the surrounding facts. In former times certain technical words were essential in deeds of realty. Here the property was mainly personal, and, in respect to the creation of interest in personal property, formal words are not important, if the substance of the transaction intended can be ascertained. Unless the release operate as confirmation of the deed of gift, it has no operation whatever as to the donees, "to whom this release runs." The release, for greater precaution, extended to the executors in their official character, and to them as individuals, but this accentuates the fact that the paramount purpose was to ratify and confirm the deed of gift. And finally, on this point, whatever may be said as to the release operating as a transfer to the donees in the deed of gift, there can be no pretense that the widow and next of kin intended to transfer their interest in the estate to the 20 colleges. They are not in any way referred to in the written instruments, and it is difficult to perceive how a transaction can inure to their benefit, contrary to the intention of the parties, and which would give it the practical effect of rehabilitating the illegal trust.

It is said that the statute of 1860 was intended for the benefit of a wife, husband, child, or parent, and that, if they do not raise the question, the validity of a will under that statute cannot be questioned by other parties. In my view, that inquiry is not pertinent, under the facts in this case. The widow has raised the question in the most emphatic way, by transferring her interest in the estate to the donees under the deed of gift. But I am of opinion that any person who would take an interest in the property of a decedent, under the statutes of descent or distribution, in case of intestacy, may raise the question under the statute of 1860, although not holding the relationship mentioned in the statute, provided he would be entitled, if the statute had been violated, to a share in the excess willed to the corporations, and that he would not be bound by the consent of other parties to the disposition. The cases of *Harris v. Society*, 2 Abb. Dec. 316, and *Chamberlain v. Chamberlain*, 43 N. Y. 434, seem to be direct authorities upon this point. In both the testator left a widow, and no child or parent, and bequeathed more than half his property to corporations, by wills taking effect after the passage of the act of 1860. In the one case the widow consented to the invalid disposition, and in the other, by her election to take a provision in lieu of dower, she was held to be barred from claiming any other interest. In both cases the objection interposed by next of kin, remote relations of the testator, was sustained.

There are other points urged by the counsel for the appellants which are not free from difficulty, but I will not consider them. I

think the judgments below are erroneous, and that the donees under the deed of gift are entitled to the fund.

All concur with VANN, J., for affirmance, except ANDREWS, C. J., who reads for reversal. Judgment affirmed.

(55 Ohio St. 538)

JOYCE v. DAUNTZ.

(Supreme Court of Ohio. Dec. 15, 1896.)

SUBROGATION—PURCHASE OF INCUMBRANCE—MERGER.

1. As a general rule, any person having an interest in property subject to an incumbrance which may defeat or impair his title, has a right to disengage the property by payment of the incumbrance; and when he does so, if the debt is not one for which he is personally liable, he is entitled to be subrogated to the rights of the incumbrancer against the property; and subrogation arises by operation of law whenever a mortgage debt is extinguished by one entitled to redeem, other than the mortgagor or person ultimately liable for the mortgage debt.

2. Where land incumbered by mortgage has been sold by the mortgagor for its full value, and the purchase money applied in satisfaction of the mortgage debt, equity will keep the mortgage security alive for the benefit of the purchaser, and enforce it for his protection as against incumbrances subsequent thereto; and where the purchase money so applied is but a partial payment on the mortgage debt, the purchaser will be entitled to enforce the lien to the extent necessary for his reimbursement, when that will not interfere with the mortgagee's security for the unpaid balance.

3. The right of the purchaser to subrogation in such case is not affected by notice of the incumbrances when he bought and paid for the land; nor is it necessary to his right that he show an intention was then present to keep the mortgage on foot for his protection, for that, being to his advantage, the intention will be presumed.

(Syllabus by the Court.)

Error to circuit court, Pickaway county.

Action by Eliza L. Joyce against Frederick L. Dauntz. Judgment for defendant, and plaintiff brings error. Affirmed.

On the 7th day of February, 1887, Peter Ford gave a mortgage to John M. Shuster on one small parcel of land in Franklin county and five parcels in Pickaway county, containing altogether something over 400 acres, to secure his note of that date to Shuster for \$923, payable March 1, 1890. Shuster, being indebted to Eliza L. Joyce in an amount larger than the note and mortgage, transferred them to her as collateral security, and she brought the action below, which was to foreclose the mortgage on 22 acres of the Pickaway county lands; the Franklin county land, and one parcel of 68 acres of that situate in Pickaway county, having been released by Shuster from his mortgage, for a sufficient consideration received by him, and the balance of the lands covered by his mortgage, except the 22 acres having been sold in proceedings under an assignment made by Ford for the benefit of his creditors, and the proceeds exhausted in satisfaction of liens

prior to the Shuster mortgage. The 22 acres involved in this suit were not included in the assignment, because, as the petition alleges, that parcel had been sold and conveyed by Ford to Frederick L. Dauntz prior to the assignment. Dauntz was made a party defendant, and the petition prays that he be required to set up his claim, and for a sale of the premises, and the application of the proceeds in payment of the amount due the plaintiff. Dauntz filed an answer, in which he alleges that he purchased the premises in question from Peter Ford on the 21st day of December, 1889, and on the same day received a conveyance of the land, duly executed by Ford and his wife; that at the time of the purchase and conveyance the land was incumbered by two mortgages which had been given by Ford, one to Joseph S. Fullerton for \$6,000, and the other to James Corry for \$1,800, both of which were prior and superior to the Shuster mortgage, and both included all the lands described in the latter mortgage; which two prior mortgages were held by W. G. Deshler, to whom they had been transferred, and the indebtedness secured by them was then past due; that Dauntz paid for the land so purchased by him the sum of \$1,100, which sum was the full value of the land, and more than it would have sold for at forced sale. The answer then avers: "That \$150 of said purchase money was paid to said Eliza L. Joyce, plaintiff herein, and applied as a payment on the said note of \$923, in said petition mentioned, and sued on in this case, and that \$950 of said purchase money was paid by this defendant to said W. G. Deshler, who then owned and held said notes and mortgages given by said Peter Ford to said Fullerton and to said Corry, as aforesaid, to be applied on said mortgage liens, and the said sum of \$950 was applied by said W. G. Deshler on said notes and mortgages, and thus went to reduce, and did reduce, the prior liens on said mortgaged premises, to the lien of the plaintiff herein. And this defendant further says that by reason of said payment of said purchase money, \$150, on the said note of the plaintiff, and the said \$950 on the said prior liens, to the lien of the plaintiff on said land, the said plaintiff has received the full benefit of the entire value and proceeds of said sale of twenty-two acres of land, held by him as aforesaid; and the entire value of said security having been applied by this defendant, through the said Peter Ford, to the payment of prior bona fide liens on said lands held as said security as aforesaid, the plaintiff has received the benefit of the entire proceeds of said sale of said twenty-two acres of land, and ought not in equity to be allowed to ask or demand any further sum whatever out of said security." The answer prays that the plaintiff may be ordered to release the lien she is asserting against the land, and enjoined from further proceeding to enforce it; or, if the defendant is not entitled to that relief, that he may be subrogated to the lien and

rights of the prior incumbrances to the extent that the purchase money paid by him reduced the amount due on those mortgages. The court of common pleas sustained a general demurrer to the answer, and, the defendant not asking leave to amend or plead further, a judgment of foreclosure and sale was rendered in favor of the plaintiff, which judgment was reversed by the circuit court for error in sustaining the demurrer, and to reverse that judgment this proceeding in error is prosecuted.

Thomas E. Steele and Henry P. Folsom, for plaintiff in error. P. C. Smith and Milt Morris, for defendant in error.

WILLIAMS, C. J. (after stating the facts). Assuming, as is contended in behalf of the plaintiff in error, that in the ascertainment of the amount found due her in the decree of foreclosure Dauntz obtained credit for the \$150 he alleges was received by her out of the purchase money which he paid for the land, the question remains whether he is entitled to the benefit of the two prior mortgages, and to enforce them against the plaintiff, as liens superior to hers, to the extent that the purchase money paid by him for the land was applied in payment of the indebtedness they secured. It is a well-settled general rule that "when any person having a subsequent interest in the premises, and who is therefore entitled to redeem for the purpose of protecting such interest, and who is not the principal debtor primarily and absolutely liable for the mortgage debt, pays off the mortgage, he thereby becomes an equitable assignee thereof, and may keep alive and enforce the lien so far as may be necessary in equity for his own benefit. He is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection." Among the persons so protected are grantees of the mortgagor, and any subsequent grantee who has taken the land simply subject to the mortgage. Pom. Eq. Jur. § 1212. And in 1 Jones, Mortg. § 869, it is said that: "If a mortgage be paid by a person not personally liable, for the purpose of protecting his estate, he may have the benefit of it in aid of his title, without any assignment to him, or proof of any intention on his part to keep it alive." The rule, it is held, does not include a purchaser who buys the naked equity of redemption as such, and pays for nothing more, nor one who assumes the payment of the mortgage debt, and receives a corresponding reduction in the purchase price of the land, for the reason that in the one case he receives all the estate he purchased and paid for, and in the other he becomes the principal debtor; and in neither case can have any equitable right against the mortgagor, or other incumbrancer. The answer in this case will not admit of a construction warranting the conclusion that the purchase by Dauntz was of the equity of redemption eo nomine, nor that he assumed the pay-

ment of the mortgage indebtedness, or any part of it, with a reduction on that account in the price paid for the land. Neither conclusion is consistent with the allegation that he purchased the land at its full value; for that fairly indicates an intention to acquire and be invested with the complete title, and that intention is further shown by the fact that the purchase price was applied towards the payment of existing incumbrances. That application, though made with the assent of the vendor, did not constitute an assumption of the mortgage debt by the purchaser, nor render him liable to the mortgagee, nor exonerate the mortgagor. The purchaser became the owner of the land, subject to the unsatisfied incumbrances upon it. True, at the time of the conveyance to Dauntz, the condition of the mortgages had become broken, and the estate he acquired was the equity of redemption; but that is sufficient to sustain his right to subrogation, if otherwise entitled to it. He is not in the situation of a stranger or mere volunteer discharging an incumbrance. Any person having an interest in property subject to an incumbrance which may defeat or impair his title has a right to disengage the property from the incumbrance by payment, and, upon payment, if the debt is not one on which he is ultimately liable, he is entitled to subrogation to the rights of the incumbrancer against the property. *Sheld. Subr. § 12.* "Subrogation arises by operation of law whenever the mortgage debt is extinguished by one other than the mortgagor, who is entitled to redeem." 1 *Jones, Mortg. § 874.* There can be no doubt that Dauntz, after his purchase, had the right to redeem by payment of the mortgages. And the rule is frequently applied in favor of the owner of the equity of redemption who has discharged an incumbrance on the land, which was in existence when he became the owner. Redemption consists in payment, and hence in such case subrogation by operation of law results from payment of the mortgage debt; and it is not essential to that result that there be an avowed intention at the time to keep the mortgage alive for the protection of the owner of the equity of redemption; an intention to that effect will be presumed. "Where an owner of lands who is not primarily and personally liable to pay a debt secured by mortgage or other charge on the land, pays it, he may keep the lien alive as a security for himself against other incumbrances or titles. Whether he does so is a question of intention; and when it is evidently for his benefit, that intention will be presumed." *Pom. Eq. Jur. § 798.* "The rule that payment by a mortgagor extinguishes the mortgage is founded upon the reason that there could generally be an advantage to him in keeping on foot his own mortgage against his own estate. But no such reason exists when a purchaser pays an incumbrance existing before the time of his purchase. Frequently there is an advantage in keeping the

mortgage on foot as a security, and whenever there is such advantage the purchaser is entitled to hold it as a separate title." 1 *Jones, Mortg. § 869.* Nor is it necessary, as counsel contend, that, in order to secure the purchaser in this right, he should be ignorant of the mortgage or of the subordinate liens at the time of his purchase. "The most common instance where the doctrine of subrogation is applied is in the case of purchasers of the equity of redemption with or without notice of existing liens. Thus, when a purchaser of land pays off a debt of his grantor, secured by a deed of trust upon the premises as a part of the purchase money, to protect his own property from sale, he will be subrogated to the deed of trust as against an intervening lien of the grantor. Here the payment is not voluntary, as if made by a stranger, but is made by the purchaser to protect his own interest in the property. And in such a case a court of equity will keep alive the lien in his favor, notwithstanding it has been formally released without his knowledge and consent." *Semon v. Terhune (N. J. Ch.) 25 Am. Law Reg. (N. S.) 465, note, 2 Atl. 18.* It is not believed, however, that equity will so keep the lien on foot after its cancellation of record, as against rights intervening between that and the assertion, in the proper mode, of the right of subrogation. But that question does not arise in this case. The Shuster mortgage was taken while the two prior mortgages were subsisting liens, and before Dauntz made his purchase.

It does not appear from the answer whether, when the money paid by Dauntz on the land was applied on the mortgages held by Deshler, the amount then due on them exceeded the payment, or the payment was sufficient to satisfy the balance then remaining due. But that does not seem important here, for if it were only a partial payment of the mortgage debts, leaving an unsatisfied balance due on them, as against which and the holder of the mortgages there could be no equity in favor of Dauntz that could interfere with the enforcement of the mortgage security, his right of subrogation as against the later liens, to the extent of the payment, would nevertheless exist. It has been held that a purchaser of an equity of redemption incumbered with four different liens, who paid off the first two liens and part of the third, was subrogated by the payment to the rights of the creditors under their respective liens to the extent they were so paid, and entitled to set them up and enforce them as against the holder of the fourth lien. *Walker v. King, 45 Vt. 526.* The same principle is recognized in *Sidener v. Hawes, 37 Ohio St. 532.* And see *Simpson v. Del Hoyo, 94 N. Y. 180.* Deshler was not made a party to the foreclosure suit, which probably would have been done if anything remained unpaid on his mortgages. At all events, he is not asserting any claim against this land, nor interposing

any objection to the right asserted by Dauntz; and a consideration of his rights will be in time when properly brought before the court.

But it is insisted that, as subrogation is founded in equity and can be invoked only when necessary to secure some equitable right, the remedy is inappropriate in this case, because it would operate unjustly to the plaintiff. If it would, the remedy should be denied; but such, we think, will not be its effect. Payment of the full value of land purchased ordinarily entitles the purchaser to a good title; and when that payment is made towards the satisfaction of a paramount incumbrance, an intention to protect the title by relieving the land of the incumbrance is sufficiently obvious. There is no room for an inference that by payment on the first mortgage liens there was an intention merely to advance the lien of the later mortgage or to benefit its holders; although the plaintiff, as a partial holder of that mortgage, was benefited to the full amount of the payment by reducing to that extent the prior liens on the other lands, included in all of the mortgages, and thus augmenting the value of her security. Her position has in no way been changed for the worse on account of the payment, and, in case the defendant is allowed the benefit of the prior mortgages for his reimbursement, her security remains precisely what it was when she took a partial transfer of the Shuster mortgage; while, on the other hand, if the defendant is denied that remedy, he must lose the property he bought and paid for, or pay for it twice, in order to keep it. It is here his equity arises which enables him to call to his aid the doctrine of subrogation.

The case of *Carter v. Goodin*, 3 Ohio St. 76, cited, and apparently much relied on, by counsel for plaintiff in error, we do not regard as irreconcilable with this claim of the defendant in error. There it was sought by the grantees of land, under a deed that was defective as a release of dower, to avail themselves of a mortgage executed by the grantor before the conveyance, in which the wife had joined, to defeat an action brought by her for dower in the land, after the husband's decease. The purchase money paid was applied in discharge of the mortgage before the debt became due, and before there was any breach of its condition. The mortgage was given to secure the debt of the husband, and the grantees relied entirely on the release of dower contained in their deed; which, however, proved to be insufficient. The decision is placed upon these grounds, as shown by the opinion, in which it is said: "This conveyance, therefore, upon which it was the evident intention of the parties to rely for their title, failing to contain a valid release of the dower, the grantees cannot help themselves by a resort to a satisfied mortgage, and especially one which was discharged by the mortgagor himself before condition broken, and therefore before even the mortgagee himself had acquired any right which he could enforce against the

premises." A more satisfactory ground for the decision perhaps may be found in the fact that the charge created by the mortgage on the wife's dower interest was for the security of her husband's debt, and not her own; so that the relation which she and her dower interest sustained to the creditor was analogous to, if not strictly, that of a surety, which gave her the right to insist on the application of her husband's estate to the satisfaction of the mortgage, to the exoneration of her own; and, as his property—the consideration paid him for the land—was so applied, the release of her estate thus accomplished simply secured to her what she was equitably entitled to. *Mandel v. McClave*, 46 Ohio St. 407, 22 N. E. 290. If her interest in the land had been subjected to the payment of the mortgage debt, leaving any part of her husband's estate therein unappropriated to that purpose, she would herself have been entitled to be subrogated to the mortgage as against later liens, and would not be estopped from maintaining that right against the grantees in the deed, for the deed was not binding on her. See 24 Am. & Eng. Enc. Law, p. 228, and cases there cited.

The answer of Dauntz is sufficient to entitle him to priority over the plaintiff's lien, to the extent that the consideration paid by him on the land was applied towards the satisfaction of the prior mortgages. Judgment affirmed.

(55 Ohio St. 466)

MUSSER, Auditor, v. ADAIR.

(Supreme Court of Ohio. Dec. 15, 1896.)

COUNTY AUDITOR—ERROR IN MAKING TAX OMISSIONS—APPELLATE JURISDICTION—INJUNCTION.

The proceeding of county auditors, under sections 2781, 2782, Rev. St., authorizing such auditors, in certain cases, to make additions to the valuation of the property of individuals returned for taxation, cannot be reviewed on error under section 6708, Rev. St. The remedy of the individual for errors or mistakes in such cases, prejudicial to him, is by injunction, under section 5848, Rev. St.

(Syllabus by the Court.)

Error to circuit court, Scioto county.

The suit below was commenced in the court of common pleas by Mary O. Adair against Filmore Musser, auditor of Scioto county, and Mark Wells, its treasurer. It purports to be a petition in error by the plaintiff to the auditor and treasurer of the county. The plaintiff avers that on January 21, 1891, the auditor, on the application of certain persons, employed as tax inquisitors, made certain additions to her returns for the years 1886, 1887, 1888, 1889, 1890, and 1891, being for credits claimed to have been omitted by her in making her returns for these years, with an addition of 50 per centum on the amounts added for each year as a penalty. As the record of the auditor made in the case the notice is set out, and its service by Samuel G. Harper; the auditor's statement of the facts;

his certificate of the additions as made, and their entry upon the duplicate of 1891 as required by statute. The "statement of facts" is as follows: "In the matter of the returns of moneys and credits for taxation made by Mary O. Adair for the years 1886, 1887, 1888, 1889, 1890, and 1891. In obedience to a notice issued by Filmore Musser, auditor of Scioto county, Ohio, and served upon said Mary O. Adair, who failed to appear, but sent her brother, J. C. Adair, who, on the 20th day of October, 1891, appeared before said auditor at his office in Portsmouth, Ohio, in said county, and said J. C. Adair was duly examined under oath touching the returns of moneys and credits of said Mary O. Adair to the assessor for said years, and he was given an opportunity to show that the returns made by her for said years of her moneys and credits were correct, but he failed to satisfy said auditor of the correctness of said returns for any one of said years; and thereupon said auditor, under sections 2781 and 2782 of the Revised Statutes of Ohio, proceeded to correct said returns, and make the proper entries upon the tax lists and duplicates in his office; and upon the sworn testimony of said J. C. Adair and the records of the recorder's office of Scioto and Lawrence counties, and other competent and satisfactory evidence, said auditor finds that the returns of said Mary O. Adair of her moneys and credits for each of said years were false, and from the same evidence said auditor finds that said Mary O. Adair ought to have returned as and for her true returns to the assessor for said years the following, to wit: For 1886, \$4,867; for 1887, \$4,867; for 1888, \$5,539; for 1889, \$6,430; for 1890, \$6,345; for 1891, \$6,645. And from the records in his office said auditor finds that said Mary O. Adair made the following returns of moneys and credits, and no more, to wit: For 1886, \$2,500; for 1887, \$2,500; for 1888, \$3,500; for 1889, \$3,500; for 1890, \$3,500; for 1891, \$3,500. And from the foregoing facts and figures said auditor finds that said Mary O. Adair ought to be, and she is hereby, charged with taxes upon the following valuations, which include the penalty of fifty per cent. prescribed by law upon the true returns which ought to have been made, to wit: For 1886, \$4,800; for 1887, \$4,800; for 1888, \$4,808; for 1889, \$6,145; for 1890, \$6,017; for 1891, \$6,467. And said auditor finds that there is now due and payable as taxes on said valuations the following sums, to wit: For 1886, \$87.34; for 1887, \$88.32; for 1888, \$94.24; for 1889, \$113.08; for 1890, \$111.31; for 1891, \$103.47,—making the total taxes \$598.86 now due and payable to the treasurer of said county. And thereupon said auditor has this day placed upon the proper tax lists and duplicates said sums against said Mary O. Adair, and has certified the same to the treasurer of said county for collection, and thereupon he files this statement of facts in his office, as required by section 2782 of the Revised Statutes

of Ohio. Filmore Musser, Auditor of Said County. Portsmouth, Ohio, January 21, 1892." Twenty-seven different assignments of error are then made upon the transcript of the record of the auditor, and the papers in the case as certified by the auditor, most of which are, however, simply averments of facts not disclosed by the record, or any of the papers. The plaintiff finally, however, elected to stand upon her assignments of error of law. The cause was then argued and submitted to the court, and the court, being of the opinion that there were no errors of law apparent on the record in the proceedings of the auditor, affirmed the same. Error was then prosecuted to the circuit court of the county. The case having been submitted to the circuit court, it found that there was error apparent in the record in this, to wit: "(1) That the notice alleged to have been served upon the said Mary O. Adair to appear before the auditor was insufficient in law. (2) That no notice was served upon the said Mary O. Adair to appear before the auditor before he made the entry upon the tax list and duplicate of the taxes charged against her, as shown in the auditor's statement of facts; and that said Mary O. Adair was not given an opportunity to show that her returns of property for taxation for the years in question were correct before the auditor made the entry upon the tax list and duplicate of the taxes charged against her as shown by his statement of facts." Thereupon the court reversed the judgment of the common pleas, and held that the proceedings of the auditor should be held for naught. The case is here for reversal of the judgment of the circuit court. Reversed.

John C. Milner and A. C. Thompson, for plaintiffs in error. Nelson W. Evans, for defendant in error.

MINSHALL, J. (after stating the facts). The proceeding below purports to be a petition in error to the auditor of Scioto county, the auditor being made the defendant. This seems a little novel. The court rendering the judgment is not ordinarily made the defendant in a proceeding to reverse it. But this novelty must be recognized in practice if this proceeding can be maintained. We do not think it can. A court can only review the judgment of a court on a proceeding in error. In *Ex parte Logan Branch Bank*, 1 Ohio St. 433, an appeal was taken by the bank from a decision of the auditor of state affecting it to the supreme court under a provision of a statute expressly authorizing such an appeal. This court has such appellate jurisdiction as may be conferred on it by law. The court dismissed the appeal on the express ground that it could not entertain it. The court held that the auditor did not act judicially as a court, and an appeal can only be had from one court to another.

A proceeding in error is in the nature of an appeal; in fact, invokes appellate juris-

diction. The holding in this case is in accordance with the established construction of appellate jurisdiction. Story, in his work on the Constitution (section 1761), says: "The essential criterion of appellate jurisdiction is that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. In reference to judicial tribunals, an appellate jurisdiction, therefore, necessarily implies that the subject-matter has been already instituted in and acted upon by some other court, whose judgment or proceedings are to be reversed." See also, Elliott, App. Proc. §§ 16, 17. The auditor of a county, under sections 2781, 2782, Rev. St., does not act as a judge. He is required to inquire, and may take evidence to inform his mind, and must use his best judgment in the matter; but in all this he does not act judicially, within the meaning of the constitution that all judicial power is conferred on its courts. If he did, then the statute would be invalid, for he is not created by law and elected as a judge. The power to hear and determine, however much judgment and discretion is required, does not, of itself, make a judge, in the judicial sense. The power simply indicates jurisdiction in the officer of the question to be heard and determined. Whether the power conferred is judicial or not depends not only upon the nature and character of the question, but upon the manner and circumstances under which it is to be determined. All ministerial officers are required to exercise more or less consideration and judgment in the performance of their duties. In *Murray's Lessee v. Improvement Co.*, 18 How. 272, it was held that the power conferred by an act of congress on an auditor of the treasury to audit and ascertain the amount due from a collector of customs, and on which a distress warrant may be issued and levied on the property of the delinquent by the solicitor of the treasury, does not confer judicial power on the accounting officer, within the meaning of the national constitution, conferring judicial power on its courts; nor did it violate the guaranty of due process of law, though no notice is required to the delinquent. It is said in the opinion: "That the auditing of the accounts of a receiver of public moneys may be, in an enlarged sense, a judicial act, must be admitted. So are all those administrative duties, the performance of which involves an inquiry into the existence of facts, and the application to them of rules of law." The opinion was delivered by Justice Curtis, and is remarkable for its research and ability. *State v. Hawkins*, 44 Ohio St. 98, 109, 5 N. E. 228. Judicial powers are those conferred on judges as courts in the hearing and determination of questions arising in litigation between parties in actions pending before them. *State v. Harmon*, 31 Ohio St. 250; *De Camp v. Archibald*, 50 Ohio St. 618, 624, 35 N. E. 1056. Elliott, App. Proc. § 8. Ex parte actions are only a

seeming exception to this rule. In habeas corpus, for instance, the proceeding, though styled ex parte, is, in fact, a proceeding between a party claiming his liberty and the person claiming the right to restrain him of it. In short, judicial power is the power exercised by courts in hearing and determining cases before them, or some matter incidental thereto, and of which they have jurisdiction. Such powers cannot be conferred on a ministerial officer. A county auditor cannot be empowered to hear and determine an issue between A. and B. as to title to land, or to a horse, or as to whether A. should recover of B. a certain sum of money. These are judicial questions, and can only be determined in a proper proceeding by a court. But as to whether a certain tract of land or a horse is owned by A., and should be taxed as his property, or that B. owes A. a certain sum of money which should be returned by A. as a "credit," are different questions; and, however much inquiry and consideration may be involved in their determination, he determines no question of title as between adversary parties that is binding on them. Therefore a county auditor, under the sections above referred to, in making additions to the returns of a person of his property for taxation, does not act as a judge. He acts simply as an agent of the state in the valuation and assessment of the property of its citizens for the purpose of taxation. He is simply a ministerial officer, and none other. His proceedings under these sections make a prima facie case for the collection of the tax based on the additions. The citizen cannot be heard to allege any want of due process of law in the matter, any more than he could of the returns of a township assessor. The township assessor, the auditor, and the board of equalization are all parts of the same system, devised by the legislature for the assessment of the property of individuals for the purpose of taxation. The law provides the individual an adequate remedy where any injustice has been done, or where he thinks it has been done. Section 5848, Rev. St., expressly provides that courts of common pleas and superior courts shall have jurisdiction to enjoin the illegal levy of taxes or assessments or the collection of either. Such provisions have uniformly been held to afford the citizen an adequate remedy against any unjust or illegal tax or assessment. *Cooley, Tax'n*, 49, 51; *McMillen v. Anderson*, 95 U. S. 37; *Hagar v. Reclamation Dist.*, 111 U. S. 701, 4 Sup. Ct. 633; *Davidson v. New Orleans*, 96 U. S. 97; *Adler v. Whitbeck*, 44 Ohio St. 539, 568, 9 N. E. 672. In *McMillen v. Anderson* it was held that the revenue laws of a state do not violate the amendment guarantying due process of law, "although they do not provide that the person shall have an opportunity to be present when the tax is assessed against him, or that the tax shall be collected by suit"; and that "a statute which gives a per-

son against whom taxes are assessed a right to enjoin their collection, and have their validity judicially determined, is due process of law, notwithstanding he is required, as in the other injunction cases, to give security in advance." In view of this statute and the propriety and adequacy of the remedy afforded, there is no ground for holding that it was the intention of the legislature that the acts of the auditor, in making additions to the returns of an individual of his property for taxation, should be reviewed on error in the common pleas, or any other court.

If it be asked, what was the purpose of the provision requiring the auditor to file in his office a statement of the facts or evidence on which he acted, it may be replied that it could not have been for the purpose of a review by the courts in a proceeding in error, or more would have been required than to simply "file" it in his office. If that had been the purpose, it would certainly have provided for the taking and filing of bills of exceptions, setting forth the evidence, and the making of a record. It was most probably designed as information to the taxpayer, and also as a check on inconsiderate haste, as men always act with more care when they are required to state their reasons.

In the remedy by injunction the court exercises an equitable jurisdiction. Mere irregularities are of no importance, unless they affect the substantial rights of the plaintiff. Notice must be given, for the statute requires it; but it is not important how the notice is served, if the party have a fair opportunity to be heard before the auditor placed the additions upon the duplicate for collection. The court may enjoin the whole tax, or a part of it, or remit the penalty, as the facts and justice of the case may require. The suit affords every remedy the citizen can require consistently with the interests of the state, which cannot be delayed in the collection of its revenue without more or less embarrassment to all the public interests. "Administrative process of the customary sort is as much due process of law as judicial process. We should meet a great many unexpected and very serious embarrassments in government if this were otherwise." Cooley, J., in *Welmer v. Bunbury*, 30 Mich. 201.

The intense feeling exhibited by counsel for the defendant in error in his brief against the law would be more than justified if its enforcement can only produce the injustice and wrong so severely denounced. But in view of the fact that it is simply designed, not to make one pay more than another, but to compel all to contribute proportionately from their property to the support of a common government, there seems little ground for the severity of his arraign-

ment of the law and those concerned in its enforcement.

Reliance is placed on *Haff v. Fuller*, 45 Ohio St. 495, 15 N. E. 479, and *Lewis v. Laylin*, 46 Ohio St. 663, 23 N. E. 288. These cases, as will be shown, must be confined to their particular facts. The first was a suit to enjoin the construction of a ditch. In such cases records are required to be made and kept of their proceedings; and it was there held that a proceeding in error is the proper remedy where the defects complained of are apparent on the face of the record, and that injunction is only proper where they do not, and have to be supplied by averment. The same may be said of *Lewis v. Laylin*. It grew out of a road improvement under the two-mile law; and the assessments were questioned on irregularities in the proceedings, and averments made of matters allunde the record. The only evidence introduced of the irregularities charged was the record itself. These the court regarded as of no consequence, and remarked that the case could be disposed of for this reason on the decision of the former case. In *Genin's Ex'r v. Auditor*, 18 Ohio St. 534, no question was made or considered by the court as to the review of the proceedings of the auditor on error. The question passed sub silentio the case, and is, therefore, not authority on the point. Authority for a proceeding in error in such cases is based upon the clause in section 6708, Rev. St., conferring jurisdiction in error on the court of common pleas to review the judgments of justices of the peace and probate courts, and by which it is extended to "any other tribunal, board, or officer exercising judicial functions, and inferior in jurisdiction to the court of common pleas." This clause of the section, so far as it relates to ministerial officers, is open to the objection on which *Ex parte Logan Branch Bank* was decided. This case is sound in principle, and should not be departed from further than has been done in the two preceding cases. The above clause in section 6708 cannot be applied to cases coming within the provisions of section 5848, Rev. St., affording a remedy by injunction against the collection of illegal taxes and assessments. On well-settled principles of construction, the provisions of this section must be excepted out of the generality of the language used in section 6708. If not, a statute highly remedial would, in a measure, be emasculated.

We are therefore of the opinion that there was no authority for the commencement of the proceeding in error in the common pleas, and that the judgment of the common pleas and of the circuit court should be and are reversed, and that the petition in error in the common pleas be dismissed. Judgment accordingly.

(55 Ohio St. 446)

MEIER et al. v. FIRST NAT. BANK OF CARDINGTON et al.

(Supreme Court of Ohio. Dec. 8, 1896.)

CO-PARTNERSHIP — PARTNERSHIP DEBT — JUDGMENT ON NOTE — PREFERENCE AMONG EXECUTIONS — INTERVENING LIENS.

1. A promissory note, signed by all the members of a co-partnership, when given for a consideration received by the firm, is as effectual to create a partnership debt as if signed in the firm name.

2. The recovery of a judgment against the makers, on such a note, does not extinguish the partnership liability, nor exclude the creditor from participation in the distribution of the effects of the firm, in case of its insolvency, among the partnership creditors.

3. Equity will look behind the form of a judgment, and inquire into the nature of the demand on which it is founded, and the relation of the parties, when necessary for the preservation of equitable rights.

4. The provision of section 5382, Rev. St., which forbids preference among executions against the same debtor sued out during the term at which the judgment was rendered, or within 10 days thereafter, applies only to executions sued out on judgments of the same court.

5. The rule of equality established by that provision is not defeated or affected by the intervention of another lien having legal priority over the judgments and executions that are subsequent to such lien. If the amount of money made is insufficient to satisfy all the executions, the whole amount applicable to each and all of them must, notwithstanding such intervening lien, be distributed to all the execution creditors, in proportion to the amounts of their respective demands.

(Syllabus by the Court.)

Error to circuit court, Franklin county.

Petition by the First National Bank of Cardington against Lewis Meier & Co. and others for distribution of proceeds of executions against Stiles Bros. From the judgment Lewis Meier & Co. and others bring error. Reversed.

The controversy in the courts below was over a fund arising from sales on executions of the property of George P. Stiles and Abram Stiles, brothers, who were clothing merchants, having a store in the village of Ashley, in Delaware county, where they carried on business as partners under the name of the Ashley Clothing Company, and another store in the village of Cardington, in Morrow county, where they carried on a like business under the partnership name of the Cardington Clothing Company. Becoming involved, and unable to meet their debts, judgments were obtained against them by a large number of their creditors, executions were issued on these judgments, and the fund in question is the proceeds of the sale of the property in the two stores, seized on these writs. The controversy relates to the order in which distribution shall be made of the fund among the creditors. The first judgments obtained were two recovered by the First National Bank of Cardington, in the court of common pleas of Ashland county, at its September term, 1893. They were so obtained on the 20th day of September, 1893, on notes signed by George P. Stiles and

Abram Stiles, with warrants of attorney attached, upon which the judgments were taken by confession. On the same day that these two judgments were recovered, executions were issued on them to the sheriffs of Delaware and Morrow counties, respectively, who, on the same day, levied the writs on the stock of goods in their respective counties. These were the first levies on the property. On the next day, September 21, 1893, the same bank obtained two judgments in the court of common pleas of Franklin county, upon notes executed by George P. Stiles and Abram Stiles, and on that day caused executions issued on them to be levied on the same property. And on that day, Sperry & Wormstaff also recovered a judgment in the same court, against the same defendants, on notes executed in the same way, and caused an execution issued thereon to be levied on the same property, on the same day. These three levies were the next in point of time. All of these judgments were rendered against George P. Stiles and Abram Stiles, without any mention of a partnership existing between them, but upon indebtedness contracted in the business, and for the benefit of the firm, and on its credit. On the 23d day of September, 1893, in the court of common pleas of Ashland county, which was during its September term of that year, other creditors, who are plaintiffs in error here, recovered judgments against George P. Stiles and Abram Stiles, described as partners, and on the same day caused executions issued on their respective judgments to be levied on the same property that was taken on the executions issued on the judgments recovered in that court by the bank; and these levies were the next, or third, in point of time. These judgments of the plaintiffs in error exceed in the aggregate the sum of \$7,000. Afterwards, but still at the September term, 1893, of the court of common pleas of Franklin county, others of the plaintiffs in error, creditors of the Stiles Bros., recovered judgments in that court, and caused executions to be issued thereon, and levied on the same property, during that term of the court. These were fourth in point of time, and amount to a large sum. The property was sold, producing a fund amounting to \$6,996.27, which, by agreement of all parties, was paid over to the clerk of Franklin county for distribution as might be ordered by the court. Whereupon the First National Bank of Cardington filed its petition in the court of common pleas of Franklin county to marshal the liens and bring about a distribution of the fund according to the rights of the parties, making all the creditors who caused execution to be levied on the property parties to the action. The case went to the circuit court on appeal, and was there submitted upon an agreed statement of facts, which, so far as they are deemed material, are substantially as above set forth; and upon these facts that court

ordered distribution to be made of the fund as follows: "(1) To the payment of the costs of this suit, and the costs on the order of sale in the case of Oppenheimer, Krauss & Co., amounting to the sum of \$372.46. (2) To the plaintiff the amount of its said four several judgments and costs, amounting in the aggregate to the sum of \$3,895. (3) To Sperry & Wormstaff, the amount of their said judgment and costs, \$566.50. (4) That the balance of said fund, being found insufficient to pay the remaining judgments in full, be distributed pro rata among the defendants who recovered judgments in the Ashland common pleas, on the 22d day of September, 1893, the said pro rata amounts being as follows, to wit: To Lewis Meier & Co., the sum of \$66.26; E. B. Robbins & Co., \$122.51; Garson, Meier & Co., \$253.20; L. C. Wachsmuth & Co., \$140.05; the Gem Shirt Co., \$262.05; Bergunder Bros. & Co., \$363.90; Legler, Barlow & Co., \$68.94; Levy, Price & Co., \$190.73; Michaels, Stern & Co., \$315.26; Kahn Bros. & Felthelmer, \$65.17; G. Sturm & Sons, \$284." The creditors who were given a pro rata share of only what remained after deducting the judgments of the bank and of Sperry & Wormstaff, and the creditors who recovered judgments in the Franklin county common pleas, and levied their executions at the same term, but on a day subsequent to the judgments recovered in that court by the bank and Sperry & Wormstaff, being dissatisfied with the distribution as ordered by the circuit court, have brought the case on error to this court.

Thomas H. Rickets, T. J. Keating, and M. R. Patterson, for plaintiffs in error. Watson, Burr & Livesay, W. C. Vaughan, and Olds & Olds, for defendant in error bank. W. L. Merwine and Charles D. Beardsley, for defendants in error Sperry & Wormstaff.

WILLIAMS, C. J. (after stating the facts). The plaintiffs in error contended that distribution according to the judgment of the circuit court is erroneous (1) in directing payment of any part of the fund to the defendants in error the First National Bank of Cardington and Sperry & Wormstaff; or, if not to that extent, then (2) in awarding them the full amount of their judgments out of the fund in controversy.

1. It is contended that they are not entitled to any share of the fund, because the notes upon which their judgments were recovered were executed in the individual names of the makers, George P. Stiles and Abram Stiles, without subscribing the firm name, or otherwise indicating the existence of any partnership relation between them, or intention to bind the firm, and the judgments were rendered in the same way; from which it is argued that these defendants in error must be treated as the individual creditors of George P. and Abram Stiles, and excluded

from participation in the fund in controversy, under the familiar rule which gives firm creditors of an insolvent partnership priority in the distribution of the firm effects over the individual creditors of its members: It is conceded, however, that the notes were given in partnership transactions, with the intention of binding the firm, and for considerations which went to its benefit; and it seems indisputable that they created partnership obligations. It is well settled that a partnership debt may be created by the execution of a note by all of the members of the firm, as fully as by one member subscribing the partnership name. *Chit. Bills*, pp. 52, 53; *Woolen Co. v. Jullard*, 75 N. Y. 535; *Mix v. Shattuck*, 50 Vt. 421; *Austin v. Williams*, 2 Ohio, 61. The adoption of a firm name is largely for convenience in making contracts binding on all the members by its use, thus obviating the necessity of securing the individual assent of and execution by each of the partners, which, when the members are numerous, might not only be inconvenient, but sometimes impracticable. But it is contended that, as the individual creditors have priority of right to the individual property of the partners, as against the partnership creditors, the former cannot, at the same time, be allowed the advantages of partnership creditors, and thus share equally with creditors of both classes, and that, by putting their notes in judgment against George P. Stiles and Abram Stiles, without any designation of their partnership character, or reference to their partnership relation, the bank and Sperry & Wormstaff have conclusively elected to stand as individual, and not as partnership, creditors. It is not claimed that they have sought satisfaction of their judgments out of any individual property of the partners, nor that there is or was any property of that kind which could be reached. The judgments follow the notes, and rendering judgments in that form did not extinguish the character of the notes as partnership obligations, nor defeat their legal effect as such. Courts of equity look behind the forms of judgments, and inquire into the nature of the demands on which they are founded, and the relation to the parties, when necessary to the preservation of equitable rights; so that if, from the form of the notes as executed, a presumption should arise that they were intended to create an individual obligation of the makers, and nothing more, such presumption is not conclusive, but it may, nevertheless, be shown that they were in fact given for considerations which went to the use of the firm, and which were parted with on its credit, and thus show they represent partnership debts. And there can be no reason why that may not be done after judgment rendered on them, as well as before, especially as against other creditors, in a proceeding in equity involving the right, as between them, of participation in a fund

produced by the partnership property. The rights of the creditors, on that state of facts, against the firm, are in no respect different from what they would be if the firm name were attached to the notes; and execution upon the judgments must, therefore, be as available against the partnership property. Whether, if the members of this firm were possessed of individual estates which these defendants in error were endeavoring to have applied to the satisfaction of their judgments, they would be denied participation in the partnership effects, or put to an election as to the fund they would pursue, is a question not presented. There is nothing in the case to indicate an intention on their part to seek satisfaction of their judgments out of any individual estate of either of the partners, or abandon any rights against the partnership effects. On the contrary, their proceedings on their judgments were promptly and exclusively against the partnership property, and, on those of the bank, prior in order of time to any lien acquired by any other creditor.

2. The method of making distribution among the execution creditors entitled to share in the fund is controlled by section 5382, Rev. St., which provides that, "When two or more writs of execution against the same debtor are sued out during the term in which judgment was rendered, or within ten days thereafter, and when two or more writs of execution against the same debtor are delivered to the officer on the same day, no preference shall be given to either of such writs; but if a sufficient sum of money be not made to satisfy all executions, the amount shall be distributed to the several creditors in proportion to the amount of their respective demands; in all other cases the writ of execution first delivered to the officer shall be first satisfied; and the officer shall indorse on every writ of execution the time when he received the same; but nothing herein contained shall be so construed as to affect any preferable lien which a judgment on which execution issued has on the lands of the judgment debtor." The general rule established by that section is that, as between execution levies, the writ first delivered to the officer shall have priority, and subsequent levies shall have precedence in the order in which the writs are received by the officer. This is in accordance with the general principle, which accords the preference to the diligent creditor over one less diligent. But to this general rule the statute has prescribed two qualifications. One is to the effect that there shall be no priority as between executions sued out during the term of the court in which the judgments are rendered, or within 10 days after the term; and the other applies the same rule of equality as between all executions that are delivered to the officer on the same day. The first of these qualifications governs the case before us, and it is clear the equality

of right, as between the executions there referred to, relates to those issued on judgments rendered in the same court, and at the same term. Executions issued from different courts, though on judgments rendered at the same time, and during corresponding terms, do not come within the provision, but take priority from the time of their delivery to the officer. But, when several executions issued on judgments rendered in the same court and at the same term are delivered to the officer during that term, or within 10 days thereafter, they are by the express terms of the statute made equal in right, and that equality is not disturbed by the intervention, between the judgments or levies, of another lien, which becomes superior to the judgments or levies that are subsequent thereto. The statute makes no exception to the rule it prescribes with respect to such execution, on account of intervening liens, but includes all executions against the same debtor sued out and delivered to the officer at the term of the rendition of the judgment, or within the designated time thereafter, and in plain and unequivocal terms forbids any preference between them on any account, and distinctly requires that, if a sufficient amount is not made to satisfy all the writs, it shall be distributed to the execution creditors in proportion to the amounts of their several demands. When different creditors place executions in the hands of the officer on the same day, the last one doing so is not regarded as so lacking in diligence as to postpone his writ until the first one delivered to the officer shall be satisfied; and there is no manifest impropriety in extending the same rule of equality to creditors who recover judgments against the same debtor at the same term of court, and cause executions to be issued thereon and levied during the term, or within a short time thereafter. A similar rule has been adopted by another provision of the statute which denies priority to liens obtained by filing transcripts of justices' judgments with the clerk of the court during vacation over judgments rendered at the next ensuing term. Rev. St. § 5378; *Babbett v. Morgan*, 31 Ohio St. 273. A like principle is also adopted in that provision of the statute which makes judgments recovered at the same term of the court equal as liens on the debtor's real estate situated in the county where the judgment is rendered.

The race between creditors generally begins with the apparent or actual insolvency of the debtor; and, when several judgments are procured at the same term of the court, followed by executions, the insolvency of the debtor is usually obvious or rapidly approaching, and in such case equality among creditors of equal merit works no injustice. But, whatever may have been the reason for the adoption of the statutory provision under consideration, the courts are not at liberty to disregard it; and, when applied to the case

In hand, it requires a distribution of the fund involved different from that ordered by the judgment below. That distribution should be as follows: After the payment of the costs of the action in the courts below, and the costs of the sale, as ascertained by the circuit court, there should first be set aside, out of the fund, the amount of the two executions issued on the judgments recovered by the Cardington Bank in the Ashland county common pleas on the 20th day of September, 1893; those executions being the first levied, and superior in right to the executions issued from Franklin county and levied the next day. Next, there should be deducted from the remainder of the fund the amount of the executions issued on the judgments recovered by the bank and Sperry & Wormstaff in the Franklin county common pleas on the 21st day of September, 1893; they being superior in right to the executions sued out on the judgments rendered on the following day in the Ashland county common pleas in favor of the plaintiffs in error. This amount should be set aside for distribution as hereafter directed. The balance of the fund then remaining being insufficient to satisfy the executions of the plaintiffs in error, issued on their judgments recovered in the Ashland county common pleas, which are next in order of priority, must be added to the amount set aside for the two Ashland county executions of the bank, and the aggregate amount they produce applied towards the satisfaction of all these Ashland county executions, in proportion to their respective amounts; and the amounts set aside for the Franklin county executions of the bank and Sperry & Wormstaff must be distributed in like proportions among all the executions that were sued out on judgments rendered at the same term of the court of common pleas of that county, and levied during that term. This distribution is in accordance with the rule laid down in *Babbett v. Morgan*, supra, and with a recent decision of this court in the unreported case of *Carriage Co. v. Ford*, from Licking county. The judgment of the circuit court must, therefore, be reversed, and judgment rendered for the plaintiffs in error, in accordance with this opinion. Judgment accordingly.

(167 Mass. 283)

COMMONWEALTH v. BILLINGS.

(Supreme Judicial Court of Massachusetts, Suffolk. Jan. 8, 1897.)

RECEIVING STOLEN PROPERTY—HARMLESS ERROR—EVIDENCE—PROOF OF OWNERSHIP—JOINT INDICTMENT—CONVICTION.

1. Where defendant is convicted on a few of many counts in an indictment, errors in the admission of evidence on counts on which defendant was acquitted were without prejudice, and are not grounds for a new trial.

2. On a trial for receiving stolen property, where defendant has said that he obtained the goods from L., a policeman, who would never tell him where he got the goods, further than that he "stood in with clerks," and who gave

them to him for carrying certain packages to L.'s house, it may be shown that there was a search of L.'s house, and the discovery of a large amount of property there, such as is not ordinarily found in a dwelling house, and a comparison of articles there found with others found in defendant's house, as tending to establish that defendant was receiving property, believing it to have been stolen.

3. Where a trial for receiving stolen property proceeds against one on a joint indictment, he may be convicted of the whole or any part of the offense.

4. It is essential to a conviction of the offense of receiving stolen property that the ownership of the property shall be proved as alleged in the indictment.

5. On a trial for receiving stolen property, the mere fact that the articles in question are similar in each case to the property kept for sale by the person alleged in the indictment to be the owner is not, without identification or other corroborating circumstances, sufficient to establish the ownership as alleged.

Exceptions from superior court, Suffolk county; Albert Mason, Chief Justice.

George H. Billings was convicted of receiving stolen property, knowing it to have been stolen, and brings exceptions. In part sustained, and in part overruled.

M. J. Sughrue, First Asst. Dist. Atty., for the Commonwealth. Melvin O. Adams, for defendant.

KNOWLTON, J. The defendant was convicted only on the eighth, sixteenth, and twenty-fourth counts of the indictment; and, if there were any errors in the admission of evidence affecting only counts upon which he was acquitted, they did him no harm, and cannot now be availed of as grounds for a new trial. *Com. v. Meserve*, 154 Mass. 64, 27 N. E. 997.

The first exception relates to the admission of evidence. The search of Learned's house, and the discovery of a large amount of property there such as is not ordinarily found in dwelling houses, and the comparison of articles there found with other articles found in the defendant's house, are facts competent to be put in evidence against the defendant, in connection with other evidence in the case. There was testimony that the defendant said of goods found in his possession, "that he obtained them from Learned, and helped him take care of them in the storehouse of his employers, on Fulton Place; that Learned would never tell him where he got them, except that he stood in with clerks, and that Learned would never tell him what clerks he stood in with; that he said the goods found at his house were goods given him by Learned for carrying goods to Learned's house from time to time in packages, the size of which was perhaps a foot and a half long." It also appeared that Learned was a police officer attached to a police station in that part of Boston where they were; that the defendant was frequently in his company on the street, evenings, and on one occasion, at a little after midnight, was found on the street, pushing a hand cart on which was a part of the prop-

erty described in the indictment; that, when the defendant was discovered on this occasion by a police officer, Learned quickly appeared, coming from behind the defendant, and, while Learned and the other officer were examining the property on the hand cart, Learned said to the other officer, "Your man is gone"; and that the defendant then ran away, and Learned pursued him in one direction, and the other officer in another. These circumstances, all occurring at about the same time, were evidence that there was a guilty arrangement between the defendant and Learned to steal property from shops in that vicinity, or to receive property known by them to have been stolen by others. At least, it was evidence that the defendant was receiving from Learned stolen property, believing it to have been stolen, which is all that the law requires to constitute the crime of which he was convicted. *Com. v. Leonard*, 140 Mass. 473, 4 N. E. 96.

The request to rule that the finding of large quantities of goods in Learned's possession could not be considered against the defendant "unless and until it was affirmatively shown that he participated with Learned, at some time or place, having guilty knowledge and intent, either in the act of larceny, or of receiving such goods," was rightly refused. That was equivalent to a request to rule, of each circumstance in the case, that it could not be considered unless the case was made out without it. The finding of these goods was a circumstance proper to be considered in connection with the defendant's admissions in regard to his dealings with Learned, and with the other facts of the case. So, too, the judge refused to rule that, because the defendant was indicted jointly with Learned, he could not be convicted, if he was guilty as to a part of the property described in the count, and Learned was guilty as to another part. Where the trial proceeds against one upon such an indictment, he may be convicted of the whole or of any part of the offense charged. *Com. v. Cook*, 12 Allen, 542; *Com. v. Brown*, 12 Gray, 135; *Com. v. Miller*, 150 Mass. 69, 22 N. E. 434.

The defendant asked a ruling, as to each count of the indictment, that there was not sufficient evidence to warrant a verdict of guilty. In regard to two of the counts on which the conviction was had, we think the ruling should have been given. It was necessary to prove the ownership of the property received as charged in the indictment. There was sufficient evidence in the testimony of Milliken to justify, if not to require, such a finding in regard to the biggins and the tea-pots described in the eighth count of the indictment; but, in regard to the others, it is expressly stated in the bill of exceptions that there was no evidence of the breaking or the entering of the shop of any of the persons named as owners in the different counts of the indictment at any time, or of the loss by them of the property described in the indictment,

or of any similar property. Nor was there any identification of any of the articles in question by any one, except to the extent that they were similar in each case to the property kept for sale by the person alleged to be the owner. This last fact, without corroborating circumstances beyond those which appear in the case, was not enough to warrant a jury in finding the allegation of property in the indictment to be proved; and it is therefore necessary to sustain the exceptions, and set aside the verdict, on the sixteenth and twenty-fourth counts. Exceptions sustained as to the sixteenth and twenty-fourth counts, and overruled as to the eighth count.

(167 Mass. 383)

CHASE v. MAINE CENT. R. R.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 9, 1897.)

RAILROADS—INJURY AT CROSSING—CONTRIBUTORY NEGLIGENCE.

The burden rests on a plaintiff, suing for injuries received by a person struck by a train at a railroad grade crossing, to show freedom from contributory negligence; and evidence that the person injured drove a horse on the crossing at a trot, without stopping to look or listen, it not being shown that he could not have seen or heard the approaching train had he done so, is insufficient.

Report from superior court, Suffolk county; Francis A. Gaskill, Judge.

Action of tort by Josiah G. Chase, executor, against the Maine Central Railroad, to recover for the death of plaintiff's testator. A verdict for defendant was directed, and the case reported. Judgment on the verdict.

Robert M. Morse and J. W. Spaulding, for plaintiff. Strout & Coolidge and Henry N. Rice, for defendant.

LATHROP, J. This is an action of tort, at common law, for injuries sustained by the plaintiff's intestate, by reason of the wagon in which he was driving coming into collision with a train of cars of the defendant, at a place in Richmond, in the state of Maine, where a highway crossed the single-track road of the defendant, at grade. The accident happened in the afternoon of August 17, 1887, and the trial took place in the superior court in January, 1896. The presiding judge, at the close of the plaintiff's evidence, ruled that the plaintiff had offered no testimony which would authorize the jury in finding that the intestate was in the exercise of such due care as is required by law to enable the plaintiff to recover. The report set forth sufficient acts of negligence on the part of the defendant, in running its train at a higher rate of speed than is allowed by law where a flagman or a gate is not maintained at a crossing at grade, and in not ringing a bell and sounding a whistle. On the question of due care on the part of the intestate, there was evidence tending to show the following facts: On the day of the accident, the intestate

tate was driving a horse in an open Concord wagon, at a moderate trot, from Pleasant street, through South street, westerly towards and across the railroad. With him in the wagon was a boy, named Haley, who was then six years and eight months old, and who was the only witness produced who was present at the time of the accident. Pleasant street appears from a plan produced at the trial to be about 420 feet from the crossing on South street, where the accident occurred. As the intestate approached the track, he did not stop or slacken speed; but, when he got to the railroad, the horse started up, and attempted to cross the track in front of the train, which was approaching from the north. Then the intestate attempted to pull up the reins, which had been loose,—that is, not pulled up tight,—but did not stop the horse. The train struck the wagon, and the intestate and the boy were thrown violently therefrom, and the intestate died from his injuries 17 days afterwards. There was also evidence that when near the house of one Scott, which is about 50 feet from the crossing, the intestate pulled out his watch, and looked at it; that the train which struck the wagon was known as the "Flying Yankee," and it passed through the town once a day, going south; that the time it was due was well known, approximately; that on the day of the accident it was late, one witness testifying it was 19 minutes late; and that the train was making no more noise than usual, and was accompanied by a great cloud of dust. There was also evidence that this train, in summer, was as likely to be late as on time. South street, from Pleasant street to the crossing, was a level, smooth road. There was evidence that the railroad, before reaching the crossing, passed through a cut, the highest point of which was 7 feet, 200 feet from the crossing. There were also some fences, $3\frac{1}{2}$ to 4 feet high, and a building and barn, and some fruit trees, all of which, it is contended, interfered with the view of the approaching train. It is obvious, however, that a man on the seat of an open Concord wagon would not have his view interfered with by the fences, or by the fact that the cars passed through the cut. The building and barn were on the corner of Pleasant street and South street, and could not have interfered with the intestate's line of vision except for a few moments, after turning into South street. If the fruit trees were high enough to obstruct the view of the intestate, it appears from the plans and photographs that, during nearly all the time he was on South street, these trees would not interfere with his seeing the train for a distance of, at least, 200 feet from the crossing until it arrived there.

The principal argument for the plaintiff is based upon the theory that the evidence shows that the railroad was visible but from two places on South street between Pleasant street and the crossing, namely, at a point 50 feet from the crossing, and from one further

towards Pleasant street, the exact position of which is not clearly defined; and that, when the intestate arrived at the last point, the train had not reached the point on the railroad visible from there, and at 50 feet from the crossing it was too late to do anything. So far as the testimony goes, we do not think that it supports the plaintiff's contention. It nowhere appears in the testimony that the railroad was visible from South street only from these two points. The report states as to the testimony of one Randlette as follows: "The witness testified as to one particular spot, which was fifty feet from the track, at which he could see, by close looking, the smokestack and the roof of the cars. The position of the train when seen from this spot was placed by the witness, successively, 'a little south of the Spruce street crossing, near the whistling post,' which was five hundred and fifty feet from the South street crossing, and finally at a point marked on the plan two hundred and seventy-three feet from the crossing." It does not appear from the report whether this witness was on the ground when he made his observation, or seated on a wagon. The only other testimony comes from one Small, who, before the time of the accident, had ridden through the cut on locomotive engines. He testified that the South street crossing was visible from the cab of the engine, when the engine was about opposite the whistling post, and distant five hundred and fifty feet from the crossing. On cross-examination, he testified that, when riding on the engine, he could see the crossing, and within a radius of 100 feet from the center of the crossing. He was then asked, "Could you see the people here?" and answered, "I never took any notice." This question was then put, "You never noticed whether you could or could not?" His answer was: "I can see all round here in the radius, you know. I, of course, never looked right over there." The report states that, at the last sentence, the witness pointed further to the east on South street than the radius of 100 feet from the center of the crossing. From the testimony of these witnesses the jury would not be warranted in finding that a person driving on South street could not see an approaching train except from two points; and, as we have already seen, the plans and photographs show an entirely different state of things.

The plaintiff further contends that the fact that the intestate pulled out his watch, and looked at it, when he was 50 feet from the crossing, would warrant the jury in finding that the regular time of the passing of the train was known to the intestate; that he looked to see if this time had passed; and that, when he found that it was 19 minutes after the time, he had a right to assume that it had passed. But his purpose in looking at his watch was purely a matter of conjecture. There is nothing to show that it was accompanied by any act or word indicating what

his purpose was. The case presented, then, is of a man approaching a railroad crossing at grade, driving with his reins loose, at a moderate trot, without stopping or slackening speed, not looking or listening for an approaching train, and not thinking, apparently, anything about it, until, as he got to the railroad, the horse starts up, and attempts to cross the track, and the driver makes an effort to stop the horse, when it is too late. If this case had been tried in Maine, there can be no doubt that the plaintiff would not have been entitled to recover. It is well settled in that state that, where a collision occurs between a traveler upon the highway and a train of cars, it is *prima facie* evidence of negligence on the part of the traveler; that a person approaching a railroad crossing at grade must look and listen before passing over; and that, if his view is obstructed, he must stop and listen carefully. *Grows v. Railroad Co.*, 67 Me. 100; *State v. Railroad Co.*, 76 Me. 357; *Lesan v. Railroad Co.*, 77 Me. 85; *Chase v. Railroad Co.*, 78 Me. 353, 5 Atl. 771; *State v. Railroad Co.*, 80 Me. 430, 15 Atl. 36; *Smith v. Railroad Co.*, 87 Me. 330, 32 Atl. 967. We have no occasion to consider whether, as the cause of action accrued in Maine, the rules of law adopted by the highest court of that state should govern us in determining this case (see *Walsh v. Railroad Co.*, 100 Mass. 571, 36 N. E. 584); for we are of opinion that, on the evidence in this case, the ruling of the court below was right, according to our own decisions. The general rule in this commonwealth, undoubtedly, is that, as a railroad crossing is a dangerous place, a traveler on the highway is bound to make a reasonable use of his sense of sight as well as of hearing, in order to ascertain whether he will expose himself to danger; that if he fails so to use his senses, without reasonable excuse, he fails to use reasonable care; and that the burden is on the plaintiff to show such care, even though the defendant is in fault. *Butterfield v. Railroad*, 10 Allen, 532; *Allyn v. Railroad*, 105 Mass. 77; *Wright v. Railroad*, 129 Mass. 440; *Tully v. Railroad*, 134 Mass. 499; *Wheelwright v. Railroad*, 135 Mass. 225; *Allerton v. Railroad Co.*, 146 Mass. 241, 15 N. E. 621; *Fletcher v. Railroad Co.*, 149 Mass. 127, 21 N. E. 302; *Donnelly v. Railroad*, 151 Mass. 210, 24 N. E. 38; *Debbins v. Railroad Co.*, 154 Mass. 402, 28 N. E. 274; *Tyler v. Railroad Co.*, 157 Mass. 336, 32 N. E. 227. So, too, it may be said to be a general although not a universal rule that, if there is anything to obstruct the view of a traveler on the highway at a crossing at grade, it is his duty to stop until he can ascertain whether he can cross with safety. *Fletcher v. Railroad Co.*, *ubi supra*, and cases cited; *Debbins v. Railroad Co.*, *ubi supra*. See *Hubbard v. Railroad Co.*, 162 Mass. 132, 38 N. E. 366. The case at bar is distinguishable from *Clark v. Railroad Co.*, 164 Mass. 434, 41 N. E. 666, and from *Conaty v. Railroad Co.*, 164 Mass. 572, 42 N. E. 103, in each of which cases an invitation was given

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to cross,—in the former case by waving a flag, and in the latter by raising the gates. Judgment on the verdict.

(167 Mass. 414)

COOK v. COLEMAN et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 11, 1897.)

GARNISHMENT—INDORSEMENT—LIABILITY OF GARNISHEES.

A garnishee is not entitled to rely on the indorsement on the back of a writ of garnishment for information as to the defendants against whom the writ ran, so as to excuse him for paying out money of a defendant included in the writ, but whose name was not included in the indorsement, the indorsement being no part of the writ.

Appeal from superior court, Suffolk county.

Action by Herbert P. Cook against Eugene B. Coleman and another, in which the Hancock National Bank was summoned as garnishee. From an order charging garnishee, it appeals. Affirmed.

H. J. Jaquith and W. R. Bigelow, for appellant. Thomas Savage, for appellee Cook.

MORTON, J. The writ was duly served upon the bank, through its president, who, also, as we infer, had charge of its business. In the body of the writ the defendants were described as co-partners under the name of the Boston Building-Material Company. There was then on deposit in the bank, to the credit of the defendants, under that name, the sum of \$105.63. This was attached by the writ. Afterwards a part of it was paid out on check drawn by the defendants. The excuse given for this is that the president did not examine the body of the writ, but relied on the manner in which it was entitled on the back, from which there appeared to be but one defendant. But he was not justified in relying on what appeared on the back of the writ. That constituted no part of the writ itself. He should have examined the body of the writ, in order to determine the parties against whom it ran. His neglect to do so was that of the bank, and the payments which were made by it, through its officers or servants, subsequent to the attachment, were made by it in its own wrong. Order of the superior court affirmed.

(167 Mass. 397)

HALE et al. v. HOBSON et al.

(Supreme Judicial Court of Massachusetts.
Essex. Jan. 11, 1897.)

WILLS—CONSTRUCTION—CONTINGENT REMAINDERS.

Testator directed that the residue of his estate should remain in the control of his executors and their successors until the decease of the last survivor of the life annuitants, and that then the said residue, with all accumulated interest, should be equally divided among his grandchildren so distributed, and to their heirs, executors, etc., forever. *Held*, that the grandchildren took a contingent remainder in such residue.

Case reserved from supreme judicial court, Essex county; John Lathrop, Judge.

Petition by one Hale and others against one Hobson and others for a partial distribution of the residuary estate of Ezekial J. M. Hale, deceased. Dismissed.

Robert M. Morse and William M. Richardson, for complainants. Charles K. Cobb, for executors and trustees.

MORTON, J. This is a petition by five of the seven residuary legatees under the will of Ezekial J. M. Hale for a partial distribution of the residuary estate. Of the other two, one consents to a distribution, and the other does not object. It is agreed that the debts have all been paid, and also all of the legacies, so far as they have become due and payable. The executors and trustees and certain of the life annuitants object to a distribution. The residuary clause is as follows: "As to the residue and remainder of all my estate, both real and personal, not herein otherwise disposed of, it is my will that the same be and remain in the care and control of my said executrix and executors and trustees, and their successors, well and safely invested, until the decease of the last survivor of the life annuitants named in my foregoing will, and that then the said residue and remainder, with all the accumulated interest thereof, shall be equally divided amongst my grandchildren per stirpes, to hold to such grandchildren so distributed, and to their heirs, executors, administrators, and assigns, forever."

The first question is whether the interest which the grandchildren take is a vested or contingent one. If it is vested, then the further question will remain whether this court has power to order the distribution prayed for, and, if it has, whether it should do so. If it is contingent, then it is manifest that this petition cannot be maintained. The grandchildren may not become entitled to what they now seek to have distributed. This will has been before this court twice, —in *Hale v. Hale*, 137 Mass. 168, and *Wardwell v. Hale*, 161 Mass. 396, 37 N. E. 196. In neither of those cases, however, was the question presented which has now arisen. It has also been before the courts of New York and Illinois. *Hobson v. Hale*, 95 N. Y. 588; *Hale v. Hale*, 125 Ill. 399, 17 N. E. 470; *Id.*, 146 Ill. 227, 33 N. E. 858. In the case in New York the precise question arose which now comes before us, and it was held that the interest was contingent; the result being that the residuary clause was declared void so far as it related to certain real estate situated in that state, and the grandchildren took as heirs at law, because, in that view of the case, the power of alienation was suspended beyond the period fixed by statute in that state. That decision is not binding upon us, and it may be that the law as to what constitutes vested and contingent

interests is different in that state, by reason of the statute, from what it is in this state. *Moore v. Littel*, 41 N. Y. 66; *Hennessey v. Patterson*, 85 N. Y. 91; *Gray, Perp.* §§ 107, 108; 4 Kent, Comm. (12th Ed.) 203, note 1. But it would be unfortunate if the clause should receive opposite constructions here and there, though that consideration would not justify a conclusion at variance with the principles that have been heretofore established in this state. We think, however, that the decision by the New York court of appeals was correct according to the rules of the common law, and that the interest created by the residuary clause must be regarded as a contingent, and not as a vested, one. The reasons which have led us to this result are as follows: In the first place, what is to be distributed among the grandchildren will consist, not only of the residue, and of the legacies that may fall in, but also of the accumulated interest. Plainly, this last could not vest at the testator's death; and that tends to show that the vesting of the whole was postponed till the arrival of the event on which the distribution is made to depend. *Hall v. Hall*, 123 Mass. 120, 124. In the next place, the scheme of the will intends, we think, a contingent interest. The testator provides for his widow and children and grandchildren, and gives various legacies and life annuities, and then, contemplating that a portion of his estate remains undisposed of, and looking forward to the time when the last life annuity shall have ceased, and the residue be free for distribution, he directs his trustees then to divide the residue and remainder, with its accumulated interest, equally among his grandchildren. What grandchildren? It seems to us more reasonable to suppose that a class consisting of his surviving grandchildren was meant than that the grandchildren living at his death were intended. It is true that there are no words of survivorship, but it is as if the testator took his stand at the time of the death of the last life annuitant, and said, "I direct the remainder and its accumulations to be divided among my grandchildren," in which case no words of survivorship would be necessary, and those living then would take. The further words, "their heirs, executors, administrators, and assigns," do not describe or identify those who take, but the quantity of the estate which the legatees take, whoever they may be. *Thomson v. Ludington*, 104 Mass. 193. Again, there are no words of present gift, as there are in many of the cases in this state in which an interest has been held to be vested, and as there are in other clauses of the will respecting other legacies, showing that the testator knew how to use apt words for that purpose. The omission of words of present gift, taken in connection with the provision that the care and control of the residue and remainder are to remain in the executors and trustees,

and their successors, and that the residue is unascertainable till the time for distribution arrives, also tends, it seems to us, to show that, not only was it the intention of the testator to postpone possession, but also, the acquisition of an absolute interest.

It is true that this construction leaves the remainder without any limitation over, if no grandchild survives the last life annuitant, and that the children of any grandchild dying before the last life annuitant will not share in the distribution. It is also true that the law favors vested, rather than contingent, remainders. But the testator nowhere manifests an intention to provide for his great-grandchildren, either before or after the death of the last life annuitant, and in providing for his children and grandchildren he has carried his regard for his descendants as far as the law would have carried its regard for them if he had unintentionally omitted a child from his will, and he well may have been content with that. Pub. St. c. 127, § 21. The rule favoring vested, rather than contingent, remainders, always yields to the testator's intention. Knowlton v. Sanderson, 141 Mass. 323, 6 N. E. 228. There are numerous cases in this state in which remainders have been held to be vested. It would serve no useful purpose to attempt to review them all, even if it were possible to do so within proper limits. In some of them it was plain that a vested interest was intended. Hill v. Bacon, 106 Mass. 578; Darling v. Blanchard, 109 Mass. 176. In others, as already observed, there were words importing a present gift. Pollock v. Farnham, 156 Mass. 388, 31 N. E. 208; Ballard v. Ballard, 18 Pick. 41; Shattuck v. Stedman, 2 Pick. 468. In still others, the devise was to the testator's children; and the general rule prevailed that in such cases a vested interest will be held to have been intended unless the contrary plainly appears. Gibbens v. Gibbens, 140 Mass. 102, 3 N. E. 1; Blanchard v. Blanchard, 1 Allen, 227. In others, again, the ultimate limitation was in terms or effect to the testator's heirs; and in such cases the rule is well established that generally the persons who take are those who answer to the description at the testator's death. Whall v. Converse, 146 Mass. 345, 15 N. E. 660; Cummings v. Cummings, 146 Mass. 501, 16 N. E. 401. And still further, in others, the will was ambiguous, and the intention doubtful, and the cases were determined, in the main, by the application of the rule that a gift will be regarded, where it properly can be, as a remainder and as vested, rather than as an executory devise and as contingent. Marsh v. Hoyt, 161 Mass. 459, 37 N. E. 454; Teele v. Hathaway, 129 Mass. 164; Blanchard v. Blanchard, supra; Eldridge v. Eldridge, 9 Cush. 516, 519. Most, if not all, of the cases cited by the petitioner will fall within one or another of these classes; and many of them are distinguishable in other

respects, also, from the case at bar. The petitioners rely especially upon Cummings v. Cummings, 146 Mass. 501, 16 N. E. 401, and White v. Curtis, 12 Gray, 54. Cummings v. Cummings has already been referred to and distinguished. In White v. Curtis the remainder was limited upon a life estate, and naturally would take effect at the testator's death. Abbott v. Bradstreet, 3 Allen, 587. There are many cases in this state in which the remainders have been held to be contingent, and which tend, we think, to support the conclusion to which we have come, though they are not in all respects precisely like the present case. Proctor v. Clark, 154 Mass. 45, 27 N. E. 673; Peck v. Carlton, 154 Mass. 231, 28 N. E. 166; Knowlton v. Sanderson, 141 Mass. 323, 6 N. E. 228; Denny v. Kettell, 135 Mass. 138; Hall v. Hall, 123 Mass. 120; Thomson v. Ludington, 104 Mass. 193; Amory v. Lealand, 12 Allen, 281; Houghton v. Kendall, 7 Allen, 72; Winslow v. Goodwin, 7 Metc. (Mass.) 363; Rich v. Waters, 22 Pick. 563; Olney v. Hull, 21 Pick. 311; Hulburt v. Emerson, 16 Mass. 240.

Taking the residuary clause in connection with the rest of the will, and looking at the will as a whole, it seems to us that the word "then," in the residuary clause, has reference, not only to the period of distribution, but also to the persons who shall take, though there is no doubt that in some instances it has been construed in the former sense only. It is not necessary for us to consider how or by what title the executors and trustees hold the residue and remainder. The view which we have taken of the nature of the interest created by the residuary clause renders it unnecessary to consider the remaining question, as to the power of this court to order a partial distribution, and the propriety of doing so if it has the power. The result is that the bill must be dismissed, and it is so ordered. Bill dismissed.

(167 Mass. 417)

BARON v. FITZPATRICK (three cases).

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 11, 1897.)

STATUTES—REPEAL BY IMPLICATION.

Pub. St. c. 153, § 8, provides, inter alia, that notice of exceptions shall be given the adverse party, that they shall be presented to and allowed by the presiding justice, and that the exceptions shall be filed, and notice given to the adverse party, before the final adjournment of the court at which they were taken, and within three days after the verdict, opinion, ruling, direction, or judgment excepted to was given. Held, that the provision requiring notice to the adverse party of the filing of exceptions was not repealed by St. 1895, c. 153, § 1, providing that parties alleging exceptions under Pub. St. c. 153, § 8, shall, in criminal cases, file the same within 3 days, and in civil cases within 20 days, after the verdict, etc., is given.

Exceptions from superior court, Suffolk county.

Three separate actions by Charles C. Baron against John B. Fitzpatrick, tried together without a jury. There was a finding in favor of plaintiff, and defendant excepts. Exceptions overruled.

Frank Paul, for plaintiff. T. Henry Pearse, for defendant.

MORTON, J. Section 8, c. 153, Pub. St., contains various provisions relating to exceptions in civil and criminal cases. Among other things, it provides to what exceptions may be taken; how they shall be procured; when, and with whom, they shall be filed; that notice shall be given to the adverse party; and that they shall be presented to, and allowed by, the presiding justice. According to this section, exceptions were to be filed, and notice given to the adverse party, before the final adjournment of the court at which they were taken, "and within three days after the verdict * * * or after the opinion, ruling, direction or judgment excepted to" was given. *Foley v. Talbot*, 162 Mass. 462, 39 N. E. 40; *Purcell v. Steamship Line*, 151 Mass. 158, 23 N. E. 834; *Conway v. Callahan*, 121 Mass. 165. St. 1895, c. 153, § 1, changes this by providing that parties alleging exceptions under section 8, c. 153, Pub. St., "shall in criminal cases file the same within three days and in civil cases within twenty days after the verdict in the case, or after the opinion, ruling, direction or judgment excepted to is given." The defendant contends that this operates as a repeal of section 8, or at least of so much of it as requires notice to be given to the adverse party of the filing of the exceptions, and that, therefore, the ruling of the presiding justice, who held that such notice must be given, was wrong. It is evident, we think, that St. 1895, c. 153, was not intended as a repeal of section 8, c. 153, Pub. St., and does not operate as such. By its very terms, it recognizes that section as continuing in force. So far as the statute of 1895 is plainly repugnant to, and inconsistent with, section 8, it necessarily operates as a repeal of it, but no further. The only matter with which the later statute deals is the time for fixing exceptions, which is extended to 20 days in civil cases, with such further time as may be allowed by the court. This is repugnant to, and therefore repeals, so much of section 8 as provides that the exceptions shall be filed before the final adjournment of the court at which they were taken, "and within three days after verdict," etc. The defendant insists that, if section 8 is allowed to stand, the result will be that notice that the exceptions have been filed must be given within 3 days after the ruling excepted to, when the exceptions themselves need not be filed for 20 days, which, he well says, would be absurd. But we do not think that the result which he insists upon will follow. The two statutes

are to be construed together, for the purpose of ascertaining the intention of the legislature, and, when ascertained, that is to be carried out, if it can be done consistently with the rules of law. And, we think that it is plain that in extending the time for filing exceptions, the legislature intended that the time for giving notice to the adverse party should be correspondingly extended also, not that no notice should be required, and that the statute of 1895 is to be regarded as in the nature of an amendment to and repeal of so much of section 8 as relates to the time of filing exceptions, and to matters connected therewith, and we discover no difficulty in so treating and applying it. The result is that, the defendant not having given to the adverse party notice of the filing of his exceptions, they must be overruled, and it is so ordered. Exceptions overruled.

(167 Mass. 293)

CHASE v. WALKER et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 8, 1897.)

CONSTRUCTION OF COVENANT—FOR LIGHT AND AIR.

A covenant by the owner of a lot that he would not carry a wall separating his premises from those of the covenantees any higher than it then was, and that, in case it should be destroyed or taken down, "no wall, or anything else, to obstruct in the least degree the light or air, should ever be there erected higher than 10 feet," is, in effect, the grant of an easement for light and air, and is to be construed in accordance with the intention of the parties as prohibiting the covenantor or his assigns from erecting any obstruction higher than 10 feet, either on the ground occupied by the wall or by the side of it.

Report from supreme judicial court, Suffolk county; John Lathrop, Judge.

Petition under St. 1889, c. 442, by Nathaniel E. Chase against Mary L. Walker and others, to determine the validity and define the nature and extent of the following covenant: "Know all men by these presents: That I, Cornelius Coolidge, of Boston, in the county of Suffolk, and commonwealth of Massachusetts, gentleman, in consideration of one hundred and fifty-six dollars fifty cents to me paid by Titus Wells, gentleman, Warren Dutton, Esquire, both of said Boston, Margaret Cooper, widow, and Mark Newman, of Andover, in the county of Essex, Esquire, and Thomas W. Phillips, of said Boston, Esquire, the receipt of which sum is hereby acknowledged, do hereby for myself, my heirs and assigns, covenant and agree with the said Wells, Dutton, Cooper, Newman, and Phillips severally, and with their heirs and assigns, that neither I nor my heirs or assigns, or either or any of them, shall or will ever carry or cause to be carried, any higher than the same now is, the brick wall which separates my estate on Chestnut street, in said Boston, from the three estates on Walnut street belonging to said Wells, Dutton, Newman, and Phillips;

and in case the wall now there should be destroyed or injured or taken down, that no wall, or anything else, to obstruct in the least degree the light or air, shall ever be there erected higher than ten feet from the surface of the yards of said Walnut street estates, excepting the attic [lattice?] work as it now stands. And I do further, for myself, my heirs and assigns, covenant with said Dutton, Cooper, Newman, and Phillips, their heirs and assigns, that neither I, nor they, nor either of them shall or will at any time cause the vaults upon their estates to be removed from their present situation. Witness my hand and seal, this sixth day of March, A. D. eighteen hundred twenty-six. Cornelius Coolidge. [Seal]." The petitioner is the present owner, through mesne conveyances, of the property owned by the covenantor, and the defendants of that owned by the covenantees.

Darwin E. Ware and Richard D. Ware, for petitioner. John C. Gray, Francis V. Balch, and Felix Rackemann, for defendants.

ALLEN, J. It is quite plain that the literal construction which is contended for by the petitioner could not have been in the minds of the parties to the covenant. Under that construction, the covenantor might at once have erected a building or wall directly abutting upon the existing wall, and carried it up as high as he saw fit. Such a construction would lead to an absurd consequence. So far as light and air were concerned, there would have been no practical difference to the covenantees between such a structure and carrying up the existing wall. It cannot be supposed that this covenant was given and received with the intention of restricting Mr. Coolidge and his heirs and assigns from building a higher wall on the space then occupied by the existing wall, but leaving him at liberty to build as high as he pleased just inside that wall. The only question, then, is whether the words of the covenant will admit of a broader meaning. In our opinion, they will. The instrument was, in effect, a grant of an easement (Bronson v. Coffin, 108 Mass. 175, 180; Iadd v. City of Boston, 151 Mass. 585, 24 N. E. 858), and the words may be construed with a leaning against the grantor or covenantor, in order to carry out the obvious intention of the parties. That intention was that no wall, or anything else, should be built to obstruct in the least degree the light or air above the height specified. Looking at the words with reference to this obvious intention, they mean that nothing shall be built on that lot, next to the wall, to obstruct light or air more than the existing wall, or such other wall as is described, would obstruct them. Such a construction is warranted by the rules which are applied in the construction of contracts, statutes, and other written instruments, with a view of avoiding results which are absurd, or inconsistent

with what was meant by the parties to or the framers of the instrument. Metc. Cont. 278, 279, 303, 307, 312; Leake, Cont. § 189; Grey v. Pearson, 6 H. L. Cas. 61, 106; Ford v. Beech, 11 Q. B. 866; Oates v. Bank, 100 U. S. 239, 244; Stanleys v. Raymond, 4 Cush. 314, 316; Canal Co. v. Hill, 15 Wall. 94. We are therefore of opinion that the petitioner's lot adjoining the wall, to wit, No. 4 Chestnut street, is subject to an easement in favor of the three lots belonging to the respondents on Walnut street for light and air to the extent above mentioned. It becomes unnecessary to consider the question of estoppel. Ordered accordingly.

(167 Mass. 449)

FIELD v. EARLY et al.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 13, 1897.)

CONVERSION OF MORTGAGED PROPERTY—RECOVERY
BY MORTGAGOR—ENJOINING SECOND
ACTION BY MORTGAGEE.

1. Where goods were wrongfully taken from the possession of the mortgagor before condition broken, by a third person, and the mortgagor recovers their full value in conversion, on payment into court of the amount of a judgment so recovered the defendant may maintain a bill in equity to enjoin the prosecution of a second action for the conversion by the mortgagee, and to require him to resort to the money paid in satisfaction of the judgment in the former suit in lieu of the property.

2. A mortgagee cannot maintain suit for conversion of the mortgaged goods by a third party, where, at the time, he was not in possession, or entitled to possession.

Report from superior court, Worcester county.

This was a bill in equity by one Field against Early and others to determine what was the proper disposition to be made of certain money collected on an execution against the plaintiff, against whom there had been an action and judgment for the conversion of certain goods. The case was reserved for the supreme judicial court. Decree for complainant ordered.

William A. Gile, for plaintiff. Thomas G. Kent and Geo. T. Dewey, for defendants.

FIELD, C. J. It appears, from the report in this case, that the plaintiff, Field, took possession, without right, of the stock of goods, on or about January 10, 1891, and retained possession until December 1, 1894, when he sold the goods at public auction, and received the proceeds. At the time when he took possession Roosa was the owner of the equity in the goods, subject to three mortgages,—one given by Merrifield to Dewey, on these and other goods, dated February 1, 1885; one given by Merrifield to Dewey, on these goods, dated December 18, 1890; and one given by Roosa to Albert K. Page, on the same goods, dated December 18, 1890. This last mortgage was given to secure the payment of \$1,650, with interest, payable in one year from date; and there was no breach of the condition of this

mortgage when Field took possession, and the mortgagee was not in possession. The two mortgages given by Merrifield to Dewey were to secure the payment of a promissory note, dated February 1, 1885, for \$2,500 and interest, payable on demand, and the second of these mortgages was given as additional security to the first, and on goods added to the stock after the execution of the first mortgage. The principal of this debt, at the time the second mortgage was given, had been reduced to \$1,400. On the same day, when the second mortgage was given, Merrifield conveyed the goods to Roosa, subject to the two mortgages, and then Roosa gave to Albert K. Page the third mortgage mentioned. No demand had been made for the payment of the note secured by the first and second mortgages, and it does not appear that the mortgagee under either of these mortgages, or his assignee, was in possession of the goods when Field took possession. In each of the three mortgages it was provided that the mortgagor might retain possession of the goods until breach of condition, and we infer that, at the time when Field took possession, Roosa must be regarded as in lawful possession, if anybody was, and he had the right of possession until some demand was made for the payment of the note secured by the first and second mortgages. See *Field v. Roosa*, 159 Mass. 128, 34 N. E. 77. On April 23, 1891, after the plaintiff took possession, the second mortgage given by Merrifield to Dewey was assigned by Dewey to Luke J. Page, as the report finds, "for the benefit of said Albert K. Page, and the sole ownership and beneficial interest therein was in the said Albert K. Page." It does not appear that the first mortgage ever has been assigned, or whether any of the goods covered by that mortgage were in existence when Field took possession. On January 17, 1891, Roosa brought an action against Field and one Lamb for a conversion of the goods, and obtained judgment against Field for the value of the goods; and we infer that the damages recovered in that suit were the full value of the goods at the time of the conversion, on or about January 10, 1891. On May 24, 1893, Albert K. Page brought a suit against Field for the conversion of the same goods as those sued for in the action of Roosa against Field, and this suit is now pending. The same counsel appear for Albert K. Page in his suit as appeared for Roosa in Roosa against Field, and Albert K. Page and his counsel were present at the trial of the action of Roosa against Field. Field has paid the judgment against him, and, by consent of the parties, the money is now in the hands of Messrs. Kent & Dewey, attorneys at law, who have been made parties defendant in the present suit, and hold the money to await the final order of the court in this case. The other defendants in the present suit, besides the deputy sheriff, to whom the execution in the action of Roosa against Field was committed for service, are Roosa, Albert K. Page, and Luke J. Page. The purpose of the present suit

is that Albert K. Page may be enjoined from prosecuting his action at law against Field, and that the money in the hands of Messrs. Kent & Dewey may be paid to the persons equitably entitled to it.

It is found, in the report, that "the objection that an action for conversion by said Roosa would not lie was not taken or raised by any party at the trial of said action" of Roosa against Field, and that "the said Roosa is peculiarly irresponsible." The conclusion of the report is as follows: "If, upon the above facts, and all proper inferences to be drawn from them said sum of money recovered and paid upon said judgment should be applied towards the extinguishment of said mortgage indebtedness of said Roosa to said Albert K. Page, or if the said Page is estopped to proceed with and carry on said suit brought by him in Suffolk county, and should be enjoined from prosecuting the same, or if he is estopped to receive therein any sum, except a balance of a judgment in excess of the sum recovered by said Roosa in his suit, if such amount should be recovered, or if the plaintiff's bill should be dismissed, a decree to that effect is to be entered, or such other order and decree is to be made as to law and justice shall appertain." On these facts, it is evident that Albert K. Page cannot maintain his suit for conversion of the goods, because, at the time of the conversion, he was not in possession, or entitled to the immediate possession, of the goods. As equitable owner of the mortgage assigned to Luke J. Page, he cannot maintain an action for the conversion of the goods in his own name, even if there had been a breach of the condition of that mortgage; and when his action was brought there had been no breach of the condition of the mortgage given to him by Roosa. *Baker v. Seavey*, 163 Mass. 522, 40 N. E. 863; *King v. Neale*, 114 Mass. 111. We perceive no reason, on the facts found in the present suit, why Roosa, in his action, should not have recovered damages to the full value of the property converted. *Cram v. Bailey*, 10 Gray, 87. In *Anthony v. Railroad Co.*, 162 Mass. 60-65, 37 N. E. 780, where the lessees were held entitled to recover full damages for the destruction of buildings, it was said in the opinion: "If the lessors have any interest in the damages, they can, before they are paid, intervene by proper proceedings." In *Brewster v. Warner*, 136 Mass. 57, where it was held that a bailee for hire could recover full damages for injury to personal property in his possession, it is said in the opinion: "It is not necessary to consider what steps might be taken if the bailor should seek to intervene to protect his interest."

If Roosa rightfully recovered of Field judgment for the full value of the goods, and this judgment has been paid, it is plain that Field could not properly be held to pay again the amount of the value of the goods to the mortgagees. Roosa, if he received payment of the goods converted by Field, would hold the money as a substitute for the goods, and would be

compelled to account therefor with the mortgagees. *Hanly v. Davis*, 166 Mass. 1, 43 N. E. 523. Roosa being peculiarly irresponsible, Field might well hesitate to pay him the money without notice to the mortgagees, that they might protect their rights. Whether it would be his duty to give such notice, if the mortgagees had had no knowledge of the suit by Roosa, we need not decide. It may be that, having knowledge of the suit of Roosa against Field, it was their duty to intervene in some way, or bring some process to protect their rights, if they were not content that Field should pay the judgment to Roosa; but we do not see how they can complain that Field has formally called their attention to their rights by this suit in equity, and we infer that they are content to have their rights to the money in the hands of Kent & Dewey determined in this suit. If the mortgagees claim no part of the money, or are willing that it should be paid into the hands of Roosa, they should say so in their answers, and disclaim all interest in the suit, and then the bill might be dismissed, unless, indeed, it was retained for the purpose of enjoining Albert K. Page from prosecuting his action. But if they claim an interest in the money, their rights can be adjudicated in this suit, and all risk arising from the pecuniary irresponsibility of Roosa can be avoided. We do not understand that the two defendants, one of whom is the mortgagee of the third mortgage, and the other the assignee of the mortgagee in the second mortgage, disclaim all interest in the suit.

It may be that the judgment obtained in Roosa against Field, if satisfied, would be a legal bar to subsequent suits against Field by the mortgagees; but the plaintiff in the present suit, if he is willing to pay that judgment, ought not to be harassed by other suits, and, as the money he pays is in some sense a substitute for the goods converted, the title to which, on payment of the judgment, vests in him, we think that it is a proper remedy for the mortgagees to resort to the money paid, as in the case of property sold by a court of competent jurisdiction discharged of all liens, unless they are content to trust solely to the responsibility of Roosa. According to the terms of the report, the money paid by the plaintiff should be applied towards the extinguishment of the indebtedness secured by the mortgages in the order of their dates, so far as the mortgages covered the goods converted by Field; and Albert K. Page should be enjoined from prosecuting his action at law against Field. As to Early the bill may be dismissed. The details of the decree may be settled by a justice of the superior court. So ordered.

(167 Mass. 459)

DUGAN v. STANCHFIELD.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 18, 1897.)

APPEAL—EXCEPTIONS—REVIEW.

An exception that the court overruled a motion to set aside the verdict, on the ground that

it "was against the evidence, the weight of evidence, and the law, and the damages excessive," raises no question of law.

Exceptions from superior court, Suffolk county; H. N. Sheldon, Judge.

Action by one Dugan against one Stanchfield to recover on a contract for work and materials. After verdict in favor of the plaintiff for \$69.25, the defendant moved the court to set it aside, on the ground that it "was against the evidence, the weight of evidence, and the law, and [that] the damages [were] excessive." The court overruled the motion, and defendant brings exceptions. Exceptions overruled.

H. Dunham, for plaintiff. E. O. Bicknell, for defendant.

PER CURIAM. It is plain that the bill of exceptions raises no question of law. *Behan v. Williams*, 123 Mass. 366. Exceptions overruled.

(167 Mass. 265)

RICHMOND v. AMES.

(Supreme Judicial Court of Massachusetts. Worcester. Jan. 7, 1897.)

BREACH OF COVENANT—RIGHT OF WAY—ENCROACHMENT BY GRANTEE—BONA FIDES.

In an action for breach of covenant against incumbrances, it appeared that land conveyed by defendant was subject to a right of way in favor of third persons, who recovered damages from plaintiff for encroaching on the easement with buildings. The only evidence of bad faith on the part of plaintiff in encroaching on the easement was that the wife of one interested in the easement told plaintiff, at the time he began the building, that he was building over the line, to whom he replied that he was within the calls of his deed, as he actually was. *Held*, that plaintiff was entitled to an instruction that the evidence that he proceeded in bad faith was insufficient to sustain a finding to that effect.

Exceptions from supreme judicial court, Worcester county.

Action by Willard Richmond against Susan F. W. Ames for breach of a covenant against incumbrances. From a ruling refusing to give a requested instruction, plaintiff brings exceptions. Sustained.

W. S. B. Hopkins and Frank B. Smith, for plaintiff. Rockwood Hoar and Charles M. Thayer, for defendant.

BARKER, J. The case in which the present exceptions were taken is the same case which is reported in *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671, and the exceptions were taken at the new trial (upon the question of damages only) ordered by the decision there reported. The new trial was before a jury, and, without going at length into testimony, the parties agreed that the facts which appear in the reported cases of *Richmond v. Ames*, 164 Mass. 467, 41 N. E. 671, and of *Green v. Richmond*, 155 Mass. 188, 29 N. E. 770, and of *Starkie v. Richmond*,

so far as they were pertinent to the questions on trial, should be taken as evidence, and the jury was made acquainted with all the facts so agreed to be in evidence. The facts with which the jury were so made acquainted were these:

In the year 1834 there was a passageway running easterly from Main street, in Worcester, through land owned upon both sides by Isaac Davis. On the northerly side of the passageway, at the corner of Main street, Davis' land was occupied by a block known as the "Slater Block," extending about 36 feet in depth, and forming to that extent the northern boundary of the way. Beyond the southeasterly corner of the Slater Block, the northern line of the passageway was not marked or defined by any structure; but at that time, and for more than 20 years prior thereto, Starkie as tenant, and all other persons who used the way, and had rights of way therein as owners of lands abutting thereon, had traveled over the open space which extended eastward from the rear of the Slater Block, in a northeasterly direction, around the corner of the Slater Block, to a dyehouse occupied by Starkie. In 1834 Davis conveyed to the predecessors in title of Green, by a deed describing land on the east side of Main street, and adding: "Also, I give and grant unto the grantees, their heirs and assigns, a right of passageway entering in at the south end of the store now occupied by Elijah A. Brigham [which was the south store in the Slater Block], and passing in the rear of my buildings between my store and barn, to the rear of their store as it now is, and to the rear of it as it shall be extended in depth so as to be sixty feet deep. And it is further agreed by the parties to this deed, in case the grantor, his heirs or assigns, should erect new buildings on Main street, the passageway might be removed further east. * * * It is understood that the above passageway is to be a free and open passageway, convenient for teams to pass and repass to and from the rear of the grantees' store as the same now is, or as it may hereafter be, unless the depth of said store exceed sixty feet." On the south side of the passageway Davis built the Quinsigamond Bank Block, and sold it, in 1863, to five grantees, with a right of way in "Layard Place," so called, which was the passageway mentioned. The Quinsigamond Bank Block had an ornamental front, which, at the corner upon Main street and the passageway projected into the passageway beyond the main line of its wall, and at different intervals along the wall there were projections into the passageway, varying in width from 1 inch to 2½ feet. On October 1, 1872, Davis, being the owner of the Slater Block and the open space in its rear, conveyed to Starkie certain other land abutting on Layard Place, together with a right of way in said passage to and from Main

street, as said way then existed. On April 1, 1873, Davis conveyed to the present defendant, Mrs. Ames, a tract of land described as follows: "A certain lot or parcel of land, with the buildings thereon, situated on the easterly side of Main street, in said city of Worcester, and with the privileges and appurtenances thereto belonging, bounded and described as follows: Northerly, on land of James Green, one hundred (100) feet; easterly, on an open passageway twenty (20) feet wide, sixty-six (66) feet, more or less, to an open passageway nine (9) feet four (4) inches wide; southerly, on said last-named passageway, one hundred (100) feet; westerly, on Main street, sixty-six (66) feet more or less,"—and the conveyance contained the usual covenants. On October 11, 1877, Mrs. Ames conveyed to Richmond, by the deed upon the covenants in which the present suit was brought, land the description of which was as follows: "A certain tract or parcel of land located on the easterly side of Main street, in said Worcester, bounded and described as follows, to wit: Beginning at the southwest corner of the estate hereby conveyed, which is also the southwest corner of the estate conveyed to me by Isaac Davis, by his deed bearing date April 1st, 1873, being recorded in Worcester county registry of deeds, Book 892, page 519; thence northerly, by line of said Main street, thirty-five feet more or less, to a point in the easterly line of said Main street, which said point would be intersected by a line running parallel to the southerly boundary line described in said Davis' deed, above referred to, and distant northerly sufficient to pass through a point four inches northerly from the southerly line of the southerly granite pilaster now standing in front of the store now occupied by Hiram H. Ames; thence easterly, passing through said point in said pilaster, and parallel to said southerly boundary line referred to in said Davis' deed, one hundred feet, to a passageway twenty feet wide; thence southerly, by line of passageway, thirty-five feet, more or less, to a passageway nine feet four inches wide; thence westerly, by line of said way, one hundred feet, to the line of said Main street and the place of beginning,—meaning and intending to convey all of the southerly portion of said estate, as far northerly as said point on said pilaster, with same distance in the rear." This deed contained the usual covenants.

The former decision in this case (see *Richmond v. Ames*, 164 Mass., at pages 471, 473, 41 N. E. 671) held that the southerly boundary line of the land conveyed by this deed was a straight line, running from the easterly line of Main street in a southeasterly course to a 20-foot passageway in the rear; that this line coincided with the northerly line of a tract of land, called a "passageway," 9 feet 4 inches wide throughout its whole extent; that this

northerly line of passageway is parallel with, and 9 feet 4 inches from, the building on the south side of Layard Place; that this passageway, or tract of land, and its northerly boundary line, constitute a monument in the deed; and that other persons had paramount rights in some portion of the area included in the deed with its southerly line thus established. Within a short time after taking this deed, and before Richmond had made any alteration in the property, he discovered that other parties had rights to an open and unobstructed passage over the way, which precluded him from a right to build over the way. Without resorting to Mrs. Ames, Richmond then made a claim of damages upon Davis, and was paid by him the sum of \$2,000 for surrendering the right to build over the way mentioned in the deed from Davis to Ames. The Slater Block remained upon the land until the year 1878. Teams, in going to and from the premises of Green, were accustomed to pass over any part of the area in the rear of the Slater Block without objection from the owner, turning northerly after passing the southeast corner of the Slater Block, instead of keeping on in a more easterly course, and turning northerly within the limits of the 20-foot way. But it was held, in *Green v. Richmond* (see *Starkie v. Richmond*, 155 Mass., at page 196, 29 N. E. 770), that Richmond, notwithstanding this use of the area in connection with Green's premises, had the right to occupy the area with a permanent building. In the summer of 1875 Ames had built a picket fence in the rear of the Slater Block, which fence stood until after the deed of October 11, 1877, to Richmond; but there was no evidence that the fence was built for the purpose of indicating or defining the north line of the passageway, unless the existence of the fence was such evidence. In the year 1878 Richmond removed the Slater Block and the fence, and erected the building now standing on the north side of Layard Place, and which new building extends east from Main street 80.2 feet, and leaves the passageway between itself and the building on the south side of the passageway, Layard Place, of a uniform width of 9 feet 4 inches. While the work of removal and of rebuilding was going on Green was abroad, and Starkie was residing and doing business on his premises in the rear, to which the passageway led. While Richmond was engaged in the work of rebuilding, the wife of Starkie, who was authorized to represent him, went to Richmond, as soon as the work had progressed enough to show where the walls were to be, and told him that he had gone over the passageway. To this Richmond replied "that his deeds were all right." Whereupon Starkie's wife said that "her husband's deeds were before his, and that her husband understood that he had nearly ten feet of the passageway." Richmond completed his building. Aside from this conversation, no act or communication, either of Green, who returned from abroad after the completion of the new building, or of

Starkie, is shown until the year 1887. The passageway, as it was left by the erection of the new building, continued to be used. Green did not know that the way had been narrowed until some years afterwards, although he might at any time have ascertained it by measurement. As it was determined in the cases of *Starkie v. Richmond* and *Green v. Richmond*, Richmond had, in fact, by his new building, narrowed the passageway near the line of Main street $27/100$ of a foot, and at the actual line of Main street over $40/100$ of a foot, and he had widened it $2/10$ of a foot where the southeast corner of the Slater Block stood. In the year 1887 Green and Starkie's wife had several interviews with Richmond in reference to paying the passageway from Main street, and also the area in the rear of and up to Richmond's new building, which was done, and the expense thereof was shared by Starkie, Green, Richmond, and others who had rights in the passageway. This area, between the east end of Richmond's new building and the 20-foot passageway, was left open from the completion of the building in 1878 until 1887, during which time teams passed and repassed over the open area, around the southeast corner of the building, to and from the premises of Starkie and of Green. In the year 1887, and after the passageway and area were paved, there was a controversy between Richmond and Mrs. Starkie as to the condition in which the area forming the back yard of the new building was kept; and in consequence of this controversy Richmond built a fence extending from the southeast corner of the new building, 19.9 feet easterly on the same line, and then turning at a right angle, and running northerly, and inclosing the open area; and it inclosed part of the paved surface.

Except for the conversation above stated, between Richmond and Mrs. Starkie, at the time when the new building was in process of erection, neither Starkie nor Green took any steps towards the removal of Richmond's building or fence, or to recover damages for interference with the way, until the commencement of the suits of *Starkie v. Richmond* and of *Green v. Richmond*, nor was any further complaint made by either Starkie or Green until after the building of the fence in 1887. Those suits were bills in equity, filed in January, 1889, to enjoin Richmond from interfering with the way, and to compel him to remove the building and fences therefrom. They were heard in the superior court without a jury. The finding of the court was that Richmond's new building stands partly on land over which teams were accustomed to pass in the rear of the Slater Block, and that, by the new building, Richmond had both narrowed the way and widened it as above stated. The court refused to order the removal of the building, determined the location and width of a passageway to be thereafter maintained, ordered the removal of the fence and post, and that the damages of Starkie and of Green should be assessed in their respective cases by a jury. These are

the damages which, by the agreement recited in the present bill of exceptions, were in fact assessed in the respective cases, in accordance with the decrees therein, and which it is now further agreed amounted altogether to the sum of \$2,587.86. It is now further agreed that, as between Green and Richmond, and as between Starkie and Richmond, these damages were reasonable, and that \$677.46 were reasonable counsel fees, and that \$51 were reasonable witness fees incurred by Richmond in defending those suits, and that \$232.54 was the diminution in value of Richmond's estate by reason of the incumbrance on the triangular piece of his land at the southeast corner, and that the Green and Starkie damages, the witness fees, and the diminution in value were fixed by the proceedings in those suits under the final decrees. The four sums just mentioned are the same found by the presiding justice at the trial of the present case, reported in 164 Mass., and 41 N. E., in the finding "that, in order to remove so much of the incumbrance as is affected by the cases of Starkie and Green against Richmond, the plaintiff had to pay in damages \$2,587.86, for reasonable counsel fees \$677.46, and for witness fees \$51,—making a total of \$3,316.32," and in the finding "that, by reason of said incumbrance upon a triangular piece of the plaintiff's land at the southeast corner, the plaintiff's estate was diminished in value, in 1892, to the extent of \$232.54."

At the new trial on the question of damages, the defendant claimed to go to the jury on two questions of fact: First, of notice to Mrs. Ames of the suits of Green v. Richmond and Starkie v. Richmond; and, second, on the question of the good faith of Richmond towards Mrs. Ames in building on the incumbered strips of land after the notice, contained in the conversation, before recited, between Richmond and Mrs. Starkie, of Starkie's claim as to the passageway and its width. With regard to the question of notice to Mrs. Ames, both she and Richmond gave substantially the same testimony which is reported in Richmond v. Ames, 164 Mass. 470, 471, 41 N. E. 671, and each of them gave some additional testimony of a character substantially similar to that so reported. We find nothing in the whole evidence at the last trial to make the question whether notice could properly be found from it a different one from that decided adversely to Richmond in Richmond v. Ames, 164 Mass. 475, 41 N. E. 671, and therefore need not discuss it further. On the question of the good faith of Richmond towards Mrs. Ames in building on the incumbered strips of land after he had notice of Mrs. Starkie's claim in regard to the passageway, Mrs. Starkie, who was the wife of the plaintiff in Starkie v. Richmond, and who, as stated, was acting for him at the time, was called as a witness; but her testimony was only as to her interview with Richmond, and was entirely in accord with the account of that interview given in the reported cases specified. There was no new evidence tending to establish

any other facts touching the boundary lines, or the building of his block by Richmond, than those which have appeared in the reports referred to. The plaintiff, among other requests, which need not now be discussed, asked the court to rule, in substance, that the evidence relied on by the defendant to prove that the plaintiff proceeded in bad faith in building his block, and in building his corner fence, is incompetent and insufficient to sustain a finding to that effect by the jury. The presiding justice refused to give this instruction, and left it to the jury to say whether the plaintiff proceeded in good faith in erecting his building after the notice from Mrs. Starkie. The verdict was for the plaintiff in the sum of \$1,133.98.

The only additional features bearing upon the question thus left to the jury against the plaintiff's exception, beyond that presented by the reported cases of Starkie v. Richmond, Green v. Richmond, and Richmond v. Ames, before mentioned, and which was considered by this court in the decision in Richmond v. Ames, were the testimony of Mrs. Starkie, above referred to, and the agreement that the four sums were reasonable sums, and that all of them, except the counsel fees, were fixed in the former suits. It was said, in that decision, that it was "entirely consistent with the facts reported that the present plaintiff proceeded in good faith in erecting his building, even after the notice of Starkie's wife. The facts, so far as as they are reported, are such that it might well require the judgment of a court in order to determine the boundaries and width of the passageway which Starkie and Green were entitled to use." If, after that decision, it was open to the defendant to try the question whether Richmond proceeded in good faith to erect his building after the notice from Starkie's wife, we find nothing in the slight additional evidence, or in the agreements now before us, to justify a finding that he proceeded in bad faith. That he erected the building and contested the suits with a design to make expense for Mrs. Ames is inconceivable. While he was putting up a block within the right plainly given by his own deed, a woman came to him in the alleyway, and told him that he was encroaching on the alleyway, and that their deeds came first. His position, as announced in his reply, was that he was going by his deed. He kept on at the work, which was then either in the stage of the removal of the old building, or had progressed only so far as to show where the wall of the new building was to be. There was no further or other notice or remonstrance or complaint for nine years. So far from acting oppressively towards Mrs. Ames, he had, shortly after obtaining his deed from her, without resorting to her, compelled Davis, her grantor, to make good the damage done him by reason of the fact that he was precluded from building over the way. In relying upon his own deeds he was within his legal right, as he was, also, in defending the suits. He certainly made

no concealment of the fact that the suits were being pressed against him, and talked about them with Mr. Ames, who was the agent of Mrs. Ames in managing her real estate, and had him as a witness in the suits. We find no circumstance indicating any improper or unreasonable motive or act on the part of Richmond throughout the transaction from beginning to end. He acted within the right given him by the defendant's deed, was cast in damages at the end of a long-delayed, tedious, and doubtful litigation, and was, we think, entitled to have the jury instructed that the evidence relied upon to prove that he proceeded in bad faith was insufficient to sustain a finding to that effect. Exceptions sustained.

(167 Mass. 302)

WILCOX v. ZANE.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1897.)**NEGLIGENCE—VOLUNTEER—CONTRIBUTORY NEGLIGENCE—EVIDENCE.**

1. One who goes on a roof, at the request of a tenant in the building, to do gratuitously work which the tenant has the right to do on the roof, is not a volunteer, and therefore the owner is liable to her for injuries caused by neglect to repair the roof.

2. Plaintiff, while working on a roof, was injured by the breaking of a roof board under her feet. The roof had not been repaired for more than two years, and the board which broke was cross-grained, knotty, and badly rotted. Plaintiff had never noticed the condition of the roof, and was doing her work in the usual way. *Held*, that negligence and contributory negligence were questions for the jury.

Exceptions from supreme judicial court, Suffolk county.

Action by Clara A. Wilcox against Joseph Zane to recover for personal injuries. The trial judge directed a verdict for defendant at the close of plaintiff's evidence, and plaintiff brings exceptions. Exceptions sustained.

E. O. Shepard, for plaintiff. Elden, Wait & Whitman, for defendant.

KNOWLTON, J. The evidence tended to show that the roof where the plaintiff was injured was retained in the possession of the defendant as a place to be used in common by his tenants in the building for hanging clothes to dry, and for other uses to which the yard of a dwelling house is commonly put. It was, therefore, his duty to keep it in a reasonably safe condition for the uses for which it was intended. *Looney v. McLean*, 129 Mass. 33; *Marwedel v. Cook*, 154 Mass. 235, 28 N. E. 140; *Watkins v. Goodall*, 138 Mass. 533; *Miller v. Hancock* (1893) 2 Q. B. 177. The plaintiff was a boarder with Mrs. Pray, one of the defendant's tenants, who, by contract with the defendant's agent, had a right to use the roof in common with others. At Mrs. Pray's request, she went upon the roof to do work for Mrs. Pray, which she had a right to

do there under her contract with the defendant. Although she was working gratuitously, she was, in a sense, a servant or agent of Mrs. Pray, and she went upon the roof in Mrs. Pray's right. *Barstow v. Railroad Co.*, 143 Mass. 535, 536, 10 N. E. 255. The use which the tenants might make of the roof was not limited to working there in person. The implied invitation growing out of the defendant's contract extended to the agents and servants of the tenants who went upon the roof to do work which the tenants were authorized to do there. The defendant had an interest in the use to which the roof was being put, for he received pay from his tenants for the privilege of so using it. Upon the evidence in this case the defendant owed the plaintiff the same duty to have the roof reasonably safe at the time of the accident that he owed to Mrs. Pray. *Plummer v. Dill*, 156 Mass. 426, 31 N. E. 123; *Hart v. Cole*, 156 Mass. 475, 31 N. E. 644. There was evidence from which the jury might have found that he failed in the performance of this duty. It is clear that it was not necessary to have a very strong floor, for, if one broke through it, his foot could not descend more than about four inches before it would be stopped by the roof below. As the danger of injury was small if a board broke, a greater risk of breaking was allowable than if a break would be likely to be attended by serious consequences. But there was evidence that the board which broke was badly decayed, and was cross-grained and knotty, and that no repairs had been made on the roof for more than two years. We think that the pieces of broken board which were in evidence, the photographs, and the testimony of the witnesses, presented a question for the jury on this branch of the case. We cannot say, as matter of law, that there was no evidence that the plaintiff was in the exercise of due care. She testified that she had never noticed the dangerous condition of the roof at the place of the accident, and she was in the performance of her duty in the usual way. She had no such duty to observe the condition of the roof in regard to safety as the defendant had. Exceptions sustained.

(167 Mass. 315)

TRADERS' NAT. BANK v. ROGERS.(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 8, 1897.)**FORGERY OF NOTE—RATIFICATION—ESTOPPEL.**

1. Failure of one, when shown a note indorsed with his name, to at once repudiate the genuineness of the signature, while evidence, in the nature of an admission on the question whether he assumed the signature as his own, is not conclusive; he having received no benefit from the forgery, and the forger not being his agent for any purpose.

2. Statement of one to the holder of a note, when shown the same with his name indorsed thereon, that "the note will be paid," is not con-

clusive evidence of a ratification of the signature.

3. One who, when shown a protested note indorsed with his name, states that it will be paid, is not thereby estopped to claim the signature a forgery; the evidence warranting a finding that he did not make the remark with intent to mislead, and that it was not relied and acted on as an admission of the genuineness of the signature.

Exceptions from superior court, Suffolk county; Chas. S. Lilley, Justice.

Action by the Traders' National Bank against Albert D. Rogers on a note indorsed with defendant's name. The court found for defendant, and plaintiff excepts. Exceptions overruled.

The conduct of defendant relied on by plaintiff, of which Mr. Jaquith was president, was when defendant came to the bank after being notified that it had a protested note bearing his indorsement.

Strout & Coolidge and W. R. Bigelow, for plaintiff. O. R. Elder, for defendant.

ALLEN, J. 1. The plaintiff contends that if the defendant, when the note was first shown to him, knew that the indorsement of his name upon it was a forgery, he was bound to inform the plaintiff of this fact, and that his omission to do so amounted, of itself, to an affirmation of the signature. There was nothing to show that the defendant had received any benefit from the forgery, or that the forger was his agent for any purpose. Under these circumstances, the defendant was not bound, as a matter of legal duty, to repudiate or disclaim at once the genuineness of the signature. His failure to do so was evidence in the nature of an admission, which might be considered as bearing upon the question whether he assumed the signature as his own, but it was not conclusive. *President, etc., v. Crafts*, 2 Allen, 269, 273; *Harrod v. McDaniels*, 128 Mass. 413. Nor was the defendant's statement that "the note will be paid" conclusive evidence of a ratification of the signature. It was consistent with the idea that the defendant was surprised at finding his name upon the note, and left the bank, saying as little as possible, but meaning only to give the impression that he thought the note would be taken up by some one other than himself. Indeed, his words and manner would seem to have left this impression upon Mr. Jaquith himself. It was competent for the court to find, as it did, upon the evidence, that it was not satisfied that the defendant made the remark with the intent to give the plaintiff's officers to understand that the signature was his, and genuine, or with intent to induce the bank to assume that his statement was an admission of the genuineness of the signature; and this finding negatives ratification. *Creamer v. Perry*, 17 Pick, 332; *Wellington v. Jackson*, 121 Mass. 157; *Bank v. Crafts*, 4 Allen, 447, 455; *Smith v. Tramel*, 63 Iowa, 488, 27 N. W. 471.

2. It was also competent for the court to find, as it did, upon the evidence, that it was not satisfied that the defendant made the remark above mentioned with intent to mislead the plaintiff, or that the plaintiff relied and acted upon his statement as an admission of the genuineness of his signature. According to the rule of law as established in this commonwealth, this negatives an estoppel. *Lincoln v. Gay*, 164 Mass. 537, 42 N. E. 95; *Stiff v. Ashton*, 155 Mass. 130, 29 N. E. 203; *Bank v. Buffinton*, 97 Mass. 498. Exceptions overruled.

(167 Mass. 460)

COMMONWEALTH v. FLYNN.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 20, 1897.)

LARCENY—POSSESSION OBTAINED BY FRAUD—INSTRUCTIONS.

1. Evidence that defendant solicited a person to purchase a ticket entitling her to have her photograph taken, 25 cents to be paid in advance; that, on her stating that she had no change, defendant offered to change a dollar for her, and, on receipt of the bill, told her that he was going out for the change, and for her to await his return; that he never returned, and, when arrested, denied having ever seen her,—warrants a conviction of larceny, on the ground that he obtained possession of the bill by fraud with intent to convert it to his own use.

2. Instructions based on a hypothesis not warranted by the evidence are properly refused.

Exceptions from superior court, Suffolk county; Daniel W. Bond, Judge.

Daniel Flynn was convicted of larceny, and excepts. Exception overruled.

Prosecutrix testified substantially as follows: That on February 27, 1896, witness was employed as a cook by a family living on Mill street, Dorchester. That defendant came to her, and asked her to purchase a ticket entitling her to have one dozen photographs taken for \$1.50, 25 cents to be paid in advance, at the Revere Studio, 98 Court street, Boston. That she purchased a ticket of defendant, and paid him therefor 25 cents. That thereupon defendant said to witness that, if she would give him 25 cents more, he (defendant) would finish off six or seven more photographs for witness. "I said to defendant that I had no more change. I had paid him twenty-five cents. He told me he would change a bill. I gave him a dollar bill, and he put it in his pocket, and said: 'There is another man with me on the road. I have not got the change. I am going out for the change.' He gave me two tickets, and told me to hold them till he came back. He never came back. I did not see him till a week or so later, when he denied that he ever saw me before." That witness, after handing said dollar bill to defendant, had no claim upon it except for the 75 cents change defendant agreed to bring back to her. That she had never visited the Revere Studio, nor applied to have any pictures taken upon the ticket purchased of defendant. Christopher Karcher, the complainant,

testified substantially as follows, subject to the defendant's objection, and exception duly made and saved: That on March 9, 1896, he arrested defendant. That he then asked him if he was guilty, and he said, "No." That defendant said he had to suffer for some one else. That defendant gave witness his name Andrew Hall. That witness then took defendant to police station 11, in Dorchester, and there asked witness his name, and he would not give his right name. That defendant said his name was Taylor, and that then he said his name was Daniel Flynn.

John D. McLaughlin, for the Commonwealth. Clarence W. Rowley, for defendant.

MORTON, J. The defendant was identified by the witness Driscoll as the man who obtained the bill from her, and, in addition to the representations by which he induced her to part with it, there was evidence that he went away with it, and never returned; and that when he was arrested, about 10 days later, he denied that he had ever seen her before, gave different names to the officer who arrested him, and said that he had to suffer for some one else. It was competent for the jury to find in this testimony that the title to the bill did not pass to him, and that he obtained possession of it by fraud, with the present intent to convert it to his own use, and did so. This would constitute larceny. *Com. v. Rubin*, 165 Mass. 453, 43 N. E. 200; *Com. v. Lannan*, 153 Mass. 287, 26 N. E. 858; *Com. v. Barry*, 124 Mass. 325. The first of the rulings asked for by the defendant was therefore rightly refused.

The remaining instructions which were requested by the defendant present questions of more difficulty. If the circumstances disclosed by the evidence were such as to fairly justify the inference that a relation of trust and confidence arose between the witness Driscoll and the defendant, so that he became her debtor for 75 cents, and she gave him credit therefor, then, the title to the bill having passed to him, he could not be convicted of larceny, though he had obtained possession of it by fraud. *Com. v. Barry*, *supra*. But if he was only her hand or agent to get the bill changed, with the right to retain 25 cents out of it when he had done so, returning the rest to her, and he obtained possession of the bill by fraud, with the intent at the time to appropriate the whole to his own use, and did so, then the title to the bill remained in her, and he was guilty of larceny. *Com. v. Barry*, *supra*; *Com. v. Lannan*, *supra*; *Com. v. O'Malley*, 97 Mass. 584; *Justices v. People*, 90 N. Y. 12; *Murphy v. People*, 104 Ill. 528; 2 Bish. Cr. Law, § 808. Obtaining possession by fraud in such a case is regarded as having the same effect as obtaining possession by trespass. *Com. v. Rubin*, 165 Mass. 454, 455. We think that there was no evidence, or, if there was, it was so slight as to be no more

than a scintilla, that fairly would have warranted the jury in finding that the transaction was of the former, and not of the latter character. The undisputed testimony was that the defendant received the bill for the purpose of getting it changed, and that he was expected to do so immediately; and though the witness Driscoll did not expect the bill to be returned to her, but only to receive the 75 cents, that does not show, and has no tendency to show, that she had parted with the title to the defendant. But the bill remained her property till he had delivered it to another person, and received the change. *Com. v. Lannan*, *supra*. Nor, for the same reason, was there any evidence which fairly would have warranted the jury in finding that the bill was delivered to the defendant in payment of the 25 cents which the witness Driscoll had agreed to pay him, meaning thereby that the property in the bill had passed to him. It was expected that he would receive his pay out of the dollar, but that is very different from saying that the bill, or any part of it, became his; and that the effect of the transaction was to convert the witness Driscoll from his debtor into his creditor. In the view of the case which we take, the instructions which we are now considering were each based in some particular on a hypothesis which the evidence did not warrant, and were therefore rightly refused. Those which were given were correct. The statements which were made by the defendant to the officer are not shown to have been made under such circumstances as to make them incompetent. *Com. v. Myers*, 160 Mass. 530, 36 N. E. 481. Exception overruled.

(167 Mass. 364)

BISHOP v. NORTH ADAMS FIRE DIST.

(Supreme Judicial Court of Massachusetts.
Berkshire. Jan. 9, 1897.)

EMINENT DOMAIN—STATUTE—DAMAGES FOR WRONGFUL TAKING—HIGHWAYS—ADDITIONAL SERVITUDE.

1. St. 1889, c. 144, providing that a fire district may, for the purpose of constructing and repairing aqueducts (section 1), take any land necessary, and (section 3) dig up any road, public way, or other way along which water pipes are laid, does not authorize the appropriation of a perpetual right to take from a tract of land adjacent to the highway, in which water pipes were laid, earth and stones for repairing aqueducts.

2. Where petitioner in a proceeding to assess damages for a taking of land for public use proves no value except of all the land taken, and the taking is invalid in part, there can be no recovery, the remedy for damage by the invalid taking being by action in tort.

3. The owner of the fee in a highway is not entitled to compensation for the subjection of the highway to the additional public use of laying water pipes under it.

Exceptions from superior court, Berkshire county; Elisha B. Maynard, Judge.

Petition by Eleanor L. Bishop against the North Adams Fire District for an assessment of damages by a jury for land taken by

respondent in the construction of a water-works system. There was a verdict directed for defendant at the close of plaintiff's evidence, and plaintiff brings exceptions. Exceptions overruled.

Pingree, Dawes & Burke, for petitioner.
Mark E. Couch, for respondent.

LATHROP, J. St. 1889, c. 144, authorized in section 1 the North Adams Fire District, for the purpose of supplying said district, the inhabitants of North Adams, and the inhabitants of that portion of Williamstown lying adjacent and contiguous to the proposed main line of pipe through which the water was to be conducted, with pure water for the extinguishment of fires and for domestic and other purposes, to take by purchase or otherwise the waters of a certain brook and its tributaries in Williamstown, and convey the water through Williamstown and North Adams; and to "take and hold by gift, purchase or otherwise, any lands, rights of way and easements, necessary for obtaining, taking and conveying said water and laying, constructing and maintaining aqueducts, water courses, reservoirs, storage basins, dams and such other works as may be deemed necessary for collecting, purifying, storing, retaining, discharging, conducting and distributing said water." By section 2 the fire district is required, within 60 days after any taking under the act to "file and cause to be recorded in the registry of deeds for the county and district in which such land or other property is situated, a description thereof sufficiently accurate for identification, with a statement of the purpose for which the same was taken, which statement shall be signed by the chairman of the prudential committee of said fire district." By section 3 the fire district was given the power, for the purposes aforesaid, among other things, to make excavations, and to carry any pipe over or under any public way, highway, or other way, in such manner as not unnecessarily to obstruct the same; and, under the direction of the boards of selectmen of the towns of North Adams and Williamstown, "to enter upon and dig up such road, street or way for the purpose of laying down, maintaining or repairing any pipe, drain or aqueduct." By section 4 the fire district is liable to pay "all damages sustained by any persons or corporations by the taking of or injury to any of their land, water, water rights, rights of way, easements or property, or by the constructing or repairing of any aqueduct, reservoir or other works." And damages are to be assessed and determined, in the case of any person sustaining damages as aforesaid, in the manner provided by law when land is taken for the laying out of highways. The petitioner is the owner of five lots of land in Williamstown, each of which, except one, abuts upon a public highway called the "Back Road." The lots abutting on the highway have in all an area of over 50 acres, and the lot not

abutting on the highway is connected with the other lots, and has an area of about three acres. There are no fences between any of the lots. At the trial in the superior court there was evidence tending to show that on or about November 15, 1889, a water pipe of the respondent was laid through the Back Road, which lies westerly of the petitioner's land, until the pipe approached the southerly boundary of her land, when it crossed the highway to the west, and passed southerly outside the limits of the way through the land of one Russell Briggs, through which a dike had to be constructed for the pipe; that in the road in front of the petitioner's land the pipe was laid on the surface, and earth and soil were taken to fill the road and cover the pipe; and that earth and soil were also taken and carried onto the land of Russell Briggs to construct the dike and to cover the pipe; and that excavations were made into the land of the petitioner along the easterly side of the way in two places for about 30 feet, to obtain the earth and soil so used.

The exceptions recite: "The petitioner testified that the excavations made by the agents of the fire district aforesaid in laying said pipe rendered it impossible to drive onto her said land." The petitioner also introduced evidence as to the value of her five lots of land at the time of the alleged taking, and damages for taking the same, contending that the description in the alleged taking embraced and included all of the lots. The petitioner was allowed to put in evidence, against the objection and exception of the respondent, a certified copy of an instrument, recorded in the registry of deeds, which the petitioner contended was a taking of all of her lots. After the admission of this instrument, the presiding justice ruled that upon the pleadings and evidence the petitioner could not recover, and directed the jury to return a verdict for the respondent; and the case comes before us on the petitioner's exceptions.

The principal questions which have been argued before us by the counsel for the respondent relate to the admissibility in evidence of the certified copy of the instrument of taking. The objections made to this in the court below appear to be that there was no evidence of any vote of the respondent relating to the alleged taking of the petitioner's land, nor how such an instrument came to be recorded, nor by whose authority it was made, nor whether the person whose name was appended was ever chairman of the prudential committee of the respondent. We do not find it necessary to determine these questions, even if they are open upon the exceptions before us. For the purposes of the case, we consider the alleged taking to be in evidence. The first questions to be determined, then, are what the respondent took, and how far the taking was authorized by law.

The instrument in question is dated on January 6, 1889, which is probably a mistake for January 6, 1890, as the instrument was recorded in the registry of deeds on the latter date, and the language of the instrument relates to a time between the two dates. It recites a taking, on November 15, 1889, under St. 1889, c. 144, of "the sole and exclusive right and privilege at all times hereafter to lay down, keep, and forever maintain in good repair an iron pipe twenty-four inches in diameter (inside measurement) for conveying and distributing pure water for the purposes named in said act, in, along, and through a certain piece or parcel of land situate in Williamstown in said county, bounded on the north and east by land of Clarence Whitney, on the south by the Stevenson lot, so called, and on the west by lands of Russell R. Briggs and of Thomas Quinn as the pipe of the fire district is now laid. The said water pipe of the said fire district is laid wholly within the limits of the public highway leading from North Adams to Williamstown, known as the Back Road, the fee of which is in the name and owned by Eleanor L. Bishop of North Adams in said county, subject to the public easement of a highway." It is evident that thus far there was no attempt to take the whole of the petitioner's land, or even an easement in the whole. The general language employed covering the petitioner's land and the road is qualified by the words, "as the pipe of the said fire district is now laid," as well as by the words which state where the pipe is laid. The fair meaning of the instrument is simply that an easement was taken in the public highway. It is therefore immaterial that the entire tract was inaccurately described by stating that it was bounded on the north and east by land of Clarence Whitney, and on the south by the Stevenson lot, when in fact it was not so bounded. The remaining portion of the taking is thus described: "The said fire district did also take at the time and for the purposes aforesaid the right to take at all times after the laying of the said water pipe by the said district as aforesaid sufficient earth, soil and stones from the tract hereinbefore described to construct the trench and to cover the said water pipe, of the said district adjacent to said tract, and keep the same in perpetual repair, with the right at all times hereafter to enter upon said tract and keep the same in perpetual repair, with the right at all times hereafter to enter upon said tract of land with men and teams to keep and maintain the said water pipe in good repair for the purposes named in the act." The language here used is ambiguous. The words, "the tract hereinbefore described," might be construed to include the land of the petitioner, including the road, but the fact that the water pipe is described as being "adjacent to said tract" apparently shows that the intent of the instrument was to take the land of the petitioner exclusive

of the road. The purpose was declared to be not only to obtain materials for the construction of the trench, but to keep the same in perpetual repair, thus subjecting the land of the petitioner, inclusive or exclusive of the road, to a perpetual servitude. We find no authority for such a taking given in the act. The only words in section 1 which have any application are these: "And may also take and hold * * * any land * * * necessary for obtaining, taking and conveying said water, and laying, constructing and maintaining aqueducts." But neither these words nor the general words in section 3 are, in our opinion, broad enough, so far as the aqueducts are concerned, to authorize the taking of land outside of that necessary for the laying and constructing of the pipes, and do not authorize the imposition of a perpetual servitude upon large tracts of adjacent land, for the mere purpose of furnishing the material for constructing and repairing the aqueducts. The grant of power to take land by the right of eminent domain is not to be extended by implication or inference. *Railroad Co. v. Davis*, 43 N. Y. 137, 148; *Railroad Co. v. Gunnison*, 1 Hun, 496. To construe the taking as valid would give to the respondent, which is merely a quasi municipal corporation (see *Prout v. Fire Dist.*, 154 Mass. 450, 28 N. E. 679), a greater power than is given to municipal, or even to railroad, corporations by existing laws. Thus, under Pub. St. c. 49, §§ 99-101, cities and towns may take land for gravel and clay pits for a length of time not exceeding 10 years, and the report of the laying out is required to state the extent and depth of the excavation to be permitted. See *Hatch v. Hawkes*, 128 Mass. 177. By Pub. St. c. 112, §§ 88, 91, 95, a railroad corporation may take land outside the limit of its location for the purpose of procuring stone and gravel, but can do so only by applying to the county commissioners, who may prescribe the limits within which the same may be taken. See, also, St. 1884, c. 134. In the case at bar the petitioner's land abuts on the highway only about 600 feet, and the respondent has assumed to take the whole of her land, amounting to over 50 acres, to cover the pipe adjacent, and keep the same in perpetual repair. If the statute authorized the taking of any land adjoining, we should be constrained to say that the taking in this case was not necessary, and could not be justified. At the trial in the court below the only evidence of value and damages offered by the petitioner was on the theory that all of her lands were taken. As we are of opinion that there was no valid taking of all her lands, she cannot recover for such a taking. The excavations on the petitioner's land were a mere trespass, for which her remedy is by an action of tort. While there appears to have been some change in the grade of the road, no claim for this was made in the court below,

and there was no evidence as to how this change affected her land. The statement in the bill of exceptions that the excavations made in laying pipe rendered it impossible to drive on her land, relates, we presume, to a temporary interruption of travel which would not entitle her to relief. See *Shaw v. Railroad Co.*, 159 Mass. 597, 35 N. E. 92, and cases cited; *Fitch v. Railroad Co.*, 59 Conn. 414, 20 Atl. 345; *In re Squire*, 125 N. Y. 131, 26 N. E. 142. While we assume that the petitioner owned the fee in the highway, the fact that this, by the laying of the pipe, was subjected to an additional public use, did not entitle her to relief. *Attorney General v. Metropolitan R. Co.*, 125 Mass. 515; *Pierce v. Drew*, 136 Mass. 75, 81. The ruling that the petitioner was not entitled to recover was therefore correct. Exceptions overruled.

(167 Mass. 231)

COFFING v. DODGE.

(Supreme Judicial Court of Massachusetts. Berkshire. Jan. 6, 1897.)

FOREIGN CORPORATIONS—ENFORCEMENT OF STOCKHOLDERS' LIABILITY — LIMITATIONS — NEGLIGENCE OF AGENT—MEASURE OF DAMAGES.

1. Liability of a stockholder of a foreign corporation under the statutes of the foreign state to a creditor of the corporation, not being alleged to be contractual, or to be so held by the courts of that state, cannot be enforced in Massachusetts.

2. Where a declaration seeks recovery for breach of contract, recovery cannot be had in that action under a supplemental declaration seeking to recover the consideration of the contract, and basing the right thereto on rescission made after commencement of the action on the contract.

3. In an action for damages by reason of bad investments made by defendant for plaintiff, some of them more than six years before the commencement of the action, it is error to submit the case for the jury to find on all the items, without regard to the statute of limitations; the counts being in contract, for negligence, and for fraud, to each of which the six-years statute applies, unless defendant has fraudulently concealed from plaintiff the cause of the action (Pub. St. c. 197, § 14), and a ruling, as matter of law, that there was such concealment, not being warranted by the evidence.

4. In an action to recover for bad investments in mortgage securities made by defendant for plaintiff, the case being submitted on three counts,—one for breach of defendant's undertaking to invest plaintiff's money safely; another for negligence in putting her money, as her agent, into worthless securities; and the other for fraudulent representations inducing plaintiff to allow defendant to place her money in the investments,—it is error to charge that "the measure of damages is the difference between the value of the securities at the time plaintiff got the property into her possession (she having, one to two years after interest was in arrears and ceased to be paid on the mortgages, which was six months to a year and a half after the purchases thereof, become the owner of the lands covered thereby, through foreclosure and purchases of the equities) and the face value of the securities at that time"; the measure of damages in case of recovery for breach of contract or for negligence being the difference between the value of the mortgages at the time they were bought, and safe mortgages, and this being the measure in cases of fraudulent representations, unless the facts of

the particular case warrant a different rule and the default in interest being a circumstance to put plaintiff on inquiry, so that her damages should be measured as of a time not later than then.

Exceptions from superior court, Berkshire county; Ellisha B. Maynard, Judge.

Action by Rebecca J. Coffing against John L. Dodge. Verdict for plaintiff. Both parties except. Plaintiff's exceptions overruled. Defendant's exceptions sustained.

H. C. Joyner and G. C. Warner, for plaintiff. Marshall Wilcox and Frank H. Wright, for defendant.

BARKER, J. The action was begun on April 22, 1895, by a writ in contract. The original declaration had five counts, the first of which was in contract for breach of the defendant's undertaking to safely invest for the plaintiff money which he promised to invest safely for her as her agent; the third was for fraudulent representations, whereby the plaintiff was induced to allow the defendant to invest the plaintiff's money in certain mortgages, which turned out not to be good; the fourth count was for negligence in investing the plaintiff's money in worthless notes or bonds; and the fifth was to enforce the defendant's liability as a stockholder in a corporation which had guaranteed certain notes and mortgages belonging to the plaintiff. Before the trial, a supplemental declaration was added, in which the plaintiff alleged a rescission by herself of the contract under which her money was invested by the defendant in the mortgages, and sought to recover the money, with interest. At the trial, the plaintiff relied upon the first, third, fourth, and fifth counts of the original declaration, and upon the supplemental declaration. At the close of the evidence, the plaintiff's counsel were asked by the court if they would elect upon what counts they relied, and replied that they were not prepared to make an election, but relied on the above-mentioned counts of the original declaration, and on the supplemental declaration. The court ruled that the plaintiff could not recover upon the fifth count, even if she proved all the allegations therein made, and also that she could not recover in this action under the supplemental declaration; and the case was submitted to the jury on the first, third, and fourth counts of the original declaration. The jury returned a general verdict for the plaintiff, and both parties have entered bills of exceptions in this court. The plaintiff's bill states exceptions to the ruling that she could not recover under the fifth count, and also to the ruling that she could not recover under the supplemental declaration.

The ruling that the plaintiff could not recover upon the fifth count of the original declaration was right. We do not enforce foreign statutes which provide for bringing

into court the creditors and stockholders of a foreign corporation, in order to liquidate its affairs, or which impose, for the benefit of the creditors of a foreign corporation, a penal liability upon the stockholders. *Erickson v. Nesmith*, 15 Gray, 221, 4 Allen, 233; *Hutchins v. Mining Co.*, 4 Allen, 590; *Halsey v. McLean*, 12 Allen, 438; *New Haven Horse Nail Co. v. Linden Springs Co.*, 142 Mass. 349, 7 N. E. 773; *Post v. Railroad Co.*, 144 Mass. 341, 11 N. E. 540; *Bank v. Rindge*, 154 Mass. 203, 27 N. E. 1015. It is true that in *Bank v. Ellis* (Mass.) 44 N. E. 349, we sustained, upon demurrer, a declaration to enforce the liability of a stockholder in a Kansas corporation. But it was there alleged that the liability was contractual, arising from the subscription of the defendant for his stock, whereby he guaranteed the payment sought to be recovered, and that the liability had been so construed in Kansas by its court of last resort, and other allegations showing that no injustice could be done to the defendant or to the corporation or other creditors or stockholders by entertaining the action. Here there is no distinct allegation that the liability is contractual, nor that it has been so construed by the courts of Kansas, nor are there any allegations from which it can be seen that no injustice to others will be done. The ordinary rule must be applied, and we need not consider whether such a count could be joined in one action with the third and fourth counts, which were in tort, and not for the same cause of action, as this count.

The ruling that the plaintiff could not recover under her supplemental declaration, filed long after the commencement of the action, was also right. That declaration set up, as the foundation of the plaintiff's right to recover, an alleged rescission, made after the commencement of the action, of the contract upon which the action itself was founded, and which the plaintiff had affirmed by the act of bringing the action for its breach. See *Connihan v. Thompson*, 111 Mass. 270; *Whiteside v. Brawley*, 152 Mass. 133, 24 N. E. 1088. Even if the bringing of the suit upon the contract did not conclusively determine the plaintiff's right to rescind, because of her ignorance of the facts subsequently disclosed, she cannot be allowed to maintain the present action upon a rescission made after the action was commenced. We do not consider whether enough was in fact done to work a rescission if she still had a right to rescind, or whether such a count, which is in contract for the recovery of the consideration paid, can be joined with the third and fourth counts in tort.

The defendant's bill brings up exceptions to the ruling of the court as to the effect upon the action of the statute of limitations, and as to the measure of damages. The investments in respect of which the plaintiff sought to recover under the counts which

went to the jury were made on June 29, 1888, August 18, 1888, January 26, 1889, and May 18, 1889. Her writ was sued out on April 22, 1895, more than six years after the time when all the investments were made, except the last investment. The defendant contended that the cause of action on account of these transactions except the last was barred by the statute of limitations, but the court instructed the jury as follows: "There is a rule of law, and it is set up in this case, that in certain cases the writ must be brought within six years from the time the cause of action accrued, and the question is whether it accrued at the time of the first loan, or at the time the final loan was made. That is a question of law, to be passed upon by the supreme court, and, for the purposes of this case, I instruct you that you need not trouble yourselves about any part of it being outlived." As the case stood, this ruling was clearly wrong. The presiding justice was submitting to the jury three counts, each relating to all of the investments above specified. One count was for breach of the defendant's undertaking to invest the plaintiff's money safely; one, for simple negligence in putting her money, as her agent, into worthless securities; and one, for fraudulent misrepresentations, whereby the plaintiff was induced to allow the defendant to place her money in the investments mentioned. It is plain that the ordinary or six-years statute of limitations applied to each of these counts,—the count in contract, the count for negligence, and also to the count for fraud,—unless it should be found by the jury that the defendant had fraudulently concealed from the plaintiff the cause of action on which the count declared, in which case only, under the provisions of Pub. St. c. 197, § 14, the plaintiff's action would not be barred by the statute until six years after she discovered that she had the right of action. The plaintiff now contends that, by reason of the statute last cited, no part of her cause of action is barred. But the bill of exceptions contains no intimation that this contention was made at the trial, and the clear implication from the language of the instruction itself, that "the question [as to when the cause of action arose] is whether it accrued at the time of the first loan, or at the time the final loan was made. That is a question of law, to be passed upon by the supreme court,"—is to the contrary. If the contention that the defendant had fraudulently concealed the cause of action from the plaintiff, and that no part of her right of action was barred, because she had not discovered it until within less than six years before bringing her suit, was, in fact, raised at the trial, the instruction given was still more inadequate to the case than if the question then raised was whether the six years began to run from the time when the first loan was made

or when the last was made. In substance, the ruling given withdrew the statute of limitations from the consideration of the jury. The bill of exceptions does not disclose a state of evidence upon which it could be ruled, as matter of law, that the ordinary statute of limitations did not apply, and that no part of the plaintiff's cause of action was barred. The ruling given was therefore wrong, and the defendant's exception to it must be sustained.

The evidence tended to show that the investments of the plaintiff's money, to which the counts submitted to the jury related, were in mortgages upon lands in Wichita, Kan., securing notes payable upon time, with semiannual interest, and guarantied by a Kansas loan and investment company; that the plaintiff held these securities as investments, relying upon the defendant's representations, and receiving the interest up to April 1, 1890, when interest due upon one of the mortgages was not paid; that after that time she received no interest upon any of the loans; that, by purchases of the equities and foreclosures made during the years 1891 and 1892, she became the owner of the lands covered by the mortgages; and evidence was introduced by both parties to show the fair market value of the lands covered by each of the mortgages, both at the time when the respective mortgages were received by the plaintiff and at the times when she became the owner of the mortgaged lands. Upon the question of damages the jury were instructed as follows: "This is the rule of damages. The measure of damages is the difference between the value of the securities at the time plaintiff got the property into her possession and the face value of the securities at that time." In considering the exception to this ruling, it is to be remembered that it was to be applied by the jury to three counts, one of which was in contract, one in tort for negligence, and one for fraudulent representations; and that, as the verdict is general, we cannot know whether the damages found were given for a breach of contract alone, for mere negligence, or for the consequences of false and fraudulent representations. The instruction applies one rule to all the counts, and the exception to it must be sustained, unless the rule was the correct measure of damages if they were given for breach of contract, or for mere negligence, as well as for the consequences of fraudulent representations. The evidence tended to show that, when the plaintiff became the owner of the mortgages, the property covered by them was worth little more than the amounts of the mortgage loans, and that in the years 1891 and 1892 the property covered by the mortgages was worth not more than half of the amount of the loans. If so, it might be found by the jury that the value of the mortgages was depreciating from the time when the plaintiff acquired them. She al-

leges in the third count of her declaration that, upon some of the mortgages, interest was in arrear within six months from the time of her purchase, and that it was so upon all within 18 months; and it must be assumed that the time as of which the jury were told by the instruction to assess the damages resulting from the several investments was a time considerably subsequent to that when the plaintiff's attention must have been directed to the value of the mortgages by nonpayment of interest, and that as to every investment the ruling required the damages to be assessed as of a time two or three years after the date of the breach of contract, if the damages were given for such a breach, and after the property, the too little value of which was the damage sought to be recovered, was wrongfully foisted upon her by the negligence or the fraud of the defendant.

As to the damages in contract, it is plain that, the contract being to invest the money safely, its breach was complete when the plaintiff's money was put into unsafe investments. The essence of the transaction was the delivery of unsafe investments upon a contract to invest safely, and the measure of damages for the breach was the difference in value between the mortgages actually delivered and safe mortgages. Although it did not then appear that the quality of the mortgages was inferior to that which the defendant had undertaken they should be, the fact must then have existed, or there was no breach; and the only measure of the wrong done the plaintiff by the breach was the then difference between the value of the mortgages and safe mortgages. If, at the time, there was a market value for such mortgages if everything was known about them, the market value would furnish the amount; and, if there was no market by which their value could be ascertained, other evidence must be resorted to. But the measure of damages was the difference in value at the time of the breach of contract; and, as applied to the count in contract, the instruction was wrong, in not calling the attention of the jury to the true rule, and in giving to them, as the absolute measure of damages, the difference between the value of the securities at a date long subsequent and their face value at that time. So as to the damages for simple negligence. The wrong which resulted from the defendant's negligence was merely that the plaintiff acquired unsafe, instead of safe, mortgages for her money. This wrong was complete when she acquired them, and the measure was the difference in value between what she got and what she would have had if the defendant had used due care, namely, between the unsafe mortgages which she got, and good mortgages; and it was to be measured as of the time when it accrued, and by the test of market value, if there were means of applying that test, and, if not, upon such

evidence as could be had. The ordinary rule for the ascertainment of damages for false representations or fraud, where the loss to the plaintiff results from the fact that property which he acquires in consequence of the fraud or false representations is of a poorer quality or of less value than it would have been if he had not been cheated, is the same which governs the assessment in cases of breach of contract or for negligence, where the occasion of the loss is the poor quality or value of property acquired by the plaintiff. This, as held in *Nash v. Trust Co.*, 163 Mass. 574, 581, 40 N. E. 1039, is commensurate with the wrong done him, and will ordinarily make good his loss, and is to be applied unless in the particular case there is something in the facts disclosed which warrants the application of a different rule.

Looking to the bill of exceptions for evidence of facts tending to support the count for fraud, we find that there was evidence tending to show that the defendant falsely represented that the loans were for not more than one-third of the value of the mortgaged property, when in fact the property was worth but little more than the amount of the loans; that he held some of the mortgages of the same company as investments of his own funds, while in fact he held them, not as investments, but was selling them for profit, having bought them at a discount; and that he told her that the appraisers upon whose estimates of value the loans were made were fair men, whereas in fact they were not fair nor disinterested. The bill also shows that there was evidence that the defendant told her that the company which guaranteed the mortgages was paying dividends semiannually upon its stock, and that he himself held some of the stock, paying semiannual dividends, which the company guaranteed, and evidence tending to show that the company paid semiannual dividends for but 18 months. But there was no evidence tending to show that the statements that the defendant held some of the stock, or that the company guaranteed the dividends, were false, nor that the statement that the company was paying dividends semiannually on the stock was not true when made. The bill of exceptions states no other evidence tending to prove the allegations of the third count of the declaration than that the defendant told her that he knew the securities of the company to be safe as investments, and that the investments would be in all respects safe and desirable, and that he advised her to keep the matter of such investments secret, and not to consult with regard to the proposed investments with the financial advisers with whom she was wont to consult. There was also evidence tending to show that the plaintiff and defendant had been friends and neighbors for many years; that he was the president of the bank in which she kept her deposits, and its man-

aging officer; that he was familiar with her financial condition, and had previously invested for her, in his discretion, several thousand dollars which she had intrusted to him for that purpose; also, that she was a widow, and was about 83 years of age at the time of the trial; and that she held the mortgages as investments, relying upon defendant's representations, receiving interest up to April 1, 1890, when interest due was not paid upon one of the loans; and that after that date she received no interest upon any of them; and that during the years 1891 and 1892, by foreclosure or purchase of the equities, she became the owner of the mortgaged properties.

In deciding whether the instruction as to damages was correct as applied to the count for fraud and false representations, we must deal with the case in view of the facts which the evidence stated tended to prove; but it is to be noted that even if the verdict for the plaintiff was upon this count, which we do not know, we cannot assume in her favor that all of the things which the evidence tended to prove were found, but only that enough was found to sustain a verdict for the plaintiff. The essential matters in the assessment of damages are the fixing of the time as of which it is to be made, the measure to be applied as of that time, and the determination of the amount, by means of pertinent evidence. We see no other measure to be applied, in cases where the loss is because of the unsafe quality or deficiency in value of an investment, than the difference between the value of the investment as it actually was and as it should have been; and the plaintiff, in effect, contends for a measure of this kind, namely, the difference between the value of the mortgaged property when she acquired absolute title to it and the net amount at that time of her money which remained in it. The difficulty with the instruction is that the time when the difference is to be ascertained is postponed from the time when the defendant's acts became an actionable wrong, beyond the time when circumstances showed that the representations upon which she relied were untrue, to the later date, when she changed her investments in mortgages into land, by acquiring the absolute title. If the plaintiff was found to be an aged and inexperienced woman, who confided in the defendant, because of his friendship and his position, and because she had before trusted him with the making of investments, and who took these mortgages because of his false representations that the loans were not in excess of one-third of the value of the mortgaged property, that the appraisers were fair men, and that he was himself holding similar mortgages as investments of his own property, and she held the mortgages as investments without anything to put her upon her guard until interest was defaulted, on April 1, 1890, it seems to us

that it would be fair to her, and not unjust to the defendant, to hold that her damages should be assessed as of the time subsequent to that date, when reasonable inquiry as to the circumstances of the default would have disclosed to her the true condition and value of her mortgages. The only particular in which damages so assessed could exceed damages assessed as of the time when she had first suffered an actionable wrong in consequence of the defendant's fraud would be the depreciation in value in the meantime, due to the depreciation in value of the mortgaged property during the same period. While we do not say that the ordinary investor who buys mortgages is not expected to exercise, from the time when he acquires them, reasonable diligence to see whether the value of the mortgaged property is depreciating, we do think that if the plaintiff was induced, by the fraudulent representations which the evidence tended to prove, to take these investments, and to hold them, without further inquiry, until interest was defaulted, she was doing only what, under the circumstances, was the natural consequence of the defendant's wrongful conduct, and that it is just that he, and not she, should bear such loss as was the natural consequence of keeping the investments, as the defendant must have been aware from the circumstances she probably would do, and as he must have expected her to do. But when interest was defaulted, on April 1, 1890, this was a circumstance which should have led her to inquire into the true condition of her mortgages, and, whatever such inquiry would have disclosed material to her rights against the defendant, she should be charged with knowledge of. Her wrong, inflicted before, must then have been ascertained, both in its nature and extent, and we see no reason why it should not be measured as of that time. If so, the measure would be the difference between the amount of her investment as it then stood and the then value of her securities, including the value of the lien, the personal obligation of the borrower, and the value of the guarantees, if any. Most likely, there could be no test of the value of such defaulted securities by sales in market; and, if so, very probably, evidence of the value of the mortgaged property, when she acquired absolute title to it, might be resorted to in determining the value of what she had obtained for her money. But, in any event, the instruction given was wrong, in directing the jury, in substance, that the time as of which the damages were to be measured was the time when she got the absolute title to the mortgaged property. The time as of which damages are to be assessed under the count in contract, and under the count for negligence, is the time when the plaintiff acquired the mortgages; and the same rule is to be followed in assessing damages upon the count for fraudulent representations, unless facts

appear which warrant the application of a different rule, in which event the rule must depend upon the facts disclosed. The rule given in the instructions was wrong, in any aspect of the case presented by the bill of exceptions, and for that reason the defendant's exception must be sustained.

We regret that it seems impossible to restrict the new trial to the question of damages alone. From the amount of the verdict, very likely, the jury found damages in respect of each of the mortgages; and it is probable, as the counsel for the plaintiff strongly contend, that they found the verdict upon the count for fraud. If the plaintiff had elected to rely upon that count alone, or if the jury had been asked upon which count they found the verdict, the new trial might be restricted to the question of damages. But the bill of exceptions leaves it wholly uncertain upon which count the jury found for the plaintiff, and therefore it is not determined that the defendant broke his contract, or that he was negligent, or was guilty of fraud, but only that he had been at fault in some one of the three ways charged. If the case is again submitted to the jury upon the three counts, it will, of course, be necessary that much fuller instructions should be given, both upon the statute of limitations and the matter of damages. Plaintiff's exceptions overruled. Defendant's exceptions sustained.

(167 Mass. 470)

WHIPPLE v. WALSH.

(Supreme Judicial Court of Massachusetts.
Middlesex. Jan. 26, 1897.)

CONVERSION—PLEADING—OWNERSHIP—BURDEN OF PROOF.

In an action for the conversion of chattels attached by defendant in an action to which plaintiff was not a party, where plaintiff has alleged that the property was his, and defendant has denied the allegation, plaintiff must prove his ownership, though the answer justified the taking only on the ground that the property attached was the property of defendants in the attachment.

Exceptions from superior court, Middlesex county; F. G. Fessenden, Judge.

Action of tort by G. S. Whipple against one Walsh, deputy sheriff, for the conversion of certain cows and calves attached by him on a writ against J. W. Whipple and others as the property of said J. W. Whipple. In the action for conversion plaintiff alleged that the property was his. There was a verdict for defendant, and plaintiff excepts. Overruled.

J. P. Dexter, for plaintiff. G. W. Anderson, for defendant.

FIELD, C. J. It is plain from the bill of exceptions that the jury must have found, under instructions not objected to, that the three cows and two calves alleged to have

been converted by the defendant were not the property of the plaintiff, and that this was the only issue submitted to the jury. The jury must have understood that the defendant, as deputy sheriff, could not justify taking the property of the plaintiff by attachment on a writ in which the present plaintiff was not a defendant. The answer of the defendant in the present suit justified the taking only on the ground that the property attached was the property of the defendants in the action in which the attachment was made, and was not a good answer, because the present plaintiff was not one of these defendants; but under the answer denying all the allegations contained in the plaintiff's writ and declaration it was for the plaintiff to prove that the property attached in the former suit was his property, and this the plaintiff failed to do. The refusal to rule as requested at the close of the charge to the jury is not error, because the ruling requested was unnecessary, and not pertinent to the issue. Exceptions overruled.

(167 Mass. 472)

BROW v. NORTON.

(Supreme Judicial Court of Massachusetts. Middlesex. Jan. 26, 1897.)

DISMISSAL — FAILURE TO SERVE DECLARATION — ANSWER — WAIVER.

Under St. 1894, c. 405, which authorizes a discontinuance for plaintiff's failure to furnish defendant with a copy of the declaration within three days after a demand made, where, in attachment, the declaration has not been inserted in plaintiff's writ, defendant's motion to discontinue is not waived by an answer expressly reserving his rights under the motion.

Appeal from superior court, Middlesex county.

Action of tort by one Brow against one Norton. Defendant filed a motion to discontinue because of plaintiff's failure to furnish a copy of the declaration after reasonable demand. From an order discontinuing the action, plaintiff appeals. Affirmed.

D. G. Haskins, Jr., for plaintiff. L. Roger Wentworth, for defendant.

FIELD, C. J. The only question of law arising on this appeal is whether the order of the superior court was within its power, if that court found the facts to be as alleged in the motion. There can be no doubt that St. 1894, c. 405, confers this power on the court. It is contended that the motion was waived by the filing of an answer. It appears that on April 7, 1896, which was Tuesday after the first Monday of April, on which, as we infer, the writ was returnable, the motion was filed, and that afterwards, on the 5th day of May, an answer was filed, in which it was expressly stated that the defendant did not waive the motion. The filing of such an answer was not a waiver of the motion. The order discontinuing the action, with costs, must be affirmed.

(167 Mass. 445)

LUNDIN v. SCHOEFFEL et al.

(Supreme Judicial Court of Massachusetts. Suffolk. Jan. 25, 1897.)

LEASES — BREACH OF CONDITION — FORFEITURE — EQUITABLE RELIEF.

1. Relief on the ground of accident or mistake will be granted against a forfeiture of a lease of premises adjoining a theater, for breach of a condition against making noise in preparing the premises for occupation, which would disturb performances in the theater, where a mason, sent by the lessee to ascertain the thickness of a soft terra cotta wall, was told by the lessee to be careful about making noise; and the noise complained of, caused by the driving of a chisel through the wall, lasted about a minute only, and would not have been made had it occurred to the mason that a performance was in progress in the theater at the time.

2. A finding that a cessation for 2½ months of the work of fitting up leased premises for occupation was not unreasonable within a clause in the lease providing that the work should be done without delay, will not be disturbed where there was evidence that during such period the lessee was making preparations for the work, and entering into contracts therefor, and that he was ready to go on with it when the entry was made under claim of forfeiture.

3. Equity will grant relief against forfeiture of a lease for 18½ years, incurred by a failure of the lessee for 2½ months to prosecute the work of fitting up the premises for occupation, where during such time he was preparing to have the work done, and was ready to go on with it at the time the lessors entered under claim of forfeiture; and the delay was not willful, or made in bad faith; and no demand had been made on the lessee for greater haste, or complaint made on account of the delay; and no injury resulted to the lessors.

Appeal from superior court, Suffolk county; Brayley, Judge.

Suit by Adolph Lundin against Jacob B. Schoeffel and others to enjoin defendants from excluding plaintiff from possession of leased premises under a claim that the lease had been forfeited. There was a decree for complainant, and defendants appeal. Affirmed.

Elder, Wait & Whitman, for appellants. Harriman & Daggett and G. Philip Wardner, for appellee.

ALLEN, J. The testimony in this case was given in the presence of the court, and was taken down by a commissioner, under the rule. The decree was for the plaintiff. There is no statement of the facts found or the rulings made. The decree, so far as it involves matters of fact, is to stand, therefore, unless it appears by the evidence to be clearly erroneous. *Wentworth v. Machine Co.*, 163 Mass. 28, 39 N. E. 414. The grounds of forfeiture relied on by the defendants are three, viz. the noise, the unworkmanlike character of the work in Head Place, and especially the delay in prosecuting the work of fitting up the leased premises for a bath establishment.

As to the first ground, viz. the noise occurring two days before the entry, the court might well find that it was of a trifling description. A mason, sent to ascertain the

thickness of a soft terra cotta wall, testified that he was told by the plaintiff to be as careful as he could about noise, and the driving of a chisel through the wall took only about a minute. No objection is made to this mode of ascertaining the thickness, but the noise caused a little disturbance to a matinee performance in the theater. The witness testified that he did not think about its being Wednesday, the day for matinees, and that, if he had, he should not have gone. This, if of enough significance to be considered at all, might be relieved against on the ground of accident or mistake.

The way in which the surface of the ground was left in Head Place is also a slight matter, not much insisted on in argument. By request of the defendants' agent, the plaintiff was hurrying the work there, and his men worked at night. The surface of the ground having been left uneven, the plaintiff promised to have this work properly done. He testified that one of the men promised him to lay it in the spring, after the frost got out of the ground, and that no complaint has since been made about it. The court might find that this ground of forfeiture was not insisted on by the defendants.

The principal ground relied on by the defendants is the delay in prosecuting the work of fitting up. The stipulations in the lease are as follows: "The demised premises are to be fitted up at the sole cost of the said lessee, and thereafter to be used as a bath establishment for Turkish and other baths, under the limitations hereinafter set forth. The work of fitting up to be begun forthwith, and prosecuted without delay to completion, at such times and in such manner as shall not, by noise or otherwise, interfere with the use of the adjoining property as a theater; and all changes and alterations to be made in good workmanlike manner." The lease was dated November 1, 1895, and was to run 18 years and 5 months, at an annual rental of \$1,500, payable in monthly installments. The work was in fact begun at once, and there is no complaint that it was not duly prosecuted till after January 15, 1896. The defendants' entry was on April 3d. The stipulation means that the work was to be prosecuted without unreasonable delay, and what delay would be unreasonable would depend upon the circumstances. There was no doubt a considerable delay, since from January 15th to April 1st no actual work upon the premises appears to have been done. The testimony would warrant a finding, however, that during all this time the plaintiff was engaged in his preparations by entering into contracts with different mechanics and others,—with the mason, carpenter, plumber, steam-fitter, painter, gas-piper, electric wire men, and with men to lay the floors and tiles. The details of the plaintiff's work and endeavors in managing these contracts were

testified to, and upon the evidence it might be proved that these preparations had all been completed, and that the plaintiff was ready to go on with the work, at the time when the defendants made their entry claiming a forfeiture. In fact, two days before the entry, the plaintiff had a mason in there, making some needful preparations, causing the noise already referred to. These explanations, given by the plaintiff of his delay in the prosecution of the work, were all entitled to be considered (*Harnden v. Insurance Co.*, 164 Mass. 382, 384, 41 N. E. 658; *Doe v. Ulph*, 13 Q. B. 204); and if the court, seeing the witnesses, proved the delay not to be unreasonable, we do not feel called upon to set aside that finding.

But assuming that by reason of the delay the lease was forfeited, the question remains whether a court of equity can and should grant relief. Upon the evidence, in addition to the matters hereinbefore stated, it might be proved that there was no want of good faith on the part of the plaintiff; that his delay was not willful; that no demand had been made upon him for greater haste; that no notice had been given to him, or complaint made to him on account of his delay; that the lessors had virtually stood by without objection; that no injury resulted to them from the delay; and that, if they had not entered as they did, the work of actually fitting up the premises would at once have been actively resumed. It is true that there was testimony of some informal suggestions made to the plaintiff's legal counsel with reference to his delay; but the plaintiff denied that any complaint reached him. The purpose of the stipulation requiring the work to be prosecuted without delay appears to have been to furnish to the lessors security for the payment of the rent. In point of fact the accrued rent was all paid. There was no damage to the lessors' property, no waste, no omission to make needed repairs, no increased risk of loss by fire as in the case of an omission to keep the premises insured, and it is not suggested in argument that there was any such damage to the lessors as calls for compensation. The default on the part of the lessee was hereby the omission to proceed promptly enough with the work of making improvements. It was a failure to pay out money for this purpose. If the lessee's failure had been an omission to pay rent promptly as it became due, it is plain that a court of equity might relieve against a forfeiture on this ground, though the omission was even willful. But the lessee's failure in this case was merely an omission to do promptly something which was only useful to the lessors by the way of security for the future payment of rent. It was not like a case where the omission caused a present injury or increase of risk to the lessors, as in the case of waste, nonrepair, or noninsurance. In such a case a court of equity is not required to refuse relief against a for-

feiture, but may look into the circumstances, and determine whether, on the whole, it is just and right that such relief should be granted. In *Mactier v. Osborn*, 146 Mass. 309, 15 N. E. 641, a forfeiture incurred by breach of a covenant to insure, caused by accident or mistake, was relieved against. The court said: "Where there has been a breach of a covenant to pay rent, equity will relieve against a forfeiture, although the breach is willful on the part of the lessee; and where there has been a breach of a covenant to perform some collateral duty, such as to repair or insure, which has been caused by accident or mistake, equity will relieve if the lessor can, by compensation or otherwise, be placed in the same condition as if the breach had not occurred." The precise question now before us did not arise in that case. The omission in this case is not of the same character as a failure to repair, when waste is going on or to insure. It is merely a failure to pay out money, and is much like an omission to pay taxes, which, in absence of bad faith, and where the position of the parties has not been changed, and no new rights have interfered, has been held not to bar the lessee from relief. *Giles v. Austin*, 62 N. Y. 486; *Noyes v. Anderson*, 124 N. Y. 175, 26 N. E. 316. Taking all of the circumstances of the present case into account, a court of equity might, without violating any settled rules, grant relief against the forfeiture if it found that a forfeiture had been incurred. *Sanborn v. Woodman*, 5 Cush. 36; *Atkins v. Ohlson*, 11 Metc. (Mass.) 112, 117; *Hagar v. Buck*, 44 Vt. 285; *Henry v. Tupper*, 29 Vt. 358; *Mining Co. v. Wakefield*, 72 Wis. 204, 39 N. W. 136; *Hill v. Barclay*, 18 Ves. 58; 2 Story, Eq. Jur. §§ 1314-1323. Decree affirmed.

(16 Ind. App. 555)

STATE, to Use of KREBS, v. GRIFFEN
et al.

(Appellate Court of Indiana. Jan. 13, 1897.)

CHATTEL MORTGAGES—VALIDITY—BURDEN OF
PROOF—SPECIAL VERDICT.

1. Under Rev. St. 1894, § 6638 (1 Horner's Rev. St. 1896, § 4913), providing that no mortgage shall be valid, except between the parties, when the goods are retained by the mortgagor, unless it is recorded in the county in which the mortgagor resides within 10 days after execution, to render such a mortgage valid as against other than the parties, it must have been recorded as required by the act.

2. The burden is on the mortgagee to show that the mortgage was recorded as required by the act.

3. A finding by the jury that the mortgagor executed a mortgage which recited that he was a resident of a certain county, in which it was recorded, is not a sufficient finding that he was in fact a resident of that county, so as to render the mortgage valid as against other than the parties.

Appeal from circuit court, Cass county;
D. B. McConnell, Judge.

Action by the state, for the use of Ferdi-

nand Krebs, against Edward Griffen and others. From a judgment for defendants, plaintiff appeals. Affirmed.

Nelson & Myers, for appellant. M. Winfield, for appellees.

COMSTOCK, J. This is an action brought in the Cass circuit court, in the name of the state of Indiana, for the use of Ferdinand Krebs, appellant, against Edward Griffen, a constable, and John Dunn, his bondsman, appellees. A special verdict was returned by the jury, and upon motion of appellees the court rendered judgment in their favor upon the verdict, and overruled the motion for judgment of the appellant. Several paragraphs of answer, one of which was a general denial, were filed by appellees; but no exception is urged to the ruling of the court upon the pleading, and the only question here presented is whether the action of the court in rendering judgment for appellees was correct.

The facts stated in the complaint and found by the jury are, in substance: That in June, 1894, and at all other dates hereinafter mentioned, appellee Griffen was a duly elected, qualified, and acting constable of Eel township, Cass county, Ind., and that appellee John Dunn was his bondsman. That by the terms of his bond said Griffen was obligated to turn over to the proper person all moneys which might be received by him by virtue of his office. That on the 18th day of June, 1894, August Held and Edward P. Rank executed to Ferdinand Krebs a chattel mortgage, to secure the payment of an indebtedness owing by them to him of \$350, which became due September 18, 1894. That such mortgage was duly recorded in the proper mortgage record of Cass county, Ind., on the day of its execution. A verbatim copy of the mortgage is set out in the special verdict. The following is the language of one of its recitals: "Know all men by these presents, that August Held and Edward P. Rank, of Cass county, in the state of Indiana, have bargained and sold, and do hereby bargain and sell, unto Ferdinand Krebs, of Cass county, Indiana." Then follows a description of the articles of property mortgaged and a statement of the indebtedness intended to be secured. The mortgage further provided that Held and Rank should retain possession of said property until the debt secured became due, and, if not paid promptly at maturity, Krebs should have the right to take possession of the same, and that, if the property should be levied upon by execution from any court, the mortgagee should have the right to take possession of the same for his own use. The jury further found that the property mortgaged was the property of Held and Rank. That on the 25th day of July, 1894, Held and Rank sold the mortgaged property to Herman Kammerer, subject to the lien of said mortgage,

which said mortgage debt he assumed to pay. That on the 8th day of September, 1894, Francis Spry recovered a judgment before a justice of the peace of Eel township, Cass county, against Herman Kammerer, for \$25 and costs, on which an execution was issued by said justice, and placed in the hands of the defendant Griffen. That he duly levied the same upon the chattels described in the mortgage. That at the time of said levy said mortgage debt was due and unpaid. That said Griffen subsequently advertised and sold said property, but that, before the sale, he was notified by the appellant, Krebs, not to deliver the same to the purchaser until the amount due on the mortgage was paid, and the terms of the mortgage complied with, and that, if he failed to do so, said Krebs would hold him and his bondsman responsible on his bond for the value of said property, and all damages he might sustain by reason of his failing to comply with the requirements of the statutes of the state of Indiana. That said constable delivered said property so sold to the purchasers, without requiring them to comply with the terms of the mortgage, or to discharge the lien thereof. That Held and Rank and Kammerer, since the maturity of appellant's debt, have become and are still insolvent.

To entitle the appellant to a judgment below, the burden rested upon him to establish a valid debt; that it was due; that the mortgage he held was valid; and that the defendant Griffen failed in the performance of his official duty, from which failure the appellant suffered loss. It is evident, from the brief of appellant, that the court below, in rendering judgment for appellees, held that the mortgage was invalid as to them because there was no finding by the jury that the mortgagors were, at the time of its execution, residents of Cass county, in which county it was recorded. Section 6638, Rev. St. 1894 (section 4913, 1 Horner's Rev. St. 1896), reads as follows: "No assignment of goods by way of mortgage shall be valid against any other person than the parties thereto, where such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged as provided in case of deeds of conveyance and recorded in the recorder's office of the county where the mortgagor resides within ten days after the execution thereof." The supreme court of this state have many times had occasion to apply the provisions of this section, and have uniformly held that a chattel mortgage, to be valid as to persons not parties thereto, must be recorded in the county in which the mortgagors reside, and within 10 days of its execution. A long list of citations is not necessary. *Sidener v. Bible*, 43 Ind. 230; *Lockwood v. Slevin*, 26 Ind. 124, are in point. The finding of the jury that the mortgagors were residents of the county in which the

mortgage was recorded was essential to make the mortgage valid against appellees. If they make no finding upon this question, it is equivalent to a finding that they were not residents of said county. Have they found that the mortgagors resided in Cass county? If the fact of residence is found, it appears only in the recital of the mortgage, which the jury set out in their finding, and heretofore given. The statement in the mortgage of the residence of the mortgagors, while evidence of the fact, is not the inferential fact to be found. The jury found evidence of a fact, but not the fact itself. The office of a special verdict is to find the facts essential to support the judgment. If not found, the judgment will fall. "A failure to find a fact in favor of a party upon whom the burden as to such fact rests is equivalent to finding such fact against him." *Improvement Co. v. Loehr*, 124 Ind. 83, 24 N. E. 579. Vide authorities there cited. The law requires that facts, and not evidence, should be found. *Tousey v. Lockwood*, 30 Ind. 153; *Kealing v. Vansickle*, 74 Ind. 529; *Locke v. Bank*, 66 Ind. 353. In *Hessong v. Pressley*, 86 Ind. 555, a trial before the court, and a special finding made, the court found that the sheriff made a certain return to an execution, and copied such return. The supreme court held that there was not a finding of the facts stated in the return; that, at most, they were only evidentiary facts, without any finding by the court as to their truth, or the facts inferred therefrom. Vide, also, authorities there cited. The jury in the case before us found that the mortgagors executed a mortgage at a certain date, which mortgage said that they were residents of Cass county, Indiana. This is not a finding of the fact which might have been inferred therefrom.

Appellant's counsel contend that, the jury having found that the mortgage was executed and recorded on the same day, and recited that the mortgagors were of Cass county, is a sufficient finding that the place of residence of Held and Rank was Cass county, and in support of their position cite *Brown v. Corbin*, 121 Ind. 455, 23 N. E. 276; *Gordon v. Stockdale*, 89 Ind. 240. In *Brown v. Corbin* the court trying the cause held that, the mortgage showing upon its face that the mortgagors resided in the county in which it had been recorded, the mortgage would be, *prima facie*, a valid lien, and the burden of proof would rest on the person asserting its invalidity to show that it was not recorded in the county where the mortgagors resided; that is, that the court trying that cause was justified in drawing the inferential fact that the mortgagors were residents of the county where the mortgage was recorded, as the jury in this cause might have been justified, in the absence of other evidence, in finding the inferential fact of residence from the recital on the face of this mortgage. In *Gordon v. Stockdale*, *supra*, it

is held that, when one plants wheat under a written contract which requires him to harvest, thresh, and deliver one-half of it to the landlord, and in express terms provides that each shall own one-half, such facts compel the conclusion, as one of law, that the tenant was the owner of half the wheat. And in *Dutch v. Boyd*, 81 Ind. 146, to foreclose a mortgage and recover personal judgment, in which the principal question was whether the mortgage contained a sufficient description of the premises intended to be described, the court held that a deed or mortgage which purports to have been executed and acknowledged between parties resident in the state, and contained nothing to indicate a contrary intention, will be presumed to be of land in the state. The court below held that the description was sufficient, and rendered judgment and decree for foreclosure, and the supreme court affirmed the decision. There is nothing in either of these cases at variance with the conceded proposition that a special verdict must find inferential, and not evidentiary, facts, nor do they modify or criticise the application and illustration of the rule in *Hessong v. Pressley*, supra. There is no error. Judgment affirmed.

(151 N. Y. 424)

DISTLER v. LONG ISLAND R. CO.

(Court of Appeals of New York. Jan. 19, 1897.)

CARRIERS—INJURY TO PASSENGERS—BOARDING MOVING TRAIN—CONTRIBUTORY NEGLIGENCE—PROXIMATE CAUSE.

1. One who, at the conductor's bidding, attempts to board a train moving from two to three miles an hour, past an unobstructed platform, at a station where trains do not stop, is not negligent per se. 28 N. Y. Supp. 865, reversed. *Hunter v. Railroad Co.*, 19 N. E. 820, 112 N. Y. 371; *Id.*, 26 N. E. 958,—126 N. Y. 18, distinguished.

2. The act of a passenger in attempting to board a moving train was not, as a matter of law, the proximate cause of his injury, where the train gave a sudden jerk after he had gotten one foot on the car platform and the other on the step below, and he was thrown off.

Gray and Haight, JJ., dissenting.

Appeal from supreme court, general term, Second department.

Action by Charles Distler against the Long Island Railroad Company. From a judgment of the general term (28 N. Y. Supp. 865) affirming a judgment dismissing the complaint, plaintiff appeals. Reversed.

F. R. Gilbert, for appellant. W. C. Beecher, for respondent.

MARTIN, J. This action was to recover damages for personal injuries alleged to have been caused by the defendant's negligence. On the 21st day of June, 1892, the plaintiff was at Manhattan Crossing, awaiting a train by which to reach Deer Park. Manhattan Crossing is a regular station upon the defendant's road, where all its trains stopped going east. After remaining a short time, a train arrived

going in an opposite direction, when the plaintiff inquired of the conductor the time of the next train going to Deer Park, who replied that he would return with his train in 30 or 35 minutes and stop for him. The train returned, and while passing slowly along the platform, at the rate of two or three miles an hour, the conductor bade the plaintiff get on. At the time the plaintiff was on the station platform, and, in compliance with the direction of the conductor, stepped upon the steps leading to the forward platform of the second car, passed on until one foot was upon the platform and the other was upon the first step below, when the train started with a sudden jerk or lurch, which threw him from the car, and he was seriously injured. When the plaintiff rested, the defendant moved to dismiss the complaint upon the grounds that no negligence on its part had been proved, and that the plaintiff was guilty of contributory negligence. The motion was granted. The plaintiff then asked the court to submit the case to the jury upon the facts established by the evidence, which was denied on the ground that the plaintiff was guilty of contributory negligence, as a matter of law. To that ruling the plaintiff duly excepted. In making it the court apparently relied solely upon the case of *Hunter v. Railroad Co.*, 126 N. Y. 18, 26 N. E. 958. The question to be determined in this case is whether, as a matter of law, the plaintiff was guilty of contributory negligence in getting onto the train, in pursuance of the direction of the conductor, while it was moving at the rate of two or three miles an hour, when there was nothing to indicate any unusual or peculiar danger. Inasmuch as the decisions of the trial court and general term seem to be based upon the *Hunter Case*, it is proper to examine the decisions of this court in that case, to ascertain whether the principle there decided upholds the determination of the courts below.

When the *Hunter Case* was in this court on the first appeal, it was reversed upon the ground that the plaintiff was guilty of contributory negligence in boarding a train moving at the rate of from four to six, or six to eight miles an hour, although he was within three or four feet of an elevated freight platform, which was only about six inches from the side of the moving car. The opinion on the first appeal discloses that the decision was then based chiefly upon the rapidity with which the train was moving when the intestate attempted to get on; the court, in effect, holding that to board a train moving from four to six, or from six to eight, miles an hour, was so dangerous and hazardous that it must be regarded as negligence, as matter of law, notwithstanding the conductor directed him to do so. At the same time it recognized the fact that there were cases in which an attempt to get off or on a moving train would not be regarded as negligence per se, and where the question of negligence, upon all the facts, should be submitted to the jury. When

the case was in this court upon a second appeal, it appeared by the record that there had been a change in the evidence, so that the train was described as moving at the rate of from one to two, instead of from four to six, or six to eight, miles an hour. The court reversed the judgment upon the ground that the plaintiff's intestate was negligent, and that his act contributed to his death. This conclusion seems to have rested principally upon the presence of an elevated freight platform in close proximity to the place where the intestate attempted to board the moving car, so that, in case of a misstep or other slight accident, his injury from contact therewith was almost, if not absolutely, certain. The court, however, again recognized in its opinion the existence of cases where an attempt to board or alight from a moving train would not be regarded as negligence, as a matter of law, but stated that that was not one of those cases. I think it may be said of the decisions in that case that in the first it was held that it was negligence per se to board a train moving from four to six, or six to eight, miles an hour, on account of its comparative rapid motion; and, in the second, as the danger was manifest, unusual, and peculiar, and must have been seen and understood, that, although moving at a less rate of speed, it was negligence, as a matter of law, to attempt to board it while in close proximity to a prominent obstruction, so situated that in case of failure, or of a misstep or other slight misadventure, the risk of being thrown against the obstruction and injured would be imminent. It is obvious that the facts upon which the decisions in the Hunter Case were based are essentially unlike those in the case at bar. Upon the first appeal in that case the train was shown to have been moving at a rate of speed greatly in excess of that at which a person would ordinarily walk, and in the second the proof was that, while the train was moving less rapidly, still the attempt to board it was manifestly attended with such peculiar and certain danger from surrounding obstacles as to make it negligence to do so. Neither of those conditions exists in this case. Here the train was moving at a rate of speed not greater than an ordinary walk. There was a long platform at the station, unobstructed, with nothing to indicate that any unusual danger was to be apprehended in stepping upon the train. Thus, it is apparent that the Hunter Case is plainly distinguishable from the case at bar, and that the decisions in that case do not sustain the determination of the courts below. Unless this court shall hold that it is negligence per se to step upon a moving train, no matter how slight its motion, this judgment cannot be upheld. We think the decisions in the Hunter Case have gone to the fullest limit to which this principle should be extended. It is a matter of common knowledge that it is of daily occurrence that ordinarily prudent persons safely board a train or car moving at two or three miles an hour. We are not pre-

pared to hold that it is negligence per se to step upon a train moving at that rate of speed. To do so would encroach upon the proper province of a jury. There is another distinction between this and the Hunter Case. In this case the proof discloses that the conductor was in entire charge of the train, as the representative of the defendant. When the train first passed, he informed the plaintiff that upon his return he would stop, so he could take the train to Deer Park. He doubtless had authority to make that agreement. In pursuance of it, the plaintiff remained at the station until the train returned, when, while the train was going at a rate of speed which appeared to render it reasonably safe, he complied with the direction of the conductor, and boarded it. We are not prepared to hold that, under those circumstances, the direction of the conductor was of no importance. While it was held in the Hunter Case that such a direction was unimportant where it was manifest that to comply with it was imminently dangerous, yet here, as no such condition existed, that principle has no application.

There is another ground upon which we think the judgment should be reversed. Even if it were assumed that the plaintiff was negligent in stepping upon a moving train, yet it cannot be held, as a matter of law, that such negligence, in any proper sense, contributed to his injury. The danger which attended the boarding of a moving train had been passed. The plaintiff was upon the train, and in a situation of safety, unless there was an accident, or some mismanagement. His injury can hardly be said to be the proximate result of stepping upon the moving train, or to have been occasioned by his inability to safely reach a seat because the car was in motion. The direct and proximate cause of his injury was the mismanagement of the train, causing a sudden jerk or lurch which threw the plaintiff therefrom, or at least the question whether that was the cause was a question of fact for the jury. We are of the opinion that the questions of the defendant's negligence, and the plaintiff's freedom from contributory negligence were, under the evidence, questions of fact, and should have been submitted to the jury. The judgment should be reversed, and a new trial granted, with costs to abide the event.

GRAY, J. (dissenting). I dissent from the conclusion reached by the majority of my associates, because, in all the main and material facts, this case cannot be distinguished from the Hunter Case, 112 N. Y. 371, 19 N. E. 820; *Id.* 126 N. Y. 18, 26 N. E. 958,—which in turn rested upon the principle decided in the Solomon Case, 103 N. Y. 437, 9 N. E. 430. This train was a special train, which was not scheduled to stop at the station, and upon which the plaintiff had no right to be carried. The plaintiff elected to leave his place of safety, and to incur the peril of boarding a moving train, for some purpose of convenience.

upon the invitation of his friend, the conductor of the train. These were also the facts in the Hunter Case, upon consideration of which this court determined that the plaintiff was guilty of contributory negligence, and therefore should have been nonsuited. The distinction attempted now to be made between the cases does not amount to a substantial difference. It seems to me that, in making this distinction, we are unnecessarily introducing uncertainty in the law for the government of trial courts in negligence cases.

ANDREWS, C. J., and O'BRIEN, BARTLETT, and VANN, JJ., concur with MARTIN, J., for reversal. GRAY, J., reads for affirmance, and HAIGHT, J., concurs.

Judgment reversed.

(151 N. Y. 493)

DANIHÉE v. HYATT.

(Court of Appeals of New York. Jan. 19, 1897.)

EJECTMENT — WHEN LIES — POSSESSION BY DEFENDANT.

In ejectment it appeared that defendant's wife was the actual occupant, and claimed to be the sole owner. Defendant resided with her on the land; and a fence plaintiff put on one line, and some wood he placed on the land, were removed by defendant; but he claimed no interest in it, and was employed by his wife to assist her in maintaining possession against plaintiff's efforts to dispossess her. *Held*, that the action would not lie against defendant. 30 N. Y. Supp. 707, affirmed.

Appeal from supreme court, general term, Fifth department.

Action by James Danihée against John Hyatt to recover possession of land. From a judgment of the general term (30 N. Y. Supp. 707) affirming a judgment dismissing the complaint, entered on the report of a referee, plaintiff appeals. Affirmed.

Henderson & Wentworth, for appellant. Inman & Cole, for respondent.

MARTIN, J. This action was ejectment to recover the possession of a triangular piece of land lying between premises occupied by the plaintiff and premises in which the defendant's wife has a leasehold interest. On the trial the plaintiff's complaint was dismissed upon the merits, with costs. At the commencement of the action the plaintiff was the owner of a leasehold interest in the premises described in the complaint, which included the land in dispute. Honora Hyatt is, and for the past 20 years has been, the wife of the defendant. On July 12, 1882, she became the owner of such leasehold interest under and by virtue of a deed to her from John H. Melhuish and wife. Both the lands of the plaintiff and of the defendant's wife were a part of the Allegany Indian reservation, and within the village of Great Valley. Soon after the defendant's wife acquir-

ed her title, she entered into the actual possession of the premises thus conveyed, together with the piece of land in dispute, and ever since has actually occupied the disputed land, claiming that it formed a part of the land to which she acquired title, under the Melhuish deed. Shortly after obtaining her title, and while in possession of the premises, she graded the land in dispute, making a driveway partly over it and partly upon her adjoining land, which extended from the highway in front to a barn standing upon the rear. About that time she built or caused to be moved onto her lot a dwelling house, in which she has since resided. Neither the plaintiff nor his immediate assignor was ever in actual possession of the disputed land, or any part thereof, before the commencement of this action. When it was commenced, the plaintiff knew that the defendant's wife was the actual occupant of the land, and that she claimed to be the sole and exclusive owner. In the fall of 1888 the plaintiff constructed a fence along the southerly line of the land in dispute, which was removed by the defendant. In January, 1889, the plaintiff placed a load of wood upon the disputed land, which the defendant removed. He also assisted his wife in placing and fastening a wagon thereon. The defendant, in removing the fence and wood, and in placing the wagon upon the land, did so at the request, under the immediate direction of, and solely for, his wife, and to aid her in maintaining her possession of the portion of the premises over which this controversy has arisen. He has resided with his wife on these premises during all the time she has lived there, and during a portion of the time has, with her consent, driven his team upon such driveway to and from the highway to the barn. At the time this action was commenced the defendant was not, and never had been, an occupant of the land in dispute, or any part of it, nor has he at any time claimed any title thereto or interest therein. The foregoing is the substance of the findings made by the referee. The record discloses sufficient evidence to justify them. The single question presented is whether, upon those facts, the court erred in dismissing the plaintiff's complaint.

Succinctly stated, the facts are that the plaintiff was the owner of the land in question, but it had never been in his possession. It was in the actual possession of the defendant's wife, who claimed title and the right to the possession thereof. She maintained her possession of it against the plaintiff's efforts to dispossess her. In doing so she employed her husband to assist her, and to that end he performed the acts mentioned at her request, and with the knowledge of the plaintiff that the defendant was acting for her, and that she alone claimed the right to such possession. It is difficult, under these circumstances, to find any principle upon which it can be properly held that the defendant was in the actual occupation of the land in contro-

versy, or that he deprived the plaintiff of the possession thereof. All his acts were performed for his wife, avowedly to maintain her possession, and not his own. He claimed no right thereto, and the referee has so found. In view of these facts, and the findings of the referee, the possession must be regarded as that of the defendant's wife, and not the defendant's. In *Martin v. Rector*, 101 N. Y. 77, 4 N. E. 183, this court held that since the passage of the acts in relation to the property of married women there is no presumption that the husband is in occupation of the wife's lands, and, in an action brought against the husband to recover possession, whether she is occupying them or has given her husband possession, is to be deemed a question of fact. As the finding in this case was adverse to the plaintiff, the possession of the defendant's wife must be treated as conclusively established. The defendant not being in the actual occupation of the premises, but having performed the acts mentioned merely as a servant or employé of his wife, without claiming title or right of possession, ejectment will not lie against him. *Shaver v. McCraw*, 12 Wend. 558; *Kerrains v. People*, 60 N. Y. 221; *Comstock v. Dodge*, 43 How. Prac. 97; *Bristor v. Burr*, 120 N. Y. 427, 431, 24 N. E. 937. Where the premises are actually occupied, the action of ejectment must be brought against the occupant. Code Civ. Proc. § 1502; *Banyer v. Emple*, 5 Hill, 48, 50. It follows that, although the plaintiff is the owner and entitled to the possession of the premises in dispute, he cannot maintain this action, because the defendant was not in the actual possession or occupancy of the premises. Thus it becomes obvious that the trial court properly dismissed the complaint. The judgment should be affirmed, with costs. All concur, except HAIGHT, J., not sitting. Judgment affirmed.

(151 N. Y. 506)

KNOPE v. NUNN.

(Court of Appeals of New York. Jan. 19, 1897.)

CONVERSION BY CO-TENANT.

Where tenants in common execute a deed of their land, and one of them delivers the deed to the purchaser, and takes a purchase-money bond and mortgage in his own name, without his co-tenant's consent, such co-tenant may recover his share from the former, though the bond has not been paid. 30 N. Y. Supp. 896, affirmed.

Appeal from supreme court, general term, Fifth department.

Action by Mary A. Knopé against Joseph Nunn. From a judgment of the general term (30 N. Y. Supp. 896) affirming a judgment entered on a verdict in favor of plaintiff, and an order denying a motion for a new trial, defendant appeals. Affirmed.

Patrick McIntyre, for appellant. John A. Bernhard, for respondent.

MARTIN, J. In 1883 the father of the plaintiff and defendant died seised of certain real estate situated on Jay street in the city of Rochester, N. Y. Upon his death, one-third of the premises descended to the plaintiff as his heir at law, one-third descended to the defendant, and the remaining one-third to their brother, Gregory Nunn. In 1885 the latter sold and conveyed to the defendant his one-third interest therein, so that on June 5, 1889, the plaintiff and defendant were owners, as tenants in common, of the real estate mentioned, the plaintiff owning one-third and the defendant the remaining two-thirds. On that day they united in executing a deed of the premises to Marcus Hirschfeld for the consideration of \$5,000. After its execution it was taken and retained by the defendant, to be delivered to the purchaser upon payment of such consideration. The defendant delivered it July 17, 1889, and the purchaser executed and delivered to him his bond and a mortgage upon the premises to secure the sum of \$4,000 of the purchase price and interest thereon, which, by their terms, was payable in four years, with semiannual interest. The remaining \$1,000 had been previously paid. The bond and mortgage were taken by the defendant in his own name, and were payable to him alone. The purpose of this action was to recover of the defendant one-third of the purchase price of the premises, less the amount paid to the plaintiff thereon, the whole having been paid to the defendant either in cash or by executing and delivering to him the bond and mortgage mentioned. The defendant, by his answer, in substance denied that he had received the consideration for which such premises were sold, alleged that he had paid the plaintiff more than her share of the amount actually received by him, and set up a counterclaim for money alleged to have been collected by the plaintiff as rent of the premises, and retained by her, to an amount in excess of her share or interest therein. The plaintiff, replying, denied her indebtedness for the rents mentioned, alleged that what she received was paid out under the direction of the defendant, and also pleaded the pendency of a former action between the parties, in which the defendant's counterclaim was involved.

Practically the only question in this case, which relates to the plaintiff's affirmative right of action, is whether the defendant is liable to the plaintiff for her portion of the unpaid purchase price which was secured by the bond and mortgage to the defendant, although the money thus secured had not been actually received by him before the commencement of this action. The record discloses evidence to the effect that the defendant gave credit to the purchaser, and accepted, in payment of \$4,000 of the purchase money, his bond and mortgage payable to the defendant alone, without the plaintiff's knowledge or consent. That question was litigated upon the trial, but as there was a conflict in the evidence in regard to it, and the jury found for the plaintiff,

its determination must be treated as final. There was evidence that the plaintiff had collected \$927.45 for rents of the real estate owned by the parties as tenants in common, but it also tended to show that the amount thus collected had been paid out and disposed of by the plaintiff under the directions of the defendant. At the close of the evidence the defendant asked the court to direct a verdict in his favor upon the grounds that the plaintiff's claim was not due at the commencement of the action, and it was shown conclusively that the defendant had not collected the money for the sale of the real estate. He then asked the court to direct a verdict for the defendant for \$698.96 as the amount of rents which the plaintiff had collected over and above her share. Thereupon the court dismissed the defendant's counterclaim on the ground that it was involved in a former action which was then pending between the parties, and held that there were two questions for the jury: (1) Whether the plaintiff authorized the defendant to take a bond and mortgage, or make any extension of the time of payment of any part of the purchase price; and (2) whether, after she had ascertained that it had been done, she received any money upon it, or acted in pursuance of it, in a way to ratify the contract made by the defendant, and decided that if she did not authorize him to take a bond and mortgage in his own name, having done so without her consent, he was liable for her part of the purchase price. To this ruling the defendant's counsel excepted. The defendant, having taken the bond and mortgage without recognizing that the plaintiff had any interest therein, is hardly in a situation to effectually assert as a defense that she was interested in the debt thus secured, and therefore cannot recover because it has not been actually received by him. The securities taken by him clearly import that they belong to the defendant alone, and the plaintiff elected to so treat them, which we think she was justified in doing. *Floyd v. Day*, 3 Mass. 403; *Beardsley v. Root*, 11 Johns. 464; *Chappell v. Dann*, 21 Barb. 17; *Allen v. Brown*, 51 Barb. 86, 92, 44 N. Y. 228. Under the circumstances and the facts as found by the jury, we think the plaintiff was at liberty to treat the action of the defendant in delivering the deed to the purchaser without receiving the purchase price, and taking a bond and mortgage for the remainder thereof in his own name, without her consent, as an appropriation to his own benefit of the share of the proceeds to which she was entitled, and to hold him liable therefor. *Coles v. Coles*, 15 Johns. 159; *Wright v. Wright*, 59 How. Prac. 177, 184. When the defendant delivered the deed to the purchaser, and accepted his bond and mortgage payable to himself, the relation of the parties as tenants in common in the land was terminated. By thus taking security to himself alone, he totally ignored the rights of the plaintiff, and appropriated to his own use that portion of the purchase money which belonged

to her. The appropriation of her portion, without her consent or knowledge, was a wrong, and amounted to a conversion of her interest which entitled her to recover the amount or value thereof. *Freem. Coten*, §§ 306, 307. Nor do we find any exception to the refusal of the court to direct a verdict for the defendant that would justify a reversal of the judgment. The record shows that the question whether the defendant was entitled to recover, or to have allowed to him the whole or any portion of his counterclaim, was, if construed most favorably to him, one of fact; and as no request was made for its submission to the jury, nor any specific exception taken to its dismissal, we deem it unnecessary to consider the question whether the court was correct in the view taken as to the alleged counterclaim, on the ground of the pendency of a former action between the parties, in which that claim was involved. As the questions already considered are the only ones material to a determination of this case, it follows that the judgment and order should be affirmed. The judgment and order should be affirmed, with costs. All concur, except HAIGHT, J., not sitting. Judgment and order affirmed.

(151 N. Y. 540)

PEOPLE ex rel. MILLARD et al. v.
ROBERTS, Comptroller.

(Court of Appeals of New York. Jan. 26,
1897.)

TAXATION—SALE—SETTING ASIDE—JURISDICTION
OF COMPTROLLER.

The comptroller has no power to set aside a sale of land to the state for taxes on the application of the owner. 40 N. Y. Supp. 457, affirmed.

Appeal from supreme court, appellate division, Third department.

Certiorari by John H. Millard and George N. Ostrander to review the determination of James A. Roberts, as comptroller of the state of New York, in refusing to cancel and set aside a tax sale, alleged to be invalid, on the application of relators. From a judgment of the Third appellate division (40 N. Y. Supp. 457) affirming the decision of the comptroller, relators appeal. Affirmed.

Arthur L. Andrews, for appellants. T. E. Hancock, for respondent.

O'BRIEN, J. The relators applied to the comptroller, alleging that they were the owners of certain lands in the county of Franklin, which had been sold for taxes in the year 1881, and bid in by the comptroller for the state. They asked that the sale be canceled and set aside on account of certain defects and irregularities specified in the moving papers. The comptroller denied the application, and the appellate division, upon certiorari, affirmed his determination. It is not necessary to notice the particular defects or irregularities in the sale that are claimed

to constitute the grounds of the application, since, we think, the relators have no standing to make this application. It has been repeatedly held by this court that in cases of tax sales of lands the owner cannot reclaim the lands sold by such a proceeding as this. The comptroller has no power to set aside the sale upon the application of the owner, since the statute was not intended for his benefit, but for the benefit of the purchaser, who has paid his money to the state upon the faith of a title supposed to be valid, but which turns out to be defective or void. Within recent years the statute of 1855 has been amended, but none of these amendments in any way aid the relators in this case. The objections which have been so often stated to the exercise of this jurisdiction at the instance of the owner still remain good. *People v. Chapin*, 104 N. Y. 369, 5 N. E. 64, and 11 N. E. 383; *People v. Chapin*, 105 N. Y. 309, 11 N. E. 510; *Ostrander v. Darling*, 127 N. Y. 70, 27 N. E. 353; *People v. Wemple*, 139 N. Y. 240, 34 N. E. 883; *People v. Roberts*, 144 N. Y. 234, 39 N. E. 85. It will be seen, upon a careful examination of these cases, that they cover all the statutes now in force conferring power upon the comptroller to set aside sales of lands for taxes, but none of them are yet comprehensive enough to enable an owner to repossess himself of the lands sold in such a way. If the sale is invalid, his title is not affected, and he may keep and defend his possession, or, if put out of possession, he may regain it by action of ejectment. It is obvious that there was no intention to modify or disturb these decisions by anything that was said in the case of *People v. Turner*, 117 N. Y. 227, 22 N. E. 1022; *Id.*, 145 N. Y. 451, 40 N. E. 400. The case was correctly decided in the court below, and the order appealed from should be affirmed, with costs. All concur. Order affirmed.

(151 N. Y. 549)

HUDA v. AMERICAN GLUCOSE CO.

(Court of Appeals of New York. Jan. 26, 1897.)

**APPEAL — IN ACTION FOR PERSONAL INJURIES —
WHAT CONSTITUTES A JUDGMENT
OF AFFIRMANCE.**

Where exceptions to the direction of a verdict are ordered heard in the first instance by the appellate division of the supreme court, an order overruling such exceptions, and directing judgment on the verdict, is "a judgment of affirmance," within Code Civ. Proc. § 191, as amended by Laws 1896, c. 559, which provides that no appeal shall lie from a judgment of affirmance unanimously rendered by the appellate division in an action to recover for personal injuries, or for injuries resulting in death, unless the case is certified on a question of law, or an appeal is allowed by a judge of the court of appeals.

Appeal from supreme court, appellate division, Fourth department.

Action by Maryanna Huda, as administratrix, against the American Glucose Com-

pany, to recover damages for injuries resulting in the death of plaintiff's intestate. Plaintiff appeals from an order of the appellate division (42 N. Y. Supp. 1126) overruling exceptions to the direction of a verdict, heard in the first instance in that court. Defendant moves to dismiss the appeal. Motion granted.

John G. Milburn, for the motion. Le Roy Parker, opposed.

PER CURIAM. Upon the trial of this action the court directed a verdict in favor of the defendant, and ordered that the exceptions taken by the plaintiff should be heard in the first instance before the appellate division. After argument had in the usual way, that court overruled the exceptions, denied the motion for a new trial based thereon, and ordered judgment for the defendant. The plaintiff having appealed to this court from the order so made by the appellate division, and from the judgment entered thereon, the defendant now moves to dismiss the appeal upon the grounds, that this is an action to recover damages for injuries resulting in death, that the decision of the appellate division was unanimous, and that no leave to appeal has been granted. The motion is opposed upon the ground that the appeal is not from "a judgment of affirmance," within the meaning of section 191 of the Code of Civil Procedure, as amended by chapter 559 of the Laws of 1896. The second subdivision of that section, as thus amended, provides that "no appeal shall be taken to said [this] court from a judgment of affirmance hereafter rendered in an action to recover damages for a personal injury, or to recover damages for injuries resulting in death, * * * when the decision of the appellate division of the supreme court is unanimous, unless such appellate division shall certify that in its opinion a question of law is involved which ought to be reviewed by the court of appeals, or unless, in case of its refusal to so certify, an appeal is allowed by a judge of the court of appeals." Several methods of reviewing a trial before a jury are provided by law, depending on the nature of the questions to be presented to the appellate court. Where a review of the facts, or of both the facts and law, is desired, one method may be pursued; and, when a review of the law only is desired, another method. When there is no dispute as to the facts, the exceptions may be ordered to be heard in the first instance by the appellate division, but upon such a review the exceptions only can be considered. Code Civ. Proc. § 1000. While the form of procedure is a motion for a new trial, it is in fact an appeal, the object being to ascertain which party is entitled to judgment, which is in the meantime suspended. If the exceptions are overruled, judgment is ordered for the party in whose favor the verdict was rendered:

but if they are sustained, and the verdict set aside, judgment is directed in favor of the party against whom the verdict was rendered. Thus in the one case the verdict is affirmed, while in the other it is reversed. The judgment entered is of affirmance or reversal of the verdict. No appeal lies from the order of the appellate division, which is simply written authority upon which to enter the judgment; but only from the judgment when entered. *Becker v. Koch*, 104 N. Y. 394-398, 10 N. E. 701; *Railroad Co. v. Burkard*, 109 N. Y. 648, 16 N. E. 550. There is no distinction in principle between this method of review and the one usually adopted by appealing from the judgment rendered by the trial court. Both have the same object, and differ only as to the form of attaining it. There is no difference in effect. While the judgment of the appellate division does not affirm a judgment, it affirms the action of the trial court, and may fairly be regarded as a judgment of affirmance within the meaning of section 191 of the Code as last amended. The object of that amendment was to further restrict the jurisdiction of this court and the right of appeal thereto, and we think that the legislature intended that it should apply to every final judgment of the appellate division in the class of actions mentioned, which determines the controversy on the merits, and affirms the action of the court below. The motion to dismiss should be granted, but, as the question is new, without costs, and, as no application for leave to appeal has been made, without prejudice to such an application. All concur. Motion granted.

(151 N. Y. 350)

In re FAIRCHILD.

(Court of Appeals of New York. Jan. 19, 1897.)

ELECTION CONTEST—CONSTRUCTION OF STATUTE—IN WHAT DISTRICT CONTEST SHALL BE HEARD—JURISDICTION—EFFECT OF DECISION OF POLITICAL CONVENTION—REVIEW OF PROCEEDINGS.

1. Laws 1896, c. 909, § 56, provides that all questions arising as to any certificate of nomination shall be determined in the first instance by the officer with whom such certificate is filed, and that "the supreme court, or any justice thereof, within the judicial district, or any county judge within his county, shall have summary jurisdiction, on complaint of any citizen, to review the determination and acts of such officer." *Held*, that the district and county referred to mean those within which the complainants and respondents reside, and the controversy arises, and not the district or county wherein resides the officer with whom the certificate is filed.

2. Under Laws 1896, c. 909, § 56, providing that the legality of a certificate of nomination shall be passed upon, in the first instance, by the officer with whom it is filed, and that his decision may be reviewed by the courts, it is the duty of such officer and of the courts to consider the decisions of the regularly constituted political conventions as to the validity of such certificate; and, where the state committee, the state convention, and the judicial convention successively reached the same decision as to which of two contesting delegations to an assem-

bly district convention was entitled to seats in the convention, such decision should control.

3. Where a regularly constituted congressional committee called a convention for the sole purpose of electing delegates to the national party convention, the convention so called has no power to name a new congressional committee without the consent of the electors of the district.

4. The hearing before a justice or a judge, of a summary proceeding, under Laws 1896, c. 909, § 56, to review the decision of the officer with whom a certificate of nomination is filed, as to its validity or construction, should be confined to the papers used before the officer whose decision is to be reviewed.

Appeal from supreme court, appellate division, Third department.

Summary proceedings under the election laws to review the determination of the secretary of state that Ben. L. Fairchild was the regular Republican candidate for representative for congress for the Sixteenth congressional district. From an order of the appellate division (41 N. Y. Supp. 1114, mem.) affirming an order made by a justice of the supreme court, which reversed the secretary's decision, and decided that William L. Ward was the regular candidate, and directed that his name be placed on the official ballot, Fairchild appeals. Reversed.

Benjamin F. Tracy, for appellant. J. Rider Cady, John Cadman, and Henry C. Henderson, for respondent.

MARTIN, J. The respondent contends that, inasmuch as the election has been held, the decision of the questions presented on this appeal is of no importance, as it can, at most, only affect the question of costs. We think the questions involved are of sufficient importance to require their determination by this court, as it may prevent future embarrassment in the congressional district to which this controversy relates, and also settle other questions upon which there is a conflict in the decisions of the supreme court. In *re Madden*, 148 N. Y. 136, 139, 42 N. E. 534. In examining the various questions to be reviewed, we deem it neither necessary nor desirable to make any very complete or detailed statement of the circumstances and transactions out of which this controversy arose. Consequently, we shall state only such matters and facts as are necessary to an understanding and decision of the questions to be decided.

The first inquiry relates to the jurisdiction of the courts below. A summary proceeding under the provisions of the election law was instituted to review the determination of the secretary of state to the effect that the appellant was regularly nominated as the candidate of the Republican party for the office of congressman in the Sixteenth congressional district, and his name entitled to be placed upon the Republican ticket as such nominee. The Sixteenth congressional district is within the bounds of the Second judicial district, and also of the Second judicial department. Both the complainant and the respondent were residents of that district and department. The

office and residence of the secretary of state are in the city of Albany, which is in the Third judicial district. The proceeding under review was instituted and prosecuted before a justice of the supreme court for the Third judicial district, and the review of his determination was by the appellate division of the Third department. The statute authorizing this proceeding provides: "Any questions arising with reference to any device, or to the political party or other name designated in any certificate of nomination filed pursuant to the provisions of this section, or of section fifty-seven of this article, or with reference to the construction, validity or legality of any such certificate, shall be determined in the first instance by the officer with whom such certificate of nomination is filed. Such decision shall be in writing, and a copy thereof shall be sent forthwith by mail by such officer to the committee, if any, named upon the face of such certificate, and also to each candidate nominated by any certificate of nomination affected by such decision. The supreme court, or any justice thereof, within the judicial district, or any county judge within his county, shall have summary jurisdiction, upon complaint of any citizen, to review the determination and acts of such officer, and to make such order in the premises as justice may require, but such order must be made on or before the last day fixed for filing certificates of nominations to fill vacancies with such officer as provided in subdivision one of section sixty-six of this article. Such a complaint shall be heard upon such notice to such officer as the said court or justice, or judge thereof, shall direct." Laws 1896, c. 906, § 56. The language of this statute is uncertain, ambiguous, and presents the question: Within what judicial district, or within what county, can a justice of the supreme court or a county judge entertain jurisdiction of such a proceeding? Is it the county or district in which the officer making the determination resides or his office is located, or in the county or district where the complainant resides, and in which the district is located for which the nomination is made? If the former, then, in every case where the nomination was made for a district which includes more than one county, all such proceedings would have to be instituted in the Third judicial district before the supreme court, or a justice thereof, or before the county judge of Albany county. Is it at all probable that such was the intent of this provision? I think not. I think it is not to be supposed that the legislature intended to impose upon the justices of the supreme court in the Third judicial district and the judge of the county of Albany the entire burden of this class of litigation, to the exclusion of all other judicial officers of the state. Nor do I think it intended to compel complainants and other persons interested to come into the Third judicial district to conduct and defend proceedings of this character in all cases where the determination was made by the secretary

of state. Such a construction would require a review of these proceedings in that district in every case where the office for which the nomination was made was to be filled by the electors of the state or any division or district greater than a county. So that contests in cases of most of the congressmen, justices of the supreme court, state senators, and perhaps other offices, would have to be determined in the Third judicial district, thus requiring the parties interested to travel long distances to institute or conduct and defend such proceedings, and would be quite liable to result in a denial of justice by reason of the inability of the judicial officers of that district to hear and determine the number of proceedings that might be instituted within the time they are required to be heard and determined.

But it is said that it could not have been the intention to compel the secretary to travel over the entire state to attend these proceedings, and that there might be two or more on the same day, so that it would be impossible for him to attend them all, and hence it is improbable that such was its purpose. The force of this contention is more apparent than real. It is obvious to a person understanding the character of these contests, and the manner in which they are usually conducted, that they are rarely, if ever, defended by the officer making the determination sought to be reviewed. Usually, the only parties interested, or who attend, are the contestants, respondents, and people residing in the immediate locality where the nomination was made. If the intention of the statute was to confine these proceedings to the district or county where the officer resided who made the determination, it is exceptional. We find no other statute requiring the acts of a judicial officer to be reviewed in the immediate locality where he resides, when the transaction out of which the litigation arose occurred elsewhere, and the parties interested are not residents. I cannot think such was the purpose of this statute. I am of the opinion that the district and county referred to in the statute are those within which the complainants and respondent reside, and where the transaction arose which was the subject of the determination. Thus I am led to the conclusion that Mr. Justice Edwards had no jurisdiction to hear and determine the proceeding before him; that he erred in not dismissing it on the appellant's motion; and that the learned appellate division erred in affirming his determination.

While the conclusion we have reached upon the question of jurisdiction requires a reversal, and a consideration of the other questions presented is unnecessary to a determination of this particular controversy, yet, to prevent other complications that may arise out of the existing state of affairs, and to prevent embarrassment in the future administration of the law, we deem it best to consider some of the other questions presented,

to the end that they may be settled by this court for future guidance in the execution of this statute.

The regularity and validity of the nomination of the appellant seem to depend upon two propositions. One is whether a majority of the delegates elected in the Sixteenth congressional district, who, it is claimed, were favorable to the nomination of the appellant, were properly elected, or, under the circumstances proved, must be held to have been so elected; and, if so, the other is whether they were properly convened for the purpose of making such nomination, so that their action was regular and binding.

As to the first, we are presented at the outset with the question how far the action of the state and judicial convention is controlling in determining whether the delegates who participated in the Fairchild congressional convention were properly elected. Section 56 of the election law provides that if there is a division within a party, and two or more factions claim the same device or name, the secretary of state, in a case like this, shall decide such conflicting claim, "giving preference of device and name to the convention or primary, or committee thereof, recognized by the regularly constituted party authorities." That the state committee and state convention of a party are its regularly constituted authorities there can be no doubt. In this case, whether a majority of the delegates in the congressional district favored the nomination of Fairchild depends solely upon the regularity of the election of five delegates elected in the second assembly district of Westchester county. In that district an assembly district convention was regularly called. Before its organization, however, a dispute arose between the delegates, and two separate conventions were organized, each of which elected delegates to the state convention, delegates to the judicial convention, and delegates to the congressional convention for the Sixteenth district. When the state convention assembled, the delegates elected by each of these two conventions appeared before the state committee and the state convention, and claimed seats in the latter. The contest arising out of this situation was first brought to a hearing before the state committee, which, after considering the matter, decided that the assembly convention which elected delegates who were favorable to Fairchild's nomination was the regular and properly organized district convention, and that the delegates elected by it were the duly and properly elected delegates. This contest was then brought to a hearing before the convention, where the matter was again investigated and considered, and the convention reached the same conclusion. Subsequently, the question of the regularity of the assembly district convention for that assembly district arose in the judicial convention held for the judicial district which included that assembly dis-

trict. The question was again contested, and the judicial convention reached the same conclusion as that reached by the state convention. Thus, the state committee, the state convention, and the judicial convention all decided that the assembly convention in that district which elected the five delegates favorable to, and who voted for the nomination of, Fairchild, was the regular and properly authorized assembly convention for that district; thus, in effect, determining that they were the proper and regular delegates therefrom. That was the only question in dispute relating to the delegates elected. That, if that convention was regular, it had the same authority to elect congressional delegates as it had to elect state or judicial delegates, is not disputed. The only question in either case was, which of the two conventions was regular? That question, as we have already seen, was decided in favor of the Fairchild convention.

The effect of the statute, and how far its provisions are binding upon officers determining these questions, and upon courts or judges in reviewing the determinations of such officers, is a subject upon which the supreme court has rendered variant and conflicting decisions; one class holding that the determination of party conventions or party authorities has no weight whatever, while the other class is to the effect that, in determining questions as to the regularity of conventions, officers and courts should rely upon the action and determination of the regularly constituted party authorities upon the question where there has been such a determination. We think the latter effectuates the obvious intent and purpose of the statute. It is much more proper that questions which relate to the regularity of conventions, to the nomination of candidates, and the constitution of committees, should be determined by the regularly constituted party authorities, than to have every question relating to a caucus, convention, or nomination determined by the courts, and thus, in effect, compel them to make party nominations, and regulate the details of party procedure, instead of having them controlled by party authorities. We think that in cases where questions of procedure in conventions or the regularity of committees are involved, which are not regulated by law, but by party usages and customs, the officer called upon to determine such questions should follow the decision of the regularly constituted authorities of the party, and courts, in reviewing the determination of such officers, should in no way interfere with such determination. We think an opposite rule would be in conflict with the spirit and intent of the statute, burden the courts with a class of litigation that would be unfortunate and embarrassing, and might produce results entirely at variance with the will of a majority of the electors of the party. We are therefore of the opinion that the action of the state committee and state con-

vention should be regarded as controlling, and that the courts below were not justified in holding that Ward was properly nominated, as it is manifest, if the action of the state convention is to control, a majority of the properly elected congressional delegates of the Sixteenth district voted for the nomination of Fairchild.

But another question is raised, which is whether the convention at which Fairchild was nominated was properly called. There were two committees, each of which claimed to be the proper one. The committee calling the convention at which Fairchild was nominated was elected at the regular congressional convention, held in 1894, when Fairchild was first nominated as congressman for that district. In the spring of 1896 it called a convention for the sole purpose of electing delegates to the national convention at St. Louis. That was the only purpose of the convention, and the sole object mentioned in the call issued by the committee. The convention, however, when it met, attempted to appoint a new congressional committee. Whether it had the authority to do so is another of the questions involved. I think it had not. The electors of the district who were members of the Republican party elected delegates to that convention for a single purpose only. They conferred upon the delegates thus elected the power to perform for them one single act. The whole governmental power and authority of a party rest in its members, in the same manner that all governmental power of the state rests in the people until delegated to its representatives. Delegates can represent the members of a party only to the extent of the authority actually conferred by the latter. In 1894 the members of the party in that district had elected a congressional committee, and invested it with power to call the next congressional convention, in 1896. It was that committee which called the Fairchild convention. The power that had been conferred upon it could not be withdrawn, and a new committee appointed, without the consent of the electors of the party, acting through its delegates elected for that purpose. It would not, I apprehend, be seriously contended, if that convention had assumed to nominate a congressman, that its action would have been regular or valid. If such a nomination would have been irregular and invalid, how can it be said that its action was any more regular in attempting to appoint a committee when no such power had been delegated to it? If invalid in one case, I think it is equally so in the other. The act would be unauthorized in both, and not binding in either.

We think the learned judge before whom this proceeding was instituted correctly held that on the hearing before him the parties should be confined to the papers used before the secretary of state, whose determination he was called upon to review. The proceeding before him was clearly one of review, was in

no sense original, and could be properly heard only upon the papers upon which the original determination was based. The order of the appellate division and the order made by Hon. Samuel Edwards should be reversed, and the determination of the secretary of state affirmed, with costs in all the courts. All concur, except O'BRIEN, J., not voting. Ordered accordingly.

(151 N. Y. 543)

PEOPLE v. CONROY.

(Court of Appeals of New York. Jan. 26, 1897.)

CRIMINAL LAW — APPEALS IN CAPITAL CASES — PRINTING OF RECORD — POWER TO MAKE ALTERATIONS.

1. Under Code Cr. Proc. § 485, which provides that on an appeal, "when a judgment is of death, the clerk * * * must forthwith cause to be prepared and printed the number of copies of the stenographer's minutes and judgment roll which are required by the rules of the court of appeals, which shall form a case and exceptions upon which the appeal shall be heard," neither the clerk nor any other person or tribunal has the power, without notice to the defendant and an opportunity to be heard, to make any changes whatever in the minutes of the stenographer after they have been filed with the clerk.

2. While the statute confers no authority on the court of appeals to alter the record furnished it by the county clerk on an appeal, it has the implied power to compel him to print such a record as the statute requires.

Appeal from supreme court, trial term, St. Lawrence county.

Frank C. Conroy was convicted of murder in the first degree and sentenced to death, and appeals. Motion by appellant to require the clerk to print and serve the record as required by the statute. Motion granted.

John C. Keeler, for the motion. Ledyard P. Hale, for the People.

PER CURIAM. On the 10th of August, 1896, at a trial term of the supreme court held in and for the county of St. Lawrence, the defendant was convicted of the crime of murder in the first degree, and sentenced to be put to death in the manner prescribed by law during the week commencing on the 28th of September, 1896. On the 12th of that month an appeal from the judgment of conviction was taken to this court, and, in due course of time, printed copies of the judgment roll, notice of appeal, and what purported to be the minutes of the stenographer, as transcribed and certified by him and filed with the county clerk, were served on the attorney for the defendant. Each copy bore the certificate of the county clerk that it was a copy of the stenographer's minutes, the notice of appeal, and of the judgment roll on file in his office, and that the same had been compared by him with the originals, and that they were correct transcripts therefrom and of the whole thereof. Upon comparing the printed copies thus certified with the original transcript of the minutes filed

with the county clerk, and with the copy filed with the governor, it appeared that changes had been made therein, but on investigation it also appeared that such changes were made in good faith, to correct what were regarded as manifest errors, and not for the purpose of prejudicing the defendant. While some changes were made by the stenographer by interlineation before the minutes were filed, so as to conform to his original notes, others were made without his authority, after the minutes were filed, and without the knowledge or consent of the defendant or his attorney. Our attention is called specifically to upward of 100 changes, the most of which appear upon inspection to be of no material importance, as they simply correct mistakes in grammar and the like, without changing the meaning in any particular; but a few, if not clearly material, are of such a character as to make it a debatable question whether they may not prejudice the defendant upon the hearing of the appeal.

By section 485 of the Code of Criminal Procedure the clerk is required, upon a conviction for a criminal offense, to make up a judgment roll consisting of various papers, which are carefully specified, and, as the section further provides, "when a judgment is of death the clerk, in addition to the foregoing, must forthwith cause to be prepared and printed the number of copies of the stenographer's minutes and judgment roll which are required by the rules of the court of appeals, which shall form a case and exceptions upon which the appeal shall be heard," and the expense of preparing and printing the same is made a county charge. The practice thus authorized is anomalous, and differs radically from the ordinary means provided for the review of judgments, both civil and criminal. Ordinarily, a case is made by the appellant, to which the respondent may propose amendments, and, if these are not agreed upon by the attorneys for the respective parties, they are settled by the judge who presided at the trial. In this way, as the experience of generations has shown, substantial accuracy is attained, and the case is presented to the appellate court upon as perfect a picture of what transpired at the trial as can well be secured. Even on an appeal from justice's court, in a civil action involving the most trifling sum, there is careful provision for repeated amendments of the return in order to obtain a correct record for the purpose of reviewing the judgment. Upon an appeal, however, from a judgment of conviction in a capital case, involving the highest peril to which a human being can be exposed, no opportunity is, in terms, provided for the correction of the most glaring mistake, or the settlement of questions as to alleged mistakes, as there is in civil cases by a hearing on notice before the presiding judge, who, by his experience, knowledge, and impartiality, is in

a better position to determine what the record should be than any one else. The stenographer's minutes, with the crude and literal statements of counsel, witnesses, and jurors, material and immaterial, with all the inaccuracies of grammar, absence of clearness, and want of condensation incident to verbal utterances written down and transcribed verbatim, are now, as the statute has usually been enforced in practice, printed in *hæc verba* under the direction of the county clerk. No express provision is made by which a mistake, however obvious, can be corrected, or a statement however immaterial, can be omitted. While the statute says that the clerk must "cause to be prepared and printed" the requisite number of copies, no direction is given as to what preparation he is to make, and it doubtless means that he is simply to cause copies to be made for printing, as it would not be reasonable to intrust that officer with the power of making a case, without notice to either party, either by changing the minutes of the stenographer or reducing them to narrative form. It is claimed that no court or officer has the power, either with or without notice to the parties, to make any change whatever in the minutes of the stenographer after they have been filed with the county clerk. We do not now sustain, nor do we dissent from, this position taken by the defendant's counsel. It may be that the statute compels this conclusion. On the other hand, it may be that there is an implied power to correct mistakes, springing from the commanding necessity of the situation, the nature of a case and exceptions, and the method of procedure in all other appeals that prevailed when the statute was passed. We are not now required to decide whether such a power exists or not. We simply hold that, if it does exist in some officer or tribunal, it can only be exercised after due opportunity has been afforded to the defendant to be heard. To hold otherwise would violate every precedent that has been created to protect rights of property and the liberty of the person. The changes made in the stenographer's minutes now under consideration, after they had been filed with the county clerk, were without notice and without authority. Even if they were immaterial and made with the best of motives, we cannot too strongly condemn any interference with a public record of such great importance. On the facts as they now appear, we think it is the duty of the clerk to cause the stenographer's minutes to be printed literally as filed, without change or alteration of any kind made after that date. If changes may be made at all, it is not for him to make them, without the knowledge or consent of the defendant, or to practically indorse them after they have been thus made. He has no more power to alter the stenographer's minutes, or to adopt an alteration made by some one else, than he has to tamper with the judgment roll itself. What we have said in relation to him applies

with equal force to every one else, unless it may be, as we have suggested, but not decided, that mistakes may be corrected upon due notice to the defendant, or with his consent.

Our power to make the order asked for by the defendant is challenged by the learned district attorney upon the ground that the statute has not conferred upon us the requisite authority. In *People v. Hoch*, 150 N. Y. 291, 44 N. E. 976, we held that we had no power to alter the record furnished us by the county clerk. We still adhere to that conclusion, but we further hold that we have power to require the clerk to do his duty by obeying the statute. This power exists by necessary implication, as the right to hear the appeal involves the right to require such a record to be presented as the law commands the clerk to prepare and print. Unless he does his duty, the right of appeal given to the defendant may be of no avail. As the printed records are required to be furnished to us for official action, we necessarily have the right to determine, upon a proper application and the full presentation of the facts, whether they have been prepared and printed according to law, and, if we find that they have not, to direct the clerk accordingly. While we think, therefore, that the motion should be granted, before we take leave of the subject we wish to call attention to some evils that have been introduced by the strange and unsafe practice provided by the statute under consideration. The expense of printing the record, which falls upon the county where the case arose, is usually doubled, and sometimes quadrupled, not only by including immaterial matter, but also by presenting the evidence in the form of questions and answers, instead of condensing it in the form of a narrative. The appeal books in the murder cases that have been before us during the comparatively brief period that this statute has been in force contain thousands upon thousands of pages of evidence taken upon the examination of jurors, although no objection was made nor exception taken, and in many instances where the juror did not sit upon the trial. We have had cases presented where between three and four hundred pages of the printed record contained only matter of this kind, the printing of which cost several hundred dollars, and yet it was not only absolutely useless, but it imposed an unnecessary burden upon the judges who had to read it in order to discharge their duty to the parties, for only by reading could they tell whether it was material or not. A record of one thousand pages, which is not unusual in these cases, if prepared in the narrative form in which civil cases are required to be presented to the court, could ordinarily be reduced to not more than three or four hundred pages. The saving of expense to the people, and of labor to the judges, who, in the crowded condition of the calendar,

have no time to waste on useless investigation, induces us to again call attention to the subject, as we did on a former occasion. *People v. Shea*, 147 N. Y. 78-86, 41 N. E. 505. Aside from the saving of expense to the public and the time of the court, it is dangerous to permit an appeal involving human life to be heard upon a record, the correctness of which depends wholly upon the accuracy of a single official, working, always rapidly, frequently under great difficulties, and sometimes in the midst of confusion caused by the witness and both counsel speaking at the same time. It is no reflection upon the faithful body of men who serve as stenographers in the trial courts to say that they cannot always be accurate; that they sometimes misunderstand the answers of witnesses, and fail to catch the exact words of the court in its rulings or charge. It is possible that a stenographer may be incompetent, or suffering from some ailment, temporary or permanent, that would prevent him from hearing accurately or recording literally what transpires on the trial. As the change of a single word may involve serious consequences, the propriety of requiring a case to be made and settled in the usual way is too obvious for discussion. While perfect accuracy is not attainable by any method, when a proposed case is carefully prepared and presented with the amendments proposed by the other side to the presiding judge for settlement, that officer, aided by the minutes of the stenographer, the suggestions of counsel, and his own minutes and recollection, is in a position to insure a record that is substantially correct. We hope that the safe practice which formerly prevailed may be restored.

Returning to the matter directly before us, it is ordered that the county clerk of St. Lawrence county forthwith cause to be prepared, printed, and served the number of copies of the stenographer's minutes and judgment roll required by the rules of this court, and that such minutes be printed as they were filed by the stenographer, without omission or change of any kind. All concur. Motion granted.

(151 N. Y. 520)

HUMES v. PROCTOR et al.

(Court of Appeals of New York. Jan. 28, 1897.)

TRESPASS FOR CUTTING TIMBER—PROOF OF TITLE
—ADMISSIONS—DECLARATIONS AS
TO BOUNDARY.

1. In trespass for cutting timber on land claimed by plaintiff under a contract of sale of a part of a certain lot executed by defendant's predecessor in title, where plaintiff's title was in issue, a deed to defendant put in evidence by him, and supplemented by testimony of one of his witnesses that it conveyed all of such lot except the portion belonging to plaintiff, may be regarded as an admission of plaintiff's title.

2. In trespass for cutting trees on plaintiff's land for the purpose of laying out a road, where the boundary between the lands of plaintiff and defendant was in issue, the admission of dec-

larations to plaintiff, by one who acted as defendant's agent in laying out the road, that "nobody can move you from your old lines and your corners," was harmless, since it was a mere expression of opinion, which did not locate any lines or monuments.

8. In trespass for cutting timber on another's land, treble damages are recoverable on a finding of damages by the jury, unless there is an affirmative finding, as provided in Code Civ. Proc. § 1668, that the injury was involuntary, or the defendant had probable cause to believe the land his own, or that the timber was taken by authority of the road officers.

Appeal from supreme court, general term, Fourth department.

Action by Aaron Humes against Emma H. Proctor as executrix of the estate of Thomas E. Proctor, deceased, and another, for damages for cutting timber on plaintiff's land. From a judgment of the general term (26 N. Y. Supp. 315) affirming a judgment for plaintiff entered on a verdict of a jury, and affirming an order giving treble damages and denying a new trial, defendants appeal. Affirmed.

Watson M. Rogers, for appellants. A. E. Kilby, for respondent.

BARTLETT, J. This action was brought to recover damages for an alleged trespass in cutting and removing trees from the land of plaintiff in the town of Diana, Lewis county. The main defense rests upon the contention that plaintiff had no title to the land in question. The jury found title in the plaintiff, and fixed his damages at \$51, which were trebled by the court in pursuance of the prayer of the complaint. The learned general term affirmed the judgment, holding that plaintiff's evidence was sufficient to justify the verdict of the jury, that there were no exceptions upon which the judgment should be reversed, and that treble damages were properly allowed.

The question of title is presented upon the following facts: Thomas Proctor, one of the defendants, now deceased, was the owner of lot 11, being a very considerable tract of woodland, except 130 acres, which plaintiff held under contract of purchase, made in 1868 with the then owner of the property. Plaintiff, prior to the drawing of the contract, was permitted to locate the 130 acres, and for that purpose went upon the premises with a surveyor representing the vendor, and directed him to lay out a parallelogram containing the specified number of acres, and thereupon, as is contended by plaintiff and substantially admitted by the surveyor, they erected marks and monuments practically locating the land to be included in the contract. After this was done the contract was drawn between plaintiff and the vendor, the premises being described, as was supposed, by courses, distances, and monuments, according to the surveyor's notes made when the 130 acres were so selected. The balance of lot 11 bounded plaintiff's tract on the north, east, and south, and the line of the

lot on the west. In 1890 Proctor desired to build a road through the woods from an alleged highway lying to the west of lot 11, and at or near the northwest corner of plaintiff's tract, to his (Proctor's) lands lying easterly of the 130 acres. This road was constructed, and the contention by plaintiff is that it rests upon the northerly portion of his land, and Proctor's executrix insists that it lies wholly to the north of plaintiff's premises. It thus appears that, at the trial of this action, which took place about 24 years after plaintiff selected his land, the main question submitted to the jury was the boundaries of the tract so located by the plaintiff and vendor's surveyor, not in accordance with the courses and distances of an existing contract, but by marks and monuments then said to have been established by plaintiff. It would not be profitable to examine the conflicting evidence submitted to the jury on this question, as it suffices to say that we have considered it carefully, and find it impossible to hold that there was no evidence to sustain the verdict for plaintiff. It was a question peculiarly within the province of the jury, and their verdict locating the road on plaintiff's land is conclusive.

The question of adverse possession by plaintiff is of no importance, and is not considered on this appeal, as the case turns on the original location of the lands in question as already pointed out. The premises, when selected, were wild lands in the wilderness of Lewis county, and the lines and monuments were more difficult to ascertain after the lapse of nearly a quarter of a century than would be the case in a country under cultivation. The plaintiff built a house on his land about 1867, and lived in it a portion of every year thereafter; erected other buildings later, including a sugar house; cleared a portion of land, and raised hay and other crops; fenced a part of the west line; and cut wood and timber from the premises. These facts were material as bearing on the question of location. We agree with the learned general term as to correctness of rulings at the trial considered by them, and also as to the order trebling plaintiff's damages under sections 1667 and 1668 of the Code of Civil Procedure. It only remains to consider several additional points presented for our determination.

It is insisted by the appellants that plaintiff did not prove title to the 130 acres. As the question is now presented to us by the record, it is not necessary to determine the legal questions discussed by appellants as to plaintiff's proofs of title. We do not mean to intimate that there is any defect in plaintiff's proofs; but, as the defendants put in evidence the deed from the state of New York to defendant Proctor, and proved by their own witness that it conveyed all of lot 11 except Aaron Humes' 130 acres, it may well be regarded as an admission of plaintiff's title, in view of the fact that it was

not attacked at the trial or general term. The contest at the trial was over the location of the northern boundary of plaintiff's tract, and the strip of land on which the road was built. Any alleged defects in the chain of plaintiff's title should have been pointed out specifically on the motion to nonsuit, so that plaintiff might have offered further evidence in regard to it, if so advised.

The appellants also raise the point that the trial judge charged the jury, in effect, that the road running westerly from at or near plaintiff's northwest corner towards Harrisville was not a legally constituted highway. We do not think that the charge of the court is subject to any such construction. The jury did not consider in their verdict, however, any question but the trespass on the 130 acres east of the west line of lot 11, and the question of the highway was thus dropped out of the case, as fully appears by the very careful instructions of the trial judge as to the form of the verdict.

Appellants further insist that their motion to strike out certain declarations of the defendant Mead, giving his opinion as to the lines and corners of plaintiff's land, should have been granted. It is undisputed that Mead represented Proctor to some extent in laying out the road complained of, and he is sued as a joint trespasser in this action. It might well be doubted, if Mead had been stating facts as to the boundaries of the tract in question, that his admission would, under the circumstances, have bound Proctor, as no transaction of the principal was pending at the time, although the agency existed. *Anderson v. Railroad Co.*, 54 N. Y. 334-341. Mead said to plaintiff, according to the evidence objected to, that "There ain't nobody can move you from your old lines and your corners." This was mere opinion, which located no lines or monuments, and was perfectly harmless. This evidence was also competent, for what it was worth, against Mead, as to treble damages.

There are several other points which we have considered, but will not discuss. We find no reversible error, and the judgment appealed from should be affirmed, with costs. All concur, except O'BRIEN, J., not voting, and MARTIN, J., not sitting. Judgment affirmed.

(151 N. Y. 527)

ALDRIDGE, Superintendent of the Poor, v. WALKER.

(Court of Appeals of New York. Jan. 26, 1897.)

PAUPERS—ORDER REQUIRING RELATIVES TO SUPPORT—RES ADJUDICATA—NOTICE OF WILLINGNESS TO SUPPORT—NEGLECT OF AUTHORITIES.

1. An order of the court of sessions requiring defendant to pay to the superintendent of the poor a weekly sum for the support of her daughter is not res adjudicata, precluding defendant from showing, in an action brought to enforce such order, that during the time for which such payment is claimed the daughter

was not a public charge. 33 N. Y. Supp. 1125, reversed.

2. Defendant, having been ordered by the court of sessions to pay to the superintendent of the poor a weekly sum for the support of her daughter, notified the superintendent in July, 1891, that she was ready to support her daughter in her own house, and forbade him to incur any expense on her behalf. No attention was paid to the notice until December, 1892, when, upon a second notice to the same effect, the superintendent sent the daughter to the defendant's house. *Held*, that defendant was not liable for the time during which her daughter remained a public charge owing to the negligence of the superintendent.

Appeal from supreme court, general term, Fourth department.

Action by David Aldridge, superintendent of the poor of Oneida county, against Mary Walker. From a judgment of the general term, Fourth department, affirming a judgment for plaintiff, defendant appeals. Reversed.

For former report, see 26 N. Y. Supp. 296, and 33 N. Y. Supp. 1125, mem.

S. M. Lindsley, for appellant. Timothy Curtin, for respondent.

HAIGHT, J. This action was brought to recover for the support and maintenance of Sarah Walker, the daughter of the defendant. The action is based upon an order of the court of sessions of Oneida county bearing date April 4, 1887, as modified by another order of that court bearing date June 17, 1887, wherein the defendant, as mother of Sarah Walker, was required to pay to the superintendent of the poor of the county of Oneida the sum of three dollars per week for the support and maintenance of Sarah Walker until the further order of that court. The conclusions of law based upon the findings of facts by the trial court only are brought up for review. It appears from the facts found that Sarah Walker was committed to the Oneida county poorhouse as a poor person, on the 18th day of May, 1886, and that she was duly discharged therefrom by the superintendent of the poor on the 10th day of July thereafter; that she then obtained employment in a private family, and supported herself until the 20th day of May, 1891, at which time she was again committed to the county house by the overseer of the poor of the town of Rome, where she remained until the 20th day of June thereafter. She was then discharged, and again committed to the county house by the same overseer of the poor on the 21st day of November, 1891, where she remained until the trial of this action. On the 23d day of June, 1886, the then superintendent of the poor of the county of Oneida caused a notice to be served upon the defendant to the effect that he would apply to the court of sessions of that county on the 6th day of December, 1886, for an order compelling her to support her said daughter. It further appears that this motion was brought on for a hearing in the

court of sessions on the 4th day of April, 1887, the defendant failing to appear. An order was made providing that she should pay six dollars for each and every week after the date of the order, until the further order of the court, to be used exclusively for the support and maintenance of her daughter Sarah after that date. Upon an application made therefor by the defendant, this order was opened upon her paying the sum of \$155, and she was given a hearing thereon, whereupon the order of June 17, 1887, was made, reducing the weekly allowance from \$6 to \$3. Thereafter the defendant paid, from time to time, the amount required to be paid by that order, until the 29th day of May, 1888, as we are now told, upon the supposition that her daughter, Sarah, was still an inmate of the county house. She then refused to pay more; and subsequently, and on the 18th day of November, 1890, this action was brought. It further appears from the facts found that in the year 1859 the supervisors of Oneida county, by resolution duly passed, adopted the provisions of the "Livingston County Act," relating to the support of the poor, and thereupon the provisions of chapter 334 of the Laws of 1845 were extended to Oneida county, and that the same has ever since been in force in that county; and that all the poor of Oneida county were not a charge upon the county when any of the proceedings were had to compel the defendant to support her daughter, Sarah.

It will be observed, from the facts narrated, that a question is presented as to whether this action can be maintained by the superintendent of the poor. The orders of the court of sessions, upon which it was based, were made after Sarah had been discharged from the county house by the superintendent of the poor, and at a time when he had no jurisdiction or control over her. That order required the defendant to pay the sum stated per week from and after the 4th day of April, 1887, at which time, and for several years thereafter, Sarah continued to support herself, and was not a charge upon the county, or upon any town therein. It is claimed that it does not appear that Sarah was ever insane, blind, old, lame, impotent, or decrepit, so as to be unable to work and maintain herself, and that she consequently was not a person within the provisions of section 914 of the Code of Criminal Procedure, in which her mother could properly be charged with her support. Upon this branch of the case the trial court has found, as a conclusion of law, that the superintendent of the poor of the county was not authorized to institute the proceedings to compel the defendant to support her daughter, Sarah; but for the purposes of this case we shall disregard this conclusion of the trial court, pass the consideration of the questions raised with reference to the jurisdiction of the court, and assume that all of

the questions raised with reference thereto are res adjudicata.

Upon the merits, the case is, moderately speaking, extraordinary. Sarah was committed to the county house on the 18th of May, 1886, and remained until July 10th,—seven weeks and three days. She was then discharged by the superintendent, and from that time until May 20, 1891, supported herself, and was not a public charge to the amount of a single penny. She then became an inmate of the county house for one month, and was again discharged, and was again committed on the 21st day of November, 1891. The order of the court of sessions made no provision for reimbursing the county for the seven weeks and three days in which she was an inmate of the county house during the year 1886. It provided for her support after the 4th day of April, 1887, by requiring a weekly payment to be used exclusively for her support and maintenance thereafter. The defendant paid \$155 on the 17th day of June, 1887, being the costs and weekly payments accrued upon the former order to that date, and then paid the \$3 per week required by the order of the latter date, until the 29th day of May, 1888, making a total of upwards of \$300, not a dollar of which had thereafter been expended for her support and maintenance by the superintendent prior to the commencement of this action. The trial court awarded judgment for the sum of \$887.13, being \$3 per week from the 29th day of May, 1888, to the 29th day of January, 1894, the time of the trial, which judgment was reduced by the general term to the sum of \$708, besides costs; thus limiting the recovery to the 12th day of December, 1892, the day on which the superintendent approved of the defendant's home as a suitable place for the residence of her daughter, Sarah. From the 21st day of November, 1891, the date of her last commitment, to the 12th day of December, 1892, the date to which recovery was permitted, was 1 year and 21 days. It thus appears that the superintendent of the poor has received upwards of \$300, and a judgment of upwards of \$700 for 1 year, 1 month and 21 days' actual support of the defendant's daughter in the county house, which, at \$3 per week, would not amount to the sum of \$200, leaving a considerable amount of the sum already paid by the defendant unexpended. The question is thus presented as to whether the superintendent can recover of the defendant for the five years intervening between the making of the order and the commitment of Sarah in 1891. The general term appears to have been of the opinion that the order of the court of sessions was res adjudicata, and that no defense was available to the defendant except that of payment. We think this is carrying the doctrine of res adjudicata beyond its legitimate scope. Suppose that Sarah had died on the next day after the making of the order, thus

determinating her dependency upon the public for her support, is it possible that that fact could not be shown, and would the courts be bound to award judgment against the mother for the support of her daughter years after she was dead? And if her death could be shown as a termination of her dependency upon the county for her support, why may not the order of the superintendent, discharging her as an inmate of the county house, and her thereafter supporting herself, be shown? Her dependency upon the county may be terminated in either of the ways pointed out; and, when terminated, the superintendent has no further charge or liability with reference to her. The object and purpose of the order of the court of sessions thereupon cease and determine. There is no necessity for its longer continuance, or for its execution; and it appears to us that no reason exists in law or equity for the enforcement of such an order after the happening of such an event. If this be so, there was nothing due and owing from the defendant to the plaintiff at the time this action was brought. It is true that in an action brought under section 920 of the Code of Criminal Procedure a recovery can be had down to the time of the trial, but this has reference only to actions in which there is some amount due and owing at the time the action was brought.

It is stated that Sarah Walker was 45 years of age. It is found as a fact that the defendant lived on a farm in the town of Deerfield, in the county of Oneida, and has kept house there for many years; that prior to the year 1885 Sarah lived with her mother on the farm; that she had to herself a comfortable room, suitably furnished, and was provided with such fare as the defendant provided for herself and her household; that during the year 1885 Sarah voluntarily left her home, and went to the town of Rome, where she remained until she went to the poorhouse, in May, 1886; that the home, support, and maintenance provided by the defendant for Sarah were comfortable and suitable to the conditions of the parties, and as good as the defendant was bound to provide; that in July, 1891, the defendant caused notice in writing to be served upon the superintendent of the poor to the effect that she was ready and willing to provide suitably and properly for Sarah at her own home, and forbidding him to expend anything or incur any expense in the matter of her support or maintenance, but to this notice the superintendent made no response; that on the 12th day of December, 1892, the defendant again offered to take her daughter home, and provide for her in a suitable and sufficient manner; and that the plaintiff thereupon told defendant to take her, and thereby approved of the defendant's home as a suitable place for her support and maintenance. The general term, as we have seen, modified the judgment entered upon

the decision of the trial court, in effect holding that the recovery should be limited to the 12th day of December, 1892, thus, in effect, recognizing the rule that we contend for,—that other defenses may be available than that of payment. But we have called attention to these findings for another purpose. It is not quite apparent to us why the 12th day of December, 1892, should be selected as the date for the termination of the order of the court of sessions, instead of the earlier date. The defendant had furnished her daughter with a home, with all the comforts suitable to her condition in life, prior to the time that her daughter left. In July, 1891, she called the superintendent's attention to this, through her written notice of that date, and expressly stated that she was willing to provide for and support her daughter at her own house. This cast upon the superintendent the duty of determining whether her offer was suitable and sufficient. This he did determine a year or more later, but she ought not to be held responsible for his delay and neglect in the meantime. It is quite apparent, for the reasons stated, that this judgment ought not to be permitted to stand; and so fully are we convinced that the claim has no merit that we think it our duty to here finally dispose of the case. The judgment should be reversed, and the complaint dismissed, with costs. All concur, except O'BRIEN, J., not voting, and MARTIN, J., not sitting. Judgment accordingly.

(151 N. Y. 536)

CRITTEN et al. v. VREDENBURGH et al.
(Court of Appeals of New York. Jan. 26,
1897.)

JUDGMENT—BY CONFESSION—SUFFICIENCY OF STATEMENT.

A statement reciting that plaintiffs had loaned defendant divers sums, which the latter agreed to pay, and had performed services in selling goods for the defendant, and that on an adjustment of accounts the defendant was justly indebted to plaintiffs in a certain sum, which he then agreed to pay, is sufficient to support a confession of judgment under Code Civ. Proc. § 1274, providing that, on the entry of judgment by confession, the defendant shall file a written statement showing concisely the facts out of which the debt arose. 38 N. Y. Supp. 542, affirmed.

Appeal from supreme court, appellate division, Third department.

Action by Defrees Critten and others against Charles W. Vredenburg. There was judgment by confession in favor of plaintiffs. An order denying a motion by the Manufacturers' Bank of Cohoes to set aside the judgment having been affirmed by the appellate division (38 N. Y. Supp. 542), the bank appeals. Affirmed.

This was a motion by an attaching creditor of the defendant, Vredenburg, to set aside a confession of judgment made by the said defendant to the plaintiffs, upon the ground, among others, that the statement in the con-

fession of judgment did not state sufficiently the facts out of which the debt arose. The court at special term denied the motion, and the order denying the same was affirmed by the appellate division. The appellate division granted leave to the attaching creditor to appeal to this court from the order of affirmance, and certified this question for our consideration: "Was the statement sufficient, under subdivision 2 of section 1274 of the Code of Civil Procedure?" The statement in the confession is that between March 1, 1893, and October 1, 1895, the plaintiffs "loaned and advanced to me divers and sundry sums of money, which I agreed to repay them, with interest, and also did and performed work, labor, and services for me in selling merchandise for me upon commission and guarantying the accounts of the same. On October 1, 1895, I had an adjustment of accounts with said co-partnership concerning all the said matters, whereby it was found that I was justly indebted to them in the sum of \$19,879.02, which sum they thereupon demanded from me, and which amount I agreed to pay to them. No part, however, of said sum has been paid, and there is still due and owing to them from me the full and true sum of \$19,879.02, with interest thereon from October 1, 1895."

Charles F. Doyle, for appellant. Benjamin N. Cardozo, for respondents.

PER CURIAM. The statement in the confession of judgment is quite similar in its effect to that which was under consideration in *Broistedt v. Breslin*, 105 N. Y. 682. We there affirmed an order below, which denied a motion to set aside a judgment by confession on the ground of the insufficiency of the statement on which it was entered. The confession in that case read that it was "for a debt justly due to the plaintiff, arising upon the following facts: The defendant, at different times, borrowed of the plaintiff divers sums of money, and also purchased of the plaintiff horses, and, on an accounting of their dealings together this day, there was found to be due from the defendant to the plaintiff the sum of \$2,298." The denial of the motion in the *Broistedt* case was rested, in the opinion of the general term of the Second department, upon the cases, in this court, of *Freligh v. Brink*, 22 N. Y. 418, and *Harrison v. Gibbons*, 71 N. Y. 58. There, as here, the statement showed an account stated between the parties and a resulting indebtedness. There was enough in either statement to comply with the statute, which requires that it shall be concise, and it is not material that there was not greater particularity or definiteness in regard to the times and amounts of the loans of money, or of the sales of merchandise upon commission. This statement satisfies the object of the statute, because it indicates the facts out of which the indebtedness arose, and the

form which it assumed in the account stated between the parties. The case of *Wood v. Mitchell*, 117 N. Y. 439, 22 N. E. 1125, does not conflict with the previous case of *Broistedt v. Breslin*, and is not an authority in conflict with the view we take of the present case. In *Wood v. Mitchell* the confession of judgment was "for a debt now justly due to the said plaintiff from me, arising from the following facts, viz.: The said sum of \$5,000 is a balance due to said plaintiff of various sums of money loaned and advanced by him to me, the said defendant, during a period from about July 1, 1896, to date, and includes interest upon such loans and advances to this date." That statement was quite different in its effect from the one in question. Its facts were peculiar, and we were quite warranted in holding that their indefiniteness vitiated the confession of judgment. The statement was vague, while the present one sets forth similarly to a pleading, an account stated upon a certain day, and claims interest upon the sum then found to be due upon the adjustment of accounts from that day. We think the question certified to us should be answered in the affirmative, and that the order appealed from should be affirmed, with costs. All concur. Order affirmed.

(54 Ohio St. 329)

CITY OF CANTON v. WAGNER.

(Supreme Court of Ohio. March 17, 1896.)

MUNICIPAL IMPROVEMENTS—NOTICE.

A notice under Rev. St. § 2304, to a landowner, of a resolution by a city council as to the necessity of improving a certain street, defining the nature of the improvement, and stating that the expenses would be charged to the land abutting thereon, is sufficient.

(Syllabus by the Court.)

Error to circuit court, Stark county.

Action by the city of Canton against Christian Wagner. Judgment for defendant. Plaintiff brings error. Reversed.

Peter J. Collins, for plaintiff in error.
Charles C. Upham, for defendant in error.

PER CURIAM. The following notice, under section 2304, Rev. St., is sufficient both in form and substance: "Notice. Canton, Ohio, April 9, 1891. To Christian Wagner: You are hereby notified that a resolution was adopted by the council of the city of Canton, Ohio, on the 30th day of March, 1891, declaring it necessary to open and improve Deuber avenue, from Ohio street to Fairfield street, by grading and graveling the same, and by lawning, flagging, and curbing the sidewalks, in accordance with plans, profiles, and specifications on file in the office of the city civil engineer; the expense of said improvement to be charged per foot front upon the lots and lands abutting on said improvement. By order of the council. H. G.

Shaub, City Clerk." Judgment of the circuit court is reversed, and that of the common pleas affirmed.

(164 Ill. 427)

McNULTA v. CORN BELT BANK.

(Supreme Court of Illinois. Jan. 15, 1897.)

BANKS — INCREASE OF STOCK — POWER OF DIRECTORS — LIMITATION ON TRANSFER OF STOCK — BONUS TO PRESIDENT — RELEASE OF SUBSCRIBERS — CONTRACT — ULTRA VIRES — PUBLIC POLICY.

1. The directors of a bank organized under the state banking act adopted a resolution fixing the compensation of their president, and providing that he should receive, as a consideration "for his acceptance" of the office, "an additional sum, equal to 2½ per cent. on all stock to be issued, payable at the time fixed for such issues; that is to say, at least \$100,000, par value, of the said stock is to be issued within one year after the opening of the said bank for business, and another additional \$100,000, making \$300,000 in all that is to be issued, including the first issue of \$100,000, within two years from that date." *Held*, that that part of the resolution which attempted to fix in advance the amount of the increase of the stock, and the time when such increase should take place, was invalid. 63 Ill. App. 593, affirmed.

2. The "additional sum" specified in the resolution was a bonus, and not a salary.

3. Under Banking Act, § 2 (3 Starr & O. Ann. St. p. 105; Rev. St. c. 18a), which provides that the application to the auditor for permission to organize shall state the amount of capital, an application which states the capital stock at \$100,000, with a purpose to increase it to \$300,000, has no effect in the matter of increasing the capital stock.

4. A corporation organized under the banking act can increase its capital stock only in the manner prescribed by section 12 of the act. 63 Ill. App. 593, affirmed.

5. Where the charter of a corporation fails to state by whom the power to increase its capital stock is to be exercised, its board of directors have not, merely by virtue of their position as directors, the authority to increase the capital stock without the assent of the stockholders. 63 Ill. App. 593, affirmed.

6. A by-law of a bank which provides that all stock sold or transferred shall be with the express condition that it will be voted in favor of all propositions submitted by the board of directors to increase the capital stock of the bank, until its capital stock reaches \$300,000, and that such provisions shall become a part of every contract for the transfer of any stock of the bank, and shall become binding on the transferee by the acceptance of the stock, is void because it attempts to limit the future action of the stockholders in reference to the increase of the stock. 63 Ill. App. 593, affirmed.

7. Such a by-law is void because it attempts to limit the right to sell or transfer the corporate stock, by imposing unreasonable conditions.

8. The president of a corporation cannot recover a bonus voted by the directors to be paid to him in consideration of his contemplated action in carrying out unlawful provisions for the future increase of the stock, and for controlling its transfer.

9. Directors of a corporation cannot vote a salary, or a large bonus in addition to a salary, to one of their number, as president, when he takes part in the proceeding, or his vote is essential to the adoption of the resolution.

10. Subscribers to the capital stock of a state bank, who have, by fraudulently representing that the stock has been paid up, obtained permission from the auditor to commence business, cannot, as stockholders, ratify a resolu-

tion which they themselves have adopted as directors of the bank.

11. A resolution of the board of directors of a state bank voting a bonus to their president in consideration for the temporary supply of funds for the purpose of deceiving the auditor, and fraudulently accomplishing an organization of the bank with authority to proceed to business, and to dispose of stock apparently paid up in full, is an agreement to do an act forbidden by the statute, and is void.

12. The directors of a corporation are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the state shall lose any of the benefit of his subscription; and subscribers to the capital stock of a state bank cannot release their obligations by fraudulently providing funds to be counted by the auditor as the paid-up capital of the bank, and immediately withdrawing them, leaving the bank without funds till the stock should be sold.

13. A corporation cannot avail itself of the defense of ultra vires when a contract, not immoral in itself, or forbidden by any statute, has been, in good faith, fully performed by the other party, and the corporation has had the full benefit of its performance. 63 Ill. App. 593, affirmed.

14. In an action to enforce the executory part of a contract not within the power conferred upon the defendant corporation by the act of its creation, the defense of ultra vires is allowable.

15. Where a contract between a board of bank directors and their president contemplates an action which is forbidden by the banking act, it is void, as against public policy, and will not be enforced in favor of either party to it.

Appeal from appellate court, Third district.

Assumpsit by John McNulta against the Corn Belt Bank to recover a percentage claimed to be due on unissued stock of defendant, and for certain services. From a judgment of the appellate court affirming a judgment in favor of defendant (63 Ill. App. 593), plaintiff appeals. Affirmed.

This is an action of assumpsit, brought on January 25, 1894, by appellant against appellee, to recover \$3,750, or 2½ per cent. on \$150,000 of unissued stock, claimed to be due to appellant for accepting the office of president of the appellee bank, and for certain services alleged to have been performed. The declaration, which contains the common counts and two additional counts, declares upon the resolution hereinafter set forth, which was adopted by the directors of said bank on November 21, 1891. The pleas are the general issue, non est factum, and set-off. Under the latter plea, it is sought to recover back from appellant \$3,750, alleged to have been wrongfully paid to him. A jury was waived, by agreement, and the cause was tried before the circuit judge without a jury. The trial court found the issues for appellee upon the first and second pleas, and against it on the third plea, being the plea of set-off. A motion for a new trial was overruled, and judgment rendered in favor of appellee for costs. From the judgment so rendered an appeal was taken to the appellate court. The latter court affirmed the judgment of the circuit court, and the present appeal is prosecuted from such judgment

of affirmance. The appellee assigns a cross error upon the finding against the allowance of the amount claimed in the plea of set-off. The material facts in the case are as follows:

On October 5, 1891, the auditor of the state issued to appellant and other persons a permit to organize a banking association under the banking act of Illinois of June 16, 1887, amended June 3, 1889. 3 Starr & C. Ann. St. p. 105 (Rev. St. c. 16a). The application to the auditor for permission to organize stated the name to be Corn Belt Bank; business to be carried on in Bloomington, Ill.; capital stock, \$100,000, with purpose to hereafter increase to \$300,000; amount of each share, \$100; number of shares, 1,000, to be increased to 3,000; duration of association, 99 years. Appellant subscribed for 900 shares of stock; and 10 others, for 10 shares each. At a meeting of the subscribers held, pursuant to notice, on October 27, 1891, at which all the shares of stock were represented, and at which appellant was elected temporary chairman, the number of directors was fixed at 11, and all of the 11 subscribers to the stock were elected directors. On the same day, and immediately following the meeting of the stockholders, a meeting of the directors was held at which appellant was elected president of the board of directors. J. T. Snell was elected vice president. The salaries of the teller and bookkeeper were fixed, and committees were appointed. At a subsequent meeting of the directors, held on November 21, 1891, the resolution set out in the declaration, and heretofore mentioned, was adopted, the full board being present. That resolution is as follows: "Whereas, John McNulta has been elected president of the Corn Belt Bank, and, preliminary to his acceptance of said office and entering upon the duties of the same, it is necessary to fix and agree upon compensation for his services as such president; therefore, be it resolved, that it is understood and agreed that the compensation of John McNulta, as such president, shall be one hundred dollars per year, payable in semiannual installments, and, as a further consideration for his acceptance thereof, an additional sum equal to two and one-half (2½) per cent. on all stock to be issued, payable at the time fixed for such issues; that is to say, at least one hundred thousand dollars, par value, of the said stock is to be issued within one year after the opening of the said bank for business, and another additional one hundred thousand dollars, making three hundred thousand dollars in all that is to be issued, including the first issue of one hundred thousand dollars, within two years from that date. The said John McNulta, by his acceptance hereof, agrees to subscribe for and take, at par value, all of such stock, in lots of not more than fifty thousand dollars each, within any one period of thirty days after the preceding lot has been fully disposed of, paying there-

for in cash, par value, with his own funds, whenever the board of directors shall find responsible persons agreeing to purchase the same from him at such a price as may be fixed by the board, not less than 105, and interest at 7 per cent. from the date of the issue of such stock, and to sell the same to the persons, and in the amounts designated by the board, with only the restrictions in transfer in use at the time of the commencement of business. For the purchase and sale of which stock said John McNulta is also to have interest at the rate of seven (7) per cent. per annum, and exchange on New York, on all sums so invested by him. The overplus arising from the sale of said stock by him to inure to the benefit of the bank, and be disposed of as the board of directors may see fit."

Subsequently, on December 2, 1891, a meeting of the directors was held, and the minutes of that meeting, before proceeding to state the other business that was transacted, recite that the full board was present, and that the bank was "formally opened at 10:30 a. m., after inspection by auditor's deputy." The action that was taken at the meeting of December 2, 1891, is hereafter referred to; and, before further alluding to such action, the facts in regard to the "inspection by the auditor's deputy" may be here stated: Appellant and the 10 other original subscribers to the capital stock paid nothing upon their subscriptions. The 10, who subscribed for 10 shares each, gave their notes for \$1,000 each; and one of the witnesses says: "McNulta owed the other \$90,000. To my knowledge, he did not pay any money into the bank for that \$90,000." Arrangements were made with the First National Bank of Bloomington to furnish \$100,000 in currency, which was so furnished. This amount of currency, \$100,000, was taken over from the First National Bank to the Corn Belt Bank, and was there counted by the deputy of the auditor as money paid in upon the subscriptions to the capital stock; but after it was so counted, and upon the same day, it was taken back to the First National Bank, or, to speak more accurately, \$75,000 of it was taken back to the First National Bank, and \$25,000 of it was applied, for the benefit of that bank, upon a purchase by it of certain drafts, as hereafter stated. Appellant obtained in Chicago certain certificates of deposit, issued by a bank of that city, payable to his order, and certain drafts drawn by said Chicago bank to his order upon a bank in New York, amounting altogether to \$100,000. These certificates and drafts were brought from Chicago to Bloomington by a special messenger, and were indorsed by appellant, who left them with the First National Bank of Bloomington, and thereby obtained \$100,000 in currency to use for the inspection of the auditor. The president of the First National Bank says that he concluded to purchase \$25,000 of the drafts; so that he only re-

ceived back \$75,000 of the currency, and surrendered \$75,000 of the drafts and certificates. The \$25,000 in currency and \$75,000 in drafts were at once sent back to Chicago. They did not belong to the Corn Belt Bank. They were placed to the credit of the appellee at the bank in Chicago, but drafts to the amount of \$101,250 were at once drawn, dated December 2, 1891, by the assistant cashier of appellee, upon the Chicago bank, payable to appellant's order. Upon the back of these drafts appear indorsements by appellant and others. Mr. Howell, the present president of the appellee bank, and one of the original subscribers for 10 shares, says: "When the matter of organization was talked up, McNulta assured us he had made arrangements with a syndicate in Chicago for the money; it could be sent down here, and held while the auditor counted it; could then be sent to Chicago; and could then sell stock to parties desiring it. My understanding is, it was so done." The appellant, after stating that he transferred the drafts and certificates to the First National Bank to get the currency, says: "I got this money to use it as long as we thought it would be required. That time was made as short as possible." Whether or not the parties whose names were indorsed upon the drafts drawn upon the Chicago bank belonged to the syndicate furnishing the money, does not definitely appear. But certain it is that the money which was used for the inspection of the auditor on December 2, 1891, was in Chicago on December 3, 1891, in the hands of other parties than appellee.

After the inspection of the money by the auditor, and the formal opening of the appellee bank, on December 2, 1891, the directors, at their meeting on that day, adopted by-laws, fixed the salaries of the teller and cashier at the rates previously adopted by the board, and "on motion the salary and compensation of the president was fixed as previously adopted by vote of the board. The vice president presiding, the vote was taken by roll call, and all members voting in favor thereof. In each case of the fixing of salary and compensation the several original resolutions were readopted, with the understanding that the time of employment was as provided in the by-laws." At a meeting of stockholders immediately following the meeting of directors, all the stock was represented. All the members and shares voted to approve the by-laws, and to "approve and confirm all the records, proceedings and transactions of the board to date." Section 2 of article 6 of the by-laws is as follows: "The stock of this bank shall be sold only to persons who buy the same for an investment, and shall not be sold to or held by any persons without the consent of the board of directors, or by any person having fifty shares or more thereof, or to any person owning any stock in any other bank in Bloomington, Illinois. That no sale or

transfer of said stock shall be made to any person or firm or co-partnership, the members of which, severally or collectively, hold or own fifty shares of the stock of this bank, or to any person or persons owning or holding any stock in any other bank in Bloomington, Illinois." If the stock shall be held by such prohibited persons "without the consent of the board of directors of this bank, such stockholders shall not be entitled to vote any such capital stock at any election, and any dividend, earnings, or profits that may accrue thereon shall inure to the benefit of this bank." Section 4 of article 6 of the by-laws is as follows: "That all of the stock of this bank sold or transferred shall be with the express condition and understanding that it will be voted in favor of all propositions submitted by the board of directors to increase the capital stock of this bank, from time to time, not exceeding \$50,000 at any one time, or within a period of sixty days, until its capital stock reaches \$300,000, and that the new stock be disposed of entirely to persons, and in such amounts, as the board of directors may direct. That the provisions of this article and the by-laws of this corporation shall become a part of every contract for the transfer of any stock of this bank, and shall operate as a reservation of a limited ownership of the stock transferred, to the extent of the provisions hereof, made binding on the transferee by the acceptance thereof."

After the organization of the bank in the manner stated, the stock issued to the original subscribers was sold; sales being made to the original promoters at 102½, and to outsiders at 105. Four hundred and forty shares were sold at 102½, and 560 at 105, making altogether the sum of \$103,900. Of this profit of \$3,900, the sum of \$1,400 went to appellee, and \$2,500 to the "organization fund," as it was called. How much of the \$2,500 was received by appellant is not clear, as the evidence upon the subject is conflicting. It is certain that \$1,250 of it was sent to some bank or syndicate in Chicago. One of the witnesses says that the remaining \$1,250 went to the original promoters. Another says that the bank in Chicago received the whole of the 2½ per cent., or \$2,500. The books show that appellant was credited with \$102,500, of which \$100,000 was for his subscription, and \$2,500 for organization; but he says that this was a mistake, as to the \$2,500. Howell testifies as follows: "When the matter of paying the Chicago syndicate was talked over, McNulta said: 'We will get that back, to a great extent. When small banks are organized around the country, we will let them have the money for the auditor to count, and charge them a per cent.'" Afterwards, in May, 1892, an additional amount of stock, being \$50,000, was issued to appellant, though with much reluctance, and against strong opposition. The increase of \$50,000 had been previously

authorized by a resolution adopted at a meeting of the stockholders. The \$50,000 was counted by the auditor on May 17, 1892, as being the amount paid by appellant upon his subscription for that amount of stock. He, however, as matter of fact, paid no money. He obtained the \$50,000 to be counted by the auditor by taking \$25,000 from the funds of the appellee bank, and giving his note for that amount to the bank. The other \$25,000 he obtained from Chicago. The books of the bank show that \$25,000 in currency was received from Chicago on May 17, 1892, and sent back on May 19, 1892. Of this second issue, \$50,000 of stock, all except 116 shares, or \$11,600 of it, was sold, but these 116 shares were not sold. Upon this transaction appellant was paid $2\frac{1}{2}$ per cent., or \$1,250. This \$1,250, and the \$2,500 which went to the organization fund upon the issue of the original \$100,000 of stock, making \$3,750 in all, constitute the amount claimed by appellee under its plea of set-off. The following is the testimony of Howell, the present president of the appellee bank, as to the withdrawal of \$25,000 from the funds of the bank in May, 1892, to be shown to the auditor, and as to the execution by appellant of his note to the appellee for the amount so withdrawn for such purpose: "Afterwards the question of issuing the \$50,000 additional stock came up. McNulta insisted upon issuing it. Part of the directors thought it was not good policy. I insisted that the way we had carried the stock was under a false representation, and that it would come back on us and injure the bank, and that it would be better for the bank to pay him the two and a half per cent., and quit issuing stock. He said: 'I don't want money that I have not earned. I want to carry out the original policy of the bank, and get the two and a half per cent. that I am entitled to.' He did not make any claim, while president, for the stock not issued. Twenty-five thousand dollars came out of the vaults of the bank to pay for the \$50,000 of stock that was issued. I do not know where rest came from. The whole \$50,000 was counted in currency. A few evenings after we had counted this money, the investment committee, consisting of the president, Vice President Snell, Humphreys, Burns, and self, found notes of McNulta amounting to \$25,000. The day we counted the money, Burns said, 'Is this money, or any part of it, funds of the Corn Belt Bank?' Eddy said, 'No, sir; it is Gen. McNulta's.' And he said, 'Every dollar of it is mine.' The evening we discovered these notes, we sent for McNulta, and asked him what he meant, without consulting with the investment committee, putting up his note, when he was already close up to the limit. We understood that no one person could borrow more money than ten per cent. of the capital stock. Ten thousand dollars had been given the cashier as the limit of McNulta's credit. I did not know,

when we counted the money, that McNulta had borrowed this money from the bank. We asked him what he meant by endangering the charter of the bank by such a loose way of doing business. He said his object was in saving his commissions going to the syndicate which he represented, which got one-half of the two and one-half per cent. he was to have. Mr. Snell said, 'If you have promised them two and a half per cent. on the stock issued, how are you going to evade paying them what is due them?' He said, 'I can fix it up with them all right, and I thought I might as well save it to the bank.' The question came up, if the auditor's deputy should come and find the note for an amount greater than the law permits. He said, fix it up the best way we could. Some one of the committee suggested that each of us give our notes for enough to reduce him inside the limit. I said, 'I don't owe the Corn Belt \$5,000 or \$6,000, and I don't propose to give my note for that much.' McNulta suggested that each give his note for enough to bring him within the limit, and Mr. Eddy to write a contract that the note was given, without consideration, to save commission to the bank. We gave our notes, stock was sold, and these notes were taken up."

Appellant continued to be president of appellee until December 2, 1892, when he retired because of the refusal of the directors and stockholders to issue any more stock. The remaining \$150,000 of the \$300,000 named in the resolution was never issued. The present suit is brought to recover $2\frac{1}{2}$ per cent. upon the \$150,000 which has never been issued. Appellant states that he was released from his obligation after he had left the bank. Eddy, the cashier of appellee in December, 1891, swears that when appellant furnished the \$100,000 at that time, in the manner already stated, "he was relieved of his obligation immediately."

Welty & Sterling and Rowell, Neville & Lindley, for appellant. J. E. Pollock, A. J. Barr, and Fifer & Phillips, for appellee.

MAGRUDER, C. J. (after stating the facts). It is assigned as error that the trial court refused to hold as law certain propositions submitted by the plaintiff below, the appellant here. By the propositions so submitted the court was asked to hold, as matter of law, "that the resolution declared on is a resolution to pay McNulta an amount equal to $2\frac{1}{2}$ per cent. on all stock to be issued, in addition to the \$100,000 past issued, and that the whole per cent. was to be due upon the sum of \$200,000 at the end of two years, whether the stock was issued or not; that it was competent for the directors of the Corn Belt Bank to pass the resolution sued on, at the date of its passage, and to bind the corporation by such passage; that at the meeting of December 2d, the record

of which is in evidence, it was competent for the bank directors to approve and adopt the resolution declared on, and, with the assent of the stockholders, to bind the corporation by the terms of the resolution; that the approval of the resolution sued on by the directors at their meeting of December 2d, and the approval of the same by the stockholders at the same date, was not ultra vires."

The subject presented for consideration by the assignments of error relates to the construction and validity or invalidity of the resolution referred to, which is set out in full in the statement of facts preceding this opinion. The resolution provides for the payment of both a salary and a bonus. The salary of appellant as president of the board of directors, or his compensation for services as such president, was fixed at \$100 per year, payable in semiannual installments. Salary is a "reward or recompense for services performed, and is usually applied to the reward paid to a public officer for the performance of his official duties." 21 Am. & Eng. Enc. Law, p. 443, note 3, and cases cited. The banking act of this state provides that the directors elected by the subscribers to the capital stock "may proceed to organize by the election of one of their number as president, and may appoint the necessary officers and employes and fix their salaries." Rev. St. c. 16a, § 4 (3 Starr & C. Ann. St. p. 107). If this confers upon the board of directors the authority to fix the salary of their president, their power is confined to fixing a recompense or reward to be paid to him for performing such services or duties as are appropriate to, and required by, his office as president. But the resolution provides that he should receive an "additional" sum (that is, a sum besides and beyond his salary), as a consideration for accepting the office of president, and that this additional sum should be equal to 2½ per cent. on all stock to be issued. To pay a man for accepting an office is not to pay him for performing the duties of an office after it has been accepted. An amount equal to 2½ per cent. upon all stock to be issued would appear to be a very large consideration to be given for the mere act of accepting the office of president of the bank, if the words, "acceptance thereof" were understood in their ordinary meaning. But the second paragraph of the resolution shows that, by the acceptance of the office, appellant agreed to take all of the stock to be issued, at a certain price, at a certain time, and upon certain terms, and to sell the same in a certain way. What was to be done under the agreement involved in the acceptance of the office was not necessarily or appropriately embraced in the services or duties required of the president of a bank. Hence the "additional sum" specified in the resolution is a bonus, and not a salary. It is very evident that the resolution contemplated the payment of the bonus of 2½ per cent. upon the whole \$300,000 of stock, although it is so drawn that

it can be construed either as providing for 2½ per cent. upon \$300,000, or as providing for 2½ per cent. upon the \$200,000 to be issued after the payment of the original capital stock. Certain it is that the appellant and those associated with him interpreted the resolution as applying to the original \$100,000 of capital stock, because the bonus of 2½ per cent. was paid upon the original capital stock, as appears from the statement of the facts herein. The resolution uses the words "making \$300,000, in all, that is to be issued"; thus treating the original \$100,000 of stock as part of the stock to be issued, upon which the 2½ per cent. was to be calculated. The resolution was originally passed on November 21, 1891, and at that time the original \$100,000 had only been subscribed for, and not paid in; so that the words, "paying therefor in cash, par value, with his own funds, whenever the board of directors shall find responsible persons agreeing to purchase the same," etc., would upon that day apply as well to the first \$100,000 as to the second \$200,000. The resolution was readopted on December 2, 1891, after the \$100,000 in currency had been counted by the auditor's representative. Considered as of the latter date, the resolution would only apply to the \$200,000 to be issued, because it does not stand to reason that there would be an agreement to subscribe for, and take at par value, and pay for in cash, stock which had already been subscribed for and taken and paid for.

Appellant contends that he was to have the bonus of 2½ per cent. upon all the stock, whether it was actually issued or not; that he was not to have a percentage upon the stock, but a sum equal to 2½ per cent. upon the stock which it was the purpose of the bank to issue in the future, in addition to the original capital stock; and that, as the designation of a percentage of 2½ per cent. was merely a mode of expressing what sum total he was to have, it was immaterial whether the stock was issued or not. Whether the resolution is capable of this construction or not, it is not such a resolution as entitles the appellant to a recovery in this case, under the views hereinafter expressed. It is quite clear, from the terms of the resolution, that the additional sum, equal to a percentage on all the stock to be issued, was only "payable at the time fixed for such issues"; and, as the times fixed for the issuance of increases in the stock could only be determined by the action of the bona fide stockholders when circumstances would justify such increases, that part of the resolution which attempts to fix in advance the amount of the increase of the stock, and the time when such increase should take place, was invalid. Section 2 of the banking act provides that the application to the auditor for permission to organize shall state the amount of capital. The application here stated the capital stock to be \$100,000, and, while it also stated that there was a purpose to thereafter increase the capital stock to \$300,000,

such statement of a mere purpose or intention had no effect in the matter of increasing the capital stock. The banking act provides a mode in which the capital stock may be increased. By section 12 of that act it is provided that, whenever the board of directors may desire to increase the capital stock, they may call a special meeting of the stockholders, for the purpose of submitting to a vote of such stockholders the question of such increase of capital stock; that such meeting shall be called by giving to each stockholder, either in person or through the mail, 30 days' notice, signed by a majority of the directors, stating the time, place, and object of the meeting, and also by publishing a general notice of such meeting for three successive weeks in a newspaper; that at such meeting each stockholder shall have one vote for each share of stock held by him, and votes representing two-thirds of all the stock shall be necessary for the adoption of the proposed increase; that at such special meeting, or any regular meeting, the proposition for an increase may be submitted to a vote, and, if it is carried by such two-thirds vote, a certificate thereof, verified by the president's affidavit, and under the corporate seal, shall be filed in the auditor's office, and in the office of the recorder of deeds of the county where the principal office of the bank is located; that upon the filing of such certificate the change proposed and voted for as to such increase of stock shall be declared accomplished in accordance with such vote; and that the bank shall, upon filing such certificate, cause a notice of such "change of organization" to be published for three successive weeks in a newspaper in the county where its principal office is located. 3 Starr & C. Ann. St. pp. 110, 111. As the appellee was organized under the statute of this state already referred to, it could only accomplish an increase of its capital stock in the mode prescribed by that statute. It is well established that a corporate body, having only a statutory existence, can only exercise its franchises and powers in the manner prescribed by the law under which it is organized. *Fridley v. Bowen*, 87 Ill. 151. An increase or reduction of the capital stock of a corporation is a fundamental change in its affairs, and must be authorized by the shareholders at a corporate meeting. 1 Cook, Stock, Stockh. & Corp. Law, § 285. It is, in the language of the statute, a "change of organization." Even where the charter of a corporation falls to state by whom the power to increase its capital stock is to be exercised, its board of directors have not, merely by virtue of their position as directors, the authority to increase the capital stock without the assent of the shareholders. *Eldman v. Bowman*, 58 Ill. 444. The policy of a corporation is always under the control of a majority of its stockholders, and the lawful exercise of its franchise and business must be regulated and governed by a majority of its stockholders. *Wheeler v. Steel Co.*, 143 Ill. 197, 32 N. E. 420. By the terms of the law under which appel-

lee was organized, an increase of its capital stock could only be effected by a vote representing two-thirds of all the stock. The question of the increase is required to be submitted to the vote of the stockholders. The submission of the question of the increase of the stock to their votes involves and implies the exercise on their part of their own free and independent judgment as to the policy and advisability of making such increase. It involves the right to determine, in their discretion, not only whether the stock should be increased, but when such increase is to be made. In accomplishing it, the mode prescribed by the law must be followed. It is manifest from what has been said that a resolution passed by a board of directors, who are the mere agents and trustees of the stockholders, charged with the duty of faithfully managing their affairs, cannot fix in advance the time for increasing the capital stock of the corporation, without reference to the action of the stockholders, or the methods prescribed by the statute. This is what the resolution here under consideration attempts to do, by stating that "at least \$100,000, par value, of the stock is to be issued within one year after the opening of said bank for business, and another additional \$100,000 * * * within two years from that date." In this respect the resolution was wholly invalid. Its attempt to keep the matter of increasing the stock under the control of the original board of directors is further manifest from the provision, which it makes for the sale of the stock to the persons and in the amounts designated by the board, "with only the restrictions in transfer in use at the time of the commencement of business." The restrictions thus referred to are contained in section 4 of article 6 of the by-laws. That section provides: "That all of the stock of this bank sold or transferred shall be with the express condition and understanding that it will be voted in favor of all propositions submitted by the board of directors to increase the capital stock of this bank from time to time, not exceeding \$50,000, at any one time, or within a period of sixty days, until its capital stock reaches \$300,000. * * * That the provisions of this article and the by-laws of this corporation shall become a part of every contract for the transfer of any stock of this bank, and shall operate as a reservation of a limited ownership of the stock transferred, to the extent of the provisions hereof made binding on the transferee by the acceptance thereof." This by-law is illegal and void, not only because it seeks to keep the future action of the stockholders in reference to the increase of the stock in subjection to the will of the original directors who passed the by-law, but also because it attempts to limit the right to sell or transfer stock, by imposing unreasonable conditions. Shares of stock in a corporation are as transferable as any other kind of personal property, and all unreasonable attempts to restrain the right to transfer such shares are void, as being against public policy.

1 Cook, Stock, Stockh. & Corp. Law, § 331. The right of a stockholder to sell and transfer his stock cannot be restrained by a by-law which makes such sale and transfer subject to the consent of the directors, or refuses to permit the same unless the directors are satisfied. Id. § 332.

As the bonus to be paid to appellant was in consideration of his contemplated action, carrying out unlawful provisions for the future increase of the stock, and unlawful provisions for controlling the transfer of the stock, he is not entitled to the recovery of such bonus. This conclusion is further warranted by the fact that the resolution, which was passed for the benefit of the appellant, was the product of his own influence. It must be remembered that appellant owned nine-tenths of the stock; he having \$90,000, and the other stockholders only \$10,000. When the \$100,000 was brought over to the appellee bank from the First National Bank of Bloomington, and counted by the auditor as paid in upon the subscriptions to the capital stock, appellant was not only held out to the auditor as a stockholder who had paid his subscription of \$90,000, but the other stockholders were represented as having paid their subscriptions of \$10,000. This sum of \$10,000, submitted temporarily to the inspection of the auditor, was not furnished by the stockholders, but by appellant for them. Appellant was president of the board of directors. The 11 directors were the 11 stockholders, so that whether there was a meeting of directors, or a meeting of stockholders, appellant, as owner of nine-tenths of the stock, had the controlling interest, and was the predominant influence. On December 2, 1891, when the board of directors met and readopted the resolution of November 21, 1891, fixing appellant's salary, and giving him the bonus already mentioned, the minutes recite that all the members voted in favor of the resolution; and, of course, all the members included the appellant. On the same day, when the 11 stockholders met, all the stock was represented, and all the members and shares voted to confirm the previous proceedings, including the passage of the resolution; and of course, if the minutes are correct, appellant must have voted to approve the adopting of the resolution and by-laws, which conferred upon him such large compensation. The law is that, where a salary or compensation is voted to a director, the vote is illegal, if it is carried only by including the vote of the director who receives the pay or salary. 2 Cook, Stock, Stockh. & Corp. Law, § 657. Where the chief stockholder, who is president, induces the directors to vote a large salary to him, the corporation may defeat the officer's action at law to recover it. Id.; also, *Miner v. Ice Co.*, 93 Mich. 97, 53 N. W. 218. Directors cannot vote a salary, much less a large bonus or compensation in addition to a salary, to one of their number, as president, when he takes part in the

proceeding, or his vote is essential to the adoption of the resolution. *Wickersham v. Crittenden*, 93 Cal. 17, 28 Pac. 788, and cases cited; *Gridley v. Railway Co.*, 71 Ill. 200.

It is claimed that the resolution was ratified by a meeting of the stockholders. The meeting of the stockholders held on December 2, 1891, was composed of the same men (11 in number) who constituted the board of directors, by whom the resolution was originally passed. The same men merely sat as stockholders to approve what they had just done as directors. They were not really bona fide stockholders. They paid nothing for their stock, as appellant merely obtained \$100,000 in currency, and put it in the bank for a few hours, until the auditor counted it, and it was thus made to appear that they were stockholders whose stock had been fully paid for. Section 5 of the banking act provides that "when the directors have organized * * * and the capital stock of such association shall have been all fully paid in and record of the same laid before the auditor, he shall * * * make a thorough examination into the affairs of such association, and if satisfied the authorized capital has been paid in, and that the association has the full amount dedicated to the business, * * * he shall give them a written or printed certificate under seal authorizing them to commence business," etc. 3 Starr & C. Ann. St. p. 108. The stockholders who, under the statute, would have the power to ratify the previous acts of the directors done before the stock was paid for, were such bona fide stockholders as owned stock "all fully paid in," and "dedicated to the business" of the association. Here, however, there was no actual payment, as the money was withdrawn as soon as counted by the auditor. The association did not have the full amount of its capital stock dedicated to the business. Stockholders claiming to be such by the means thus designated were not bona fide stockholders. *Terwilliger v. Telegraph Co.*, 59 Ill. 249; *Bates v. Telegraph Co.*, 134 Ill. 536, 25 N. E. 521. Consequently their ratification amounted to nothing. In addition to this, the unlawful character of the contract with appellant, as embodied in the resolution, appears upon the face of the resolution itself. By it, appellant agrees to subscribe for, and take at par value, all the stock, and pay for it in cash, par value, with his own funds, not absolutely and unconditionally, but only when "the board of directors shall find responsible persons agreeing to purchase the same from him," etc. His own funds are to be at once replaced by money, to be furnished by purchasers of stock to be found by the directors. The resolution contemplates only the temporary use of moneys to be supplied by appellant for the purpose of taking the stock at its par value. Courts will construe a contract in the light of the circumstances surrounding the parties, and of the objects

which they evidently had in view. *Torrence v. Shedd*, 156 Ill. 194, 41 N. E. 95, and 42 N. E. 171. So construing the present resolution, it contemplates the doing of that which was actually done; that is to say, the temporary supply of funds for the purpose of having them counted by the auditor, and thus illegally accomplishing an organization of the bank, with authority to proceed to business, and to dispose of stock apparently paid up in full. The bonus or compensation which appellant was to receive was to be paid to him for doing that which was in direct contravention of the statute, because the statute requires the capital stock to be fully paid in, and dedicated to the business of the association. The agreement embodied in the resolution is an agreement to do an act forbidden by the statute, and therefore is not binding. *Penn v. Bornman*, 102 Ill. 523; *Davis v. Railroad*, 131 Mass. 258; *Miner v. Ice Co.*, supra. The effect of the resolution, and of what was done under it, was to release the original subscribers to the capital stock from the obligation to pay their subscriptions. When the \$100,000 was paid in, the subscriptions appeared to be thereby discharged; but, when it was taken out, appellant and the other stockholders were immediately released, and yet nothing remained in the bank to show payments of the subscriptions. Until sales were made of the stock, the bank had no funds whatever, all pretended payments upon the subscriptions being withdrawn. "It has been settled by very numerous decisions that the directors of a company are incompetent to release an original subscriber to its capital stock, or to make any arrangement with him by which the company, its creditors, or the state shall lose any of the benefit of his subscription. Every such arrangement is regarded, in equity, not merely as ultra vires, but as unjust to the other stockholders, to the public, and to the creditors of the company." *Burke v. Smith*, 16 Wall. 390; *Melvin v. Insurance Co.*, 80 Ill. 446; *Railroad Co. v. Bowser*, 48 Pa. St. 29; *Osgood v. King*, 42 Iowa, 478.

It is claimed by counsel for appellant that, even if the contract embodied in the resolution is ultra vires, the appellee cannot avail itself of the defense of ultra vires, where the contract has been, in good faith, performed by the other party to it, and the corporation has had the benefit of the contract and of the performance. It is true, as a general rule, that a corporation cannot avail itself of the defense of ultra vires when a contract not immoral in itself, nor forbidden by any statute, has been in good faith fully performed by the other party, and the corporation has had the full benefit of its performance. *Kadish v. Association*, 151 Ill. 531, 38 N. E. 236. But, while the rule is that the executed dealings of a corporation under such a contract will be allowed to stand, yet the rule is otherwise where the contract ultra vires remains executory. *Thomas v. Rail-*

road Co., 101 U. S. 71; *Kadish v. Association*, supra. In the latter case, courts will oftentimes interfere to prevent its enforcement. Id. Here the object of the suit is to recover what is claimed to be due upon the unexecuted part of the contract. Appellant is suing to recover a bonus of 2½ per cent. upon \$150,000 of stock which has never been issued, under a contract which is clearly ultra vires so far as it attempts to control the increase of the capital stock in a manner not authorized by the statute. If this be regarded as a contract merely ultra vires (that is, a contract not within the power conferred upon the corporation by the act of its creation), the defense of ultra vires is here allowable, as the present action is brought to enforce the executory part of the contract. *Thomas v. Railroad Co.*, supra. So far as the executed part of it is concerned (that is to say, so far as appellant has been paid his bonus upon the original issue of \$100,000 of the stock, and upon the second issue of \$50,000), appellee cannot recover back the amounts thus already paid, under the plea of set-off, if the contract be treated as merely ultra vires in the sense already stated. But the resolution here sued upon, regarded as a contract between appellant and the appellee corporation, is a contract which is illegal in its character, and contemplates action which is forbidden by the statute. Such a contract is not merely ultra vires, but it is void, as against public policy, and will not be enforced in favor of either party to it. Where parties concerned in illegal agreements are in pari delicto, the law will not aid either, but will leave them without remedy against each other. *Bishop v. Preservers' Co.*, 157 Ill. 284, 41 N. E. 765. We are therefore of the opinion that appellant is not entitled to recover the bonus claimed by him upon the unissued stock, and that, under its plea of set-off, appellee is not entitled to recover back what has already been paid to appellant. It follows that there was no error in refusing to hold as law the propositions submitted by the appellant to the trial court. The judgments of the appellate and circuit courts are affirmed. Judgment affirmed.

(165 Ill. 26)

LLEWELLIN v. DINGEE et al.

(Supreme Court of Illinois. Jan. 10, 1897.)

PETITION TO RESTORE LOST RECORDS—ADMISSION OF EVIDENCE—BURDEN OF PROOF.

1. Under a petition to restore lost files in a bill to set aside a decree, entries in a book kept by petitioner's solicitors, purporting to give the names of the parties and their solicitors, and the nature of the bill in which the files were destroyed, are incompetent to show the contents of the lost files without preliminary proof that the entries were contemporaneous with the employment of the solicitors as a part of the transaction, or that the firm usually made such entries in connection with the transaction recorded.

2. Where a petitioner has averred under oath that the exhibits attached are true copies of lost files of a bill which he seeks to have restored, and defendants answer that they do not know whether the exhibits are copies or not, and neither deny nor admit the averment, but call for proof, the petitioner must affirmatively show that the exhibits are true copies.

Appeal from appellate court, First district.

Petition by Henry Llewellyn against Caroline M. Dingee, administratrix, etc., of Henry A. Dingee, deceased, and others, to restore lost records. From an affirmance of a decree in favor of defendants (64 Ill. App. 563), petitioner appeals. Affirmed.

Bulkley, Gray & More and Alfred Moore, for appellant. Knight & Brown and J. A. & H. R. Baldwin, for appellees.

CARTWRIGHT, J. A decree for partition of certain lands in Cook county was entered by the circuit court of that county in 1861; and appellant filed his bill April 22, 1871, for the purpose of setting aside that decree, but the files and records of the latter suit were destroyed by fire October 9, 1871. He filed his petition in this case April 21, 1888, asking the court to restore said lost and destroyed files and records. He alleged that his bill filed in 1871 was answered, and he filed his replication to such answer; that after the destruction of the files the suit was dismissed by the circuit court April 8, 1873, by a general order; that on June 14, 1880, he filed a petition similar to the present one to restore the destroyed files, and that such petition was pending in said court until July 12, 1887, when it was dismissed for want of prosecution. He annexed to his petition what he alleged to be substantial copies of the files which he asked to have restored, and the petition was verified by his oath. The appellees answered the petition, admitting that the suit begun in 1871, in which the files were destroyed, was dismissed in 1873, and averred that petitioner had no right to have the files restored, because he had no further interest in the cause; that the former petition for restoration, begun June 14, 1880, was dismissed when reached for trial, July 12, 1887, on the regular trial call; that afterwards petitioner filed a motion to set aside the order of dismissal, which was heard and denied; and that the decree of dismissal so entered was a bar to the present suit. On a hearing of the petition it was dismissed for want of equity, and the decree dismissing it has been affirmed by the appellate court.

The parties have argued questions as to the power of the court to dismiss the bill filed in 1871 by the general order of April 8, 1873, applicable to all causes pending before the fire, and not docketed, as to laches and limitations, and as to the effect of the dismissal of the former petition for

want of prosecution, as a bar to a removal of the application; but none of those questions will be considered, for the reason that petitioner failed to make any proof of the contents of the files and records which he asked to have restored. The solicitors, Eldridge & Tourtelotte, who acted for complainant in the suit where the files were destroyed, Spafford & McDaid, solicitors for the defendants in that suit, and every person employed by either of said firms, and the principal defendants, were all dead. There seemed to be no one living who knew what was contained in the original files. It was attempted to prove that the copies attached to the petition were true copies of the destroyed files by introducing alleged copies made by petitioner's solicitors in 1880. It appears that in the former proceeding, begun in 1880, to restore the files, an order was entered allowing petitioner to file copies of the bill, answer, and replication, and he filed what he claimed were such copies. They were prepared by his solicitors, and were never admitted by the defendants, nor decided by the court, to be copies. Petitioner attempted to prove some admission of the late H. O. McDaid, solicitor for defendants at that time, that the alleged copies were true and correct. The testimony was that Mr. McDaid agreed to O. K. correct copies; that these alleged copies were given to him; that petitioner's solicitor kept calling on him for that purpose, but that he never succeeded in getting Mr. McDaid to O. K. them. The testimony did not show any admission that the copies were correct, but rather proved that such an admission could not be obtained. Of course, the fact that petitioner or his solicitor asserted in 1880 that certain papers were copies of the original pleadings had no tendency to establish the truth of the same claim or assertion when renewed in 1888.

Petitioner also offered in evidence the entries in a book called a "docket," kept by his solicitors, Eldridge & Tourtelotte, giving the names of the parties and their solicitors, and memoranda of the nature of the bill in which the files were destroyed. This evidence was rejected by the court, and that ruling is complained of. If the evidence had been competent, it would not have justified a decree, since there would still have been an entire absence of proof touching any of the pleadings except the bill. But the entries were properly rejected. There was no preliminary proof that the entries were contemporaneous with the services or employment of the solicitors as a part of the transaction, or even that the firm usually made such entries in connection with the transaction recorded. The solicitor in whose handwriting the entries were made was living up to within a few months of the hearing of this case, and they might have been made, for aught that ap-

pears, long after the transaction; and, if such evidence could be admitted in any case, it was properly rejected here.

The petitioner averred that the exhibits were substantial copies, and the petition was verified by his oath. The defendants answered that they did not know whether the exhibits were copies or not, and would neither admit nor deny the averment, but called for proof. In that state of the case, it is insisted that the verified petition was sufficient proof, but that is not the rule. By the chancery practice, by which this proceeding was governed, an averment which is neither admitted nor denied must be proved. *De Wolf v. Long*, 2 Gilm. 679; *Wilson v. Kinney*, 14 Ill. 27; *Trenchard v. Warner*, 18 Ill. 142; *Kitchell v. Burgwin*, 21 Ill. 40; *Dooley v. Stipp*, 26 Ill. 86; *Nelson v. Pinegar*, 30 Ill. 473. It was incumbent upon petitioner to prove that his exhibits were substantial copies of the destroyed record, and this he failed to do.

The court admitted, against the objection of appellant, the testimony of a real-estate dealer that the property was included in the village of Wilmette; that between 1873, when the bill was dismissed, and 1888, a great deal of the property was sold, and that at least 125 houses had been built upon the land, almost wholly by different owners. This evidence was offered on the question of laches, to show that during the long delay of petitioner the rights of numerous innocent third parties who would be injured by permitting him to maintain his petition had intervened. As the petition was not proved, the questions whether laches was a defense, and whether the evidence was relevant, are of no consequence. The judgment will be affirmed. Affirmed.

(184 Ill. 576)

GAGE v. CITY OF CHICAGO.

(Supreme Court of Illinois. Jan. 19, 1897.)

CITY CHARTER—REPEAL OF ORDINANCE—CONDEMNATION PROCEEDINGS—DAMAGES—DISMISSAL OF PROCEEDINGS.

1. The provision in the special charter of Chicago that all ordinances shall be referred to a committee before being voted on by the common council, was repealed by the general incorporation act of 1872, which was subsequently adopted by the city.

2. In proceedings to condemn land for street purposes, an objection to an assessment that it included costs of proceedings under previous petitions which had been dismissed, cannot be sustained where the record does not affirmatively show such fact, but merely shows an increase in each successive assessment.

3. Under 3 Starr & C. Ann. St. c. 24, art. 9, § 53, providing that the city shall pay for lands taken for street purposes within two years from the entry of a judgment in the condemnation proceedings; and that the court, after such time, and on a showing that the damages have not been paid, may enter an order requiring the city to pay within a short day, in default whereof it shall dismiss the proceeding,—the proceeding will not be dis-

missed until the city has been placed in default for noncompliance with the order of the court.

Appeal from circuit court, Cook county; Francis Adams, Judge.

Proceeding by the city of Chicago against Henry H. Gage to condemn land for street purposes. From a judgment affirming a special assessment, defendant appeals. Affirmed.

Gail E. Deming, for appellant. J. D. Adair, for appellee.

CARTER, J. This is an appeal from a judgment of the circuit court confirming a special assessment levied to pay the compensation awarded in the condemnation of certain premises taken for the opening of Wright street between Seventy-Third and Seventy-Fourth streets, in the city of Chicago. The ordinance as in force when the first proceedings were had provided for the opening of the street between Seventy-Second and Seventy-Fourth streets, but so much of it as provided for the opening of the street between Seventy-Second and Seventy-Third streets was repealed, and the former proceedings were set aside.

The questions raised on this record arise on the third supplemental assessment petition, the proceedings under two previous petitions having been set aside. Appellants contend that the judgment confirming the assessment levied to pay such damages and the costs of levying and collecting the assessment is erroneous for the following reasons:

First. It is insisted that it was error for the circuit court, on its hearing of the assessment, to allow the petitioner to amend the condemnation petition by filing and making a part thereof the ordinance passed March 12, 1894, repealing so much of the previous ordinance as provided for opening Wright street between Seventy-Second and Seventy-Third streets, for the reason that such repealing ordinance was never legally passed. It was shown in evidence by the proceedings of the city council that on the introduction of the ordinance it was passed by a unanimous vote, but without having been first referred to a committee. A provision of the former special charter of Chicago provided that "all ordinances, petitions, and communications to the common council shall, unless by unanimous consent, be referred to appropriate committees, and only acted on by the council at a subsequent meeting on the report of the committee having the same in charge." The contention is that under the general act of 1872 adopted by the city, which provides that "all laws or parts of laws not inconsistent with the provisions of this act shall continue in force and applicable to any such city or village, the same as if such change of organization had not taken place," the above-recited provision of the special charter was not repealed, but remained in full force; and that the ordinance in question, not having been referred to a committee, but having been passed at the

same meeting at which it was presented, was not legally passed, and is therefore void. This question was fully considered in *Swift v. People*, 162 Ill. 534, 44 N. E. 528, where it was held that this provision of the special charter was superseded by the adoption of the general incorporation act of 1872. The point made by appellants must therefore be overruled.

Second. It is next contended that the petition in the condemnation proceedings did not contain a copy of the ordinance certified by the clerk, as required by section 5 of article 9, relating to special assessments for local improvements, and that it was error to admit in evidence upon the trial the assessment levied under or based upon a petition not containing such certified copy. Without considering the question whether such an objection to the petition for condemnation could be raised on the hearing of the assessment before the jury under the supplemental petition, it is a sufficient answer to the point made to say that the record does not show the alleged defect in the petition. It is said that, instead of containing a certified copy of the ordinance, the petition contains merely a certified copy of the report of the commissioner of public works, and a draft of an ordinance thereto attached. Counsel are in error. The petition recites the passage of the ordinance, and states that a certified copy is annexed; and, although a report of the commissioner of public works accompanies the ordinance, the ordinance is duly certified by the city clerk. A similar point was made and overruled in *Doremus v. People*, 161 Ill. 26, 43 N. E. 701. It is true that case involved a different provision of the statute, which required only that the petition recite the ordinance, and not that it contain a certified copy, as is provided in section 5, but the decision fully covers the question here raised.

Third. Counsel next insist that the assessment given in evidence showed that it included the costs of the proceedings under the previous petitions which had been set aside and dismissed, and that the court erred in admitting the assessment roll in evidence over their objection based on this ground. It is said that the costs under each petition were carried forward, and included in the succeeding assessment, and that the assessment under the third supplemental petition embraced all previous costs; and that this conclusively appears from the record, because each successive assessment showed an increase in the amount of costs in the precise amount of the preceding assessment. It is not claimed that the fact which is said to be conclusively shown by the record appears otherwise than by inference arising from the identity of figures and the increase by those amounts in each successive assessment as above stated. It is highly probable that appellants are correct in the inferences they deduce from the facts appearing, but they are here alleging error, and the fact upon

which this assignment of error is based is one capable of direct and positive proof, but the record contains no proof, except as above stated; at least none is pointed out in either the briefs and arguments or the abstracts, and we will therefore assume there is none; and, as the rule is that all intendments must be taken against, and not in favor of, the pleader, we cannot regard the fact assumed by counsel as shown by the record. So far as we are informed by the record, there may have been such an increase of costs without including the costs made under previous petitions. Therefore, as the record does not raise the point contended for, its decision, or the further discussion of it, becomes unnecessary.

The fourth point made, to state it in counsel's own language, is that: "The circuit court erred in refusing to grant or entertain appellant Henry H. Gage's motions that the court inquire whether the lands in which it appeared said Henry H. Gage was interested, and sought to be taken, had been taken or damaged and paid for, and, if not, that a rule be entered on the city to pay for the same in a short day, and, in default, that the petition be dismissed as to such lands. The city is required under the statute to pay for the land sought to be taken by condemnation proceeding within two years of the entry of the judgment of condemnation. Section 53, art. 9, c. 24, 3 Starr & C. Ann. St., provides: 'In all proceedings heretofore commenced, where the property has not been fully paid for, or that shall hereafter be commenced, said city or village shall take and pay for the lands sought to be taken or damaged within two years of the entry of the judgment in such condemnation proceedings. And after the expiration of such time the court in which the proceedings may have been had, upon a motion of any person interested in the lands may inquire in a summary manner whether the lands in which such person is interested have been taken or damaged and paid for; and if the court finds that such lands have not been taken or damaged and not been paid for, it shall enter an order requiring the city or village to pay for such lands within a short day, to be fixed by the court; and in default thereof shall dismiss such proceedings as far as they relate to lands of such person.'" While more than two years had passed since the judgment condemning the land had been entered, and waiving the question whether the record sufficiently shows that he came within the provisions of the statute as one "interested in the land" taken, or that he otherwise pursued the provision in question of the statute, we are unable to see, as the record here stands, how appellant, Gage, was injured in the hearing of the assessment by the refusal of the court to allow his motion, or that it had any proper place on this hearing in the supplemental proceeding. The statute says: "On the hearing, the report of

the commissioners shall be competent evidence, and either party may introduce such other evidence as may tend to establish the right of the matter. The hearing shall be conducted as in other cases at law, and if it shall appear that the premises of the objector are assessed more or less than they will be benefited, or more or less than their proportionate share of the cost of the improvement, the jury shall so find, and also find the amount for which such premises ought to be assessed, and the judgment shall be rendered accordingly." 1 Starr & C. Ann. St. p. 498, § 31. If the court had granted the motion, and fixed a day for the payment of the condemnation money, the hearing of the assessment would have proceeded, for the proceedings could not have been dismissed, even as to appellant's land, until the petitioner was placed in default for noncompliance with the order of the court. The very purpose of the assessment was to pay for the land taken. No question is presented by this assignment of error upon the record as it stands which affects the judgment appealed from.

The only question remaining is whether or not the verdict of the jury is sustained by the evidence. Appellant thinks it is not, but we think it is. The judgment will be affirmed. Judgment affirmed.

(164 Ill. 531)

ZEIGLER et al. v. PEOPLE ex rel. KOCHERSPERGER, County Treasurer.

(Supreme Court of Illinois. Jan. 19, 1897.)

SPECIAL ASSESSMENTS—VALIDITY—APPLICATION FOR JUDGMENT—NOTICE—WAIVER OF DEFECTS.

1. Hurd's Rev. St. c. 120, §§ 58, 191, providing that no assessment of real property shall be illegal because not listed or assessed in the name of the owners, or because listed without name, or in any other than that of the rightful owner, apply to special assessments. *People v. Green*, 42 N. E. 163, 158 Ill. 599, followed.

2. Where owners appear generally to an application for judgment for a delinquent special tax levied to pay for a local improvement, without limiting the appearance and confining it to objections to the jurisdiction, they waive all defects, if any, in the notice.

Appeal from Cook county court; O. N. Carter, Judge.

Application of the people, on the relation of D. H. Kochersperger, county treasurer, for judgment for delinquent taxes. From a judgment overruling their exceptions, G. K. Zeigler and others appeal. Affirmed.

This is an appeal from the county court of Cook county on a judgment of sale entered August 10, 1896, against the property of appellants, upon the application of the county treasurer for a judgment for the amount due and unpaid on such lots upon special assessment warrant No. 17,260. The sole point relied upon in resisting the application for judgment was the fact that the names of the owners of the property were not given in the

advertised list. The appellants appeared and objected, not particularly to the jurisdiction, but upon the merits, on July 15, 1896. Afterwards on July 23, 1896, they obtained leave to file additional objections, under the second of which they then and now contest. Their appearance was not entered.

Geo. H. Taylor, for appellants. J. D. Adair, for appellees.

PHILLIPS, J. (after stating the facts). By the proviso to section 58, c. 120, Hurd's Rev. St., it is declared "that no assessment of real property shall be considered as illegal by reason of the same not being listed or assessed in the name of the owners thereof." Section 191 of chapter 120 further provides that "no assessment of property * * * shall be considered illegal * * * on account of the property having been charged or listed in the assessment or tax list without name, or in any other name than that of the rightful owner. * * *". These provisions were held applicable to special assessments in *People v. Green*, 158 Ill. 599, 42 N. E. 163. The appellants, having appeared generally and filed objections without in any manner limiting their appearance, and not confining it to objections to the jurisdiction, waived all defects in the notice, if any existed. The objections were properly overruled. The judgment of the county court of Cook county is affirmed.

(164 Ill. 531)

ANDREWS et al. v. PEOPLE ex rel. KOCHERSPERGER, County Treasurer.

(Supreme Court of Illinois. Jan. 19, 1897.)

PUBLIC IMPROVEMENTS—ASSESSMENTS—ORDINANCE FOR PAYMENT BY INSTALLMENTS—SUFFICIENCY.

Act June 15, 1891 (1 Starr & C. Ann. St. [2d Ed.] p. 781) § 55, provides that the amount of any special assessment may be divided into installments, when so provided by ordinance, the first of which shall not exceed 25 per cent. of the total; and that the remainder shall be divided into four equal annual installments, bearing interest as specifically described. Section 57 provides that, when any city, etc., desires to collect assessments by installments, the ordinance providing for the improvement shall so state, and fix the amount of the first installment. *Held*, that an ordinance providing that an assessment shall be divided into installments, in accordance with such act, and that the amount of the first installment shall be 20 per cent. of the total assessment, complied with such act, and it was not necessary to set forth the number of installments, when they should become due, etc.

Appeal from Cook county court; O. N. Carter, Judge.

Application by the people, on the relation of D. H. Kochersperger, county treasurer, for judgment for delinquent taxes. From a judgment overruling their exceptions, Milo J. Andrews and others appeal. Affirmed.

Geo. H. Taylor, for appellants. J. D. Adair, for appellees.

WILKIN, J. This is an appeal from a judgment of the county court of Cook county for a sale of property owned by the appellants for an installment of a delinquent special assessment. It is insisted on behalf of appellants that the ordinance under which the assessment was levied does not authorize its collection by installments, and the only question discussed by counsel is whether that ordinance is in compliance with section 55, art. 9, Cities and Villages Act (1 Starr & C. Ann. St. [2d Ed.] p. 781). The provision in this ordinance dividing the assessment into installments is as follows: "Sec. 4. That said assessment shall be divided into and collected by installments, in accordance with the act of the general assembly of the state of Illinois * * * approved June 15, 1891, in force July 1, 1891, and that the amount of the first of said installments shall be twenty per cent. of the total of said assessment." Section 55 of the statute, *supra*, provides: "That the amount of any special assessment for any local improvement in any city, incorporated town or village may be divided into installments, when so provided for by the ordinance providing for the said improvement, the first of which shall not exceed the sum of twenty-five per cent. of the total of said assessment, and which shall be due and payable from and after confirmation of said assessment. The remaining portion of said assessment, after deducting the first installment, shall be divided into four equal annual installments, which said installments shall be payable annually thereafter, and collected in the same manner that other assessments are now collected, and the annual interest, herein provided for, on all of said installments, which may at any time remain unpaid, shall also be payable annually thereafter and collected in the same manner that other assessments are now collected. Each of said four last named installments shall bear interest at the rate of six per cent. per annum payable in each year from and after the first day of July next succeeding the confirmation of said assessment when such confirmation shall be had between the first day of November and the first day of March; and when such confirmation is had between the first day of March and the first day of July, then each of the said four last named installments shall bear interest at the rate of six per cent. per annum in each year from and after the first day of October next succeeding such confirmation of assessment; and when such confirmation is made between the first day of July and the first day of November, then each of said last named installments shall bear interest at the rate of six per cent. per annum from and after the first day of January next succeeding such confirmation of assessment. Such interest shall be payable in each year at the time when the installments are payable: provided, that in cities containing a population of fifty thousand or more this and the following sections shall not apply except in cases where any such special assessments shall exceed in

the aggregate the sum of fifteen thousand dollars."

The contention of counsel for appellants is, as we understand, that the ordinance, to be valid, should have set forth the number of installments into which the assessment should be divided, when they should each become due, etc.; in other words, instead of saying it should be divided into and collected by installments in accordance with the act, etc., it should have stated, in and of itself, how it should be divided and collected, making its provisions conform to the statute. The ordinance, taken with the statute, is certain and specific. It fixes the amount of the first installment at 20 per cent. The statute says that installment shall be due from and after the confirmation of the assessment. The statute also says the remaining portion shall be divided into four equal annual installments, which shall be payable annually, etc. If the part of the statute, beginning with the words, "The remaining portion of said assessment," and ending with the sentence, "Such interest," etc., had been literally copied into the fourth section of the ordinance, there could have been no question of its sufficiency; and while it may be conceded, as a general rule, that the better mode of drafting the ordinance would have been to so copy its language, we are satisfied this statute does not contemplate that it should be so done. Section 57 of the act clearly indicates the contrary. It provides: "Whenever any city, incorporated town or village desires to make the collection of any special assessment as aforesaid, by installments, under the provisions of this act, the ordinance providing for said improvement shall also state that the same shall be collected by installments, and fix the amount of the first installment." By thus providing that the ordinance shall state that the assessment shall be collected by installments, and fix the amount of the first installment, it clearly implies that it shall not be necessary to do more. As we have seen, this ordinance does state that the assessment shall be divided into and collected by installments, and it also fixes the amount of the first installment. This was a full compliance with the requirements of the statute. The judgment of the county court will be affirmed. Affirmed.

(164 Ill. 627)

DEIMEL v. PARKER.

(Supreme Court of Illinois. Jan. 19, 1897.)

APPEAL—REVIEW—EVIDENCE.

Overruling exceptions to a master's report disallowing a claim cannot be reviewed unless the record contains all the evidence in regard to such claim.

Appeal from appellate court, First district.

Bill by Simon Deimel against Rudolph Deimel and another for the settlement of a partnership. From a judgment of the appellate court (59 Ill. App. 426) affirming a decree overruling exceptions to the report of the master, Ignatz Deimel appeals. Affirmed.

Duncan & Gilbert, for appellant. Moran, Kraus & Mayer, for appellee.

CARTER, J. We are of the opinion that the appellate court decided correctly in holding the transcript of the record of the circuit court insufficient to determine, on appeal, the questions raised and discussed by appellant. One John Deimel filed his bill in equity in the circuit court of Cook county to dissolve the co-partnership between himself and Rudolph and Joseph Deimel, alleging mismanagement and insolvency, and praying for adjustment of its affairs, dissolution, appointment of a receiver, a ratable distribution of its assets among its creditors, and for other relief. Rudolph and Joseph Deimel answered, admitting the allegations of the bill, and a decree was entered in accordance with the prayer of the bill. The cause was referred to the master to state the account and receive proofs and claims, etc., and it was ordered that claims might be filed with said master on or before April 1, 1890; that the master should have power to fix the time, place, and mode of proving claims with him, subject to the orders and directions of the court.

The transcript of the record filed in the appellate court and in this court is a mere fragment of the record of the cause in the circuit court, and contains none of the evidence taken before the master and reported to the court; and although the master's report disallowing the claims of Ignatz Deimel against the firm makes reference to a former report to the court in the cause, and specific reference to the evidence upon which he based his conclusions, we are left to mere conjecture as to the contents of such former report, and as to the facts upon which the master's conclusions were based. Appellant excepted to the master's report, and took his appeal from the decree overruling his exceptions, and confirming the report disallowing his claim; and his purpose on this appeal seems to be to test the formal sufficiency of the report, regardless of the question whether it was sustained by the evidence or not. Without considering whether such formal sufficiency could be determined in the manner attempted (see *Tyler v. Simmons*, 6 Paige, 127), we think the report was sufficiently definite in its references to the evidence upon which it was based, so far as we can tell from the record as presented to us, and, in the absence of the evidence from the record here, we must assume that it fully sustained the master's conclusions.

Counsel for appellant say, in substance, that there were thousands of pages of testimony taken in the cause having no relation to the claim of appellant, and that it would have been a useless incumbrance of the record, and a burdensome expense to appellant, to bring up the entire record. It is sufficient here to say that appellant did not bring up so much of the record as relates to appellant's claim,

but omitted all of the evidence tending to support or defeat it; hence we are not called upon to decide the question urged by counsel as to whether or not, in such a case, it is necessary for appellant to bring up a complete record of the entire cause. In any view of the rule, he must bring up enough of the record to present to this court the question he desires reviewed, as it was presented to the trial court. The first report made by the master upon this claim was set aside as being imperfect and irregular because the merits of the claim could not be determined by the court from the report and evidence therein referred to, and the master was directed to permit a rehearing upon the evidence theretofore taken, and upon such further evidence as either party might introduce; and he was also directed to report his conclusions, and to specify particularly the evidence heard and considered by him upon the hearing of said claim. This he did. The evidence was before the court. How can we say whether it supports the conclusions of the master or not, unless it is before us? We cannot agree with appellant that, in so far as the master states the ultimate facts in his report, they do not support his conclusions as to the part of the claim to which they relate. If embodied in the decree, they would have supported the decree, if such a decree required support. See *Ryan v. Sanford*, 133 Ill. 291, 24 N. E. 428. As was said in *Bertrand v. Taylor*, 87 Ill. 235: "This court cannot properly consider any question arising upon the record, unless we have a full record before us, or it is made known to us in some approved manner that the transcript contains all parts of the record material to the question submitted to us for decision." See, also, *Van Meter's Heirs v. Lovis' Heirs*, 29 Ill. 488; *Miller v. Whittaker*, 33 Ill. 386; *Culver v. Schroth*, 153 Ill. 437, 39 N. E. 115. If appellant had incorporated in the transcript all the evidence upon which the master based his conclusions, which were confirmed by the trial court, and this had been made to appear to us in some approved manner, we could then answer the question propounded by counsel,—whether an appellant must obtain a complete record, containing many thousands of pages of matter wholly irrelevant to his contention, when a very few pages would constitute a complete record in respect to the question to be reviewed on appeal. Finding no error, the judgment of the appellate court is affirmed. Judgment affirmed.

(164 Ill. 513)

TOWN OF CICERO v. SACKLEY et al.
(Supreme Court of Illinois. Jan. 19, 1897.)

APPEAL AND ERROR—REVIEW—EVIDENCE.

A finding of facts by the appellate court, on which its judgment is based, is conclusive on the supreme court, under *Prac. Act*, § 88.

Appeal from appellate court, First district.

Action by James A. Sackley and another, doing business as Sackley & Peterson, against the town of Cicero, in which plaintiffs appealed to the appellate court from a judgment in their favor for part of the amount claimed by them. From a judgment of the appellate court (64 Ill. App. 181) reversing such judgment, and awarding plaintiffs a larger sum, defendant appeals. Affirmed.

F. W. Pringle and H. R. Pebbles, for appellant. R. S. Thompson, for appellees.

PER CURIAM. This was an action brought by James A. Sackley and Peter Peterson, a firm known as Sackley & Peterson, against the town of Cicero, to recover a balance due on a contract under which they furnished the labor and materials and improved Washington Boulevard from the east line of Robinson avenue to the center line of Harlem avenue, in the town of Cicero, under a contract entered into between the respective parties. In the circuit court, by agreement, a jury was waived, and a trial had before the court, which resulted in a judgment in favor of the plaintiffs for \$1,127.10. The plaintiffs, not being satisfied with the amount of the judgment, appealed to the appellate court, where, upon a hearing, the appellate court reversed the judgment of the circuit court, and entered a judgment in favor of the plaintiffs for \$3,410.95. To reverse this judgment, the defendant appealed.

The appellate court found the facts different from the circuit court, and recited the facts as found in its final judgment, as required by the statute. Upon looking into the record, it will be found that plaintiffs were to be paid \$2.95 per lineal foot for the work agreed to be done for the town. On the trial in the circuit court the court found that the number of lineal feet of roadbed made and completed under the contract was 12,149.6. But upon this point the appellate court made the following finding: "(4) That number of lineal feet of such roadbed, measured in one line, along the center of Washington Boulevard, from Robinson avenue to Harlem avenue, was 12,149.6, but that the street and alley intersections improved by appellees under said contract, lying in Washington Boulevard, but outside the center 38 feet of said boulevard, reduced to lineal feet of roadway 38 feet wide, equal 774.18 lineal feet in addition, being 774.18 lineal feet more than appellees were found by the circuit court to be entitled to be paid for at \$2.95 per lineal foot." Under section 88 of the practice act, where any final determination of a cause in the appellate court shall be made as the result, wholly or in part, of the finding of facts concerning the matter in controversy different from the finding of the circuit court, it shall be the duty of the appellate court to recite in its final judgment the facts as found, and the judgment of the

appellate court shall be conclusive as to all matters of fact in controversy in said cause. Here the appellate court found that there were 774.18 lineal feet of roadbed more than plaintiffs had been allowed for in the circuit court, and entered judgment for the whole number of feet at \$2.95 per lineal foot, the contract price. So far as appears from the record, the judgment of the appellate court was fully warranted by the facts, but whether that is so or not is a matter that cannot be inquired into on this appeal. No question is made in this record in regard to the admission or exclusion of evidence, and no propositions were submitted to the circuit court by either party to be held as law. As we perceive no error in the record, the judgment of the appellate court will be affirmed. Affirmed.

(184 Ill. 503)

NATIONAL BANK OF AMERICA v. NATIONAL BANK OF ILLINOIS.

(Supreme Court of Illinois. Jan. 19, 1897.)

ACTION ON CHECK—DEFENSE.

In an action to recover the amount of a check, brought against the drawee, it appeared that the payee indorsed and delivered it to a firm which deposited it with private bankers, who gave the firm credit therefor, and deposited it on the same day with plaintiff bank, receiving credit for its full amount; and that defendant refused to pay it because the drawer had notified it to stop payment. *Held*, that it was no defense that the check passed from the drawer to the different parties, including plaintiff, without any consideration between the parties at the time of any one of the transfers, there being no evidence that plaintiff had knowledge of any infirmity in the check.

Appeal from appellate court, First district.

Action by the National Bank of Illinois against the National Bank of America to recover the amount of a check drawn on defendant by a depositor. From a judgment of the appellate court (64 Ill. App. 355) affirming a judgment in favor of plaintiff, defendant appeals. Affirmed.

Walker, Judd & Hawley, for appellant. Moran, Kraus & Mayer, for appellee.

WILKIN, J. On June 2, 1893, E. Kellogg Beach drew his check upon the appellant for \$1,000, which he delivered to his son, C. B. Beach. The son indorsed and delivered the check to the firm of Henry & D. S. Greenbaum, and they deposited it with the firm of Herman Shafner & Co., private bankers in the city of Chicago, who gave them credit therefor, and Shafner & Co. on the same day deposited it in the National Bank of Illinois, receiving credit for the full amount thereof. The next morning the cashier of the latter bank caused it to be presented to the appellant to be certified, but the latter, having been notified to that effect by the drawer, marked it "Payment stopped." A formal demand by the National Bank of Illinois was afterwards made up-

on the appellant for the payment of the check, the maker having there on deposit sufficient funds for that purpose. Payment being refused, appellee brought this suit to recover the amount of the check. The appellant offered proof upon the trial to the effect that the check had passed from the original drawer to the different parties, including the National Bank of Illinois, without any consideration between the parties at the time of any one of the transfers; but this evidence was rejected by the court, and the jury instructed to find the issues for the plaintiff, which it did, fixing the damages at \$1,000, with interest. From that judgment the defendant appealed to the appellate court, where the judgment below was affirmed.

It has long been the settled law of this state that the drawing and delivery of a check upon a fund deposited in a bank is in effect an assignment of such fund in toto or pro tanto, and that, after demand made, the holder of the check has a direct cause of action against the bank, if it has, at the time, sufficient funds of the drawer in its hands, and refuses to make payment. It is contended on behalf of appellant that the rule is inapplicable to the facts of this case, because it does not appear that the check was issued or transferred for a valuable consideration. It was held in *Strong v. King*, 35 Ill. 9, that if a banker receives a check as money, and gives the debtor credit therefor, it is an appropriation of the check by the holder, and operates as a payment, the check thereby becoming the property of the banker with whom deposited. In *American Trust & Savings Bank v. Gunder & Paeschke Manuf'g Co.*, 150 Ill. 336, 37 N. E. 227, the payee of a check indorsed it to his banker "For deposit," to be placed to the depositor's credit, and sent the same by mail to his banker, who gave the depositor credit on account for the amount of the check, and, after marking it "For collection and return," forwarded it to the drawer for payment; and we held "that the deposit of the check was in legal effect a negotiation thereof, so as to vest the legal title in the banker, with the right on his part to charge it back to the depositor in case it was not paid on presentation, and that the credit given his depositor in his account was a sufficient consideration for the assignment." The fact that there was no consideration for the check could in no way affect the legal right of the holder thereof, unless it was shown that he had notice of the want or failure of consideration. A check payable absolutely, and at all events, to a certain person or order, in money, is negotiable. *Daniels*, Neg. Inst. § 1651. "And, when sued upon, the possession is prima facie evidence of title, and the plaintiff is presumed to be a bona fide holder for value, without notice of any defense existing between prior parties, and such defenses cannot be

pleaded against it." *Id.* § 1652; *Security Bank v. Northwestern Fuel Co.* (Minn.) 59 N. W. 987. It is not claimed that the defendant below offered to prove that the plaintiff had notice of want of consideration, or any other infirmity in the check growing out of the transaction between the drawer and payee, or between the latter and their indorsee, *Herman Shafner & Co.* The evidence offered by the defendant presented no defense to the action, and hence there was no error in the instruction to find for the plaintiff. The judgment of the appellate court will be affirmed.

(164 Ill. 630)

COLE v. BURNAP.

(Supreme Court of Illinois. Jan. 19, 1897.)

REVIEW—NEWLY-DISCOVERED EVIDENCE—LEAVE TO FILE BILL—LIMITATIONS—SUFFICIENCY OF BILL.

1. Where it is sought to review a decree on the ground of newly-discovered evidence, the party must apply to the court for leave to file the bill of review.

2. It is within the sound discretion of the court to grant or refuse leave to file a bill of review on the ground of newly-discovered evidence. 63 Ill. App. 490, affirmed.

3. Leave to file a bill of review will not be granted, ordinarily, after the statutory period of limitations fixed for writs of error has expired.

4. Before leave to file a bill of review will be granted, the party must perform the decree, or show inability, or some valid excuse for its nonperformance.

5. A bill of review must fully set out the original bill, and the proceedings thereunder.

Appeal from appellate court, First district.

Petition by F. G. Cole against Lucile W. Burnap, administratrix, etc., to have a decree reviewed. From an affirmance of a decree in favor of defendant (63 Ill. App. 490), petitioner appeals. Affirmed.

Zach Hofheimer, for appellant. C. H. Willett, for appellee.

CARTWRIGHT, J. On September 29, 1884, Eleanor L. Cole obtained a decree of divorce from appellant, in the superior court of Cook county, on a charge of extreme and repeated cruelty towards her; and upon a further hearing that court, on May 20, 1885, decreed alimony to her in the sum of \$50 per month. On October 27, 1887, appellant filed his petition to vacate and set aside the decree for alimony, on account of newly-discovered evidence of adultery by said Eleanor L. Cole, which he alleged he was unable to obtain at the time of the decree. A demurrer was sustained to that petition, and it was dismissed. The dismissal was affirmed by the appellate court and this court. *Cole v. Cole*, 35 Ill. App. 544; *Cole v. Cole*, 142 Ill. 19, 31 N. E. 109. Eleanor L. Cole afterwards died, and on October 30, 1893, appellee, as her administrator, was substituted in the suit. On October 14, 1895, appellant filed a paper, verified by him, setting up substantially the

same matters contained in the petition filed in 1887, and asking to have the decree for alimony reviewed, reversed, and set aside. Appellee filed her motion to strike this paper from the files, and on hearing of the motion the court ordered that unless appellant should bring into court within 10 days \$5,-855.35, the amount due under the decree, to await the event of the bill of review, the petition for such bill of review should be stricken from the files. The money not being brought into court, the paper was stricken from the files. The action of the superior court has been approved by the appellate court.

The ground alleged for asking a review of the decree being newly-discovered evidence, it was necessary to apply to the court for leave to file the bill of review. *Griggs v. Gear*, 3 Gilman, 2. The paper in question begins in a petition, and is sworn to as such; but it concludes as a bill of review, with a prayer for summons and answer, and that the decree may be reviewed, reversed, and set aside. In the motion to strike it off the files, it is called a "bill of review," and in the order striking it off it is called a "bill of review, or petition for leave to file a bill of review." But, whatever the paper could be called, it was properly stricken from the files. Allowing a bill of review to be filed by reason of newly-discovered evidence rests in the sound discretion of the court, and leave may be refused for any satisfactory reason. *Griggs v. Gear*, supra. In this case, Eleanor L. Cole, against whom the charge was made, and who knew the facts, had died, so that her testimony and aid in meeting it were lost. The records showed that appellant knew the alleged facts when he filed his petition in her lifetime, in 1887. If he had desired to file a bill of review, he should have asked leave then. There was very great danger of injustice being done if the decree should be opened after her death, and such a lapse of time.

Again, a bill of review is in the nature of a writ of error, and ordinarily courts of chancery apply the same limitation to such a bill as the statute fixes for a writ of error. *Lyon v. Robbins*, 46 Ill. 276; *Sloan v. Sloan*, 102 Ill. 581. The petition in this case was filed more than 10 years after the decree was entered, and no reason is given for taking the case out of the usual rule. There is no excuse for the delay.

It is also necessary to perform the decree, or show some valid excuse or inability, before leave to file a bill of review will be granted. *Griggs v. Gear*, supra; *Horne v. Zimmerman*, 45 Ill. 14; *Judson v. Stephens*, 75 Ill. 255; *Bruschke v. Der Nord Chicago Schuetzen Verein*, 145 Ill. 433, 34 N. E. 417. In this case the decree was not performed, nor any excuse or inability alleged. The court leniently gave time for performance, but the privilege was not availed of.

Considered as a bill of review, the paper

filed was wholly insufficient, in not fully setting out or stating the original bill and proceedings thereunder. A mere synopsis of what the pleader regards as the substance of the proceeding sought to be reviewed is not sufficient. *Judson v. Stephens*, supra; *Goodrich v. Thompson*, 88 Ill. 206; *Bruschke v. Der Nord Chicago Schuetzen Verein*, supra; *Axtell v. Pulsifer*, 155 Ill. 141, 39 N. E. 615.

It is objected that the court had given to the attorney for Mrs. Cole a judgment against appellant for 25 per cent. of the alimony, under a contract by her to give the attorney that per cent. of what he could recover for his services, and that, if the decree stands, appellant is liable to pay 25 per cent. of it twice. There was an order made, as between the administrator and the attorney, but the appellant was not a party to it. There was no notice to him, nor appearance by him. The court found that the contract was an equitable assignment to the attorney of 25 per cent. of the alimony, but there is nothing in that order which endangers appellant's rights, or under which he could be required to pay the decree, or any part of it, twice. The judgment of the appellate court will be affirmed. Affirmed.

(184 Ill. 478)

STEENBERG et al. v. PEOPLE ex rel. KOCHERSPERGER.

(Supreme Court of Illinois. Jan. 19, 1897.)

MUNICIPAL CORPORATIONS—STREET IMPROVEMENT—ASSESSMENTS—VALIDITY—COLLATERAL ATTACK.

1. Where an ordinance for a street improvement, and all proceedings thereunder, are, on their face, sufficient, and fulfill every condition requisite to confer jurisdiction on the county court, the ordinance, assessment, and judgment of confirmation of the county court are not void because there was a misnomer of one terminus, or a misdescription of the improvement.

2. Where an ordinance for a street improvement, the assessment, and judgment of confirmation of the county court are not void, but the ordinance is merely insufficient because the description of the locality is defective, as appears by extraneous evidence, objection by property owners for such insufficiency cannot be first made on an application for judgment of sale.

Appeal from Cook county court; O. N. Carter, Judge.

Application by the people, on the relation of D. H. Kochersperger, for a judgment of sale for delinquent taxes. From a judgment overruling objections filed by Karl Steenberg and others, they appeal. Affirmed.

Darrow, Thomas & Thompson, for appellants. J. D. Adair, for appellee.

CARTWRIGHT, J. There was a proceeding by special assessment in the county court of Cook county for the curbing, grading, and paving of a part of Mead street in the city of Chicago, and by the judgment of that court the assessment against appellants' lots

was confirmed. When application was made by the county collector for judgment of sale against the lots as delinquent, appellants appeared and filed objections, which were overruled, and judgment was entered. The objection relied upon in the county court and here is that in the ordinance and all proceedings for the levy of the assessment, including the judgment of confirmation, there was a misnomer of the northern terminus of the improvement. The locality where the curbing, grading, and paving was to be done was described as "Mead street in the city of Chicago, from Fullerton avenue to Logan avenue in said city of Chicago." There was no such street as Logan avenue intersecting Mead street. The improvement was in fact on Mead street, from Fullerton avenue to a street running from the middle of Logan square across Mead street, and which had been called "Humbolt Avenue" up to January 14, 1895, when it was named "West Wrightwood Avenue." The assessment was made for that improvement, and the work was about completed, when the county collector applied for the judgment.

It being conceded that the objection made would have been a good one if presented on the motion for confirmation of the assessment, the controversy is over the question whether it could be taken advantage of in the collateral proceeding for judgment of sale. That depends on the question whether the county court had jurisdiction to take any action in the special assessment proceeding. If it had such jurisdiction, its judgment against appellants' lots was of binding force, although there may have been some objection to the entry of judgment of confirmation, which, if presented, would have been sustained. In such case the objection cannot be raised in the collateral proceeding. *Prout v. People*, 83 Ill. 154; *Andrews v. People*, Id. 529; *Gage v. Parker*, 103 Ill. 528; *Schertz v. People*, 105 Ill. 27; *Dickey v. People*, 160 Ill. 633, 43 N. E. 606. On the other hand, if the county court acted without jurisdiction in entering its judgment of confirmation, that judgment would be void, and could be successfully resisted anywhere. *Schertz v. People*, supra; *Boynton v. People*, 155 Ill. 66, 39 N. E. 622; *Culver v. People*, 161 Ill. 89, 43 N. E. 812. The ordinance, affidavit of posting notices, certificate of publication, assessment roll, and all proceedings were, on their face, proper and sufficient, and fulfilled every condition requisite in the law to confer jurisdiction on the county court. In such a case we cannot assent to the claim that the ordinance was a nullity, and the assessment and judgment of the county court void, because there was a misdescription of the improvement. Where an ordinance exceeds the power of the city council, or the necessary conditions for its enactment have not been observed, the ordinance will be void, and no rights can grow up under it; but this ordinance is not of that char-

acter. The enactment of such an ordinance was within the corporate power, and there is no question of its lawful passage. The description of the locality where the improvement was to be made was defective, as appears by extraneous evidence, and for that reason an objection might have been sustained to the confirmation. The parties assessed were notified of the assessment against their property for the improvement specified in the ordinance, and, if they wanted to object that the ordinance was insufficient because the northern terminus was wrong or was uncertain, they should have made their objection on the application for judgment of confirmation. They would then have had an opportunity to prove the fact. The county court had jurisdiction to enter judgment of confirmation, and objections for mere insufficiency of the ordinance cannot be made by collateral attack on the application for judgment of sale. *Gage v. Parker*, supra; *People v. Green*, 153 Ill. 504, 42 N. E. 163. The judgment of the county court is affirmed. Affirmed.

(164 Ill. 608)

ILLINOIS CENT. R. CO. v. CITY OF KANKAKEE.

(Supreme Court of Illinois. Jan. 19, 1897.)

STREET IMPROVEMENT — ASSESSMENT — PROPERTY SUBJECT.

A railroad right of way, parallel with and adjoining a street, is assessable for special benefits for an improvement of the street.

Appeal from Kankakee county court; John Small, Judge.

Petition by the city of Kankakee for the appointment of commissioners to assess benefits for a street improvement. From a judgment against the realty of the Illinois Central Railroad Company for \$1,500, the amount assessed by the commissioners, the company appeals. Affirmed.

On December 18, 1895, appellee, the city of Kankakee, passed an ordinance providing for the improvement, by paving, curbing, etc., of that part of East avenue lying between Court street on the north and Hickory street on the south, to be paid for by a special assessment upon the realty specially benefited thereby, so far as the same could be legally assessed, and the balance by general taxation. The part of East avenue involved in this controversy adjoins and runs parallel with the right of way of the railroad of appellant the length of three blocks. At the north end of the proposed pavement East avenue is about 15 feet higher than the track of appellant, and falls rapidly towards the south, so that, one block south, at Merchant street (which does not extend across the tracks), both are about on a level. Continuing south, to the next cross street (Station street), the avenue and tracks are nearly on a level, but at Hickory, the third cross street south, the tracks are higher than the avenue.

The station is located opposite Station street. Commissioners were appointed, who estimated the probable cost of the improvement at \$11,048.60. The petition of appellee was filed in the county court, and commissioners were appointed to spread the assessment. The total sum thus to be raised was fixed at \$9,100.00, and the right of way of appellant was assessed at \$1,500. Upon the return of the assessment appellant filed objections, which were heard by the court, a jury being waived. Evidence was submitted, and the court found that appellant's realty was not assessed more than it would be benefited, and the objections were overruled. From a judgment against the realty of appellant for \$1,500 the Illinois Central Railroad Company appeals to this court.

W. R. Hunter, for appellant. Paddock & Cooper, for appellee.

WILKIN, J. (after stating the facts). On the trial below appellant submitted to the court 13 written propositions of law, embodying the law relating to special assessments, all of which the court held, except the tenth, which is: "That, under the law and evidence, said real property of said company, assessed for said improvement, will not be specially benefited thereby." That the railroad right of way, relatively situated, is assessable for special benefits arising from local street improvements, is settled by repeated decisions of this court. *Kuehner v. City of Freeport*, 143 Ill. 92, 32 N. E. 372; *Rich v. City of Chicago*, 152 Ill. 18, 38 N. E. 255, and cases there cited. Proposition 10, as a proposition of law, was therefore rightly refused. The only question, then, presented by this record for our consideration, is one of fact. Counsel insist that, under the evidence herein, to an unprejudiced judicial mind, the proposed improvement will not specially benefit the right of way. Whether or not, as a matter of fact, the property was specially benefited, and, if so, the amount of the benefit, was a question for the court, under all the evidence. The report of the commissioners, by the express provisions of the statute, made a prima facie case for the city. The evidence introduced by appellant to overcome that prima facie case, and that offered by the city in rebuttal, was conflicting; and, after carefully considering all the evidence, we cannot say that the court erred in its conclusion that the assessment was fair and reasonable. The judgment of the county court will be affirmed.

(164 Ill. 566)

GULLETT v. FARLEY et al.

(Supreme Court of Illinois. Jan. 19, 1897.)

DOWER—PROPERTY IN LIEU—RENUNCIATION—ELECTION.

1. A written renunciation, filed in the county court within a year after testator's death (Rev. St. c. 41, § 11), by his widow, who elected to

take in lieu of the provisions of the will her "dower and legal share in the estate" which shall remain after the payment of debts, is a sufficient renunciation to enable the widow to take under section 12, which provides that where a husband dies testate, leaving no children, the wife may, if she elect, have in lieu of dower one-half of all the estate which remains after the payment of claims against the estate; since the word "dower" in the renunciation can be rejected, as her evident intention was to take an estate burdened with debts.

2. A widow who files a bill for partition, alleging that she is the owner in fee of the undivided one-half of land left by her husband, makes a sufficient election under Rev. St. c. 41, § 12, providing that if a husband die testate, leaving no child, the widow may, if she elect, have in lieu of dower absolutely one-half of all the estate after all legal charges are paid.

Appeal from circuit court, Woodford county; N. W. Green, Judge.

Bill by Rosina Farley and others against Robert Gullett for partition. There was a judgment for complainants, and defendant appeals. Affirmed.

Eliza Gullett exhibited her bill in chancery in the circuit court of Woodford county on the 25th day of June, 1894, showing that she and one Robert Gullett were tenants in common and owners in equal moieties of the S. E. $\frac{1}{4}$ of section 9, township 27 N., range 1 W. of the third P. M., in Tazewell county; that they derived title through James Gullett, who died on the 15th day of December, 1893, testate, and without issue, but leaving his widow, Eliza Gullett, the complainant in the bill; that his last will was probated in the county court of Tazewell county on the 20th day of February, 1894, and letters testamentary issued to George W. Kingsbury as executor of the will. By the will James Gullett made certain provisions for his widow, Eliza Gullett, in lieu of dower. He devised the S. E. $\frac{1}{4}$ of section 9 aforesaid to Robert Gullett, charging such bequest with certain payments and disbursements to be made by him. He also devised certain lands to his wife, which are eliminated from this controversy. Eliza Gullett, on the 26th day of March, 1894, filed in the county court of Tazewell county an instrument in writing by which she renounced the provisions of the will which had been made in her favor, and in her bill claimed, in lieu of the provisions made for her by the said will of James Gullett, that by such renunciation she was entitled to one-half of the real estate of which her husband, James Gullett, died seised. Eliza Gullett died on the 7th day of January, 1895, testate, leaving no issue or husband surviving her. Her will was dated the 13th of December, 1894, and admitted to probate in the county court of Tazewell county the 24th of January, 1895, and letters were issued thereon to Lewis Harns, with the will annexed. By her will, among other devises, she made the following to Rosina Farley: "I also, for the foregoing reasons, devise, give, and bequeath to the said Rosina Farley any and all real es-

tate owned by me now or hereafter, to her and her heirs and assigns forever." By leave of court, Rosina Farley was made, upon the suggestion of the death of Eliza Gullett, a party complainant, and on the 15th of April, 1895, she filed an amended bill in the nature of a supplemental bill, setting up the death of Eliza Gullett, and that under the devise in her will she, Rosina Farley, was the owner of the undivided $\frac{1}{2}$ of the S. E. $\frac{1}{4}$ of section 9, township 27 N., of range 1 W. of the third P. M., in Tazewell county, and praying for a partition thereof between her and Robert Gullett. Answer was filed by the defendant, and replication to the answer by the complainants, and hearing had, and the court ordered that the premises be partitioned as asked in the prayer of the bill. To reverse this decree the case is brought to this court.

Winslow Evans and M. C. Quinn, for appellant. W. L. Ellwood and B. D. Meek, for appellees.

CRAIG, J. (after stating the facts). The questions presented by the record are: First. Did Eliza Gullett, by the renunciation filed by her in the county court of Tazewell county at the March term, 1894, simply take dower in the premises in controversy and one-half of the personal estate, of which James Gullett died possessed, after the payment of debts under sections 10, 11, c. 41, Rev. St. Ill., or did she take under such renunciation one-half of the real estate in fee simple of which James Gullett died seised, under section 12, c. 41 (Hurd's Rev. St. p. 552)? Second. Did Eliza Gullett, by exhibiting her bill in the circuit court of Woodford county, and averring therein that she was the owner of the undivided one-half of the premises in controversy, elect to take one-half of the real and personal estate after the payment of debts, under section 12, c. 41, Rev. St.?

1. The sections of the statute that control and determine the controversy are as follows:

"Sec. 10. Any devise of land, or estate therein, or any other provision made by will of a deceased husband or wife for the surviving wife or husband shall, unless otherwise expressed in the will, bar the dower of such surviving husband or wife in the lands of the deceased, unless such survivor shall elect to and does renounce the benefit of such devise or other provision, in which case he or she shall be entitled to dower in the lands and to one-third of the personal estate after the payment of all debts.

"Sec. 11. Any one entitled to an election under either of the two preceding sections shall be deemed to have elected to take such jointure, devise or other provision, unless within one year after letters testamentary or of administration are issued, he or she shall deliver or transmit to the county

court of the proper county a written renunciation of such jointure, devise or other provision.

"Sec. 12. If a husband or wife die testate, leaving no child or descendants of a child, the surviving husband or wife may, if he or she elect, have, in lieu of dower in the estate of which the deceased husband or wife died seised (whether the right to such dower has accrued by renunciation as hereinbefore provided, or otherwise), and any share of the personal estate which he or she may be entitled to take with such dower, absolutely, and in his or her own right, one-half of all the real and personal estate which shall remain after the payment of all just debts and claims against the estate of the deceased husband or wife. The election herein provided for may be made whether dower has been assigned or not, and at any time before or within two months after notification to the survivor of the payment of debts and claims, and not afterwards."

There is no question but Mrs. Eliza Gullett, as the widow of James Gullett, deceased, under the renunciation and election filed by her in the county court of Tazewell county, at the March term, 1894, could have taken dower and one-half of the personal estate after the payment of the debts, had she chosen so to do, under sections 10 and 11 of the dower act. It is, however, no bar to her taking one-half of the real estate under the election filed in the county court that she could have taken dower under the same if this renunciation and election is broad enough to clearly show that it was her purpose and intention to renounce the provisions of the will, and in lieu thereof take one-half of the real and personal estate, under section 12 of the dower act. *Lessley v. Lessley*, 44 Ill. 527. The renunciation and election of the widow was as follows: "I, Eliza Gullett, surviving wife of James Gullett, late of the county of Tazewell, and state of Illinois, deceased, do hereby renounce and quit all claim to the benefit of any jointure given or assured to me in lieu of dower, or any devise or other provision made to me by the last will and testament of the said James Gullett, and I do elect to take in lieu thereof my dower and legal share in the estate of the said James Gullett which shall remain after the payment of just claims and debts against his estate. Dated this 22d day of March, A. D. 1894. Eliza Gullett." The widow, in the instrument, says, "I do elect to take in lieu thereof [the provisions of the will of her husband, James Gullett] my dower and legal share in the estate of the said James Gullett which shall remain after the payment of just claims and debts against his estate." If the word "dower" were dropped from this sentence, there would be no question as to the legal effect of this instrument. It is also clear that the widow, by this instrument, was claiming an estate that would be burdened with the debts of the estate. The widow's dower is not chargeable with the debts. When she takes

one-half of the real estate under section 12, it is chargeable with the debts. She cannot claim dower under sections 10 and 11 of the dower act, and also avail herself of the provisions of section 12 of the same act. She cannot take under both. No violence is done this instrument by rejecting the word "dower" in the above sentence, and holding that the widow elected to take one-half the real and personal estate. It is clear that the widow, by the above instrument, renounced all the provisions of the will of her husband in her favor. The law then fixed what estate she would take. It matters little what she claimed or did not claim. Her rights, on renouncing the will, were fixed by statute, and they could not be affected by claiming or omitting to claim any specific estate. *Evans v. Price*, 118 Ill. 598, 8 N. E. 854. This court, in its opinion in *Re Taylor's Will*, 55 Ill. 252, in commenting upon *Lessley v. Lessley*, uses this language: "This court, in *Lessley v. Lessley*, 44 Ill. 527, in discussing the right of the election of the widow, as given her by the dower act, said that right was based upon the ground that the wife has an interest in the estate of her husband, of which he cannot deprive her by will or otherwise, without her consent." It conclusively appears that the widow has fully renounced all provisions made for her by her husband's will in lieu of dower; that she has an interest in the estate of her husband that he cannot deprive her of, by will or otherwise, without her consent; that the renunciation and election filed in the county court of Tazewell county at the March term, 1894, was all it was necessary for the widow to make to enable her to take under section 12 of the dower act.

2. The widow, by filing her bill in chancery in the Woodford circuit court for the partition of the premises in controversy, and by averring that she was the owner in fee simple of the undivided one-half thereof, made the very best and most notorious election that it was possible to make, and one that all the parties in interest must take notice of. It was in apt time. This was ample notice that the widow did not claim dower, but one-half of the estate as heir. It is well settled that where one has the power of election such election need not be formally made. 1 *White & T. Lead. Cas. Eq.* 1154-1169. Where a widow is put upon her election between dower and legacies in lieu thereof, a suit for the legacies is a substantial election. 2 *Herm. Estop.* p. 1178. An election may be expressed or it may be implied from unequivocal acts indicating choice. 6 *Am. & Eng. Enc. Law*, 254. The widow, *Eliza Gullett*, having renounced the provisions of her husband's (*James Gullett's*) will in her favor by the written instrument filed in the county court of Tazewell county at the March term thereof, and by her bill in chancery filed in the circuit court of Woodford county of the 16th of August, 1894, and averring therein that she owned the undivided one-half of the premises, thereby elected unequivocally to take under section 12 of the

dower act, and was seised in fee simple of the premises, and had authority by will to dispose of the same, and, having so disposed of the same, to *Rosina Farley*, she became seised in fee of the premises, and was, therefore, entitled to have them partitioned. The decree of the circuit court will be affirmed. Affirmed.

(164 Ill. 537)

SCHMITT v. DEVINE et al.

(Supreme Court of Illinois. Jan. 19, 1897.)

GARNISHMENT—DEFECTIVE ATTACHMENT BOND—SCIRE FACIAS—WHEN RETURNABLE—APPEAL—PRESUMPTION OF REGULARITY.

1. A defective attachment bond, being amendable, does not affect the jurisdiction of the court, so as to render a subsequent judgment void, and hence cannot be objected to by a garnishee for the first time on appeal. 63 Ill. App. 289, affirmed.

2. The fact that interrogatories filed to be answered by a garnishee were not entitled by his proper initials is immaterial, where he was notified of their filing by his proper name.

3. Under *Hurd's St. c. 62, § 8*, requiring a scire facias issued against a garnishee after the entry of a conditional judgment against him to be made returnable "at the next term of court," such a writ made returnable at any other than the next term after its issuance, though such term commences within less than 10 days, is a nullity, and its service confers no authority on the court to enter a final judgment. 63 Ill. App. 289, reversed.

4. Where action was brought against three defendants, but only two were served, and judgment was rendered against them, in the absence of a bill of exceptions, such judgment will be presumed, on appeal, to have been warranted by the evidence, and a judgment against a garnishee, showing him to have been held as the debtor of all three defendants named, will be treated as merely defective in form.

Appeal from appellate court, First district.

Action by the United States Heater Company against *J. M. Devine* and others, as the Western Steam & Hot-Water Heating Company. From a final judgment against him as garnishee, *F. J. Schmitt* appealed to the appellate court, where the judgment was affirmed (63 Ill. App. 289), and he appeals. Reversed.

On the 10th day of December, 1894, the United States Heater Company, a corporation, commenced an action of assumpsit in the superior court of Cook county against *J. M. Devine*, *Charles P. Meyers*, and *M. K. Keenan*, a firm doing business as the Western Steam & Hot-Water Heating Company. On the same day an affidavit for an attachment in aid, and a bond, were filed with the clerk of the court, and a writ of attachment in aid was issued to the sheriff of Cook county, dated December 10, 1894, returnable on the 7th day of January next, directing him to summon *F. J. Schmitt*, *W. S. Jones*, *W. S. Fisher*, *Thomas O'Connell*, and *Joseph Aarons* as garnishees. On January 7, 1895, the sheriff returned said summons issued in the action of assumpsit: "Served on the defendant *M. P. Keenan* on December 21, 1894, and on the defendant *J. M. Devine* on December 27,

1894." The defendant, Charles P. Meyers was not served. The attachment writ was on the same day returned served on appellant, F. J. Schmitt, as garnishee, on December 11, 1894. On January 23, 1895, there was entered a judgment by default against the defendants Keenan and Devine, and a conditional judgment by default against appellant as garnishee. A scire facias issued against the defendant Meyers and was returned "Not found." No further proceedings were had as to Meyers, and no process was ever served on him. On January 30, 1895, seven days after the entry of the conditional judgment against appellant as garnishee, a writ of scire facias issued, commanding the sheriff of Cook county to summon the appellant to the "next term of said court, to be held on the first Monday of March," to show cause why said conditional judgment should not be made final. This writ was served on appellant February 15, 1895, and on March 27, 1895, an order was entered making the conditional judgment against appellant final, and entering judgment for \$691.46. To reverse the judgment of the superior court the appellant, F. J. Schmitt, sued out a writ of error in the appellate court of the First district, where, upon a hearing, the judgment of the superior court was affirmed. To reverse the latter judgment Schmitt appealed, the appellate court having issued a certificate of importance under the statute.

Loeb & Adler, for appellant. Allen & Blake, for appellees.

CRAIG, J. (after stating the facts). In the argument submitted by appellant it is claimed that the judgment should be reversed because the attachment bond was insufficient, and the interrogatories to be answered by appellant as garnishee were insufficient. It is also claimed that the superior court had no jurisdiction to render final judgment against appellant because the scire facias to show cause was insufficient. It is also insisted, as Meyers, one of the defendants in the original action, was never served, the court could enter no judgment in favor of Meyers and others, for the use of the plaintiff, the heater company, against the garnishee.

The objection made to the bond is that it is conditioned for the payment of damages arising out of the issuance of a writ returnable on the first Monday of January, 1894, while the writ issued in the cause was returnable on the first Monday of January, 1895. In all other respects the bond complied with the requirements of the statute, and it was filed and approved by the clerk of the court who issued the writ. The bond was defective, but it was amendable in the superior court; and, being amendable, it was not void; and, although defective, the defect did not deprive the court of jurisdiction to render the judgment. Had the defendants in the attachment or the garnishee appeared in the

superior court and objected to the bond, the court would have required a new bond, or dismissed the suit; but the objection to the bond, when made for the first time on appeal, comes too late. *Dennison v. Taylor*, 142 Ill. 45, 31 N. E. 148.

As respects the interrogatories: It is not denied that interrogatories to be answered were filed, but the objection is they were not properly entitled,—that they were entitled "Interrogatories to be Answered by W. S. Schmitt, Joseph Aarons, W. S. Jones, William Fisher, and Thomas O'Connell, Respectively," while appellant's name was F. J. Schmitt. We do not regard this defect as of any consequence. He was notified by his proper name that interrogatories had been filed, and, while the caption of the paper at the head of the interrogatories did not describe his initials correctly, he was in no manner deceived or misled by it.

We now come to the question raised in regard to the scire facias served on the garnishee. On the 23d day of January, 1895, a conditional judgment was entered in the case as follows: "United States Heater Co. vs. J. M. Devine, Charles P. Meyers, and M. P. Keenan, as Western Steam and Hot-Water Heating Company. 162,733. Assumpsit and Attachment in Aid. It appearing to the court that due personal service of process of garnishee summons issued in said cause has been had on F. J. Schmitt, W. S. Jones, Thomas O'Connell, and Joseph Aarons, garnishees herein, and they, being now called in open court, come not, nor does any person for them, but herein they make default, which is, on motion of plaintiff's attorney, ordered to be taken, and the same is hereby entered of record, wherefore a conditional judgment ought to be entered against said garnishees, therefore it is considered by the court that the defendants J. M. Devine, Charles P. Meyers, and M. P. Keenan, as Western Steam and Hot-Water Heating Company, for the use of the plaintiff, United States Heater Company, do have and recover of and from the said garnishees the sum of \$691.46, and interest thereon from date, being the amount of the original judgment rendered at the date aforesaid, together with all plaintiff's costs and charges in this behalf expended, unless the said garnishees, after being duly served with a scire facias to be issued, shall show cause, if any they have, why the above conditional judgment should not be made final, and execution issued accordingly." On the 30th day of January, 1895, a scire facias was issued, commanding the sheriff to summon F. J. Schmitt, W. S. Jones, Thomas O'Connell, and Joseph Aarons, garnishees, "personally to be and appear before the said superior court of Cook county on the first day of the next term thereof, to be holden at the courthouse, in Chicago, in said county, on the first Monday of March next, then and there to show cause why final judgment should not be entered against them." This

writ was served on appellant on February 15, 1895, and at the March term a default was taken, and final judgment entered against him on March 27th. It will be observed that five days of the January term, 1895, and the February term, intervened between the teste and the return day of the scire facias; and the question presented is whether the court was authorized to render a judgment against a garnishee on a scire facias thus issued and served, when the garnishee failed to appear.

The act of January 29, 1827 (Gale's St. 1839, p. 529), and the act of 1845 (Rev. St. 1845, p. 413, c. 83), both provided that the first process (summons) "shall be made returnable on the first day of the next circuit court in which the action may be commenced." In case the summons could not be served 10 days before the return day, the sheriff was at liberty to serve it at any time before the return day; but in such a case the defendant was entitled to a continuance until the next term of the court. Under the foregoing statutes it was uniformly held that, if more than a term was allowed to intervene between the teste and return day of the summons, it was void. *Hildreth v. Hough*, 20 Ill. 331; *Elee v. Wait*, 28 Ill. 70; *Miller v. Handy*, 40 Ill. 448; *Hochlander v. Hochlander*, 73 Ill. 618; *Culver v. Phelps*, 130 Ill. 224, 22 N. E. 809. But by the practice act of 1872 (Hurd's St. p. 1154, c. 110) the act of 1845 was changed. It provides that a summons shall be made returnable on the first day of the next term of court in which the action may be commenced. If, however, 10 days shall not intervene between the time of suing out the summons and the next term of court, it shall be made returnable to the succeeding term. If this statute controlled a scire facias like the one in question, then it is plain the summons was properly issued; but we are satisfied this statute does not govern or control a scire facias issued against a garnishee. The legislature, at the same session at which the practice act in relation to the return of a summons was changed, in express terms provided that a scire facias against a garnishee should be made returnable to the next term of court, as will be found upon an examination of section 8, c. 62, Hurd's St., entitled "Garnishment." That section declares: "When any person shall have been summoned as a garnishee upon any attachment or other writ issued out of any court of record, * * * and shall fail to appear or make discovery as by this act required, the court may enter a conditional judgment against such garnishee for the amount of plaintiff's demand, * * * and thereupon a scire facias shall issue against such garnishee returnable * * * at the next term of court." This statute is so plain and clear on the question in regard to the return of a scire facias that there can be no doubt to what was intended. If the garnishee act was silent in regard to the return

day of the writ, resort might then be had to the practice act; but such is not the case. Here is a positive provision of the statute directing that the writ shall be returnable at the next term. If it had been intended that a scire facias should be made returnable to the second succeeding term, the legislature would, no doubt, have made the same provision in regard to writs of that character that was made in case of a summons. As the statute required the writ to be made returnable at the next succeeding term, the clerk of the court had no authority to make the writ returnable at another or a different term. The writ must, therefore, be regarded as a nullity, and the service of such a writ conferred no authority on the court to render judgment against appellant.

One other question remains to be considered. As has been seen, one of the defendants in the action brought by the United States Heater Company—Meyers—was not served with process; and it is contended that the court erred in entering judgment against appellant as garnishee before Meyers was served with process. The original action was brought against Keenan, Devine, and Meyers. No service being had on Meyers, judgment was rendered against the other two defendants. This record contains no bill of exceptions, and, in the absence of a bill of exceptions showing the evidence before the court when the judgment was rendered, it will be presumed that the evidence fully sustained the judgment as it was rendered by the court. The fact that the judgment entered against the garnishee in form includes Meyers with Keenan and Devine is a mere formal defect, and injures no one. For the error indicated, the judgment of the appellate and supreme courts will be reversed, and the cause will be remanded. Reversed and remanded.

(164 Ill. 611)

MANSFIELD v. PEOPLE ex rel. WELLS,
County Treasurer.

(Supreme Court of Illinois. Jan. 19, 1897.)

MUNICIPAL IMPROVEMENTS — ORDINANCE — NECESSARY SPECIFICATIONS.

Under 1 Starr & C. Ann. St. (2d Ed.) c. 24, par. 430, providing that an ordinance authorizing the construction of a sidewalk shall "prescribe" its width and the material of which it shall be constructed, an ordinance which provides that a walk shall be "not less than" a specified width, and shall be built of brick of given dimensions, "or" of paving tile, etc., is fatally defective.

Appeal from Cook county court; Charles A. Bishop, Judge.

Application by A. L. Wells, treasurer and ex officio collector of DeKalb county, for judgment against the land of B. Mansfield for a delinquent special tax. From a judgment pursuant to said application, defendant appeals. Reversed.

Alschuler & Murphy, for appellant. Carnes & Dunton and C. G. Faxon, for appellee.

WILKIN, J. This is an appeal from a judgment rendered in the court below against lands of appellant for a delinquent special tax levied by the city of Sandwich for the construction of a sidewalk. The ordinance providing for the construction of the walk was passed by the city council under paragraphs 429 and 430 of chapter 24, 1 Starr & C. Ann. St. (2d Ed.); 1 Starr & C. Ann. St. (1st Ed.) c. 24, pars. 305, 306. Upon the hearing, among other things, it was contended that the ordinance failed to state the width of the sidewalk, and to prescribe the material of which it should be constructed, or the manner of its construction, as required by the statute. Paragraph 430 provides that the ordinance authorizing the sidewalk shall define its location with reasonable certainty, "shall prescribe its width, the material of which it shall be constructed, and the manner of its construction." The only attempt to comply with this requirement by the ordinance in question is found in the second section, as follows: "Sec. 2. All of said sidewalks mentioned and described in section 1 of this ordinance shall be not less than four feet six inches in width, and shall be constructed of brick of ordinary size, eight inches long, four inches wide and two inches in thickness, or paving tile of at least two inches in thickness and eight inches square, and the necessary triangular half brick, laid flat upon a bed of sand prepared for the same, except at points used for drive ways, where hard burnt brick, eight inches long, four inches wide, and two inches thick shall be used, and the same set edgewise upon such prepared bed." First, does it prescribe the width of the walk? The language is, "not less than four feet six inches in width," which simply means, in common acceptation, that it shall be at least that wide, but in no proper sense prescribes its width. To give it any other meaning would be to do violence to the express words used. Counsel for the people treat it as expressing the intention that the width shall be four feet six inches, and have cited in support of their contention cases in which the sufficiency of ordinances authorizing special assessments was the subject of discussion before the court, and the question was whether they sufficiently specified the nature, character, locality, and description of the work. All that is held in those cases is that no more than a substantial compliance with the statute is necessary. We are unable to see how it can be seriously contended that to describe a walk as "not less" or "not more than" so many feet wide is a substantial compliance with the statute which requires the ordinance to prescribe the width of a sidewalk. Any words or language from which a description of an improvement can be definitely gathered is a sufficient specification of the nature, character, locality, and description of the work. But this statute, in express terms, requires the ordinance to "prescribe"

the width; that is to say, under Webster's definition of the word "prescribe," "to lay down authoritatively as a guide, direction, or rule; to impose as a peremptory order; to dictate; to point; to direct" the width,—whereas the language of this ordinance does no more than to say it shall be not less than a certain width, leaving the city, in making its contract for the construction of the work, or the contractor, to make it any greater width, if they choose to do so. We regard the ordinance as fatally defective, in failing to prescribe the width of the sidewalk as required by the statute. It is subject to the further objection that it does not sufficiently describe the material of which the work should be constructed. It was to be built of brick, of given dimensions, or of paving tile, etc. The intention of the statute, manifestly, is that the city council shall definitely determine the width of, and material to be used in constructing, such an improvement, and so prescribe in the ordinance that no uncertainty as to these matters shall remain when the work is performed; and these provisions may be readily complied with, and are but reasonable protections to property holders who may be assessed to pay for the improvement. We think the court below erred in its judgment confirming the assessment, and it will accordingly be reversed.

(164 Ill. 473)

SCOTT et al. v. MANTONYA.

(Supreme Court of Illinois. Jan. 19, 1897.)

JUDGMENT BY CONFESSION—POWER OF ATTORNEY
—RENT DUE UNDER LEASE.

A warrant of attorney contained in a lease, authorizing any attorney on the lessee's default to enter his appearance in court, waive service of process, and confess judgment for any rent due under the lease, with costs and a stated amount as attorney's fees is valid and sufficient to authorize such confession for the amount of monthly rental accrued under the lease. 60 Ill. App. 481, affirmed.

Error to appellate court, First district.

Action by L. B. Mantonya against Frank E. Scott and Ward Stockton to recover rent under a lease. Judgment was entered for plaintiff by confession under a power of attorney contained in the lease. From the overruling of a motion to set aside such judgment, defendant Scott appealed to the appellate court, where the decision of the circuit court was affirmed. 60 Ill. App. 481. Defendant brings error. Affirmed.

Bulkley, Gray & More, for plaintiff in error.

CARTWRIGHT, J. A judgment by confession against Frank E. Scott, plaintiff in error, and Ward Stockton, was entered in the circuit court of Cook county in favor of defendant in error in pursuance of a warrant of attorney contained in a lease authorizing such confession for rent due by the terms of the lease. The judgment was for

\$210 for rent due and payable in cash by the terms of the lease, together with costs. Plaintiff in error entered a special appearance, and moved the court to set aside the judgment on the ground that the court had no jurisdiction over him. His motion was overruled, and the action of the circuit court has been sustained by the appellate court. The record is brought here under a certificate of importance. The only question in the case is whether the warrant of attorney was sufficient to give the circuit court jurisdiction to enter the judgment. This question was considered in the case of *Fortune v. Bartolomei*, 164 Ill. 51, 45 N. E. 274, where there was a lease with similar stipulations, and a like power of attorney. It was there held that authority to confess judgment was lawfully conferred by such a warrant, and the decision in that case disposes of the question raised in this. The judgment will be affirmed. Affirmed.

(164 Ill. 622)

WEDGBURY, Township Collector, et al. v. CASSELL.

(Supreme Court of Illinois. Jan. 19, 1897.)

TAXATION — CERTIFICATE OF PURCHASE AT MASTER'S SALE.

A certificate of purchase, given by a master on a sale under a decree, entitling the holder to the amount of his bid and interest, if the premises shall be redeemed within a specified time, or, if not so redeemed, to a deed, is taxable.

Appeal from circuit court, Iroquois county; Thomas F. Tipton, Judge.

Bill by Abraham Cassell against William Wedgbury, township collector, and others, to enjoin the collection of a tax. From a decree in favor of complainant, defendants appeal. Reversed.

W. F. Pierson, for appellants. Kay & Kay, for appellee.

CARTWRIGHT, J. On May 1, 1895, appellee was the owner of a certificate of purchase of premises bought by him at a master's sale, made under a decree of foreclosure, subject to the usual right of redemption. The assessor listed the certificate for taxation, and a tax was extended against appellee, which he filed his bill in this case to enjoin, on the ground that, under the laws of this state, that species of property is not subject to assessment and taxation. The bill was answered, and, on the admitted facts, the circuit court entered a decree perpetually enjoining the collection of the tax.

The only question in the case is whether a certificate of purchase, entitling the holder to the amount of his bid and interest, if the premises shall be redeemed within a specified time, or, if not so redeemed, to a deed of such premises, is subject to taxation. The constitution provides (article 9, § 1): "The general assembly shall provide such revenue as may be needful by levying

a tax, by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her or its property." And the revenue act provides for the assessment of all real and personal property. That the certificate was property cannot be denied. Complainant received it at a public sale, where he was the highest bidder, and he paid \$14,975 in cash for it. Its value was shown at the public sale held by a judicial officer, and it would be presumed to be worth the amount bid. And it was worth what it cost, for complainant in his bill alleged that redemption was made May 13, 1895, and he received, by virtue of the certificate, \$16,292.59.

It is argued that the certificate was not assessable, because of the uncertainty whether complainant would receive the redemption money called for, or would take a deed of the land. It is conceded that, if a purchaser were absolutely entitled to the redemption money at the end of 15 months, the certificate would be assessable; but it is insisted that, on account of the uncertainty whether the holder will receive money or land, the certificate is rendered intangible, and of uncertain value. The relation of complainant to the title as purchaser at the sale was of statutory creation. The legal title to the land did not pass to him at the sale (*Myers v. Manny*, 63 Ill. 211), and the payment of taxes upon the land did not cover his property interest. He acquired a right to a conveyance of the title if the premises should not be redeemed. There is no more uncertainty in such a case than in any instance of a pledge, where it is uncertain whether the property will be redeemed. Any loan upon a pledge or security may be without an absolute promise to pay the debt. By the revenue act (section 21) it is provided: "Where a deed for real estate is held for the payment of a sum of money, such sum so secured, shall be held to be personal property, and shall be listed and assessed as credits." In such a case there is equal uncertainty whether the investor will receive the sum of money or hold the land. The certificate was evidence of complainant's right to money or a deed, and he would either get his money, with interest, or the land. The mortgages foreclosed by the decree under which complainant purchased were subject to taxation. By that decree the original liens were changed in form, and the mortgages extinguished, but their essential nature was not destroyed. A new relation and new property were created, but there was a continuation of the same debt, with a new creditor, and in the form of a new lien, of a higher degree and more valuable than the mortgages. In the case of a mortgage, it is necessary to go into court and obtain a decree of foreclosure, while in case of a certificate there is no such requirement, and it is not subject to delay or contest. The estates in the land

remain the same in such a case, with the qualification that the amount and time of redemption are absolutely fixed by the decree and sale. *Stephens v. Insurance Co.*, 43 Ill. 327. There is nothing intangible about that sort of property.

It is also urged, as an objection to assessing such property, that, if the land is situated in some other county, the assessor would have no means of ascertaining the value of the certificate. As already said, such a certificate is presumably worth the amount bid; but, if that were not so, the argument would be of no avail. It could be as well applied to mortgages, or any other sort of security; and it will scarcely be contended that mortgages cannot be assessed because such securities may be upon land situated in some other county. We see no reason why complainant should not bear his just proportion of the burden of taxation according to the value of his property. The decree will be reversed, and the cause remanded, with directions to dismiss the bill. Reversed and remanded.

(165 Ill. 31)

RIMMER v. O'BRIEN-GREEN CO.

(Supreme Court of Illinois. Jan. 19, 1897.)

APPELLATE COURT—JURISDICTIONAL AMOUNT—APPEALABLE JUDGMENT.

Where the amount involved in a suit to enforce a mechanic's lien is less than \$1,000, the judgment of the appellate court is final, and not appealable.

Appeal from appellate court, First district.

Action by the O'Brien-Green Company against Emma Rimmer. From a judgment of the appellate court (64 Ill. App. 104) modifying a judgment of the superior court, defendant appeals. Dismissed.

Farson & Greenfield, for appellant. Levi Sprague, for appellee.

CRAIG, J. This was a proceeding, commenced in the superior court of Cook county, to enforce a mechanic's lien. Upon a hearing in the superior court the petitioner obtained a decree for \$417.90 and interest from January 1, 1893. To reverse the decree Emma Rimmer appealed to the appellate court, where the judgment of the superior court was affirmed as to the \$417.90, but reversed as to the allowance of interest, and Emma Rimmer has appealed to this court. This being a proceeding to collect a debt, and the amount involved being less than \$1,000, the judgment of the appellate court was final, and no appeal will lie from that judgment to this court unless the appellate court has granted a certificate of importance, as provided for in the statute, which was not done. We have held, in a number of cases, in a bill to foreclose mortgage, where the amount involved was less than \$1,000, the judgment of the appellate court was final. *Akin v. Cassiday*, 105 Ill. 23; *Segwick v. Johnson*, 107 Ill. 386. The same principle

which governs those cases in regard to an appeal must apply to a proceeding to enforce a mechanic's lien. The appeal will be dismissed. Appeal dismissed.

(165 Ill. 41)

SWIFT & CO. v. MADDEN.

(Supreme Court of Illinois. Jan. 19, 1897.)

PLEADING—AMENDMENT—NEW CAUSE OF ACTION—MASTER AND SERVANT—APPEAL—EVIDENCE.

1. Where a declaration grounded plaintiff's right of recovery on the allegation that defendant, in whose employ plaintiff was, negligently permitted certain machinery which plaintiff was required to use to become and remain out of repair, by reason of which plaintiff was injured, an additional count, containing a further allegation that defendant had notice of the defect, and induced plaintiff to remain in the service, by promising to remedy it, does not state a new cause of action. 63 Ill. App. 341, affirmed.

2. A servant who notifies the master of dangerous defects in machinery, which the master promises to remedy, is not negligent because he remains in the service for a reasonable time thereafter to permit the promise to be fulfilled, though the master fixed no definite time within which the repairs should be made.

3. An objection that there is a variance between an allegation and the proof cannot be raised on appeal when no objection was made to the introduction of the evidence on the ground of variance. 63 Ill. App. 341, affirmed.

4. Where previous written statements subscribed by a witness are read to him while on the stand for the purpose of impeachment, and he is examined with reference to them, and admits having signed them, it is not error to refuse to admit them in evidence.

Appeal from appellate court, First district.

Action by Peter Madden against Swift & Co. for personal injuries. A judgment for plaintiff was affirmed by the appellate court (63 Ill. App. 341), and defendant appeals. Affirmed.

This was an action brought by Peter Madden against Swift & Co., a corporation in Chicago, engaged in a slaughtering and packing business, to recover damages resulting from a personal injury received while in the service of the company. The first declaration filed by the plaintiff consisted of one count, to which the defendant filed a general demurrer. The demurrer was confessed, and on November 28, 1892, plaintiff filed an amended declaration, which contained, in substance, the following allegations: That the defendant, on, to wit, the 7th of June, 1892, etc., engaged in the manufacture of a substance called "glue," and, while so engaged, "employed the plaintiff to shove or move certain buckets from one part of said factory or shop to other parts thereof, for the purpose of carrying articles used in the manufacture of said substance. The plaintiff avers that each of said buckets was hung on a hook attached to a pulley or bolt of iron, which pulley or bolt of iron was attached, at the other and upper end, to two wheels, which ran upon certain rails or lines of railway," etc.; "that he was employed by defendant to move said buckets from one

part of said factory to another, and thereby it then and there became the duty of defendant to have kept the said line or lines of railway and switches in a good and safe condition of repair, that the plaintiff might safely work at his said employment of moving the said buckets." "The defendant did not regard its duty in that behalf, nor used due care or diligence in that behalf, but, on the contrary thereof, negligently and wrongfully permitted and allowed said switches in said factory, etc., to be and remain in an unsafe and dangerous condition; so that the plaintiff, while so employed by defendant, in shoving and moving said buckets from one part of said factory or building to another part thereof, with all due care and diligence on his part, turned a certain switch to move said bucket in the direction in which he was ordered to go with said bucket, on the day aforesaid, in said factory or building, etc. Said switch being in an unsafe and dangerous condition for want of repair, which fact was not known to the plaintiff, did not remain in the position in which plaintiff had properly placed it, so as to allow said bucket on said rail or line of railway to move in the direction intended, but said switch closed and sprung back as plaintiff moved the bucket to turn the same upon said switch." To the declaration, the defendant filed a plea of not guilty, upon which issue was taken on December 24, 1892. After the cause was thus at issue, no further steps were taken until the 23d day of June, 1894, when the plaintiff asked and obtained leave of court to file two additional counts. The first additional count contained, in substance, the following allegations: "It then and there became the duty of the defendant whenever the lines of railway so became broken or out of repair, and dangerous and unsafe, to repair the same, that plaintiff might safely work at his said employment; yet the defendant, although notified that the lines of railway and switches were out of repair and unsafe, and although it promised that the lines of railway and switches should be at once repaired, and thereby caused the plaintiff to continue in his said employment, did not regard its duty in that, and carelessly and negligently permitted said lines of railway and switches to be and remain out of repair, and in an unsafe and dangerous condition," etc. The second additional count alleges substantially as follows: "The defendant, well knowing that a certain switch was out of repair, and unsafe and dangerous, on, to wit, said date, June 7, 1892, carelessly and negligently ordered the plaintiff to move a certain bucket from one part of the factory to another, and over and across said switch, which was then and there out of repair and unsafe and dangerous, by means whereof the plaintiff, while so employed by defendant in moving and shoving said buckets from one part of the factory to another part thereof, over and across said switch, with all due care and diligence on

his part, to wit, on the day aforesaid, moved said bucket in the direction he was ordered to go with it, which said switch did not remain in the position in which plaintiff had properly placed it, so as to allow said bucket to move in the direction intended, but said switch closed and sprung back as the plaintiff moved the bucket upon the switch." To the first additional count of plaintiff's declaration, defendant pleaded the statute of limitations. The plaintiff demurred to the plea, and the court sustained the demurrer. Defendant excepted to the decision of the court, and elected to stand by the plea. Issue was taken on other pleas, and a trial was had before a jury, which resulted in a judgment for the plaintiff for \$—, which on appeal was affirmed in the appellate court.

J. B. Brady and J. A. Post, for appellant.
F. S. Murphy, for appellee.

CRAIG, J. (after stating the facts). The plaintiff received the injury complained of on June 6, 1892, and the additional count to which the statute of limitations was pleaded was not filed until June 23, 1894, more than two years after the injury was received, and more than two years after plaintiff's cause of action accrued. If plaintiff had brought no action until June 23, 1894, when he filed his additional counts, his action would have been barred by the statute of limitations; and it is also true that a new cause of action, distinct from that set out in the declaration, cannot be brought into the case by an additional count after the time for suing upon it has expired. The statute of limitations cannot be avoided in that way. In *Phelps v. Railroad Co.*, 94 Ill. 557, where additional counts to the declaration were filed after the statute of limitations had run, and the statute was pleaded as a bar to the case made by the additional counts, it was expressly held that the solution of the question depended upon whether the additional counts set up entirely new causes of action. The question then to be determined is whether the additional counts set up a new cause of action, or whether they contain a mere restatement of the cause of action set up in the original declaration. In a case like the one under consideration, the cause of action may be regarded as the act or thing done or admitted to be done by one which confers the right upon another to sue; in other words, the act or wrong of the defendant towards the plaintiff which causes a grievance for which the law gives a remedy. *Buntin v. Railway Co.*, 41 Fed. 741. Was the act or wrong of the defendant towards the plaintiff, as set out in the additional counts, entirely new, or was it a mere restatement of the act or wrong in a different form? Upon an examination of the declaration as originally filed, it will be found that the allegation upon which a right of recovery is predicated, in substance, was

that it was the duty of the defendant to keep in good and safe repair certain machinery which the plaintiff was required to use while in the service of the defendant as a laborer; but the defendant failed to observe its duty in that regard, but, on the contrary, negligently and wrongfully permitted the machinery to be and remain in an unsafe and dangerous condition, so that the plaintiff, while employed by the defendant in working with the machinery with due care on his part, was injured. In the additional count to which the statute of limitations was pleaded, as we understand the count, the same cause of action is set up, but in a different form. It is there, in substance, set out that it was the duty of the defendant, when the machinery was out of repair, unsafe, and dangerous, to repair the same; yet the defendant, although notified that the machinery was out of repair and unsafe, while it promised that the machinery should at once be repaired, and thereby caused plaintiff to continue in its service, did not regard its duty, but carelessly and negligently permitted the machinery to be and remain out of repair, and in an unsafe and dangerous condition. From the reading of the first count of the declaration, in connection with the first additional count, it is apparent that both state and rely upon the same wrongful act of the defendants,—its negligence in failing to keep in repair machinery in its factory, where the plaintiff was required by his employment with the defendant to labor. We think it plain that the cause of action set out in the additional count was the same as set up in the original declaration. If we are correct in this, the court did not err in sustaining a demurrer to the plea of the statute of limitations.

It is next claimed that the court erred in refusing the following instruction: "The court further instructs the jury, as a matter of law, that if they believe from the evidence that the machinery in question was out of order, and that such fact was known to the plaintiff, and that the plaintiff called the attention of the defendant to such fact, and if the jury further believe from the evidence that the foreman in charge of the plaintiff promised to have said machinery repaired, without fixing a time when the same should be repaired, and that said promise was indefinite as to when the same should be repaired, and that the plaintiff continued to work upon said machinery from day to day with the knowledge that the repairs were not made, then the court instructs the jury, as a matter of law, that the plaintiff assumed the risk of working thereon, and that he cannot recover in this case, and that the jury should find the defendant not guilty." It was not necessary that the foreman should fix a definite time when the repairs should be made to enable plaintiff to recover for an injury received while engaged in the service of the defendant after the notice was given. When the notice was given, the fore-

man promised to see that the repairs should be made. This was, in effect, a promise to repair in a reasonable time; and the plaintiff could remain in the service of the defendant a reasonable time to prevent the fulfillment of the promise without being guilty of negligence. The rule on this question is well stated by *Furnace Co. v. Abend*, 107 Ill. 51. It is there said: "It is now uniformly stated by text writers that where the master, on being notified by the servant of defects that render the service he is engaged to perform more hazardous, expressly promises to make the needed repairs, the servant may continue in the employment a reasonable time to permit the performance of a promise in that regard, without being guilty of negligence; and, if any injury results therefrom, he may recover, unless when the danger is so imminent that no prudent person would undertake to perform the service." We do not think the instruction contained a correct statement of law, and it was therefore properly refused.

It is also claimed that there was a variance between the pleadings and evidence; that it was alleged in the declaration that defendant promised that the switches and appliances should be at once repaired, while the evidence was that the appliances would be fixed without specifying the time. If the defendant desired to take advantage of the variance between the declaration and the evidence, it was his duty to object to the evidence when offered, and state the nature and character of his objection, so that plaintiff might, if he desired, ask leave to amend the declaration. But this course was not pursued. No objection on the ground of variance was made when the evidence was offered. The objection not having been made at the time the evidence was offered, it must be regarded as waived, and the question of variance cannot be raised on appeal.

It is also insisted that the court erred in refusing to admit in evidence the two statements subscribed by the witness Manning, at the request of appellant or its attorneys, in November, 1892, and November, 1894, respectively, and which conflicted with his statements made on the witness stand. Manning was asked as to the contents of these statements, and the contents were in detail read to him, and he answered that he made the statements read to him on the dates mentioned, and explained his reasons for making the statements as he did, differing from those he testified to on the stand. As the witness admitted making the previous contradictory statements, no further proof of that fact was required, and the defendant was in no manner injured by the exclusion of the offered evidence. A similar question was raised in *Railroad Co. v. Feehan*, 140 Ill. 202, 36 N. E. 1036, and the offered evidence was held to be incompetent. The judgment of the appellate court will be affirmed.

(164 Ill. 602)

VAN SCHAAACK v. LEONARD et al.

(Supreme Court of Illinois. Jan. 19, 1897.)

WILLS—RIGHTS OF LEGATEES—ELECTION—INTENTION OF TESTATOR—JUDGMENT—ESTOPPEL.

1. Where testator, either with or without knowledge of his want of title, bequeaths property owned by a legatee, the latter must either acquiesce in such bequest or relinquish any claim under the will. 63 Ill. App. 389, affirmed.

2. A bequest of the proceeds of "all insurance policies on my life," except those "wherein my daughter M. is beneficiary," includes every policy on testator's life, with the specified exceptions, though he had a right to bequeath the proceeds of but one of them.

3. Where testator bequeathed to three of his children the proceeds of all policies on his life except those wherein his fourth child was beneficiary, the latter, by accepting another provision for her benefit, relinquished her interest in policies payable to his children generally.

4. Where chancery has acquired jurisdiction of a bill by one of testator's children against the others for an accounting of the proceeds of policies on testator's life, paid to defendants, who claim said proceeds under the will, and by cross bill ask for a construction of that instrument, neither party is concluded by a subsequent judgment of the probate court declaring the estate settled, and discharging the executors.

Appeal from appellate court, First district.

Bill by Maud H. Van Schaack against Anna E. Leonard and others for an accounting of the proceeds of certain insurance policies. From a judgment dismissing the bill, which was affirmed by the appellate court (63 Ill. App. 389), plaintiff appeals. Affirmed.

Bulkley, Gray & More, for appellant. D. J. Schuyler and W. H. Barnum, for appellees.

CARTWRIGHT, J. William H. Byford, of Chicago, died May 21, 1890, leaving Lina W. Byford, his widow, and the parties to this suit, Maud H. Van Schaack, then Maud H. Byford, Anna E. Leonard, Mary J. Schuyler, and Henry T. Byford, his children and heirs at law. By his will he made certain devises and bequests to his widow, his son, Henry T. Byford, and a granddaughter, after which he provided, by the fifth clause of the will, as follows: "I give and bequeath to my children Dr. Henry T. Byford, Mary Jane Schuyler, and Anna Byford Leonard, in equal shares, the proceeds derived from all insurance policies upon my life, except from the policies wherein my daughter Maud H. Byford is the beneficiary." By the sixth clause all the residue of his estate was given to his children Henry T. Byford, Mary Jane Schuyler, Anna Leonard, and Maud H. Byford, to be divided equally between them. This will was made December 20, 1886. Afterwards, on December 31, 1888, a codicil was added, reaffirming the provisions of the will, but devising to his wife, Lina W. Byford, a house and lot in Chicago, and to his daughter Maud H. Byford another house and lot in said city. The will, with the codicil, was admitted to probate, and Henry T. Byford and the widow, Lina W.

Byford, named therein as executor and executrix, qualified as such. William H. Byford had procured six policies of insurance. Two of these policies, for \$5,000 and \$10,000, respectively, were payable upon his death to his first wife, Mary Ann Byford, if living, and, if not living, then to their children. Two other policies—one for \$10,000, and the other for \$4,000—were payable at his death to his daughter Maud H. Byford. His first wife died, and after his remarriage the two remaining policies were taken out,—one for \$5,000, payable to Lina W. Byford, the second wife, and the other for \$1,500, payable to his executors. None of these policies were inventoried by the executors except the last one, which was payable to them. Appellant and appellees joined in making proofs of death under the first two policies, which, by their terms, were payable to them as children of William H. Byford and his first wife, Mary Ann Byford. The money was collected and distributed among the appellees, who claimed it under the fifth clause of the will above quoted. Appellant, who was left out of the distribution, began this suit by filing her bill setting out the will, and the claim of appellees that they were entitled to the insurance money on said policies by virtue of it; and praying for an accounting of the money so received, and for a decree compelling appellees to pay over one-fourth thereof to her. Appellees answered, claiming the money, and filed a cross bill praying for a construction of the fifth clause in accordance with their claim, and for a decree accordingly. The cross bill was answered, and replications having been filed, there was a hearing. The court found in favor of appellees; but, finding that they could have the same relief under their answer as by the cross bill, and that a decree upon the cross bill was needless, dismissed it; and dismissed the original bill for want of equity. The appellate court affirmed the decree. 63 Ill. App. 389.

It is agreed by counsel that William H. Byford had no interest in the two policies in question in this suit, or the proceeds thereof, and that he had no power to dispose of the same by his will. The proceeds belonged to the children named in the policies. Appellant, however, took a substantial beneficial interest under the will and codicil; and her right depends upon the question whether she has thereby confirmed and ratified the provisions of the fifth clause, by which her interests in the policies were disposed of by giving the same to appellees. It is a well-settled rule of equity that a person cannot take under a will, and at the same time set up any right which shall defeat any part of it. If a testator has disposed of property owned by a beneficiary under the will, such beneficiary must either relinquish his right to such property, or to that which is given him by the will, and must accept the will as a whole, or not at all. *Wilbanks v. Wilbanks*, 18 Ill. 17; *Brown v. Pitney*, 39 Ill. 468; *Woolley v. Schrader*, 116 Ill.

29, 4 N. E. 658; *Ditch v. Sennott*, 117 Ill. 362, 7 N. E. 636; *Gorham v. Dodge*, 122 Ill. 528, 14 N. E. 44. William H. Byford had a right to dispose of the proceeds of one policy for \$1,500, payable to his executors; and under the rule that where a testator has a partial interest in property it will be understood that he intended to dispose of that interest only, unless an intention to dispose of property not his own clearly appears, it is argued that the court ought to find an intention to only dispose of the proceeds of that policy by the fifth clause of the will. In such a case the intention to devise the entire property must be clear, in order to raise a question of election; but we do not think that the clause under consideration will bear the construction contended for. The expression used was: "The proceeds derived from all insurance policies upon my life, except from the policies wherein my daughter, Maud H. Byford, is the beneficiary." This language properly designated all the policies. If the testator had used any term implying title or right to the proceeds, there might be some ground for limiting the bequest to the one which he had a right to dispose of, and excluding those in which he had no interest; but he did not use such a term. He had a right to dispose of the proceeds of but one of the six policies, and, if he had intended that one only, he would certainly have used a different designation. The exception of the two policies in which appellant was beneficiary could only apply as being a separation out of all the policies. We see no possible ground for saying that the testator did not intend to dispose of the proceeds of all the policies upon his life except the two payable to appellant.

Another contention is that appellant had not lost her right to the proceeds of the policies by taking what was given her by the will, because it was not proved that her father had these policies in mind when he made the will, and intentionally assumed to dispose of the proceeds knowing that he had no right to do so. But that is not the law; and it was not necessary, in order to raise an election, that the testator knew his daughter's rights, and intended to deprive her of them. The doctrine of election rests upon the ground that one who asserts a claim to property under a will must acknowledge the equitable rights of all other parties under the same will. It is immaterial, in the application of the doctrine, whether the testator is aware of his want of power, or supposes that the property which he undertakes to give away is his own. 1 Jarm. Wills, 445; *Whistler v. Webster*, 2 Ves. Jr. 367; *Thelluson v. Woodford*, 13 Ves. 209; *Cooper v. Cooper*, 6 Ch. App. 15; 1 Pom. Eq. Jur. § 464.

Finally, it is contended that appellees were estopped by the judgment of the probate court approving the account of the executors, declaring the estate settled, and discharging the executors, from claiming that the proceeds of these policies passed under the will. This contention cannot prevail for two reasons. In the first place, the supposed estoppel was nowhere

set up in the pleadings. The bill was filed August 25, 1892, before the settlement and judgment in the probate court, which was on February 13, 1893. The bill alleged that the policies had not then been inventoried, but, of course, that could work no estoppel. In the second place, the court of chancery had acquired jurisdiction of the subject-matter and the parties prior to the judgment of the probate court. The bill and cross bill brought the rights of the parties under the will and the policies into a court which had concurrent jurisdiction with the probate court on that subject. The parties submitted to the jurisdiction in equity, and no judgment of the probate court, after such jurisdiction was acquired, could estop either party in this suit. The judgment of the appellate court is affirmed. Affirmed.

(164 Ill. 574)

**BOARD OF SUP'RS OF LEE COUNTY v.
COMMISSIONERS OF HIGHWAYS
OF TOWN OF REYNOLDS.**

(Supreme Court of Illinois. Jan. 19, 1897.)

SUPREME COURT—REVIEW OF FACTS.

An appeal from the appellate court which presents questions of fact only will not be considered.

Appeal from appellate court, Second district.

Bill by the board of supervisors of Lee county against the commissioners of highways of the township of Reynolds for a writ of mandamus to compel an appropriation for bridge building. From an affirmance of a decree in favor of defendants, complainants appeal. Affirmed.

C. B. Morrison and Wm. Barge, for appellants. J. F. Sanford, for appellees.

CARTWRIGHT, J. Appellees filed their petition for a writ of mandamus to compel appellants to appropriate a sum sufficient to meet one-half the expense of building five bridges across streams on public highways in the town of Reynolds, in Lee county. The petition set out the conditions requisite, under the statute, to call for the appropriation asked for. Issues of fact as to the existence of the alleged conditions were made by the pleadings, and, a jury being waived, were submitted to the court for trial. The issues so joined were found for the petitioners, and a peremptory writ of mandamus was awarded, as prayed for in the petition. The judgment of the circuit court was affirmed by the appellate court. The parties have presented here the same briefs that were filed in the appellate court, and the questions discussed in them relate, with one exception, to the questions of fact involved. So far as these questions of fact are concerned, such as whether the channel over which it was proposed to construct the bridges was a natural stream or an artificial ditch, and whether the defendant had refused to make the ap-

propriation, the judgment of the appellate court, under the statute and numerous decisions of this court, is conclusive. The exception is a suggestion that the statutes under which the proceeding was instituted are unconstitutional, but this question was not preserved in any way in the record as a question of law. The judgment of the trial court was not asked upon that question as a matter of law, by presenting a proposition to be held or refused, or in any other manner. There is no question of any alleged error in the admission or rejection of evidence, or in rulings upon questions of law at the trial. The defendants offered eight propositions to the trial court to be held as law, but only the seventh and eighth were propositions of law, and these were held by the court, as presented, to be correct statements of the law. The first, third, fourth, fifth, and sixth were pure statements of fact, unaffected by any principle of law, and the second was a conclusion from all the facts. Defendants filed their written motion for a new trial, in which the only reason assigned was that the court had erred in refusing to hold defendants' written propositions, and each of them, to be the law of the case; and, whether any motion for a new trial was necessary or not, it did not embrace any such proposition as the unconstitutionality of the statutes. There is no question in the record which this court has any right to consider, and the judgment of the appellate court will be affirmed. Affirmed.

(165 Ill. 32)

JOLIET NAT. BANK v. O'DONNELL.

(Supreme Court of Illinois. Jan. 19, 1897.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—PRESENTATION OF CLAIM—TIME.

Plaintiff purchased a draft, for cash, of an insolvent bank, immediately before its assignment. Payment was refused by the drawee bank, though it had sufficient funds to the drawer's credit, on the ground that it was entitled to apply said funds on notes indorsed by the drawer and discounted by the drawee. While suit was pending to determine the drawee's right to such set-off, the drawee presented to the drawer's assignee a claim in the alternative, which included the amount of the draft in case it should be held in said suit that the drawee had no right of set-off; and, though the payee's name was not mentioned in the claim, the assignee knew all the facts. After the statutory time for presenting claims had expired, the suit was determined in favor of the drawee. The payee thereupon filed a claim against the assignee for the amount of the draft, no payment having yet been made to any creditor. *Held* that, as the amount of the draft was included in the drawee's claim, the payee was equitably entitled to be subrogated to the former's rights as to that amount, and to prorate with the other creditors. 65 Ill. App. 543, reversed. Magruder, C. J., and Cartwright, J., dissenting.

Appeal from appellate court, Second district.

Petition by the Joliet National Bank against James L. O'Donnell, assignee of Hen-

ry Fish & Sons, to be allowed to prorate with other creditors in the assets in the hands of said assignee. From a judgment of the appellate court (65 Ill. App. 543) affirming an order denying the petition, petitioner appeals. Reversed.

This is an appeal by the Joliet National Bank from a judgment of the appellate court affirming an order of the county court of Will county denying appellant's petition, in which it prayed that it might be allowed to prorate with the creditors of Henry Fish & Sons in the assets of the firm in the hands of the assignee for distribution. Henry Fish & Sons, bankers doing business under the name of the Stone City Bank, failed and made an assignment on the 30th day of November, 1892, to James L. O'Donnell, assignee. O'Donnell qualified as such assignee on December 2, 1892, and is still acting as such. The appellant, doing a banking business at Joliet, Ill., at about an hour or two before the Fish Bank closed its doors and made the assignment to O'Donnell, paid to the Fish Bank the sum of \$4,200 in money, receiving therefor a draft or bill of exchange drawn by said Fish Bank on its New York correspondent, the Third National Bank. This money was, in good faith, at once taken to the Fish Bank, and either immediately paid over to its depositors, who, it seems, had about that time made "a run" on the Fish Bank, or was on the same day turned over to assignee, the appellee, and constitutes a portion of the funds that came to appellee's hands. The draft was at once forwarded by the Joliet National Bank to its New York correspondent, the Hanover National Bank, and by the latter, on December 2, presented for payment to the Third National Bank; but payment was refused, and the draft went to protest. There is no question, and the record discloses the fact, that when the draft was drawn, and at the time of its presentation for payment, the Fish Bank had more funds to its credit in the Third National Bank than that demanded by the draft. Payment of the draft, however, was refused because the Third National Bank of New York then held Joliet Enterprise Company paper which had been indorsed by the Fish Bank and discounted by the Third National Bank, and the proceeds placed to the credit of the Fish Bank, in consequence of which they claimed they had the right to a set-off on the Enterprise paper, as against the deposit to the credit of the Fish Bank. The right of set-off was at once challenged, and suit immediately commenced in the supreme court of New York by the Joliet National Bank against the Third National Bank, when it was afterwards, on motion of the Third National Bank, transferred to the United States district court for the Southern district of New York, where, under the issues presented, the case was decided adversely

to the Joliet National Bank. Soon after the case was decided the Joliet National Bank, on November 26, 1894, presented the claim to the assignee, and filed it in the county court, together with a petition for an allowance of the claim. Objection being made to filing the claim, on December 26, 1894, appellant entered a motion for leave to file the claim. The court held the motion under advisement until April 6, 1895, when leave was granted to file the claim and petition for the allowance thereof. The county court allowed the claim, but ordered that it should not share in the dividends until payment in full of all claims which had been presented to the assignee prior to March 15, 1893. At the time the claim was filed in the county court, the assignee had made no payment on any claim, nor had any payment been made any creditor when judgment was entered by the county court in this case. The following is a copy of notice published by the assignee in the Joliet Times on the 12th day of December, 1892, notifying creditors to present their claims against the insolvent estate: "Assignee's Sale. The undersigned having been appointed assignee of the property and effects of Henry Fish, Henry M. Fish, George M. Fish, and Charles M. Fish, doing business as Henry Fish & Sons, by deed of assignment filed in the office of the county clerk of Will county, public notice is given to all persons having claims against said Henry Fish & Sons to present such claim, under oath or affirmation, within three months after December 15th, 1892. Such claims may be presented by filing the same, under oath or affirmation, with the county clerk of Will county, at his office. J. L. O'Donnell, Assignee. Joliet, Ill., Dec. 12th, 1892."

Donahoe & McNaughton, for appellant.
Haley & O'Donnell, for appellee.

CRAIG, J. (after stating the facts). It will be observed that the assignee notified creditors, by publication, on the 12th day of December, 1892, to present claims against the insolvent estate within three months after December 15, 1892; and as appellant, the Joliet National Bank, failed to make a formal presentation of its claim to the assignee within the time specified, the question arises whether it is absolutely barred from sharing with other creditors who presented their claims in the assets of the insolvent estate. Section 2 of the voluntary assignment act provides: "That the assignee or assignees named in such assignment shall forthwith give notice thereof by publication in some newspaper published in the county, if any; and if none, then in the nearest county thereto, which publication shall be continued at least six weeks, and shall also send forthwith a notice thereof by mail to each creditor, of whom he or they shall be informed, directed to their usual place of residence, and notifying the creditors to present their claims un-

der oath or affirmation to him within three months thereafter." Section 10 is as follows: "That any creditor may claim debts to become due as well as debts due, but on debts not due a reasonable abatement shall be made when the same are not drawing interest, and all creditors who shall not exhibit his, her or their claim within the term of three months from the publication of notice as aforesaid, shall not participate in the dividends until after the payment in full of all claims presented within said term and allowed by the county court." Rev. St. 1893, c. 10a. If the limitation implied by this section is absolute, the time is so short that many cases may arise where injustice would be done, providing it was the intention of the law that all creditors shall share equally, and no preference be allowed. Hence in several cases it has been intimated that the equitable powers of the county court may be invoked to extend the limitation imposed by the letter of the act. In *Suppliger v. Seybt*, 23 Ill. App. 471, the court said, "It may be that cases will arise in which, under the general powers conferred upon county courts by this act, claims not presented within three months can be allowed to have the same effect as if presented within that time." In *Smith v. Goodman*, 149 Ill. 75, 36 N. E. 621, where it was claimed that the claim was not presented within three months, it was held, under the peculiar circumstances, there was a sufficient presentation. In *Suppliger v. Gruaz*, 137 Ill. 221, 27 N. E. 23, it is said: "If, therefore, this claim is now barred, he will be deprived of sharing with other creditors in the assets of the insolvent, when at the same time he has exercised all diligence which he could exercise to present his claim to the assignee." It is plain that a construction of this character is contrary to the entire scope and spirit of the act, as the act, in express terms, prohibits a preference among creditors, as will be seen by an examination of section 13. The purpose, no doubt, of the legislature in fixing so short a period for the presentation of claims was to hasten the settlement of the estate, rather than cut off an honest and bona fide claim because it might not be presented within the time prescribed by the letter of the law. It is true, the Joliet National Bank did not itself present the claim to the assignee within the time designated in the notice published; but the claim represented by the draft which the appellant held was presented within the time, as we understand the evidence introduced in the hearing before the county court. It appears that the assignee mailed a notice to the Third National Bank of New York of the time within which claims should be presented. In pursuance of this notice, the Third National Bank filed a claim in the alternative form within the three months, as follows: "Claim filed by the Third National of New York against Henry Fish & Sons, insolvents, as viz.: (1) Harry M. Chapin, cash-

ler, being sworn, states: Third National Bank has a claim against above-named insolvent, arising out of two promissory notes, amounting to \$17,362.54, made by the Joliet Enterprise Company to order Henry Fish & Sons, indorsed by Fish & Sons,—one dated Oct. 8, 1892, for \$9,572.93, payable January 7, 1893; the other for \$7,789.61, dated Nov. 19, 1892, payable February 18, 1893. Copies of notes attached. That said notes were discounted by said bank Oct. 10, 1892, and Nov. 22, 1892. That the proceeds of \$9,426.14 and \$7,671.47, respectively, aggregating \$17,097.61, were placed to the credit of Fish & Sons. That on the date of said assignment a balance of proceeds, viz. \$7,118.33, remained in the hands of Third National Bank, which it had a right and did apply towards the payment of said notes, by way of equitable set-off, and, if said set-off shall be held to be right and allowed, there will remain due the Third National from said insolvents \$9,874.09. That a suit to determine said question is now pending in the U. S. circuit court for Southern district of New York, and, if it should be held that said Third National had no right of set-off, then the whole amount due said bank from said Fish & Sons on Nov. 30, 1892, would be \$17,200.94, after allowing to them all payments and set-offs, and the rebate of interest on said notes not due, of \$161.60." In connection with the presentation of this claim, the following stipulation was made: "It is hereby stipulated by and between James L. O'Donnell, assignee of Henry Fish & Sons, and the Third National Bank of New York, a creditor which has proved its claim against said estate, that the amount of the claim of said Third National Bank of New York shall be the sum of nine thousand eight hundred and seventy-four dollars and nine cents (\$9,874.09), being the amount named in its proof of debt in that behalf, deducting the credit of seven thousand one hundred and eighteen dollars and thirty-three cents (\$7,118.33) named in said proof of debt as a deposit in said bank to the credit of Henry Fish & Sons on the 30th day of November, 1892, and claimed by said bank as a set-off, and applied by it towards payment of the notes annexed to said claim, without prejudice, however, to the right of the said Third National Bank to claim and have allowed the entire amount of the two said promissory notes annexed to said proof of debt, without deducting said credit in case it shall be hereafter finally adjudged that it had no such right to set-off, and no right to make the application of said sum of seven thousand one hundred eighteen dollars and thirty-three cents (\$7,118.33) on deposit in said bank to the credit of Henry Fish & Sons on the 30th day of November, 1892, towards payment of said notes dated July 6th, 1893. Third National Bank of New York, by E. H. Otis, Its Attorney. J. L. O'Donnell, by P. O. Haley, Attorney. George S. House."

The statute did not require the appellant

itself to make oath to the claim, but only required that the claim should be presented under oath or affirmation. Here the Third National Bank of New York had on deposit to the credit of Henry Fish & Sons when they made an assignment \$7,118.33. The draft given by Fish & Sons for \$4,200 in this fund represented appellant's claim, which appellant was contending with the Third National Bank in the courts. The Third National Bank, in order to be safe, included in its claim the identical \$4,200 belonging to appellant. Thus, appellant's claim was presented under oath to the assignee by the Third National Bank. It is true, the name of appellant does not appear in the claim filed by the Third National Bank; but that does not affect the merits of the controversy, as it was well known by the assignee and all parties concerned that appellant was the party to the suit named in the claim filed, and that the claim arose out of the draft drawn by Fish & Sons, in favor of appellant, on the fund in the Third National Bank, for the sum of \$4,200. The assignee testified: "I should say, from the condition of the accounts of the Third National Bank with Henry Fish & Sons, that its offset, whatever it is, in this claim, embraces the Joliet National Bank draft, and embraced the amount in the Joliet National Bank draft. * * * The claim presented by the Third National Bank to me, as assignee, included this \$4,200." If the claim of appellant was included in the claim presented by the Third National Bank, as the evidence shows it was, no reason is perceived why appellant might not properly be subrogated to the rights of the Third National Bank as to the \$4,200 embraced in its claim presented to the assignee. This course will mete out justice to all parties concerned, and work no detriment to any one. The claim of the Third National Bank has not been acted upon, but it remains with the assignee, in the same condition as it was when presented. There is therefore no difficulty in making a disposition of appellant's claim at the same time the claim of the Third National Bank is disposed of. We are therefore of opinion that the claim of the Third National Bank, presented to the assignee within the time required by the statute, which included the amount of the draft given by Fish & Sons to appellant, was in fact a presentation of appellant's claim, and, under the equitable rules which should govern the county court in the disposition of claims under the assignment act, may properly be availed of by appellant. It is conceded on all hands that appellant's claim is an honest one, and it is clear from the evidence that the assignee knew and was fully informed of the existence of the claim within three or four days after the assignment was made. The judgment of the appellate court and the judgment of the county court of Will county will be reversed, and the cause remanded to the county court, with di-

rections to allow the prayer of the appellant's petition. Reversed and remanded.

MAGRUDER, C. J., and CARTWRIGHT, J., dissent.

(184 Ill. 481)

WILLIAMS v. PEOPLE.

(Supreme Court of Illinois. Jan. 19, 1897.)

CRIMINAL LAW—APPEAL—INSTRUCTIONS—MOTION FOR NEW TRIAL.

1. An objection that a court failed to instruct as to the presumption of innocence cannot be urged on appeal, unless there was a request for a proper instruction.

2. Defendant filed a motion for a new trial, in which newly-discovered evidence was not stated as a ground. In support of the motion she offered affidavits setting out what was claimed to be newly-discovered testimony, which was cumulative, and not conclusive, nor was there a sufficient showing of diligence made. *Held*, that the motion was properly overruled.

Error to criminal court, Cook county; Frank Baker, Judge.

Minnie Williams was convicted of larceny, and brings error. Affirmed.

Scanlan, McGaffey & Masters, for plaintiff in error. M. T. Moloney, Atty. Gen., for the People.

WILKIN, J. Plaintiff in error was tried and convicted in the court below on an indictment charging her with the crime of larceny, and sentenced to the penitentiary. She brings the case to this court for review, and her counsel urge several grounds of reversal, none of which, in our opinion, are tenable.

It is first insisted that the court below erred in refusing to allow counsel a reasonable time to prepare for the trial; but the record wholly fails to show that any motion was made for a continuance or postponement of the case, and there is therefore nothing before us upon which that alleged error can be based.

It is again insisted that the evidence fails to sustain the conviction. The charge is that the defendant enticed the prosecuting witness, one Allen M. Easterly, into a house on Madison street, in the city of Chicago, and there stole from him the sum of \$100, the money being secretly taken from his vest pocket. Easterly testified clearly and positively to the facts and circumstances of the taking, and positively identified the defendant as the party who committed the larceny. He was corroborated by certain police officers, who assisted him in identifying her, and who testified to conversations had with her after her arrest. It is insisted, however, that neither these witnesses nor Easterly are entitled to credit, because of their conduct in offering or proposing to abandon the prosecution upon the repayment of certain sums of money, and contradictory statements made by them on that subject and as to the identity of defendant.

We do not deem it necessary to make an extended review of the testimony. As to the fact of the larceny, Easterly was contradicted by no witness except the defendant herself. He denied having made any offer or promises to abandon the prosecution upon the repayment to him of the money stolen, or any other sum. The jury were fully warranted in believing him, and, if they did so, their verdict could not properly have been other than guilty. The charge of misconduct on the part of the judge is unsupported by the record.

By agreement of counsel the court instructed the jury orally, the instructions being taken down by the reporter, and it is urged as reversible error that none of the instructions informed the jury as to the presumption of the defendant's innocence. Here, again, the record furnishes no basis for the alleged error. No request was made by counsel for such an instruction, nor was the court's attention called to the omission now complained of. It needs no argument to show that it cannot be insisted upon now. We are also of the opinion that the instructions, taken together, did sufficiently inform the jury that the burden of proof was upon the people to establish the defendant's guilt, and that beyond a reasonable doubt. We do not agree with counsel in the contention that the court assumed, in the instructions, that the amount and value of the money stolen had been proved. There was no dispute on the trial as to the amount and value of the money, the defense being that the defendant was not the party who stole it.

After the verdict of the jury had been returned, the case took a very peculiar and unusual course, and the record is burdened with what then took place, to no purpose. A motion by counsel for the defendant for a new trial was filed, based upon 12 alleged grounds, in none of which is newly-discovered evidence mentioned. Notwithstanding the fact that no such ground for a new trial was set forth in the motion, numerous affidavits of parties were filed as to conversations with the prosecuting witness, and what took place between him and police officers, and as to other facts, claimed to be newly discovered; and one witness was put upon the stand and examined at length explaining his testimony upon the trial, and detailing certain facts about which he had not been previously interrogated. Aside from the fact that all this was foreign to the motion, nothing was shown which would have authorized the granting of a new trial. No sufficient reason is shown for not producing the witness upon the trial. Admitting that all he stated would have been material to the defense, the use of proper diligence before and during the trial would have enabled the defendant, through her counsel, to procure the testimony. At least, there is nothing in the affidavit of counsel sufficiently showing the contrary.

The attempt was to try the case, after verdict, by affidavits. If that could be done on the showing here made, a new trial might be obtained in every case where one party is surprised at the testimony of witnesses for the other. But a still more conclusive reason for holding the affidavits insufficient to justify the granting of a new trial on the ground of newly-discovered testimony is that the evidence therein set forth is merely cumulative to that given on the trial, and not conclusive. We entertain no doubt that the court ruled correctly in refusing a new trial upon the ground of newly-discovered testimony.

We find no reversible error in this record, and the judgment of the criminal court will be affirmed. Affirmed.

(164 Ill. 474)

CRANDALL et al. v. CAREY-LOMBARD LUMBER CO.

(Supreme Court of Illinois. Jan. 19, 1897.)

INSOLVENCY—CLAIMS AGAINST ESTATE—PRACTICE—WAIVER OF OBJECTIONS—PROOF OF CLAIM.

1. Under the statute requiring notice of exceptions to a claim against an insolvent's estate to be given to the creditor, as in cases of original notices in the county court a contest on a claim need not be docketed under the general title of the assignment proceedings, but may be docketed as a separate proceeding.

2. After going to trial on exceptions to a claim against an insolvent estate, claimant cannot object that his adversary has no standing to except to the claim.

3. On the hearing of exceptions to a claim filed against an insolvent's estate, the burden of proof is on claimant to establish the claim.

Appeal from appellate court, First district.

Claim by James N. Crandall and others against the estate of W. H. Rolff, insolvent. Exceptions to the claim were filed by the Carey-Lombard Lumber Company, and from a judgment of the appellate court (63 Ill. App. 320) affirming an order disallowing the claim, claimants appeal. Affirmed.

Levi Sprague, for appellants. Cowen & Houseman, for appellee.

CARTWRIGHT, J. Appellants, constituting the firm of Crandall, Schultz & Co., and appellee, a corporation, each filed a claim in the county court of Cook county with the assignee against the estate of W. H. Rolff & Co., consisting of W. H. Rolff, an insolvent debtor, in pursuance of the statute regulating voluntary assignments. Appellee filed exceptions to the claim of appellants, and on a hearing of the exceptions the claim was disallowed. An appeal was taken to the appellate court, where the judgment was affirmed. Thirty-five errors are assigned upon the record, but the questions involved are few, and may be noticed under few heads. When the exceptions came on to be heard, appellants entered an objection to having the proceedings docketed separately, and insist-

ed upon having them docketed under the general title of the assignment proceedings. Their objection was overruled, and they excepted to the ruling. How this affected them injuriously we are not able to discover. The statute requires a bond for costs by the party filing exception, and a notice to the creditor served, as in case of an original notice in the county court, returnable at the next term, when the court is required to hear the cause, and render judgment, and may allow a trial by jury. Each trial and judgment of that kind is several, and separate appeals may be taken, whether the orders are written under one title or separate titles. The only reason given for wanting this controversy docketed under the general title is that in such case the whole record of the original insolvency proceedings would make up the record on this appeal. But there is no difference, in that respect, whether this branch of the proceeding was docketed in one way or another. There might be many separate and independent controversies in the same general proceeding, and an appeal in one would properly bring up so much of the record as affects that controversy.

It is next urged that appellee was not in a position to except to appellants' claim, for the reasons that it did not prove by evidence that it was a creditor; that its claim was not filed within the time required by statute; and that, if the court had admitted the judgment on which its claim was founded, it would appear to have been confessed after the assignment with no evidence that the debt existed at the date of the assignment; and therefore it stood in the same position as appellants. Upon the exceptions being filed, and summons issued and served upon appellants, they entered their appearance June 7, 1895, and demanded a trial of the exceptions by jury. The trial of the exceptions began on October 23, 1895, when the jury was waived, and the trial proceeded. After appearing and demanding the trial by jury, and subsequently going to trial before the court, it was too late to question the competency of appellee to raise the issue to be tried. By so doing appellants admitted its character as one interested in the proceedings and entitled to file the exceptions. By all rules of practice, that question was a preliminary one, to be determined before the issue should be tried. If appellee had no right to file exceptions, and was a mere intruder in a matter with which it had no concern, its exceptions should have been stricken from the files, or disposed of in some proper manner before the trial. The court proceeded to hear the evidence, and appellants offered a certified copy of a judgment entered by confession in their favor against the insolvent after the assignment. This was insufficient to prove the existence of a debt at the date of the assignment before its entry; but appellee further proved by the files that the note upon which the judgment was

entered was dated after such assignment. This copy of the judgment was filed with the assignee as appellants' claim, and was their only claim. W. H. Rolff was sworn, and stated that he owed appellants the amount of the judgment at the time it was entered. Upon this evidence the parties submitted the cause, and it failed to show any indebtedness at the time of the assignment. Afterwards, on December 10, 1895, the case was reopened, and the hearing resumed. The court stated that what he wanted was to have the claim proved, and every facility was given appellants to make such proof, but it was not furnished. Mr. Schultz, one of the appellants, and Mr. Rolff, repeatedly testified that Rolff was indebted to appellants at the time of the assignment, and that the whole amount of the judgment was due and owing at the date when it was entered after the assignment; but the most strenuous and repeated efforts of the court to elicit an answer from either one as to the amount of the indebtedness owing to appellants at the date of the assignment proved wholly unavailing. There were long drawn out examinations, profusely mingled with colloquy, argument, comment, and objection, but there was no answer to that question. When Rolff was asked what was the basis of the judgment, he said it was the different debts that he owed at the time; and again that it was for lumber furnished him by different parties. He testified that when he gave the judgment note he included in it claims due to other parties that were not in the hands of appellants before the assignment. Mr. Schultz stated that he could not say positively how much the indebtedness was at the time of the assignment, and could not give the exact figures without his books. The court offered him an opportunity to get his books, and said that he did not know how much to allow and how much to disallow; but, if he knew how much the indebtedness was, so that he could separate it, he would allow it. The court then asked Mr. Schultz what he meant by the statement that it was not all due and owing at the time, and Schultz said that he wanted to consult with his counsel on that point, and thereupon declined to answer the question. The claim was not proved, but it is insisted that the court erred in requiring appellants to prove it, and in holding that they had the affirmative to establish the claim. It is contended that when the claim was filed with the assignee, duly verified, the party filing exceptions has the burden of proof to overthrow the claim. The ruling of the court was right in requiring appellants to assume the burden of proof. If no exceptions had been filed, the claim would have been allowed; but, exceptions having been filed, the mere presentation of the alleged claim, so verified, had no tendency to establish it, and appellants were bound to prove it. The judgment will be affirmed. Affirmed.

(164 Ill. 506)

PEOPLE ex rel. WELTY, County Collector,
v. CHICAGO, B. & Q. R. CO.

(Supreme Court of Illinois. Jan. 19, 1897.)

DISTRICT ROAD TAX—ASSESSMENT AND LEVY.

A district road tax levied under Rev. St. c. 121, § 83, is invalid, where the lists furnished by the highway commissioners are extended on the tax books by the county clerk without first being delivered by the overseer of highways to the town supervisor, and by him laid before the board of county supervisors for correction, as required by sections 110, 116, and 117.

Error to Lee county court; Richard S. Farland, Judge.

Application by C. F. Welty, collector of Lee county, for judgment against the property of the Chicago, Burlington & Quincy Railroad Company for back taxes. From a judgment sustaining defendant's objections, and denying the application, the applicant brings error. Affirmed.

Brooks & Brooks, for plaintiff in error. D. W. Baxter and O. F. Price, for defendant in error.

CRAIG, J. This was an application in the county court of Lee county, at the May term, 1896, for judgment against the property of defendant in error for taxes amounting to the sum of \$216, alleged to have been assessed in the town of Harmon by the commissioners of highways for the year 1889, for making and repairing roads. The defendant in error appeared in the county court, and filed objections to the application for judgment, and a hearing was had before the court on an agreed statement of facts, as follows: That Lee county is organized under the township organization act; that the township of Harmon is one of the townships of Lee county; that said township has adopted what is known as the "Labor System" for the payment of road tax; that the road commissioners of said town, on April 19, 1889, levied and assessed the road tax against the Chicago, Burlington & Quincy Railroad Company, described in county collector's application for judgment for said back tax; that the tax was levied and assessed pursuant to the eighty-third and eighty-fourth sections of chapter 121 (entitled "Roads and Bridges") of the Revised Statutes of Illinois; that said commissioners made a list of the property of said railroad company, known as "railroad track" and "rolling stock," of which the lists hereto are correct copies; that said lists are a part of this agreement; that said lists were subscribed by the commissioners, and deposited with the town clerk; that said clerk made lists as directed by the commissioners, which they subscribed and gave to overseers of highways of districts Nos. 1, 2, and 3; that said lists are a part of this agreement; that said railroad company did not work out or pay said tax, or any part thereof, to any one authorized to receive it; that said overseers returned said tax list unpaid, and

sworn to, to the town clerk for the supervisor of the town, but did not return it to the supervisor in person; that said supervisor of said town for 1889 did not receive said lists; that he did not lay them before the board of supervisors at their September meeting of 1889, or any meeting since that time, by any supervisors of said town, but the supervisor of 1896 was requested to lay them before the board of that year, and refused, though requested by the commissioner of highways; that said county clerk, at the request of said commissioner of highways, spread said delinquent tax upon the records as back tax; that said lists of 1889 are a part of this agreement; that said tax was never paid by said railroad company; that all the taxes against said railroad for 1889 were paid. On the hearing, the court sustained the objections interposed by the defendant, and denied the application for judgment; and the collector has brought the record here for the purpose of reversing the judgment of the county court. It will be observed that by the agreed statement of facts it appears that the tax lists in question were not presented to the supervisor of the town of Harmon for the year 1889 by the overseers of the town; and that said lists were not presented by the supervisor of said town to the board of supervisors of Lee county for that year, or for any year thereafter; and that the board of supervisors of Lee county never had said lists before it at any time, and never made any order concerning the same; and that the same was spread upon the tax books as delinquent taxes, without any authority from the county board; and that it was so spread in the year 1896, and judgment for tax sale asked at that time, for these taxes claimed to be assessed against the railroad in the year of 1889.

Section 83 of chapter 121 provides that the commissioners of highways of each town shall annually ascertain how much money must be raised by tax on real and personal property and railroad property, known as "railroad track" and "rolling stock," for making and repairing roads only, not exceeding 40 cents on each \$100 as equalized for the previous year, and shall levy and assess the same as a road tax against said property. Section 84 provides that the commissioners shall affix to the name of each person named in the lists furnished by the overseers the number of days assessed to each person for highway labor, and they shall make a list for each district containing a description of each tract of land in the district, and the name of the owner, and the name of the owner of any railroad property, which shall be subscribed by the commissioners, and deposited with the town clerk, and filed in his office. Section 85 provides that one copy shall be made for each of the overseers by the town clerk; and section 95 provides that the overseers shall give three days' notice of the time and place when and where they are

to appear to work on the highways, and with what implements; and section 96 provides that every person able to work shall work the whole number of days for which he has been assessed, or he may commute the same at the rate of one dollar per day, and pay the money to the overseers of highways; and section 100 provides for the overseer of highways giving receipts for money or labor, and to write the word "Paid" distinctly against each name or tract on his list which has been paid; and section 110 provides that every overseer shall deliver to the supervisor of his town, at least five days previous to the annual meeting of the county board, these lists, containing the land and personal property road tax, with an affidavit thereto that the same are paid or delinquent and unpaid, as the case may be. Section 116 is as follows: "It shall be the duty of the supervisors of the several towns to receive the lists of the overseers of highways when delivered pursuant to section 110 of this act, and to lay the same before the board of supervisors of the county."

It is claimed in the argument that the fact that the delinquent lists were never delivered to the supervisor of the town, and never returned to the board of supervisors, is a mere irregularity, which does not affect the substantial justice of the tax, and hence the court erred in denying judgment. We do not concur in that view. In *Peoria, D. & E. Ry. Co. v. People*, 116 Ill. 240, 5 N. E. 393, after referring to section 110 of the statute, and also section 116 and 117, this court, among other things, said: "Manifestly, therefore, it was designed by the general assembly that the taxpayers should have the guaranty of protection against unauthorized and excessive burdens of taxation, in these respects, afforded by the supervision of the board of supervisors. Although that board could not reject the action of the commissioners of highways when within their lawful authority, yet we think beyond question that if it appeared from the statements laid before the board that they were, in truth, not what they purported to be, or that a majority of the commissioners had not concurred in levying the tax, or that the tax was levied for a purpose not authorized by law, or that it exceeded the rate per cent. allowed by law, it would be the duty of the board to direct that the amounts be not extended, but that the statements be returned for correction, if susceptible of correction, and, if not, that they be utterly disregarded by the clerk. In respect to these matters, the duty under these sections is not on the clerk, as it sometimes is, but on the board of supervisors; and the clerk's duty is limited to extending the levy in the proper column when the statements are delivered to him for that purpose. It would, moreover, seem desirable that the statements required by section 119 should be before the board of supervisors, to enable them to intelligently make

the requisite orders under section 116 and the proviso to section 119, in order that the amounts of such taxes be included and extended with the tax assessed under section 119, as elsewhere required." In *Wabash Ry. Co. v. People*, 138 Ill. 303, 28 N. E. 134, in considering the same sections of the statute presented for consideration in this case, it was held that the lists pass into the hands of the board of supervisors from the possession of the town supervisors, and should not go into the hands of the county clerk until they had been laid before the board. It is there said: "It is clear that these lists or statements pass into the hands of the full board from the possession of the town supervisors. They should not go into the hands of the county clerk until they have been laid before the board." In regard to the power of the board to make a levy, it is said: "It was not the intention of section 117 to confer upon the board of supervisors the power to make an original levy, but merely to supervise the levy already made by the highway commissioners; and after being satisfied that it is in proper shape, and for a lawful purpose, and, within the legal rate, to cause steps to be taken for its collection. To this end, it is the duty of the board to deliver the lists or statements so submitted to it to the county clerk, to be extended provided such lists or statements need no correction." In *Wabash Ry. Co. v. People*, 138 Ill. 316, 28 N. E. 57, it was held that the statute vested in the board of supervisors a supervisory power over the levy. If the board of supervisors are required by the statute to exercise a supervisory power over the proceedings which in the end are to culminate in a tax on the property of the road district, can a tax be sustained where the proceedings have never been before the board of supervisors, as required by statute? Here the statute, in plain terms, required the overseer of highways to deliver to the supervisor of the town, five days before the annual meeting of the board of supervisors, the list furnished by the commissioners of highways, and the supervisor is required to receive the list, and lay the same before the board of supervisors; and section 117 of the statute requires the board of supervisors to cause the amount of the arrearages of the road tax returned to be levied on the lands returned and collected in the same manner that other taxes of the county are levied and collected. No one of these provisions of the statute was complied with. The lists were never delivered to the supervisor of the town, nor were they ever placed before the board of supervisors by the supervisor or any other person. But, on the other hand, the county clerk assumed the responsibility to extend the tax, without any direction or authority from the board of supervisors or any person having authority to act in the premises. When the legislature has prescribed a certain method to be adopted to subject prop-

erty to the burdens of taxation, that method must be substantially complied with before the property can be taken and sold in satisfaction of the tax. That was not done here. There was no compliance with the law, where it was essential that there should be a compliance in order to protect the rights of the parties. Under the statute, it was the right of the taxpayer to have the lists presented to the board of supervisors for their inspection, supervision, and correction, providing the lists did not conform to the law. That was not, however, done, but the lists were extended on the tax books, disregarding this plain provision of the statute. We perceive no way that the tax in question can be sustained without a total disregard of the requirements of the statute. The judgment of the county court will be affirmed.

(163 Ill. 56)

MEADOWCROFT et al. v. PEOPLE.

(Supreme Court of Illinois. Nov. 7, 1896.)

BANKING — RECOVERING DEPOSITS AFTER INSOLVENCY.

Under Act June 4, 1879, providing that, if any banker shall receive any deposits when insolvent, whereby the deposit so made "shall" be "lost" to the depositor, said banker "so receiving said deposit" shall be deemed guilty of embezzlement, and on conviction fined in a sum double the amount of the "sum so embezzled and fraudulently taken," the crime is consummated when the insolvent banker, having fraudulently received the deposit, by his failure, suspension, or involuntary liquidation deprives the depositor of the benefit of such part of the deposit as remains to his credit.

On rehearing. Modified.

For original opinion, see 45 N. E. 303.

Walker & Eddy (L. C. Collins, Jr., and Geo. S. House, of counsel), for plaintiff in error. M. T. Moloney, Atty. Gen. (M. L. Raftree, T. J. Scofield, and M. L. Newell, of counsel), for defendant in error.

BAKER, J. The indictment upon which Charles J. Meadowcroft and Frank R. Meadowcroft, the plaintiffs in error, were convicted, was based upon the first section of "An act for the protection of bank depositors," approved June 4, 1879. Said section is as follows: "(1) Be it enacted by the people of the state of Illinois, represented in the general assembly, that if any banker or broker or person or persons, doing a banking business, or any officer of any banking company or incorporated bank doing business in this state, shall receive from any person or persons, firm, company or corporation, or from any agent thereof, not indebted to said banker, broker, banking company or incorporated bank, any money, check, draft, bill of exchange, stocks, bonds, or other valuable thing which is transferable by delivery, when at the time of receiving such deposit said banker, broker, banking company or incorporated bank, is insolvent, whereby the deposit so made shall be lost to the depositor,

said banker, broker, or officer so receiving said deposit, shall be deemed guilty of embezzlement and upon conviction thereof shall be fined in a sum double the amount of the sum so embezzled and fraudulently taken, and in addition thereto, may be imprisoned in the state penitentiary, not less than one nor more than three years. The failure, suspension or involuntary liquidation of the banker, broker, banking company or incorporated bank within thirty days from and after the time of receiving such deposit, shall be prima facie evidence of an intent to defraud on the part of such banker, broker or officer of such banking company or incorporated bank." The validity of this section of the statute is challenged on several grounds.

It is urged that it is in derogation of that provision of our constitution which declares that no person shall be deprived of life, liberty, or property without due process of law (Const. 1870, art. 2, § a), and the case is controlled by the decisions of this court in *Millett v. People*, 117 Ill. 294, 7 N. E. 631; *Frorer v. People*, 141 Ill. 171, 31 N. E. 395; *Ramsey v. People*, 142 Ill. 380, 32 N. E. 364; and *Braceville Coal Co. v. People*, 147 Ill. 66, 35 N. E. 62. The contention is that every person living under the protection of our state government has the right to be engaged in the prosecution of any one of the ordinary and common callings or business pursuits that is innocent in itself, and has been followed from time immemorial, on the same terms that govern those engaged in other ordinary and common callings or business pursuits of life, and, as incident thereto, has the right to make the same contracts relative thereto as those engaged in such other ordinary and common callings or business pursuits are allowed to make; that the business of private banking is an ordinary and common industrial pursuit, like merchandising, manufacturing, mining, and very many other occupations of life, and is open to any one who may choose to embark in it; that one of the ordinary incidents and inherent elements of the business of a private banker is the receiving of deposits from his customer, and the relation of the banker to his depositor is the ordinary contract relation of debtor and creditor, the moneys deposited becoming the property of the banker, and not trust funds; that every person in this state, other than a private banker, engaged in the ordinary and common callings of life, is allowed to enter into contracts the result of which is to establish for himself the relation of debtor to every other person in the community who may deal with him, and that to deny to the private banker the right to prosecute his business, and, as incident thereto, to contract in regard to the same on the like terms as other ordinary and common callings or business pursuits are transacted, is to deprive him of both liberty and property to the extent that he is thus denied the right to contract, without due process of

law. The fundamental error in the contention thus formulated is the assumption that the business of banking stands upon exactly the same footing that the ordinary industrial pursuits of farming, merchandising, manufacturing, and mining, and the many other common occupations of life, stand upon. The business of a banker is not *juris privati* only, but, like that of an innkeeper or common carrier, is affected with a public interest, and therefore subject to public regulation. At common law the business of banking is open to all, and may be followed by the citizen at pleasure, unless forbidden by legislative enactment. The right, however, to engage in banking may be restrained by the sovereign authority, and may be regulated by legislation; and it must be commenced and carried on in strict accordance with such statutes as have been enacted for its regulation. *Nance v. Hemphill*, 1 Ala. 551; *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. 377; *People v. Barton*, 6 Cow. 290; *Curtis v. Leavitt*, 15 N. Y. 52. In *Bank v. Earle*, 13 Pet. 519-596, it was said by Chief Justice Taney, in delivering the opinion of the supreme court of the United States: "And it is very clear that at common law the right of banking in all of its ramifications belonged to the individual citizens, and might be exercised by them at their pleasure. Undoubtedly the sovereign authority may regulate and restrain this right; but the constitution of Alabama purports to be nothing more than a restriction upon the power of the legislature in relation to banking corporations, and does not appear to have been intended as a restriction upon the rights of individuals. That part of the subject appears to have been left, as is usually done, for the action of the legislature, to be modified according to circumstances." All persons possess their rights, whether to things tangible or intangible, subject to the general police power of the state. *Northwestern Fertilizing Co. v. Village of Hyde Park*, 70 Ill. 634. The police power is that inherent and plenary power which enables the state to restrain or prohibit all things hurtful to the comfort, safety, and welfare of society. *Town of Lake View v. Rose Hill Cemetery Co.*, Id. 191; *Cole v. Hall*, 103 Ill. 30; *Harmon v. City of Chicago*, 110 Ill. 400; *Dunne v. People*, 94 Ill. 120. In *Cooley*, Const. Lim. (6th Ed.) 704, in discussing the police power of the states, it is said: "The police power of a state, in a comprehensive sense, embraces its system of internal regulation by which it is sought not only to preserve the public order, and to prevent offenses against the state, but also to establish for the intercourse of citizens with citizens those rules of good manners and good neighborhood which are calculated to prevent a conflict of rights, and to insure to each the uninterrupted enjoyment of his own, so far as is reasonably consistent with a like enjoyment of rights by others." A

banker is a dealer in capital,—an intermediate party between the borrower and the lender,—who borrows of one party and lends to another; and the business of banking is, among other things, the establishing of a common fund for lending money. Newm. Bank Dep. § 21. And, as said by the supreme court of Wisconsin in *Baker v. State*, 54 Wis. 368, 12 N. W. 12, a bank implies capital, and capital invites confidence. A man holding himself out as a banker thereby gives public proclamation that he has money, and property readily convertible into money, in his possession, and subject to his control, and for that reason he may be safely trusted; and his business not only affects himself as a banker, but every person who deals with him as such. The object of the statute that is here challenged was evidently to protect the public from being induced to deposit money with insolvent bankers, and there is manifest reason and necessity for protecting the community in their dealings with persons engaged in the banking business that do not exist in respect to their transactions with those employed in the ordinary agricultural, manufacturing, merchandising, and mining pursuits.

It is urged that proof that the accused is a banker or person doing a banking business, that he received a deposit from a person not indebted to him, and at a time when he was insolvent, whereby the deposit is lost to the depositor, is not, in and of itself, and without evidence from which the jury can infer a criminal intent, sufficient to convict of a crime. And in that connection our attention is again called to the same constitutional provision already partially considered, that no person shall be deprived of life, liberty, or property without due process of law, and also to the further provision of the constitution that the right of trial by jury as heretofore enjoyed shall remain inviolate, and, in connection therewith, to the fact that among the maxims of the common law which these constitutional provisions secure to the citizens are these: that every man is presumed innocent until proven guilty, and that the burden is upon the state to overcome that presumption of innocence by a preponderance of the evidence; and the claim is made that, in that the statute provides that the failure, suspension, or involuntary liquidation of the banker within 30 days from and after the time of receiving the deposit shall be prima facie evidence of an intent to defraud on the part of the banker, such statute is in derogation of these rights, so secured, and therefore unconstitutional and void.

The law always presumed an accused party innocent until he is proved to be guilty, and this is a presumption which attends all the proceedings against him, from their initiation until they result in a verdict, which either finds the party guilty or converts the presumption of innocence into an adjudged

fact. *Cooley, Const. Lim.* 309. But no one has a vested right in the rules of evidence, and in legal contemplation they are not regarded as being of the essence of any right with which a party is invested. They pertain to the remedy, and are subject to modification and control by the legislature. *Id.* 367. In *Board v. Merchant*, 103 N. Y. 143, 8 N. E. 484, it is said: "The general power of the legislature to prescribe rules of evidence and methods of proof is undoubted. While the power has its constitutional limitations, it is not easy to define precisely what they are. A law which would practically shut out the evidence of a party, and thus deny him the opportunity for trial, would substantially deprive him of due process of law. It would not be possible to uphold a law which made an act prima facie evidence of crime which had no relation to a criminal act, and no tendency whatever by itself to prove a criminal act. But so long as the legislature, in prescribing rules of evidence, in either civil or criminal cases, leaves a party a fair opportunity to make his defense, and to submit all the facts to the jury, to be weighed by them upon the evidence legitimately bearing upon them, it is difficult to perceive how its acts can be assailed upon constitutional grounds." And in the later case of *People v. Cannon*, 139 N. Y. 32, 34 N. E. 759, the same court held that the state legislature has power to enact that even in criminal actions, where certain facts have been proved, they shall be prima facie evidence of the main fact in question, but that the fact upon which the presumption is to rest must have some fair relation to, or rational connection with, the main fact; and that the inference of the existence of the main fact because of the existence of the fact proved must not be purely arbitrary, unreasonable, unnatural, or extraordinary, and the accused must have a fair chance to make his defense, and to submit the whole case to a jury. In *State v. Buck*, 120 Mo. 479, 25 S. W. 573, it was held, after a full review of the authorities, that a section of the statute of that state which makes it a criminal offense for an officer of a bank to receive a deposit knowing the bank to be insolvent, and in providing that the subsequent failure of the bank shall be prima facie evidence of such knowledge, is not violative of a constitutional provision that "the right of trial by jury as heretofore enjoyed shall remain inviolate."

Plaintiffs in error call attention to *State v. Beswick*, 13 R. I. 211, and other cases which apparently announce a rule somewhat in conflict with that held in the authorities we have cited. They seem, however, to be against the weight of authority. At all events, this court is committed to the doctrine, as held in New York, Missouri, and other states, that the legislature may provide that a designated fact or facts shall be prima facie evidence of a certain other fact,

but subject to the restrictions stated in the authorities to which reference has been made. In *Railroad Co. v. Jones*, 149 Ill. 361, 37 N. E. 247, we said: "It is argued that the provision of the statute making the schedule of the commissioners prima facie evidence that the rates therein fixed are reasonable maximum rates of charges is unconstitutional and void, not only as depriving the carriers of their property without due process of law, but as infringing upon the right of trial by jury. We do not think that this objection should be sustained. In the first place, the act does not deprive the railroad corporation of the right to have a judicial determination of the reasonableness of the rates, if they are not satisfied with the schedule made by the commission. The courts are open to them for a review of the acts of the commissioners in fixing the rates of charges. In the second place, the provision is an exercise by the legislature of its undoubted power to prescribe the rules of evidence. 2 Rice, Ev. pp. 806, 807; *Com. v. Williams*, 6 Gray, 1; *State v. Hurley*, 54 Me. 562. Such provisions are not unusual. Cases have arisen in this state under a statute making the fact of injury caused from sparks from a locomotive passing along the road prima facie evidence of negligence, and no question has ever been raised as to the validity of the statute. * * * Acts making tax deeds prima facie evidence of the regularity of proceedings antecedent to the deed have been held to be valid. 2 Rice, Ev. p. 607; *Hand v. Ballou*, 12 N. Y. 541; *Delaplaine v. Cook*, 7 Wis. 54; *Allen v. Armstrong*, 16 Iowa, 508; *Wright v. Dunham*, 13 Mich. 414; *Gage v. Garaher*, 125 Ill. 447, 17 N. E. 777." See, also, *Chicago & A. R. Co. v. People*, 67 Ill. 11. And in *American Trust & Savings Bank v. Gunder & Paeschke Manuf'g Co.*, 150 Ill. 336, 37 N. E. 227, where the same statute now in question was under consideration, it was held that in cases where said statute applies the receipt of the deposit is prima facie proof of fraudulent intent, and that the rule of evidence established by the statute applies both to criminal prosecutions and civil proceedings, and wherever acts done in contravention of the provisions of the statute are the subject of judicial investigation. If one is a banker or person doing a banking business, and receives on deposit the money of his customer, it is to be presumed that he knows, at the time of receiving such deposit, whether or not he is solvent. At all events, as he holds himself out to the public and to his customers as being possessed of money and capital, and therefore to be safely trusted, it is his duty to know; and he is, under all ordinary circumstances, bound to know, that he is solvent; and it is criminal negligence for him not to know of his own insolvency. Cr. Code, § 280, declares that a criminal offense consists in a violation of a public law in the commission of which there shall be a union or joint operation of act and

intention, or criminal negligence. In cases of the failure, suspension, or involuntary liquidation of a banker within 30 days after he has received a deposit from his customers, it cannot fairly be said that the fact of such failure, suspension, or involuntary liquidation does not tend to show that he was insolvent when he received the deposit; and since, if he was then insolvent, he is presumed to have known of such insolvency at that time, and it is criminal negligence, under all ordinary circumstances, for him not then to have known of it, the inference that when he received such deposit it was with a fraudulent intent on his part is not so purely arbitrary, unreasonable, unnatural, or extraordinary as would justify the courts in saying that such a failure within 30 days had no fair relation to or connection with the existence of a fraudulent intent at the time of such deposit, and that, therefore, the act of the legislature is unconstitutional, null, and void. The words of the statute, "prima facie evidence," *ex vi termini* imply that the fraudulent intent may be rebutted by any competent testimony. It is only in a very clear case that the courts will assume to declare the invalidity of a statute enacted by the legislature, and no clear and palpable case of invalidity here appears.

It is assigned as error that the court denied the motion to quash the indictment. The indictment is substantially as follows: That Charles J. Meadowcroft and Frank R. Meadowcroft on the 3d day of June, 1893, in said county of Cook, in the state of Illinois, then and there being persons, then and there doing a banking business under the name of "Meadowcroft Brothers," corruptly, willfully, fraudulently, and feloniously did receive from one John D. Collins one hundred current United States of America treasury notes, etc., of the value of, etc., of the personal goods, money, and property of the said John D. Collins, the said John D. Collins then and there not being indebted to the said Charles J. Meadowcroft and Frank R. Meadowcroft; when, at the time of receiving the said money and deposit, to wit, on the said third day of June, etc., said Charles J. Meadowcroft and said Frank R. Meadowcroft, said persons then and there doing a banking business as aforesaid, were then and there insolvent, whereby, and because of which insolvency, the said money and deposit so then and there made as aforesaid was then and there lost to him, said John D. Collins, whereby, and by force of the statute in such cases made and provided, etc. It is urged that the statute is penal, and must, therefore, be strictly construed. But the rule of strict construction does not prevent our calling in the aid of other rules, and giving to each its appropriate scope; the ascertainment of the legislative will being the primary consideration after all. *Bish. St. Crimes*, § 200. A strict construction is not violated by giving the words of a statute a reasonable meaning according to the sense in which they were intended, and

disregarding captious objections, and even the demands of an exact grammatical propriety. *Id.* § 212. And a statute which is made for the good of the public ought, although it be penal, to receive an equitable construction. 16 *Bac. Abr.* 391; *People v. Barton*, 6 *Cow.* 290. It is claimed that the indictment is defective in not containing a specific averment of an intent, at the time of receiving the money, to defraud John D. Collins. The indictment states the offense in the terms and language of the statute creating the offense, and is, therefore, to be deemed sufficiently technical and correct. Such is the legislative mandate (*Cr. Code*, § 408), and very numerous decisions of this court have given effect to it. And, in addition thereto, it charges that the act was corruptly, willfully, fraudulently, and feloniously done. It is to be noted that the offense is created and defined in the first part of the section, and that the office of the last sentence of the section, to the effect that the failure, suspension, or involuntary liquidation of the banker within 30 days from and after the time of receiving the deposit shall be prima facie evidence of an intent to defraud on the part of such banker, is merely to establish a rule of evidence that shall be applicable in trials for the offense that had already been created and defined. It may be granted that it is a legislative recognition of the fact that in the commission of the offense created there must be a criminal intent, or that negligence which is its equivalent; but such recognition is nothing more than the recognition of the principle of the common law, which, as we have already seen, is also embodied and declared in the Criminal Code in the words that in the commission of a criminal offense there must be a union or joint operation of act and intention, or criminal negligence. The act upon which the indictment is based does not require that there should be either an averment or proof of a specific intent to defraud John D. Collins. Under our statutory rule it is sufficient to charge the offense in the terms and language used in creating and defining it, and it is only when such terms and language mention the intent as one of the constituent elements of the offense created that it is necessary to allege the criminal intent. *McCutcheon v. People*, 69 *Ill.* 601. The essential element of a criminal intent or criminal negligence is, however, implied, since it is of the essence of every criminal offense, and it must in some way appear, in order to justify a conviction. A statute makes an act a crime, and either provides that proof of a specific fact or facts shall be prima facie evidence of evil intent or else the law infers the evil intent from the act itself. But if it appears upon the whole case that the thing done is not within the intention of the law, then it is not within the law, though within its letter.

It is claimed that the indictment is defective in not specifically and in express terms averring that the defendants received the money of the prosecuting witness as bankers, and as

a general bank deposit. The indictment does allege that the defendants, "being persons then and there doing a banking business under the name of Meadowcroft Brothers, did receive from one John D. Collins" certain specified moneys of certain specified values, "of the personal goods, money, and property of the said John D. Collins, the said John D. Collins then and there not being indebted to" the said defendants. The charge is in the terms and language of the statute, and, tested by the statutory rule, is to be deemed sufficiently technical and correct. If the defendants, while doing a banking business, received a deposit, the reasonable and natural conclusion is that they received the deposit in their capacity of bankers. And the rule is that a deposit is general unless the depositor makes it special, or deposits it expressly in some particular capacity. *Ward v. Johnson*, 95 *Ill.* 215; *Brahm v. Adkins*, 77 *Ill.* 263.

It is urged that the indictment is defective because it does not charge that the partnership of Meadowcroft Bros., as a partnership, was insolvent on June 3, 1893, or at any other time. The claim, in substance, is that, since the indictment simply charges that Charles J. Meadowcroft and Frank R. Meadowcroft, persons doing a banking business under the name of "Meadowcroft Brothers" were then and there insolvent, non constat that the partnership of Meadowcroft Bros. was then and there insolvent, and that, therefore, the facts alleged, if conceded to be true, do not constitute a crime. This claim is based upon the theory that a partnership is a legal entity, distinct from and independent of the persons composing it. Whatever may be the law of other states, such is not the law of this state. Most of the cases relied on to establish the proposition seem to have been decided in states that have either adopted a code, or have abolished the distinction between legal and equitable rights and remedies, or have enacted statutes giving to co-partnerships a quasi personal existence. In this state the rule which requires the assets of a firm to be first applied to the payment of firm debts, and the individual assets of the several partners to be first applied to the payment of the individual debts of the several partners, is not a rule that is recognized or enforced in a court of law, but a rule of equity that is enforceable only in courts exercising equitable jurisdiction, and is not founded on the equities of the creditors, but is worked out only through the medium of the equities of the partners. See *Hanford v. Prouty*, 133 *Ill.* 339, 24 *N. E.* 565, and numerous other cases. At law the individual debts and the partnership debts are placed upon the same footing, and are to be paid *pari passu* out of the assets. *Ladd v. Griswold*, 4 *Gilman*, 25, and subsequent cases. The statute under consideration provides "that if any banker or broker, or person or persons doing a banking business, or any officer of any banking company, or incorpo-

rated bank" shall receive a deposit, etc. It does not mention or say anything about a firm or co-partnership. The indictment follows the statute, and alleges "that Charles J. Meadowcroft and Frank R. Meadowcroft, then and there being persons then and there doing a banking business under the name of Meadowcroft Brothers," received a deposit. If Charles J. Meadowcroft and Frank R. Meadowcroft were persons doing a banking business, and were insolvent, and received a deposit under the circumstances denounced by the statute, it would seem they must be guilty of the offense prohibited by that statute. The fact that they did their banking business under the name of "Meadowcroft Brothers" did not make that mere name a legal entity, and endow it with a personal existence distinct from and independent of themselves. In fact "Meadowcroft Brothers" was simply the firm or trade name in which Charles J. Meadowcroft and Frank R. Meadowcroft did the banking business of Charles J. Meadowcroft and Frank R. Meadowcroft, and if they were solvent then "Meadowcroft Brothers" was solvent, and if they were insolvent, then "Meadowcroft Brothers" was insolvent, for there was no such a person, either natural or artificial, in existence as "Meadowcroft Brothers" distinguishable from Charles J. Meadowcroft and Frank R. Meadowcroft. There was, therefore, no necessity for averring in the indictment the insolvency of "Meadowcroft Brothers." Our conclusion is that there was no error in overruling the motion to quash the indictment.

It is assigned as error that the court denied the motion of the defendants made at the November term, 1894, to be set at liberty for want of prosecution. It appears that they were indicted at the April term, 1894, of the criminal court of Cook county; that the defendant Frank R. Meadowcroft gave bail on May 5, 1894, it being one of the days of the said April term, and that the defendant Charles J. Meadowcroft gave bail on May 7, 1894, it being the first day of the May term, 1894. It also appears that the June, July, August, September, and October terms, 1894, of said court were held after the return of the indictment and the giving of bail, and prior to the entry of said motion at said November term to be set at liberty. In *Gallagher v. People*, 88 Ill. 335, the question arose as to the construction to be placed upon the latter part of section 18 of division 13 of the Criminal Code, which reads as follows: "If any such prisoner shall have been admitted to bail for a crime other than a capital offense the court may continue the trial of said cause to a third term, if it shall appear by oath or affirmation that the witnesses for the people of the state are absent, such witnesses being mentioned by name, and the court shown wherein their testimony is material." There the defendant had been indicted, and had en-

tered into recognizance at the May term, 1874, of the court, and the claim made was that he was entitled to be discharged at the third term after the bail was given, and was not required to appear at the September term, 1876. It was held that, since he was out on bail, he was not entitled to be discharged at the third term after bail was given, because it was not shown that the various continuances were had on the application of the people, or that the accused was present, ready for or demanding a trial. And it was there said that the statute "only authorized the accused who is under bail to demand a trial, and, if not granted at the third term, to be discharged from bail and prosecution under the indictment then pending." In the case at bar it appears from the affidavit of the defendant Frank R. Meadowcroft, submitted on the motion to be set at liberty, that he appeared and gave bail on the 5th day of May, 1894; and, further, "that neither he nor his counsel, nor any one in his behalf, has appeared in court for any purpose whatsoever since the said 5th day of May, A. D. 1894." And it appears from the affidavit of the defendant Charles J. Meadowcroft, presented at the hearing of said motion, that he appeared and gave bail on the 7th day of May, 1894, and "that neither he nor his counsel, nor any one in his behalf, has appeared in court for any purpose whatsoever since the 7th day of May, A. D. 1894." If the defendants were out on bail, and never appeared in court until the November term, then, as matter of course, they were not put upon trial until that term. Even if we should assume that it was legally possible for the prosecution to try the case in their absence from court, yet it is very clear that the prosecution was not bound so to do. The defendants were fortunate in that judgments of forfeiture were not taken upon their bail bonds, if so be it that they were not declared forfeited. There was no error in denying the motions for discharges.

A multitude of questions are raised in this cause by the 54 elaborate assignments of error upon the record and in the almost 300 printed pages of brief and argument filed by the plaintiffs in error. And an analysis of the statute upon which the indictment is based will facilitate the consideration of these questions. The substance of the section expurgating all words that are not essential to the present inquiry is this: If any banker or person or persons doing a banking business shall receive from any person or persons not indebted to said banker any money, when at the time of receiving such deposit said banker is insolvent, whereby the deposit so made shall be lost to the depositor, said banker so receiving said deposit shall be deemed guilty of embezzlement, and upon conviction thereof shall be fined in a sum double the amount of the sum so embezzled and fraudulently taken, and,

In addition thereto, etc. Waiving the question of evil intent, what elements enter into the commission of the crime created by this section of the statute? Plainly these: The defendants must be bankers or persons doing a banking business, they must receive money on deposit, they must be insolvent at the time of receiving such money on deposit, and the money so received on deposit must be lost by reason of such insolvency. The nature of the first three of these elements is easy enough of comprehension. In respect to the last there is more difficulty. The words of the statute are, "Whereby the deposit so made shall be lost to the depositor." When lost? At the time that the deposit is received by the insolvent bankers? Or when, by the failure, suspension, or involuntary liquidation of the bankers by reason of insolvency, the depositor is deprived of the use and benefit of his deposit? Or is it when, upon final settlement of the insolvent estate, the exact amount that will not be repaid by the dividends declared is definitely ascertained? Or is it after the death of the bankers, and the final settlements of the testate or intestate estates left by them, and when, for the first time, it can be known just how much, if any, of the deposit is so absolutely lost to the depositor as that it will never be returned to him? The statute provides that if any banker shall receive any money when, at the time of receiving such deposit, said banker is insolvent, "whereby the deposit so made shall be lost to the depositors," said banker "so receiving said deposit shall be deemed guilty of embezzlement," and upon conviction thereof shall be fined "in a sum double the amount of the sum so embezzled and fraudulently taken." The expressions "the deposit so made" and "so receiving said deposit," if literally and rigidly construed, would seem to imply the whole amount of the deposit; and the expression, "the amount of the sum * * * fraudulently taken," if alone considered, would seem to point to the time when the deposit is first received. Upon our first examination of the statute we were inclined to the conclusion that the crime denounced therein was complete at the time of receiving the deposit, provided the bankers were then insolvent, and that the sum of money deposited and "fraudulently taken" would in all cases be the amount that, within the contemplation of the statute, was "lost to the depositor." But, upon further consideration, we are satisfied of the impropriety of such conclusion. As we have already seen, one of the essential elements of the statutory offense is that the deposit "shall be lost to the depositor." The word "shall" is in the future tense, and is indicative of a future event. Although the bankers are insolvent, and receive a deposit while so insolvent, yet it does not necessarily result that either the whole or any portion of the sum deposited is either lost to the depositor

or embezzled by the bankers. It may well be that the sum so deposited is, in view of the existing insolvency of the bankers, "fraudulently taken" by them, but such fraudulent taking does not, in and of itself, constitute the offense. It is only when "the deposit so made shall be lost to the depositor" that the bankers "shall be deemed guilty of embezzlement"; and the fine is to be a sum that is "double the amount of the sum so embezzled and fraudulently taken." If the entire amount of the deposit is paid back to the depositor, or paid out upon his checks, prior to failure, suspension, or involuntary liquidation of the bankers, it is plain that no money of the depositor has been either lost to such depositor or embezzled by the bankers. And it is equally plain that, if a part of it is checked out and paid before such failure, suspension, or involuntary liquidation, then the amount so paid is neither lost nor embezzled. When a deposit of money is made, the bankers, in contemplation of law, have money on hand to the full amount of the sum deposited, ready to deliver when called for; and their contract with the depositor is to refund that same amount on demand. When a deposit is received by bankers, they at the time being insolvent, and it, or any part of it, is not paid back on demand, as contemplated by the agreement between them and the depositor, and then, because of the insolvency of such bankers, and their consequent inability to repay, the bankers fail, suspend, or go into involuntary liquidation, then, within the true intent and meaning of this statute, which is entitled "An act for the protection of bank depositors," such sum, or such part of it as has not been so paid back, is "lost to the depositor," and, in contemplation of the law, "embezzled" by the bankers. It is true that the language of the statute is "whereby the deposit so made shall be lost," and those words give some color to the claim that the loss of the whole amount of the deposit is implied by the statute. We are, however, unable to concur in the suggestion of counsel that the crime is not complete without the loss of the entire deposit. The statute must receive a reasonable construction. The statute uses the words "shall receive * * * money," as well as the words "such deposit" and "the deposit"; and these latter expressions are broad enough to include, and do include, not only the total sum deposited, but also the constituent parts of such sum. The whole of a thing necessarily includes all its parts. And it will not be imputed to the legislature that it entertained any such absurd intention, or that, if there was a fraudulent receipt by any insolvent banker of a deposit of \$100, and the entire \$100 was lost to the depositor, it would be embezzlement, whereas, if \$5 of the \$100 deposited was paid out on the depositor's check, and the \$95 lost, there would be no embezzlement. It would seem, however, that this particular matter is of but little importance in the case at bar,

for the evidence is that plaintiffs in error failed and closed their doors without having repaid to Collins, the prosecuting witness, any part of the \$200 deposited by him. The crime created by the statute is consummated when the insolvent bankers fraudulently receive the deposit, and by their failure, suspension, or involuntary liquidation by reason of insolvency, the depositor is deprived of the benefit of his deposit, or such portion of it as has not already been paid back to him or upon his checks. The depositor is then—at that time—deprived of his contract right to have the money refunded upon demand, or paid out upon checks drawn by him, and, being deprived of this right, the deposit, within the purview of the statute, is then “lost to the depositor.” This meaning placed upon the word “lost” is not unauthorized, for the rule is that, in construing a statute, the court is not restricted to the primary meaning of a word used where, from a consideration of the whole and every part of the statute, it is plain that the word is used in a different sense. *City of Springfield v. Green*, 120 Ill. 269, 11 N. E. 261.

The view we have taken carries into effect the legislative intention, and gives force and vitality to a wholesome statute. On the other hand, to construe the statute as meaning that there can be no conviction until it can be clearly and definitely ascertained what the exact amount is that can never be recovered and is permanently and absolutely lost, would utterly defeat the object of the statute. It would seem that such amount can never be so ascertained until after the death of the banker, and the final settlement of his estate by his administrator. And, even if it should be held that what the statute contemplates is the ascertainment of the amount of the deficit after the distribution of the proceeds of the property that the banker owned at the time of his suspension of business, yet it can be readily seen that usually—in fact, almost always—many years would pass before final settlement of that estate would be made, and in the meantime the statute of limitations would frequently bar any prosecution for the offense committed. And it is to be borne in mind that it is important the exact amount of the deposit lost to the depositor shall be definitely ascertained, for the statute expressly provides that the fine imposed in case of conviction shall be a sum double the amount of the sum so embezzled and fraudulently taken.

There is authority, as well as reason, to sustain the conclusions we have reached in regard to the meaning of this statute. In *Queenan v. Palmer*, 117 Ill. 619, 7 N. E. 613, the words of the statute were, “make good all losses to depositors or others.” This court there said: “What is meant by the term ‘losses,’ as used in the statute? It would seem from the argument that defendants would restrict the meaning of the term ‘losses’ to signify only the difference be-

tween the depositor's claim and what he might have realized by an action or bill against the insolvent bank. * * * It cannot be that the term ‘losses’ was used, in this connection, in that restricted sense as to mean that which can never be recovered; otherwise there might be no such thing as any ‘losses’ to the depositors in this case, for there might exist a remedy against the bank for one portion, and against the stockholders for the residue, and what would there be left for the term to attach? Obviously the term ‘losses’ was used in a more general sense, and in one usually attached to it by common understanding. In its most general sense, the word ‘loss’ means any deprivation. In some instances it may mean that which can never be recovered, and in others that which is simply withheld, or that of which a party is dispossessed. Often the context assists to a clearer understanding of the word employed in the statute or written agreement. By another section this corporation was authorized to receive deposits from laborers and servants, and was obliged to repay such deposits when required. The suspension of the bank by reason of insolvency was an absolute refusal to repay the deposits of the owners, and operated as a deprivation,—a withholding of the same from the depositors; and that is a loss in the ordinary acceptance of the word. A portion of the value of such deposits, or all, might ultimately be recovered from either the banker or the stockholder, but the deposits are lost to the owner. After the suspension of the bank, nothing remained of his deposits but the obligation of the bank or the stockholders to pay the value. That obligation might or might not be of value to him, depending on the fact of the solvency or insolvency of both the corporation and the stockholders. At all events, the funds have been wasted by the corporation becoming partially or totally insolvent, and that is a loss to the depositor in the sense of that term as used in the statute, and his right to proceed against the stockholder arises at once. Any other definition of this word ‘losses’ would be inconsistent with the context, and would afford no adequate security to the depositors or others dealing with the bank.”

It is claimed that the state failed to make out a case at the trial because it did not show that the deposit made on June 3, 1883, by Collins, was a general deposit, as distinguished from a special or specific deposit. That fact is amply shown by the testimony of Collins and his bank book, which was introduced in evidence. Besides this, a deposit of money with bankers at their banking house is regarded as general, unless it appears that the depositor makes it special, or deposits it expressly in some particular capacity. *Brahm v. Adkins*, 77 Ill. 263. A like failure to make out a case is claimed because it is not shown that Collins ever made a demand for the return of his deposit, and that defendants re-

fused to comply with such demand. It appears from the evidence that Collins deposited \$200 on Saturday, June 3, 1893, and that when he returned to the bank on Monday, June 5th, he found the door closed and a card of the receiver of Meadowcroft Bros. tacked thereon, and the bank not open or doing business; and also that the defendants were insolvent, and have never resumed business. When a bank or banker suspends payment, and closes doors against depositors and creditors, and discontinues banking operations, it or he waives the necessity for a demand on the part of its or his depositors. *Watson v. Bank*, 8 Metc. (Mass.) 217; *Planters' Bank v. Farmers & Mechanics' Bank*, 8 Gill & J. 449. And in the late case of *Davis v. Manufacturing Co.*, 19 S. E. 371, it was held by the supreme court of North Carolina that where a bank closes its doors, and commits an act of insolvency, the deposits become immediately due without demand or notice. The case of *Wright v. People*, 61 Ill. 382, is not here in point, for there the failure to deliver on the demand of the consignor was by the express terms of the statute there involved made a constituent element in the offense that was created. At the conclusion of the evidence for the state the defendants called Collins to the stand, and, after he had testified that he had never made any demand upon the defendants, or either of them, for the return of the deposit, counsel for defendants then and there, on behalf of the defendants, tendered to Collins the full amount of the deposit, with interest thereon. Collins declined the tender, whereupon the money was deposited with the clerk of the court, subject to his order. It is claimed by counsel that if it appears, even after indictment and at any stage of the proceedings thereon, that the depositor has recovered or will recover his deposit in full, and will sustain no absolute and ultimate loss, then the prosecution must fail, even though the banker, on the day of receiving the deposit, was hopelessly insolvent. This claim is based on the clause of the statute which says "whereby the deposit so made shall be lost to the depositor." We have already placed a construction upon that clause, and it will readily be conceded that, if we are right in the construction we have given it, then the contention now under consideration cannot be sustained. It needs no citation of authorities to show that as a matter of law the restitution of money that has been either stolen or embezzled, or a tender or offer to return the same or its equivalent to the party from whom it was stolen or embezzled, does not bar a prosecution by indictment, and conviction for such larceny or embezzlement. The effect of the tender and payment in court may be a discharge from the indebtedness for the deposit fraudulently received, so far as the depositor and his civil remedies are concerned; but, the crime having been fully consummated before in-

dictment found, it is not within the power of the banker and the depositor, or either of them, to compromise or take away the right of the state to insist upon a conviction for the crime committed. It is not to be presumed in making the offense and providing for its punishment it was the intention of the legislature to make the criminal courts of the state collecting agencies for collecting debts due to depositors from insolvent banks and bankers.

The view we have taken of the statute eliminates from consideration most, if not all, of the objections that are urged by plaintiffs in error to the rulings of the trial court on questions relating to admissibility of testimony and upon instructions. It is manifest that in these rulings the trial court held the law more strongly in favor of the plaintiffs in error and against the prosecution than was warranted by the statute. The state assumed at the trial a much greater burden of proof than the law imposed upon it. The result was that the rulings upon matters of evidence and upon instructions were more favorable to plaintiffs in error than they were entitled to, and they have no just ground for complaint in that regard. Even if it be conceded that some technical errors were committed pending the struggles of the state under the unwarranted burdens that at the trial were imposed upon it, yet they were immaterial, so far as the real merits of the case were concerned, and plaintiffs in error were not damaged by them.

The evidence abundantly sustains the verdict of the jury. The testimony is exceedingly voluminous, owing to the matters already suggested. We refrain from any discussion of the facts of the case, as no useful purpose would be accomplished thereby. It is urged that there are two obvious objections to the verdict that was returned by the jury that tried the case, either of which, under the law, is fatal to the validity of the verdict and of the judgment of the court. The verdict was as follows: "We, the jury, find the defendants, Frank R. Meadowcroft and Charles J. Meadowcroft, guilty of embezzlement in manner and form as charged in the indictment, and we fix the punishment of the said Frank R. Meadowcroft and Charles J. Meadowcroft at a fine in the sum of twenty-eight dollars (\$28.00), and, in addition thereto, at imprisonment in the penitentiary for a term of one year." The first of the objections made is that the jury did not find in their verdict the sum of money or value of the deposit embezzled; that the punishment that by the mandate of the statute must be imposed is the fine, the imprisonment being optional with the jury; and that this fine must be fixed by the jury at a sum that is double the amount that is embezzled. The claim is that it is clearly settled in this state that whenever the punishment depends upon the value of the article stolen or embezzled, the jury must affirma-

tively and expressly find that value, and a general verdict is bad and will not support a conviction. The cases of *Highland v. People*, 1 Scam. 392; *Sawyer v. People*, 3 Gilman, 53; *Hildreth v. People*, 32 Ill. 36; *Collins v. People*, 39 Ill. 233; *Williams v. People*, 44 Ill. 478; *Tobin v. People*, 104 Ill. 565; and *Thompson v. People*, 125 Ill. 256, 17 N. E. 749,—are relied on as sustaining this doctrine. The claim, as urged, is too broad. The rules of the common law do not require that the jury should, in terms, find the value of the property charged to have been stolen or embezzled. It is only where, by force of our statutes, and in cases where the character of the offense and the mode of punishment depend upon the value of property that the value of such property is required to be found in the verdict. In *Sawyer v. People*, supra, it is said that, where the value of the property determines the character of the offense, and regulates the mode of punishment, it is necessary for the jury to ascertain the value, and state it in their verdict, that the court may know with certainty whether the accused should be subjected to punishment by confinement in the penitentiary, or by the payment of a fine and imprisonment in the county jail. Like language was used in *Highland v. People*, supra. And the other cases relied on are expressly decided upon the authority of the *Highland Case* and the *Sawyer Case*. Here, neither the character of the offense nor the mode of the punishment is contingent upon the value of the deposit embezzled by the banker. Upon conviction the fine is to be imposed at all events, and whether the value of the property embezzled is one dollar or four hundred dollars; and the optional punishment of imprisonment in the penitentiary may lawfully be inflicted when the value of the property is a single dollar, and omitted when its value is hundreds, or even thousands, of dollars. The most that can be said is that the amount of the fine depends upon the value, but that goes only to the measure or quantity of punishment, and not to the character of the offense or mode of punishment. We are not inclined to extend the doctrine relied on beyond the requirement of the rule, and to apply it to cases not within the reason of the rule. Here the fine fixed by the jury was only \$28, and, as we have already seen, it should, under the evidence and the law, have been \$400. Plaintiffs in error are not injured, and cannot be heard to complain.

The other objection to the verdict is that it fixed a joint, instead of a several, punishment for the two defendants. In *Moody v. People*, 20 Ill. 315, this court said: "Where several persons are jointly indicted and convicted, they should be sentenced severally, and the imposition of a joint fine is erroneous." If each defendant was guilty of the crime charged, then each incurred the penalty or penalties provided by the statute, and

the jury should have fixed the punishment of each. The verdict in this case is very informal, but is it to be regarded as invalid? It is to be kept in mind that juries are usually composed of men who are not learned in the forms of the law, or exact in their use of language, and therefore all reasonable intendments should be made in order to sustain their verdicts, when the validity of such verdicts is challenged on merely technical grounds. If the verdict was simply, "We fix the punishment of said Frank R. Meadowcroft and Charles J. Meadowcroft at imprisonment in the penitentiary for the term of one year," then, growing out of the nature of the punishment, the verdict, though informal, would without doubt be regarded as a sufficiently distinct fixing of punishment at imprisonment for one year as against each defendant. It would not in such case, reasonably or without leading to absurdities, be regarded as the fixing of a single term of one year for the two defendants jointly, the further punishment of each to be discharged upon his suffering imprisonment for six months of the term. This being so, and the "imprisonment in the penitentiary for the term of one year" being fixed as a part of the punishment of the said Frank R. Meadowcroft and Charles J. Meadowcroft, and in immediate conjunction therewith, and connected with it by the clause, "and in addition thereto," the jury fixing the other part of the punishment at a fine in the sum of \$28, we think there can be no reasonable doubt but that it was the intention of the jury to fix the punishment of each defendant at the fine of \$28, as well as at imprisonment in the penitentiary for the term of one year. It is evident that the criminal court so regarded and understood and acted upon the verdict, for it sentenced the defendant Frank R. Meadowcroft to imprisonment in the penitentiary for a term of one year, and rendered a several judgment against him for a fine of \$28, and awarded execution therefor, and also sentenced the defendant Charles J. Meadowcroft to imprisonment in the penitentiary for a term of one year, and rendered a several judgment against him for a fine of \$28, and awarded execution therefor. We find no error in the record for which the judgment should be reversed, and it is therefore affirmed. Affirmed.

(165 Ill. 17)

COMMISSIONERS OF HIGHWAYS OF TOWN OF GOSHEN v. JACKSON.

(Supreme Court of Illinois. Jan. 19, 1897.)

POLICE MAGISTRATE — JURISDICTION — OPENING
HIGHWAY — DAMAGES — ASSESSMENT — DEMAND
— MANDAMUS — FORM OF WRIT.

1. Rev. St. 1874, c. 24, art. 11, § 15, provides for the election of "police magistrates" in villages, who shall have the same jurisdiction as "other justices of the peace." 2 Starr & C.

Ann. St. c. 121, §§ 41, 59, directs proceedings for assessment of damages for laying out a highway to be brought before "some justice of the peace of the county." Const. art. 6, § 21, provides that the jurisdiction of justices of the peace and police magistrates shall be uniform. *Held*, that police magistrates have jurisdiction of such proceedings. 61 Ill. App. 381, affirmed.

2. Under 2 Starr & C. Ann. St. c. 121, § 60, requiring the place for hearing appeals to the county supervisors in proceedings for opening a road to be fixed at some place "near the road in question," the hearing may be had at a place outside the limits of the town in which the road is sought to be located, provided such place be near the road. 61 Ill. App. 381, affirmed.

3. On failure of the commissioners of highways to include damages awarded for laying out a town road in the next tax levy (2 Starr & C. Ann. St. c. 121, § 15), no demand is necessary before mandamus is brought to compel such levy, the duty being a public one, resting upon the commissioners by reason of their office. 61 Ill. App. 381, affirmed.

4. The assessment of damages for the opening of a highway, which are payable only from taxes levied for that purpose, does not create an indebtedness against the municipality, within the constitutional limitation of indebtedness. 61 Ill. App. 381, affirmed.

5. The fact that the prayer in a petition for mandamus is too broad is immaterial.

6. A writ of mandate, directing the commissioners of highways "to proceed with all lawful diligence to open and work" a certain road, "and levy all necessary and lawful taxes to pay damages to landowners, and to do all acts and things necessary and lawful to be done for the speedy opening" of the road, is not objectionable, as requiring the road to be opened before the tax is levied.

7. A writ of mandate, directing the commissioners of highways to open and "work" a certain road, is not objectionable, as depriving the commissioners of their discretion as to the manner of placing the road in a fit condition for travel.

8. The fact that the payment of damages assessed on the laying out of a town highway will be a great hardship on the taxpayers of the town, and that no public interest requires the road, is no defense to a mandamus proceeding to compel the levy of the tax; the determination of such questions being vested, by 2 Starr & C. Ann. St. c. 121, § 48, in the commissioners of highways and the supervisors.

Appeal from appellate court, Second district.

Mandamus, on the relation of William A. Jackson, against the commissioners of highways of the town of Goshen. From a judgment of the appellate court (61 Ill. App. 381) affirming a judgment granting the writ, defendants appeal. Affirmed.

B. F. Thompson, for appellants. V. G. Fuller and Barnes & Barnes, for appellee.

CARTER, J. The relator, William A. Jackson, and others, presented their petition to the highway commissioners of the town of Goshen for laying out a new road. The commissioners refused to grant the prayer of the petitioners, and Jackson appealed from their decision to three supervisors of the county. The supervisors granted the petition, had the damages assessed, and ordered the road laid out, by their final order, filed March 16, 1894. At their next semiannual meeting, on the first

Tuesday in September, 1894, the commissioners failed to levy any tax for the damages awarded for laying out this road; and in December, 1894, a written demand was served on them, requiring them "to proceed with all lawful diligence to open said road for public travel, and to levy all necessary taxes, or issue bonds, to pay the damages assessed to landowners by reason of laying out said road, and to do all acts and things necessary and lawful to be done for the speedy opening of such road." To this demand the commissioners paid no attention, and the relator, Jackson, filed his petition for mandamus in the Stark circuit court on December 13, 1894, to compel them to open and work said road, and to levy necessary and lawful taxes for the payment of damages to landowners. The court awarded the writ, commanding said commissioners "to proceed with all lawful diligence to open and work such road for public travel, and levy all necessary and lawful taxes to pay damages to landowners, and to do all acts and things necessary and lawful to be done for the speedy opening of said road to public travel." From the judgment of the circuit court an appeal was taken to the appellate court for the Second district, which affirmed the decision of the lower court, and from this judgment of affirmance a further appeal was prosecuted to this court. By stipulation of the parties it was conceded that the allegations of fact in the petition and answer were true, and that the cause should be determined upon the questions of the sufficiency of the demand made upon the commissioners, the jurisdiction of the police magistrate before whom the damages were assessed, the legality of the final meeting of the supervisors on appeal (which was held outside of the town of Goshen), and whether a tax could legally be levied to pay damages while the town was indebted to the constitutional limit.

1. The petition for an appeal was filed with, and the proceedings for the assessment of damages by a jury were had before, a police magistrate of the village of Toulon, which is the county seat of Stark county, and it was contended by the appellants that, because the statute provided that such proceedings shall be taken before "some justice of the peace of the county" (2 Starr & C. Ann. St. c. 121, §§ 41, 59), a police magistrate had no jurisdiction. This contention is without merit. In Rev. St. 1874, c. 24, art. 11, § 15, provision is made for the election of police magistrates in villages, who shall "have the same jurisdiction as other justices of the peace." And section 21, art. 6, of the constitution provides that "the jurisdiction of justices of the peace and police magistrates shall be uniform." This court has held, in *Welsh's Case*, 17 Ill. 161, that calling officers having the powers of justices of the peace "police magistrates" does not render them any less justices of the peace (*Herkelrath v. Stookey*, 58 Ill. 21); and, in *Brown v. Jerome*, 102 Ill. 371, that the constitution of 1870 "did not deprive them of any

powers possessed generally by justices of the peace."

2. The first meeting of the supervisors was held in the town of Goshen, but was adjourned to the courthouse in Toulon, about 40 rods from the Goshen line, "because there was no convenient place for said hearing at the place appointed"; but no objection was made to the legality of said adjourned meeting. The final meeting of the supervisors at which the road was ordered laid out was also held at the courthouse in Toulon, and the commissioners now contend that this meeting was illegal, and its proceedings null and void, because not held within the town of Goshen. 2 Starr & C. Ann. St. c. 121, § 60 (Act 1883), provides that the justice of the peace "shall fix upon a time and place near the road in question, when such appeal will be heard" by the supervisors. It cannot be successfully contended that 40 rods is an unreasonable distance from the road in question, and the statute does not require the place to be within the town, but "near the road in question." Act 1879, § 99, provided that the "supervisors shall fix upon a time and place when said appeal will be heard by them, which place shall be in the town where the road is located." Laws 1879, p. 279. The present statute omits the latter clause, and gives the justice of the peace the power to fix time and place. This omission was evidently done with a purpose, and we are not at liberty to reinsert it in the statute. But it is contended that the supervisors on appeal have no greater powers than the highway commissioners, and that, for the purposes of said appeal, they act as town officers, and not as county officers. The commissioners are directed, in section 33, to "fix upon a time when and place where they will meet to examine the route of said road," and, in section 47, to hold a meeting to finally determine the matter, without specifying anything as to the place of the meeting. In case damages are to be assessed, they are directed to present a certificate to "some justice of the peace of the county," who shall specify "a certain place" for the trial (section 41), without specifying that the justice or the place must be of the town in which the road is located. There is nothing in these provisions requiring action to be taken within the town, and, even if it be conceded that the commissioners must meet in their own town, on which we express no opinion, it does not follow that the supervisors are thus restricted. The justice of the peace fixes their first meeting place, which shall be "near the road in question." Suppose the case was such that it could be finally settled at one meeting of the supervisors, as in the case of vacating a road, where the supervisors affirmed the decision of the commissioners, a meeting "near the road in question" would unquestionably be sufficient. We do not see any good reason why, when more meetings than one are required, any subsequent meetings

would not be legal if held "near the road in question."

3. Was the demand made in apt time, and was there any demand necessary? Demand could not be made before breach of duty. Did any breach of duty occur, and, if so, when? Section 15, c. 121, 2 Starr & C. Ann. St., provides: "When damages have been agreed upon, allowed or awarded for laying out * * * roads, * * * the amount of such damages, not to exceed, for any one year, 20 cents on each \$100 of the taxable property of the town, shall be included in the first succeeding tax levy provided for in section 13 of this act, and be in addition to the levy for roads and bridges." Section 17 provides: "Whenever damages have been allowed for roads or ditches, the commissioners may draw orders on their treasurer, payable only out of the tax to be levied for such roads or ditches, when the money shall be collected or received, to be given to persons damaged." It is clearly the duty of the commissioners, "when damages have been agreed upon, allowed or awarded for laying out roads," to include "the amount of such damages, not to exceed, for any one year, 20 cents on each \$100 of the taxable property of the town, * * * in the first succeeding tax levy provided for in section 13." That section provides that such tax levy shall be made at the meeting of the commissioners immediately preceding the annual meeting of the county board. This meeting of the county board is to be held the second Tuesday of September. 1 Starr & C. Ann. St. c. 34, § 49. The semiannual meeting of the commissioners shall be on the same day of meeting of the board of town auditors. 2 Starr & C. Ann. St. c. 121, § 13. And the town auditors hold their semiannual meeting on the Tuesday next preceding the annual meeting of the county board. Id. c. 139, art. 13, § 3. There can be but one tax levy in a year. *St. Louis Nat. Stock Yards v. People*, 127 Ill. 22, 20 N. E. 84. The commissioners, failing to make any levy for the payment of the damages for the road in controversy on the first Tuesday in September, 1894, were thereafter in default. The relator could not have made a legal demand on them before, as he could not know that they would disregard the plain mandate of the law. *City of Cairo v. Campbell*, 116 Ill. 305, 5 N. E. 114, and 8 N. E. 688. But a demand was not necessary. "If the duty, the performance of which is sought to be enforced, is a public duty, resting upon respondents by virtue of their office, it is well settled that no such demand and refusal are necessary." High, Extr. Rem. § 41, cited in *People v. Board of Education of Upper Alton School Dist.*, 127 Ill. 613, 21 N. E. 187; *People v. Williams*, 145 Ill. 573, 33 N. E. 849.

4. It is contended by the appellants that the town of Goshen is indebted beyond the constitutional limit, and that the court has no power to compel them to create an indebtedness contrary to law. The commissioners

have no power to draw any orders for the payment of these damages unless there is a fund on hand for their payment, or a tax levy has been made for that purpose. Section 17, *supra*; Commissioners v. Newell, 80 Ill. 587; Brauns v. Town of Peoria, 82 Ill. 11; Sullivan v. Commissioners, 114 Ill. 262, 29 N. E. 688. In *City of Springfield v. Edwards*, 84 Ill. 626, where the question of municipal indebtedness beyond the constitutional limit is fully considered, the court say (on page 633): "In this view we are prepared to yield our assent to the rule recognized by the authorities referred to, with these qualifications: First, the tax appropriated must, at the time, be actually levied; second, by the legal effect of the contract between the corporation and the individual, made at the time of the appropriation, the appropriation, and the issuing and accepting of a warrant or order on the treasury for its payment, must operate to prevent any liability to accrue on the contract against the corporation. The principle, as we understand, is, there is in such case no debt, because one thing is simply given and accepted in exchange for another. When the appropriation is made, and the warrant or order on the treasury for its payment is issued and accepted, the transaction is closed on the part of the corporation, leaving no future obligation, either absolute or contingent upon it, whereby its debt may be increased." This opinion is cited in the well-considered case of *Law v. People*, 87 Ill. 385, and fully sustained in *Fuller v. Heath*, 89 Ill. 296. The law provides how money to pay for such damages on account of laying out new roads shall be raised, and, further, expressly limits the commissioners, in drawing orders for the payment thereof, to orders "payable only out of the tax to be levied for such roads, when the money shall be collected or received, to be given to persons as damages." The very words of the statute seem to be framed to meet the decision in *City of Springfield v. Edwards*, *supra*. The awarding of damages for laying out a new road is not the creation of any debt, either present or contingent, but is in the nature of a sale for cash. The property owners to whom the damages are to be paid are not obliged to part with their land until they have received their damages, and the statute expressly provides (chapter 47, "Eminent Domain," § 10, 1 Starr & C. Ann. St.) that the petitioner may "enter upon such property and the use of the same upon payment of full compensation, as ascertained as aforesaid," which statute is to be construed in pari materia with the road and bridge act. *Hyslop v. Finch*, 99 Ill. 174. Whenever the commissioners tender the cash, or its equivalent, to the landowners, then, and not till then, will they be in a position to take possession of the road. Can it be said that the landowners could sue the town before possession taken? In *City of Chicago v. Barbian*, 80 Ill. 482, the court say:

"The rights of the parties are correlative, and have a reciprocal relation; the existence of the one depending on the existence of the other. When the party seeking condemnation acquires a vested right in the property, the owner has a vested right in the compensation; but, since no vested right can be acquired in the property without the owner's consent, until compensation shall be paid, it must follow there can be no vested right in the compensation until after the amount is paid." We cannot regard the proceeding as the creation of a debt.

5. Objection is made to the language of the writ of mandamus as awarded, and also to the prayer of the petition, as being too broad. The court is not obliged to grant the prayer in its entirety, but only so much as the relator is shown to be entitled to. The objection to the language of the writ as awarded is that it commands the commissioners to open and work said highway for public travel, before it commands them to levy the tax to pay the damages assessed, and to the insertion of the word "work" in the writ. We apprehend that the order of the clauses in the writ is immaterial, inasmuch as it commands them "to proceed with all lawful diligence," etc., and "to do all acts and things necessary and lawful to be done for the speedy opening of said road for public travel." The insertion of the word "work" is immaterial, and does not deprive the commissioners of their discretion as to the manner of placing the road in a fit condition for travel.

6. It is finally contended by the appellants that the payment of these damages will be a great burden on the taxpayers of the town, and that no public interest requires the road in controversy. These are not questions for us to decide. The statute vests this power in the commissioners, and in the supervisors on appeal. Section 48, c. 121, 2 Starr & C. Ann. St. The judgment of the appellate court will be affirmed. Judgment affirmed.

(165 Ill. 78)

BAXTER v. LOUISVILLE, N. A. & C. RY. CO.

(Supreme Court of Illinois. Jan. 19, 1897.)

CARRIERS—LIVE-STOCK SHIPMENT—LIMITATION OF LIABILITY—REASONABLENESS—PLEADING.

1. An objection to a complaint on a contract to ship live stock safely, for failure to allege compliance by plaintiff with a condition requiring notice of claim, should be by demurrer, and is not ground for motion to direct a verdict for defendant.

2. A provision, in a contract for the carriage of live stock, that the shipper, as a condition precedent to recovery of damages for injury to said stock, will give notice in writing of his claim to some officer of the carrier or its nearest station agent, before said stock is removed from the place of delivery, and before it is mingled with other stock, is void, for unreasonableness, where the contract limits the company's liability to damages sustained on its own line, and the destination of the stock was

on another line, several hundred miles beyond the terminus of defendant's line, and defendant had no station agent or officer at or near the place of destination. 64 Ill. App. 130, reversed.

Appeal from appellate court, First district.

Action by Philo N. Baxter against the Louisville, New Albany & Chicago Railway Company. From a judgment of the appellate court (64 Ill. App. 130) affirming a judgment for defendant and against plaintiff for costs, plaintiff appeals. Reversed.

Bulkley, Gray & More, for appellant. G. W. Kretzinger, for appellee.

WILKIN, J. Appellant sued appellee in the circuit court of Cook county for a failure to safely carry certain live stock from Chicago to Richmond, Va., under a contract of shipment, evidenced by three receipts, in writing, dated September 28, 1891, signed by the agents of the respective parties. At the close of plaintiff's evidence the defendant made the following motion: "Defendant moves the court to instruct the jury to return a verdict for the defendant, because the plaintiff has failed to allege or prove compliance on his part with an express provision, contained in the contract sued on, requiring him to make his claim for damages in writing in the manner and within the time by said contract provided, and that no such claim was made in writing by the plaintiff at any time before the commencement of this suit, or by any one on his behalf, and no claim whatever, as required in this portion of the contract, is averred in the declaration or shown by the evidence." After hearing the argument, the motion was sustained, and the jury was instructed to return a verdict for the defendant, and, this being done, judgment was entered against the plaintiff for costs of suit. The appellate court having affirmed that judgment, this appeal is prosecuted.

The provision in the contract on which the motion was based is as follows: "And for the consideration before mentioned the said party of the second part further agrees that, as a condition precedent to his right to recover any damages for loss and injury to said stock, he will give notice in writing of his claim thereof to some officer of said party of the first part, or its nearest station agent, before said stock is removed from the place of destination above mentioned, and from the place of delivery of the same to said party of the second part, and before such stock is mingled with other stock." There is no allegation in the declaration of compliance with this provision, nor of excuse for failure to do so. Neither was any direct proof of such compliance or excuse offered upon the trial. But plaintiff's sole reliance was and is that said condition is unreasonable, and therefore void. The defendant's contention is that, while the plaintiff might have declared against it upon its common-law liability, and insisted upon the invalidity of this condition, yet, having elected to declare

in assumpsit upon the contract, he was bound to treat it as a whole, and is concluded by this as well as all other terms and conditions therein agreed upon; also, that, having himself offered the contract in evidence, he cannot now be heard to question the validity of any part of it. It is the settled law, at least in this state, that a common carrier, by contract with the shipper, fairly entered into, may limit the time within which claims for damages for injury to the goods shipped shall be made, provided the time and conditions in the requirement are reasonable. Thus, it was held, in *Black v. Railway Co.*, 111 Ill. 351, that a condition in a contract of shipment that any claim for loss or damage should be made in writing, etc., and delivered to the general freight agent of the company at St. Louis, within five days from the time the stock was removed from the cars, was a reasonable and valid condition; and this case, with others, is relied upon as sustaining the reasonableness of the condition here under consideration.

The first question, however, to be determined upon the argument of counsel, is, could the plaintiff below, appellant here, in view of his declaration and proof, raise the question of reasonableness and validity of the condition named? It is said by Hutchinson, in his work on Carriers (section 574): "So, if the plaintiff sue upon the contract, he must state the whole of it. If, for instance, there are embodied in it limitations of the liability of the carrier, they must be stated." And illustrations are there given of the application of the rule. In the following sections he states the reasons for requiring such particularity in the declaration, but in section 756 says: "But a mere collateral provision, distinct from that portion of the contract which qualifies the liability of the carrier, and which contains 'the entire consideration for the act, and the entire act which is to be done,' need not be stated; as, for instance, a provision which recites only the manner in which the damages shall be liquidated after a right to them has accrued by a breach of the contract, or a notice that the carrier was not to be liable beyond a certain amount unless the goods were entered and paid for, as being above that value. A provision of the former kind would be merely collateral to the main contract, which would be to carry the goods; and the former would be no part of the express contract to carry, although it might have the effect of the contract in estopping the owner of the goods from claiming a greater sum,"—citing *Clarke v. Gray*, 6 East, 564. And he further says: "And such words would be a condition in the contract that, unless demand or claim were made for the loss within a certain time after its occurrence, or after the date of the shipment, the liability of the carrier should cease." We understand that *Wetzell v. Dinsmore*, 4 Daly, 194, *Express Co. v. Loeb*, 7 Bush, 501, and the text quoted from *Lawson on Contracts of Common Carriers* (section 354), cited by coun-

sel for appellee, are not in conflict with the rule thus announced. In the first case, speaking of the contract of shipment offered in evidence, the court said: "If it is to be used at all as an instrument of evidence on his part, it must be taken altogether, and the contract quoted from all that is contained in it;" that is to say, all the terms of the agreement which constituted the contract of shipment as to its terms and limitations. But it does not follow that mere collateral provisions, as this is termed, must be either pleaded or considered in determining the contract. In the Kentucky case the decision turned upon the refusal of the trial court to instruct the jury that, if the parties agreed that the company was not to be liable unless the loss was caused by fraud, etc., before plaintiff could recover, they must prove the fraud; and the court said, speaking of the special contract of shipment: "That contract is made the foundation of appellees' action. They sue upon it, and make it a part of their petition; and, so far from there being any allegation that it was not fairly made, or that it was obtained by duress, imposture, or delusion, it is fully recognized by appellees as obligatory, and made the basis of their recovery in this action. By this special contract the appellant's responsibility as a common carrier under the rules of the common law was relaxed, and, under the rulings of this court in *Express Co. v. Nock*, 2 Duv. 562, in the absence of any allegations calling in question its fairness or binding force, it must be regarded as obligatory." It was accordingly held that the refusal of the instruction was reversible error. But there, it will be seen, by the terms of the contract the liability for damages was limited to injury or loss caused by fraud; the question of fraud entering into the contract of shipment limiting the liability of the carrier. And so it will be seen that the class of cases referred to by Lawson (§ 254, supra) are those in which the question is whether the shipper assented to the exemption under which the carrier seeks to escape liability. The condition here relied upon by the defendant to defeat plaintiff's action is not that, under the terms of the contract, he had no right to recover damages, but that his right of action for such damages is defeated because of a failure to give notice and claim them within a certain time. In other words, the reliance upon this condition presupposes that damages have been sustained within the terms of the contract of shipment, but that, by the provisions of this mere collateral requirement, they cannot be recovered. But, the declaration in this case having declared upon the contract, even if it ought to be held defective in not averring compliance with the condition, that defect should have been taken advantage of by demurrer, and could not, under any recognized rule of practice, be made the basis of a motion to instruct the jury to find for the defendant. And so the question here must be, was the plaintiff conclusively

bound by this provision, merely because he offered the whole contract in evidence? His position is that that part of the contract is unreasonable, and therefore void, and if, under all the proofs submitted, including the various terms of the contract, it should be so treated, manifestly he is not bound thereby.

The question, then, remains, is the provision void for unreasonableness? It appears from the authorities generally on this question that it must be determined from all the facts and circumstances of each particular case, and hence decisions are found holding substantially the same provision valid under one state of facts and invalid under another and different state of facts. The case of *Black v. Railway Co.*, 111 Ill. 351, and cases cited in 11 Ill. App. 465, with others, are relied upon by counsel for appellee as sustaining the provision. It will be seen that in the *Black Case*, and many of the others so relied upon, the carriage was by railroad companies over their own lines, and the requirement was to give notice to a particular agent, within a time fixed, as, in the *Black Case*, to the general freight agent in the city of St. Louis within five days. In other cases, as *Rice v. Railway*, 63 Mo. 314, and *Goggin v. Railway Co.*, 12 Kan. 416, where the condition was that notice should be given at or before the unloading of the stock, the place of delivery was upon the line of the carrier itself, and in both those cases the court takes into consideration the facts and circumstances surrounding the parties at the time. In the *Kansas case* it is said, after stating the facts: "Under these circumstances, we cannot hold that the time when the notice was to be given was unreasonable. * * * Nor would such a notice be reasonable in the case of an ordinary shipper who did not accompany and superintend his stock, nor would it probably prevent a recovery for injuries sustained which would not readily be seen and actually should not be discovered until the time for giving notice had expired." It appears, from the contract sued upon in this case, that the line of the defendant terminated at Louisville, Ky., and its liability is limited to damages resulting from neglect of duty on its own line; the place of destination being many hundred miles beyond that terminus, and the carriage to be over connecting lines. It is fairly inferable, from all the facts introduced upon the trial, if not from the contract itself, that the defendant had no station agent at or near the place of destination, or any officer at that place; and the question, therefore, is, is this provision, under the facts, so unreasonable and contrary to public policy as that it should be held unreasonable and void? "The place of destination above mentioned" was "Richmond, Virginia, station"; and hence the requirement, if valid, was that, before the animals were removed from that station, and before they were mingled with other stock, the shipper should give notice of his claim for damages. This, of course, to be of practical benefit to the defendant, meant

more than a mere notice that damages would be claimed, but that the nature, character, and amount of such damages should be stated, so that the defendant might inquire into and investigate the claim before the stock was removed and mingled with other stock. The evidence shows that, upon the arrival, the horses were found to be in such a condition as that immediate attention and care was required to prevent additional and greater loss than had at that time been incurred; that it was necessary to feed, water, and care for the animals, and at as early a period as practicable remove them to pasture, there being no place at the station except the stock yard, in very bad condition, at which they could be kept. The particular person to whom notice was required to be given is not designated in the provision, but the shipper is left to hunt up, without any specific directions, "some officer of said party of the first part, or its nearest station agent"; thus making it his duty to keep the stock at the station, separate from other stock, until he could ascertain such officer or agent.

As was said in *Smither v. Railroad Co.* (Tenn. Sup.) 6 S. W. 209, of a stipulation identical with the one here in question: "The stipulation is uncertain and ambiguous. There is nothing by which it can be ascertained who is an officer, or what degree of agency or what relationship any individual must bear to the corporation to be one of its officers, or make his position an officer of the company. It does not give the name of the nearest station, or use such language as, by reasonable construction, will designate a single agent to whom notice shall be given, or which is the nearest station of several in a city, or at what terminus, etc. These things were known to the corporation, and should have been definitely set out, if they can be enforced at all. It is unreasonable in requiring the shipper to retain his stock at the place of destination or delivery, unmingled with other stock, until the written notice shall have been given. It is void because it undertakes to protect the carrier from losses occasioned by his own fault, by imposing an unreasonable and difficult duty on the shipper as a condition precedent to his right to suit." The same doctrine is held in the case of *Coles v. Railroad Co.*, 41 Ill. App. 607, and the language of the court in that case is, we think, of forcible application to the facts in this case. It is true the supreme court of Kansas, in the case of *Sprague v. Railway Co.*, 34 Kan. 347, 8 Pac. 465, held otherwise; the provision in that case being also identical with the one here under consideration, and passed upon in the two cases last above cited. The facts, however, in that case, were essentially different, in that there the carriage was over the line of the defendant, and of course its nearest station agent to the place of destination was easily ascertained. That court does not, however, and we think no court could intelligently, hold that such a provision is, in and

of itself, reasonable and valid, regardless of the facts and circumstances surrounding the parties to the contract. Here the defendant is insisting upon a contract limiting its liability to its own line, and at the same time on a stipulation in that contract requiring the shipper, as a condition precedent to his right to recover such damages, to give notice of his claim, at a place of destination upon another line, wholly disconnected from its own, to one of its officers, or its nearest station agent, no matter how remote from such place of destination. We think, under these facts, that the part of the provision which requires notice to "some" officer is unreasonable and uncertain, because it in no way indicates or designates what officer, or where he may be found, and the requirement that notice shall be given to the nearest station agent is impracticable of performance, because no means are given the shipper to ascertain who such agent is, or his station. The defendant had station agents along its line at various points from Chicago to Louisville. Which of these many agents would, under the terms of this provision, be regarded the nearest station agent, would, it must be conceded, be a matter of very difficult ascertainment. It might be an agent anywhere along the line, in the state of Indiana or Illinois, who could be reached by the shortest line from Richmond station to that place. If not the nearest agent, so ascertained, what agent is meant? Was it the station agent at Louisville, Ky., or at Chicago? There is nothing in the contract from which it can be so determined. And if the provision was held reasonable and valid, and the shipper, before removing the stock, or mingling it with other stock, had notified either of these agents, no reason is perceived why the defendant could not have successfully interposed the objection that other station agents along the line were nearer Richmond station; and so the contention, if made, that the contract is susceptible of such meaning, is answered by the fact that the very contention itself only adds to the uncertainty and indefiniteness of the provision.

The evidence also tends to show that the full amount of damages sustained could only be ascertained after a reasonable time and opportunity had been given the owner of the animals to care for and restore them to a healthy condition. We do not hold the condition in and of itself unreasonable, nor that it would not be enforceable as a condition precedent to the plaintiff's right to bring his action, when applied to a shipment by a carrier over its own line, the place of delivery being upon such line; but we do hold that, as applied to the facts in this case, it is so unreasonable and impracticable of performance as to render it void. It would seem that the apparent conflict between decisions bearing on the question may be reconciled upon the just construction that, when the shipper seeks to avoid such a condition, as applied to a shipment over the carrier's own line, the burden

is upon him to prove such facts and circumstances as render compliance with its terms impracticable or unreasonable; but that, when the carrier seeks to apply it to a shipment terminating on a connecting line, it must show that it had an officer or station agent at or near the place of delivery, upon whom the required notice could have been served, and who could, by reasonable diligence on the part of the consignee, have been ascertained and found. We see nothing in the facts of the case to authorize a recovery from the defendant for damages sustained upon connecting lines, but the effect of the judgment of the trial court sustaining the validity of the condition not only relieved it from that liability, but also from the recovery for damages claimed to have resulted on its own line. We think the circuit court erred in sustaining the motion, and its judgment, and that of the appellate court, will accordingly be reversed, and the cause remanded, with directions to proceed in conformity with the views herein expressed. Reversed and remanded.

(164 Ill. 640)

MARTIN v. MARTIN.

(Supreme Court of Illinois. Jan. 19, 1897.)

VENDOR'S LIEN—ASSIGNABILITY—SUBROGATION TO MORTGAGEE—REMOVAL OF CLOUD—CONDITIONS OF GRANTING RELIEF.

1. A vendor's lien is not assignable.
2. Voluntary payment of a mortgage debt by a third person does not subrogate him to the mortgagee's rights, in the absence of an agreement to that effect.
3. T. purchased land, giving mortgage notes, and afterwards conveyed the premises by warranty deed to a third person, who quitclaimed to T.'s wife; both deeds being recorded, and T.'s wife having no knowledge of the mortgage. Defendant, T.'s employer, paid the first two notes, charging the amount to T.'s account, without any agreement for security; and several years later, supposing T. still owned the property, he paid the last note,—taking a release of the mortgage,—on T.'s promise that he should have the same security as the mortgagee had. After this payment, T., without his wife's knowledge, gave defendant a mortgage on the premises to secure the advances made by him in excess of T.'s salary. *Held*, that T.'s wife must pay defendant the amount paid by him on the last note, as a condition of removing the cloud on her title caused by her husband's unauthorized mortgage.

Appeal from appellate court, First district.

Bill by Margaret C. Martin against Nicholas Martin and others to remove a cloud. From a decree of the appellate court (62 Ill. App. 378) reversing a decree for plaintiff, she appeals. Reversed.

Rudolph Huszagh, for appellant. Flower, Smith & Musgrave, for appellee.

CARTER, J. Appellant filed her bill in the circuit court of Cook county against appellee and others to remove, as a cloud upon her title to certain real estate owned by her, a deed of trust given by her husband, Thom-

as J. Martin, to Patrick Hogan, as trustee, to secure five promissory notes for \$1,159.28 each, payable to his brother, Nicholas Martin, the appellee. The circuit court decreed the relief as prayed, but the appellate court reversed the decree and remanded the cause, with directions to require of appellant, as a condition of relief, the payment into court, for the benefit of appellee, the amount of three promissory notes of \$1,050 each, and interest, which had been paid and taken up by appellee. The facts necessary to an understanding of the case are, briefly, as follows: Appellee was a wholesale tea and coffee merchant, and Thomas J. Martin, husband of appellant, was in his employ as traveling salesman at a salary of \$3,300, and later \$3,600, per annum. In April, 1885, Thomas Martin purchased of Van Wyck the premises in question, for the price of \$4,150; and, having but a few hundred dollars in money, paid \$150, and procured from appellee \$850, and thus made the first payment of \$1,000 of the purchase money. Appellee charged up on his books to Thomas Martin the \$850 as so much advanced upon his salary. Van Wyck conveyed the premises to Thomas upon receipt of the \$1,000, and took from him his three promissory notes for \$1,050 each, payable in one, two, and three years, respectively, and a deed of trust upon the premises securing their payment; and Thomas and his wife, the appellant, went into possession, and occupied the premises as their homestead. The warranty deed from Van Wyck to Thomas Martin, and the deed of trust from the latter to the former, were duly recorded May 21, 1885. On August 21, 1885, Thomas Martin, by warranty deed, conveyed the property to one Mahon, for the expressed consideration of \$4,500, but in fact without any consideration, and on the same day Mahon, by quitclaim, conveyed the property to appellant. Both of these deeds were also then duly recorded, and thereafter appellant paid the taxes and special assessments upon the property, occupied it with her husband, and claimed to own it. As the first two notes of Thomas Martin to Van Wyck matured, they were paid by appellee and canceled, and the amount charged up on his books to Thomas, with his salary account. It seems, the third or last note was not paid until 1892, when Thomas promised his brother, the appellee, that upon its payment he would give him the same security upon the property that Van Wyck had. Appellee paid this last note, and also took a release to Thomas of the Van Wyck trust deed, and retained the papers in his own possession. Although the title to the property had been vested in appellant for nearly seven years, and so appeared of record, appellee had no actual knowledge of that fact, but supposed it was still vested in his brother. Thomas drew his salary at irregular intervals, and at the end of each year the excess he had received

as salary and as payments of his notes was carried forward, and interest charged upon it as so much due and unpaid from him to appellee. Appellee testified that he regarded these advancements as loans to his brother. When appellee paid the last note for his brother to Van Wyck, in April, 1892, upon casting up the account it was found that Thomas owed appellee \$5,796, whereupon appellee drew up five promissory notes, payable to himself, each for one-fifth of this amount, and also a deed of trust to said Hogan, as trustee, securing the same; and they were duly executed by Thomas and delivered to appellee, who filed the trust deed for record. These notes were payable one each year for five years. Appellant did not know of this transaction at the time, and, so far as the evidence discloses, did not know of it until the fall of 1893, which was about the same time that appellee learned that she had a deed to the property. She testified, also, that she did not know until January, 1892, that the property had not been paid for, when appellee stated to her that nothing had been paid on the house.

It is not set up by cross bill, or insisted in the argument, that appellee has any lien which he can enforce on the property, either by virtue of the trust deed sought to be removed as a cloud, or by virtue of the Van Wyck claim which he discharged; but the contention is that the case is such, from all of its facts and circumstances, as to call for the application of the maxim in equity that "he who seeks equity must do equity"; that before appellant can have the deed of trust given by her husband to Hogan, trustee, securing the debt to appellee, removed as a cloud upon her title, she must repay to appellee the moneys advanced by him in paying the three Van Wyck notes, and removing that incumbrance from the property, and lawful interest thereon. And this contention was sustained by the appellate court. It might seem, at first blush, that as appellant is proceeding against appellee to have his deed of trust given to secure the moneys, with others, which he had disbursed to pay off and discharge the Van Wyck lien, removed as a cloud upon her title, there would be no injustice in requiring her, as a condition of relief, to reimburse appellee for what he had expended in discharging the Van Wyck incumbrance. It is said, and with some show of reason, that she was benefited to this extent, in having her property freed from this lien, and that it would impose no hardship upon her to require her to pay it, as a condition to the removal of appellee's deed of trust given by her husband, to secure it and other moneys advanced to him. It is not, however, nor can it be, from the evidence, claimed that the deed of trust sought to be removed is any valid lien upon the property. Appellant did not sign it, or know it was given, and Thomas Martin, when he gave it, had no interest in the prop-

erty, except as appellant's husband, having conveyed it nearly seven years before, and appellee was charged by the public records with knowledge of that fact. No fraud in the transfer to appellant by her husband is shown. He was not then in debt, except to Van Wyck for this unpaid purchase money, — a debt for which appellee was in no way liable; and, from the manner of dealing between the two brothers, it seems to have been contemplated that the property should be paid for out of Thomas' salary. None of the payments, except the last, was made upon the strength of any promise of security by way of a lien upon the property. Appellee, however, besides advancing money with which to make the payments for the land as they became due, seems to have allowed his brother to draw more money than his salary amounted to, and was contented to charge it up to him, with the accrued interest from year to year. He advanced the \$850 to apply on the first payment, and paid the first two notes of \$1,050 each, without any promise of security whatever. Nor can it be said, from anything contained in the evidence, that appellant, who was the owner of the property, did or said anything to induce appellee to pay off the Van Wyck incumbrance, or to induce in him the belief that she would give, or join in giving, any security on the property whatever. She had not joined in the Van Wyck notes or deed of trust, nor had she, by the conveyance to her or otherwise, assumed their payment. Her husband had conveyed the property with covenants of warranty, and not as being subject to the mortgage; and it seems she did not, in fact, know of the existence of the mortgage. He alone, aside from the lien upon the property, continued bound to pay the notes. He, therefore, in paying them, or in procuring them to be paid by appellee, was simply discharging his own debt; and the release of the property, so far at least as the first two notes were concerned, followed as a necessary consequence. In respect, therefore, to the payment of the first two notes, in the absence of any fraud on the part of appellant, or of any act or assurance by her upon which appellant might have relied, and in view of the fact that appellee paid these two notes as mere advancements upon his brother's salary, or as personal loans, and without relying upon any supposed or promised lien upon the property, it is not easy to see how she can be charged with any duty to repay him before she can have her title cleared from the unauthorized incumbrance with which appellee has clouded it.

Appellee contends, however, that having made the payments directly to Van Wyck, the vendor, he has an equity, in the nature of a vendor's lien, which must be satisfied before appellant can have this trust deed removed as a cloud upon her title. Counsel for appellee say: "By means of these payments, appellee satisfied the claim of the

vendor, for which the vendor, even in the absence of any special agreement, would have had a lien upon the premises. Under such circumstances, the appellee is entitled to a lien in the nature of a vendor's lien, or, put differently, he is entitled to be subrogated to the rights of the vendor. A leading case in this state on the subject is *Austin v. Underwood*, 37 Ill. 438. In that case it was held that, where a third party pays directly to the vendor the purchase money of real estate, he is entitled to the lien the vendor would have had on the real estate for the purchase money if it had not been paid to him." We do not think the cases cited (*Austin v. Underwood*, and others) are in point. In the *Austin Case* the question arose in an action of ejectment between the parties to the original transaction, as to whether the money paid by Austin was purchase money. Austin had paid the purchase money directly to the vendor, for and at the request of Underwood, the vendee, who received the conveyance as the consideration of the payment, and who, in pursuance of his promise, gave Austin a mortgage, and afterwards a deed of trust, upon the property, but which did not contain a release of the homestead. At a foreclosure sale, Austin purchased the property, and brought ejectment against Underwood, and the question was whether or not the debt for which the lien was given was purchase money. If it was purchase money, there was, under the statute, no homestead exemption against it; otherwise, Underwood's defense was good, and he could not be ejected from his homestead. This court held that it was purchase money, and that, the mortgage lien having been given for the purchase money, there was, by the very terms of the statute, no homestead exemption, as against it. The case did not at all involve the maxim invoked in the case at bar. The lien which equity gives the vendor for the unpaid purchase money is personal to the vendor, and is not assignable. *Keith v. Horner*, 32 Ill. 524; *Elder v. Jones*, 85 Ill. 384; *Gruhn v. Richardson*, 128 Ill. 178, 21 N. E. 18. And, if appellee had taken an assignment of the notes to himself, the only lien he could have enforced would have been the mortgage lien. And it would seem that, if the doctrine of subrogation applies, its effect would be to subrogate him to the mortgage lien; for, if he could not become the holder of the vendor's lien by assignment, he could not by way of subrogation, which, to a great extent, rests upon the same principles. 28 Am. & Eng. Enc. Law, 172; *Bishop v. O'Conner*, 69 Ill. 431. Appellee did not pay the purchase money, and thereby procure the conveyance of the land to the vendor, under a promise by the latter to secure him by a lien upon the property, as in *Magee v. Magee*, 51 Ill. 500; but, in accordance with the distinction there mentioned, he paid a pre-existing debt created for the purchase of the prop-

erty. 19 Am. & Eng. Enc. Law, 583. The property had been purchased, and the title had passed, and afterwards, when the debt became due, he paid it. He did not thereby acquire a vendor's lien upon the property. In *Elder v. Jones*, 85 Ill. 384, Jones and wife purchased property from Elder and Wilson, and caused it to be conveyed to Mrs. Jones, who gave her two notes for the purchase money, and a mortgage on the property to secure their payment. One of the notes was paid by Jones, and upon his promise to McLean to pay the other, and at the request of the vendors, McLean paid the other note, and received it and the mortgage from the vendors. Afterwards Elder and Wilson, for the use of McLean, brought their bill to foreclose the mortgage, but it, having been executed by the wife alone, was declared invalid; and, the mortgage being invalid, the question (among others) arose whether or not there was a vendor's lien upon the property securing the payment of the amount of the note as purchase money. But this court held that Elder and Wilson, having received the full amount of the purchase money, had no further claim on the land therefor, and had no interest in the suit; that McLean was the beneficial party, and the suit should have been in his name,—but further said: "McLean cannot enforce a vendor's lien which may have once existed in favor of Elder and Wilson. The law does not authorize the assignment or transfer of a vendor's lien to the purchaser of the notes given for the purchase money. Such a lien is not assignable. It is personal, and can only be enforced by the vendor." We are referred to *Bennitt v. Mining Co.*, 119 Ill. 9, 7 N. E. 498, and other cases, as authorities in point, sustaining the judgment of the appellate court, but we are unable to see that these cases are any more than remotely analogous to the case at bar. In the *Bennitt Case* the defendant, Bennitt, as a judgment creditor, but under a void judgment, redeemed the complainant's property from a prior judicial sale, and, at a sale made by virtue of such redemption, purchased and obtained a certificate of purchase for the property; and upon a bill by the complainants to remove such certificate so obtained by sale under the void judgment, as a cloud upon the title, it was held that, as a condition of relief, they should be required to pay Bennitt the amount of the redemption money, with interest. In that case the time within which the complainants could redeem had expired, and, while it was held that they had still such an interest as to entitle them to sue, yet it is seen that they availed themselves of the redemption made by Bennitt, who had no intention of voluntarily paying the judgment debtor's debt and redeeming it from the lien, but intended and endeavored to substitute his own lien, and become himself the owner of the property by the purchase; and it was held that, before they could have the

cloud thus created removed in equity, they must do equity, and pay to Bennitt the redemption money and interest. It would seem clear that, as to all payments made by appellee except the last, there is no principle of law or equity by which the moneys thus paid can be held to be a lien upon the land, or by which their payment can be held to have been made under such facts and circumstances as to impose on appellant any duty to reimburse appellee before she can have her title cleared of the cloud created by the trust deed. At the time of the payment of the last note there was no lien on the property, except to secure said last note, the balance of the debt having been extinguished four years before. Appellee was not a surety bound for the payment of the debt, nor did he have any interest in or title to the property to protect; and, so far as the owner of the property was concerned, he was, at least as to all except the last payment, a mere volunteer. It is only where the one advancing the money occupies the place of a surety, or is compelled to pay the debt to protect his own rights, that courts of equity will, as a matter of course, and without any agreement to that effect, subrogate him to the rights of the creditor whose debt he has paid. Where such conditions do not exist, and there is no agreement that he shall have the benefit of the lien, his payment extinguishes the debt, and, of course, the lien as well. *Sandford v. McLean*, 3 Paige, 117.

But, as we view the case, appellee's rights arising from the payment of the last note, because of the agreement with the debtor, which induced the payment, that he should have the same security as Van Wyck, the mortgagee, had, stand upon a different footing. This payment, and the cancellation of the indebtedness and release of the mortgage, were induced by this promise. If Thomas had then been the owner of the property, and had refused to carry out his promise, it could not be doubted that in equity the debt evidenced by this last note and the mortgage securing it would have been treated as still alive, in the hands of appellee, and its payment would have been enforced for his benefit by foreclosure. True, he had seven years before made a gift of the property to appellant, his wife, and they both occupied it; but, the conveyance to her having been a voluntary one, he was under no obligation to her to clear the property from incumbrance, and her property rights were not injured or interfered with in any way by the substitution of appellee for Van Wyck as the holder of the mortgage, in accordance with the agreement between the debtor, her grantor, and appellee. Whether, after having taken the new deed of trust for that and other indebtedness of Thomas to him, and in view of all the evidence, he could, as the moving party, enforce the Van Wyck mortgage in his own favor, it is not necessary to determine; but, when appellant seeks to have that deed of

trust removed as a cloud upon her title, we are of the opinion that, by well-established principles of equity jurisprudence, she may be required, as a condition of relief, to pay, for appellee's benefit, the amount of the last note paid by him, and lawful interest thereon. While the maxim that "he who seeks equity must do equity" does not invest courts of equity with mere arbitrary discretion to require of the complainant, as a condition of relief to which he is otherwise entitled, the performance of conditions not warranted by settled principles of equity jurisprudence (*Finch v. Finch*, 10 Ohio St. 501), still the maxim will be applied, and conditions of relief imposed, in favor of the defendant, in many cases where he could obtain no independent or affirmative relief (1 Pom. Eq. Jur. [1st Ed.] 422). It is not, however, meant by anything here said that appellee might not, in a proper case, have affirmative relief to the extent mentioned.

For authorities upon the doctrine of conventional subrogation, from the principles of which, in view of the evidence, the equities of appellee in this case must be deduced, reference may be had to 24 Am. & Eng. Enc. Law, 200-296, and cases there cited; *Sheld. Subr.* §§ 247, 248; *White v. Cannon*, 125 Ill. 412, 17 N. E. 753. See, also, *Milholland v. Tiffany* (Md.) 2 Atl. 331; *Flannary v. Utley* (Ky.) 3 S. W. 412; *Haggerty v. McCanna*, 25 N. J. Eq. 48.

The judgment of the appellate court and the decree of the circuit court are reversed, and the cause is remanded to the circuit court, with directions that appellant take leave, if she shall be so advised, to amend her bill by tendering to appellee the money paid by him for, or in discharge of, the last Van Wyck note, with 5 per cent. interest thereon from and after such payment, and that she be required to pay the same into court for his benefit, and that upon so doing a final decree be entered in accordance with the prayer of the bill, but that, in case appellant shall fail or refuse so to do, let the order be that her bill be dismissed at her costs. Reversed and remanded, with directions.

(164 Ill. 572)

TOBERG et al. v. CITY OF CHICAGO.

(Supreme Court of Illinois. Jan. 19, 1897.)

MUNICIPAL ASSESSMENTS—PUBLICATION OF NOTICE
—CERTIFICATE.

A certificate of publication of notice of municipal assessment and of final hearing, alleging that "it has been published five times," stating also the date of the first and last publication, does not show compliance with the statutory requirement that it be published at least "five successive days."

Error to Cook county court; O. N. Carter, Judge.

Proceedings by the city of Chicago against H. Toberg and others to enforce an assessment. Judgment for plaintiff, and defendants bring error. Reversed.

Maher & Gilbert, for plaintiffs in error. J. D. Adair, for defendant in error.

J. A. Crain, for plaintiffs in error. Geo. L. Hoffman, W. H. A. Renner, and F. D. Ramsey, for defendant in error.

PER CURIAM. This record is brought before us by plaintiffs in error to reverse the judgment of the county court of Cook county entered in a special assessment proceeding against certain of his real estate to pay the cost of curbing with curb walls, filling, and paving with wooden blocks Leavitt street, from West Eighteenth street to Blue Island avenue, in the city of Chicago. No briefs have been filed by defendant in error. Plaintiffs in error did not appear in the court below, and judgment was entered by default. It is pointed out that the certificate of publication of the notice of the assessment and of the final hearing is insufficient to show due publication of the notice as required by the statute. This point is well taken. The certificate states that the notice "has been published five times in," etc., stating also the date of the first and last publications. The statute provides that the notice shall be published at least "five successive days"; and, as was said in *Evans v. People*, 139 Ill. 552, 28 N. E. 1111, "for aught that here appears, this notice may have been published two or more times in different editions of the paper printed and published on the same day. The certificate should have followed the statute, and shown a publication on five successive days." To the same effect is *Chandler v. People*, 161 Ill. 41, 43 N. E. 590. For this error the judgment is reversed, and the cause remanded. Reversed and remanded.

(164 Ill. 495)

METHENY et al. v. BOHN.

(Supreme Court of Illinois. Jan. 19, 1897.)

PARTITION — ALLOWANCE OF SOLICITOR'S FEE — PRESERVATION OF EVIDENCE — CHARACTER OF DEFENSE.

1. An allowance of fees to complainant's solicitor in a decree for partition and sale of lands cannot be sustained where the evidence on which such allowance was made is not preserved in the record.

2. Under 3 Starr & C. Ann. St. (2d Ed.) p. 2927, § 40, providing that in partition of real estate, where the rights of all parties in interest are properly set forth in the bill, the costs, including a reasonable solicitor's fee, shall be apportioned among the parties, unless the defendants, or some of them, shall interpose a good and substantial defense, it is not required that such defense should be successful, but only that it should be of a substantial character, made in good faith, and on reasonable grounds.

Error to circuit court, Carroll county; John C. Garver, Judge.

Bill for partition, filed by Charles D. Bohn against Leonnetta C. Metheny and others. From a decree ordering partition and sale and allowing fees to complainant's solicitors to be paid from the proceeds, defendants bring error. Reversed.

CARTWRIGHT, J. Appellee commenced this suit by filing his bill for the partition of certain lands in Carroll county, claiming an undivided half of the same as a son and heir at law of Samuel Bohn, deceased, subject to the dower of the widow, Lucinda Bohn. He set forth that appellant Leonnetta C. Metheny was an heir, and entitled to the other half, subject to dower; but that she claimed he was not the child of said Samuel Bohn, and had no interest in the lands; and he therefore filed the bill to have that controversy settled, and his rights as a son and heir ascertained and declared. The bill was answered, and appellee's claim to be a son of Samuel Bohn was disputed. Leonnetta C. Metheny claimed to be the only heir. There was a hearing, and the court found in favor of appellee, and entered the decree for partition. That decree was affirmed by this court. *Metheny v. Bohn*, 160 Ill. 263, 43 N. E. 380. Commissioners had reported that the lands were not susceptible of division, and appraised their value. When the cause was reinstated in the circuit court, a decree was entered confirming that report, and ordering a sale of the lands. By this decree appellee's solicitors were allowed \$5,000 as their fees for services rendered to him in the suit; and the special master was ordered, upon making the sale, to pay the costs of the suit and sale, and then pay to the widow, Lucinda Bohn, who had consented to have her dower sold, the estimated value of such dower, after which he should pay said solicitors their fee of \$5,000, and divide whatever should be left equally between the guardian of appellee and appellant Leonnetta C. Metheny. The land described in the decree for sale is different from that involved in the bill and decree for partition, one point in the description being differently located with respect to a fixed monument. The error is evidently clerical; and, if that were the only objection to the decree, it could be easily disposed of by a modification in that particular. The allowance of \$5,000 to complainant's solicitors for their services in establishing his claim to an interest in the lands is objected to for several reasons. No evidence is preserved in the record showing what services the complainant's solicitors rendered, or the value of such services. The time for filing a certificate of evidence heard on the motion for the allowance was extended 30 days from the date of the decree; but the privilege allowed was not availed of, and no certificate was presented to the chancellor, or signed or filed within that time. The rule that the evidence to sustain an allowance of this character must be preserved in the record has been repeatedly stated by this court. It was established as a rule in *Goodwillie v. Millmann*, 56 Ill. 523, where it

was said: "As a rule of practice, the evidence upon which such an allowance is made should be preserved in the record. Where such large sums are allowed, and the rights of litigants are likely to be so materially affected, they should not be deprived of having a decree reviewed in an appellate court." And this rule has prevailed whenever the question has arisen since that time, whether in suits for partition or on the dissolution of an injunction or otherwise. The language above quoted was repeated in *Albright v. Smith*, 68 IH. 181, and in *Spring v. Collector of City of Olney*, 78 Ill. 101, it was again held as follows: "The evidence upon which the allowance was made was not preserved in the record, without which, as this court has frequently ruled, the decree cannot be supported." The rule and the duty of the court in which the allowance is made is stated in *Goodwillie v. Millmann*, supra, as follows: "In taxing such fees the chancellor should exercise his own judgment, and not be wholly governed by the opinions of attorneys as to the value of their services. He has the requisite skill and knowledge to form some idea as to what is fair and reasonable compensation, and he should exercise that judgment. He should, no doubt, consider the opinions of witnesses and evidence of the sum usually charged and paid for such services, but should not be wholly controlled by the opinions of attorneys as to their value." In *Reynolds v. McMillan*, 63 Ill. 46, the subject of inquiry in such cases was stated as follows: "In fixing the amount of a reasonable fee, the examination should be directed to what is customary for such legal services where contracts have been made with persons competent to contract, and not what is reasonable, just, and proper for the solicitor in the particular case. The inquiry should be, not what an attorney thinks is reasonable, but what is the usual charge." When the question is considered in an appellate court, although it is one about which the court is well qualified to form an opinion, and upon which it will exercise an independent judgment, the evidence is necessary to a proper review of the allowance for the purpose of showing what the ordinary and usual charges of solicitors for like services are in the court where the allowance was made in cases where such fees are subject of contract between solicitor and client. The allowance in this case, being without any support in the record, cannot, under the well-established rule, be sustained.

It would not be necessary to say more, but both parties have argued the question whether this is a proper case for the allowance of a solicitor's fee against the defendant, and, as that question will arise again in this suit, they both desire to have it decided. Section 40 of the act relating to the partition of real estate, as amended in 1889, provides: "In all proceedings for a partition of real estate, when the rights and interests of all the par-

ties in interest are properly set forth in the petition or bill, the court shall apportion the costs, including the reasonable solicitor's fee, among the parties in interest in the suit, so that each party shall pay his or her equitable portion thereof, unless the defendants, or some one of them, shall interpose a good and substantial defense to said bill or petition." Prior to this amendment it was uniformly held, under statutes which authorized the court to apportion the costs, including reasonable solicitor's fees, among the parties to the proceeding, so that each party should pay his equitable portion thereof, that no allowance could be made in a contested suit where the solicitor for complainant conducted the proceeding against the interest of the defendants, and they were required to employ counsel to represent such interest. It was considered equitable that each should contribute to the fee of complainant's solicitor only in cases where he represented all interests in an amicable proceeding. By the amended section the apportionment is still to be such that each party shall only pay his or her equitable portion of the fee. The widow, Lucinda Bohn, was one of the parties in interest in the suit embraced within the language of the statute, but it was doubtless thought that it would not be equitable for her to pay any part of the fee, as she was omitted from the apportionment. Leonnetta C. Metheny employed her own solicitor, who defended her interests in the circuit court and this court, and \$2,500 was ordered taken out of her share of the proceeds of the land to pay complainant's solicitors. The entire controversy was over an undivided half of the land, and the share so involved was worth, according to the appraisement of the commissioners approved by the court, \$16,700, subject to the dower interest of the widow. By the decree the land was to be sold if it brought two-thirds of that appraisement. For recovering that share the \$5,000 was allowed. To settle the controversy which was litigated in this suit, the complainant might have resorted to an action of ejectment, where, of course, he could recover no attorney's fee against his adversary. The statute authorized the court, under a bill for partition, to investigate and determine the question of conflicting or controverted titles, and complainant chose to avail himself of that remedy.

The interests of the parties were properly set forth in the bill, as was finally determined by the decree and its affirmation in this court, and it is contended that in such case the statute requires the court to apportion the solicitor's fee among all the parties in interest in the suit. If that were true, the statute was not obeyed in this case, since the widow was relieved from any contribution. But we cannot adopt such construction. The rights and interests of the parties to be stated in the bill include every interest, whether in fee, for years, for life, in

dower, and of all persons entitled to the reversion, remainder or inheritance, or who upon any contingency may be or become entitled to any beneficiary interest in the premises. By the statute the court is directed to apportion the fees when such rights and interest are properly set forth, unless some defendant shall interpose a good and substantial defense to the bill or petition. To such a bill no defense could be successful, and to say that defendant should pay complainant's solicitor, unless he succeeded in an impossible defense, would be absurd. It is evident that the good and substantial defense which may be interposed, and which will prevent the allowance of the fee, is a defense of a good and substantial character. The legislature could not have intended the statute as an illogical absurdity, and we think it should be construed as meaning that a defense valid and substantial in character, made in good faith, and on reasonable ground, should exempt a defendant from paying a solicitor of his adversary, not for services rendered to him, but for a hostile attack upon what he in good faith believes to be his substantial right. If the bill states the rights and interests of the parties correctly, a defense which is merely formal, frivolous, or vexatious, or which is not undertaken in good faith, would not be regarded as good or substantial. The defense in this case was of a good and substantial character, and was not undertaken without reasonable grounds, although it was overcome by evidence on the part of complainant, and proved unsuccessful. In such a case it would not be equitable for the defendant to pay a part of a solicitor's fee solely earned as his adversary.

The section of the statute in question was considered in *Hartwell v. De Vault*, 159 Ill. 326, 42 N. E. 789, and the same rule prevailing under the former statute was reasserted. In that case the complainant, in her original bill, had not stated the names and interests of all parties, but had afterwards amended her bill so as to state them. This omission was connected with the fact that the proceeding was hotly contested by the parties, and the latter fact was given as one of the reasons for refusing an allowance of a solicitor's fee. Appellee relies upon the decision in *Walker v. Tink*, 159 Ill. 323, 42 N. E. 773, where it was said that the rights and interests of the parties were correctly set forth in the bill, and no interposed defense could be sustained. In that case a solicitor's fee was allowed, but no good or substantial defense was even alleged, and there was an entire absence of proof tending to establish such a defense. That case was before this court on a prior appeal. *Tink v. Walker*, 148 Ill. 234, 35 N. E. 765. Columbus T. Walker had answered the bill for partition, and filed a cross bill, which he had afterwards amended; and it was held that his amended answer and cross bill alleged no valid de-

fense, nor was there any proof tending to show one. The case went back to the circuit court, where the cross bill was again amended; but when the case came up the second time there was nothing in the amendment or additional evidence which altered the situation, or afforded a reason to change what was before said. There was nothing new except that appellants assigned some errors which did not concern them. That case does not conflict with what has been said above. For the reasons given, the decree will be reversed, and the cause remanded. Reversed and remanded.

(164 Ill. 525)

MONAHAN et al. v. FITZGERALD.

(Supreme Court of Illinois. Jan. 10, 1897.)

MECHANICS' LIENS—CERTIFICATE OF ARCHITECT—SUPERVISION OF WORK—DEFECTIVE WORK AND MATERIALS.

1. Under a contract providing that the work should be done under "the immediate supervision" of the architect and that payments should be made on architect's certificates, the owner is not bound by certificates issued, in the absence of the architect, by one to whom he had attempted to delegate his authority.

2. Contractors for putting on lath and plaster, under a contract providing that the mortar should be so applied that the key would be solidly filled, and that the work should be in perfect order when finished, cannot claim a lien where, by reason of using laths wider than those specified in the contract, and placing them near together, and failing to press the mortar so as to form a proper key, a great part of the plaster fell soon after it had dried, though no objection was made by the architect to the work as it progressed.

Appeal from appellate court, First district.

Suit by John P. Monahan and another against William Fitzgerald to enforce a mechanic's lien. From a judgment of the appellate court (62 Ill. App. 192) affirming a decree dismissing the bill, complainants appeal. Affirmed.

Stirlen & King, for appellants. Black & Fitzgerald, for appellee.

CARTER, J. This is an appeal from a judgment of the appellate court affirming a decree of the circuit court of Cook county dismissing appellants' bill for want of equity, filed to establish a mechanic's lien for lathing and plastering an apartment building. The bill alleged full performance of appellants according to the contract, specifications, and directions. The defense was that the work and materials were so defective that a large portion of the plaster fell off of the ceilings within a few weeks after it was put on, and that the cost of repairs exceeded the amount claimed by the appellants to be due under the contract. It is not disputed by appellants that large portions of the plaster fell from the ceilings of the different flats into which the building was divided, soon after the work was completed and the building heated, as shown by

appellee, but their contention is that such falling was not due to any defect in their work or materials, but to other causes, over which they had no control, such as the settlement of the building, the shrinkage of lumber, the exposure to weather by leaving the building open, and the sagging of joints caused by heavy materials to deaden sound being placed between the floors and ceiling. The master found, in substance, that the falling of plaster was due to the fact that the plaster was not sufficiently keyed to hold it in place, and that this defect in the work arose from the use of laths of too great width, the failure to leave sufficient space between them, and to use sufficient force in applying the material so as to force the plaster through and form a proper key. The contract and specifications provided in detail for a first-class job of plastering, and for the use of first-class materials. It was provided, among other things, that "mortar shall be * * * applied so that the key will be solidly filled, and the work to be gauged with plaster of Paris, so as to allow the work to set up quickly. * * * Entire job to be carefully done, so as to leave in perfect order when finished. The entire work is to be done under the immediate supervision of the superintendent, and any work done without his instruction, or not as specified, and also all work done badly or injured by the weather, must be taken out and done over. All patching and repatching to be done, wherever found necessary, without extra charge." Payments were to be made upon certificates of the architects. It appears that in November, 1893, and before the work was completed, Mr. Warren, the architect and superintendent, went to Europe, and did not return until the following March. He had, however, employed Mr. Ingraham to act as superintendent, who looked after the work for him as it progressed, both before and after his departure. Appellee also employed this superintendent to perform other duties about the building for him, and there is evidence tending to show that appellee agreed with Warren that Ingraham should act as superintendent in Warren's absence. The architect left with his stenographer certain certificates, signed in blank, with directions to deliver them on agreement of the parties. Before his return the work was completed, but some of the plaster had fallen; and, upon the promise of appellants to patch up and finish work of this character, Mr. Ingraham, who was the acting superintendent, directed the issuing of the architect's certificates to appellants, and they were filled up and delivered accordingly. After appellants received these certificates, and had repaired the work where the plaster had fallen before the receipt of the certificates, further and larger quantities of the plaster fell from the ceiling of a large number of the rooms and hallways of the house, damaging the building, and requiring great additional expense in repairs. These repairs appellants refused to make, alleging that the fault was not in their work, but in the

work of others, as above stated. The acting superintendent undertook to recall and cancel the certificates, but appellants refused to surrender them, and, upon appellee's refusal to pay, filed their bill to establish their lien. The master found that the certificates were not binding on appellee for the reason that they were not issued in accordance with the contract, that the contract required that the architect must himself determine whether the work had been properly done before issuing the certificates, and that he could not delegate this duty to another, but found, further, that appellants were not bound to wait until the architect should return from his trip abroad, and that the architect's certificate as a prerequisite to pay was waived by his absence. He further found that Ingraham daily inspected the work as it progressed, and that the defective manner in which it was done was waived by his failure to object, and by his apparent acquiescence in the manner in which appellants were performing the contract on their part, and recommended a decree allowing the complainants their demands. Both parties excepted to the master's report so far as its findings were adverse to them, respectively, and the circuit court overruled complainants' exceptions, and sustained all but two of those filed by defendant, and held complainants were not entitled to a decree, and dismissed the bill for want of equity.

A great volume of evidence was taken on the different phases of the case, and, while we have examined and considered it all, so far as counsel have presented it to us by their abstracts and arguments, it will not be necessary to refer to it at any considerable length in the disposition of the case. Much of the testimony related to the alleged inferior material used in making the mortar; but, as the evidence abundantly shows, and the master found, that the plaster fell because it was insecurely and insufficiently keyed, we do not regard it important to determine whether the exceptions to the master's findings that the material was not defective should have been sustained or not. The chancellor sustained the finding of the master that, because of the excessive width of the laths, of the manner in which they were put on, and of the lack of sufficient force in applying the plaster, no sufficient key was formed to hold the plaster in place, and that in that respect the contract was not complied with. This finding is in accordance with the preponderance of the evidence, and must be sustained. We agree that the certificates issued were not in accordance with the contract, and were invalid, and, even if it be conceded that appellants were not bound to wait for the return of the architect, but that by his absence the necessity of first procuring his certificate was waived, still appellants were not entitled to a decree without proving compliance on their part with the contract in other respects. If the plaster was so improperly put on that it could not

sustain its own weight, but fell from the ceilings almost before it was thoroughly dry, the mere fact that the superintendent did not object to the work as it progressed would not amount to a waiver of the provisions of the contract relating to the character of the work and the manner in which it should be done. Appellants were bound to know of such a fatal defect in their work, and of their departure therein from the contract, and if the superintendent also knew of it as it was being done, he was a party to the fraud; and if he did not know of it, but it was concealed from him, there was no approval by him by acquiescence; and in either case appellee was not bound by the failure of the acting superintendent to object to the manner in which the work was being done as it progressed. It would be a novel doctrine to hold that a contractor, who, under a contract requiring the best workmanship and materials, with specifications of details, has upon his own motion substituted work or materials of such an inferior character as to render the structure, when completed, valueless, may nevertheless recover the contract price upon proof that the architect or superintendent made no objection as the work progressed. It was no sort of compliance with this contract to so plaster these ceilings that the plaster, because insufficiently keyed, would in large areas fall to the floor below when the house was being occupied, whether the superintendent knew or did not know of the defective character of the work as it progressed. Suppose appellants had nailed the laths so slightly that they would not sustain the weight of the plaster, and laths and plaster had all fallen to the floor; could they have recovered on the ground that the superintendent waived compliance with the contract by not objecting, as the laths were being put on, that they were insufficiently nailed? It may be remarked, however, that the evidence in this case does not show that his attention was called to the fact that the laths were half an inch wider than required by the specifications, and were nailed on so closely together that no sufficient room was left for the plaster to pass through, or that the plaster was spread upon them with such little force that it was not pressed through in sufficient quantities to form a key to hold it in place. It is not a question whether a deviation from the terms of the contract may not be expressly or impliedly authorized by the architect or superintendent, so as to bind the owner, as was the case in *Methodist Episcopal Church v. Brose*, 104 Ill. 206, and other cases cited by appellants. "A party who has accepted work is not held to have waived defects in it, if, like plastering, it may have latent defects which are not open to inspection." *Korf v. Lull*, 70 Ill. 420; *Van Buskirk v. Murden*, 22 Ill. 446. No error has been committed to the prejudice of appellants, and the judgment of the appellate court will be affirmed. Judgment affirmed.

(164 Ill. 597)

NATIONAL LINSEED-OIL CO. v.
McBLAIN.

(Supreme Court of Illinois. Jan. 19, 1897.)

APPEAL FROM INTERMEDIATE COURT — REVIEW —
MASTER AND SERVANT—NEGLIGENCE—
EVIDENCE—INSTRUCTIONS.

1. The findings of the appellate court on questions of fact are conclusive.

2. In an action to recover for injuries received in oiling machinery, through the alleged negligence of defendant in failing to provide a proper oil can, plaintiff testified that he told the superintendent that the can furnished him was not suitable, and described the kind he wanted, and that the superintendent, on several occasions thereafter, promised to get him another can. *Held*, that there was legal evidence that the can used by plaintiff at the time of the injury was defective.

3. There is no error in refusing instructions substantially embraced in those already given.

Appeal from appellate court, First district.

Action by Daniel McBlain against the National Linseed-Oil Company to recover for personal injuries. From a judgment of the appellate court (64 Ill. App. 117) affirming a judgment for plaintiff, defendant appeals. Plaintiff died pending the appeal, and Mary McBlain, his administratrix, was substituted as appellant. Affirmed.

This was an action brought by Daniel McBlain against the National Linseed Oil Company to recover for a personal injury received by the plaintiff while in the service of the defendant, engaged in oiling certain machinery of the defendant. It is alleged in the declaration that defendant was in possession and using and operating a certain plant and linseed-oil mill, with machinery for manufacture of linseed oil, etc.; that plaintiff was then and there in the employ of defendant as a general workman, and by and under direction of defendant was put to work at the very dangerous and hazardous employment of oiling certain gearing, shafting, and machinery of defendant, used by it in the manufacture of linseed oil; that it was the duty of defendant to furnish and provide plaintiff with an oil can or oiler with which to oil said gearing, shafting, and machinery, that was reasonably safe for that purpose, so that plaintiff's person might not be needlessly or unnecessarily exposed to danger or injury to life or limb while engaged in said work; that defendant, not regarding its duty in that behalf, wrongfully, etc., failed to furnish or provide plaintiff with an oil can or oiler that was reasonably safe to be used for that purpose; that plaintiff requested defendant to supply him with an oil can or oiler which would be reasonably safe for plaintiff to use in doing said work, viz. an oil can or oiler with a long, crooked spout, and with a handle to it, and that defendant promised to furnish plaintiff with such an oil can or oiler within a reasonable time, and ordered him to proceed with the oiling of said gearing, shafting, or machinery with said defective oil can or

oiler which plaintiff then had in use; that defendant negligently, etc., failed to keep its promise in that regard, and did not furnish plaintiff with an oil can or oiler reasonably safe for him to use for that purpose; that plaintiff relied upon the promise of defendant to furnish him, etc., and under orders from defendant directing him so to do, proceeded to oil said gearing, shafting, and machinery with said defective oil can so furnished him as aforesaid, and, while relying upon said promise, plaintiff, by reason of the promise, and while engaged in oiling with said defective oil can which defendant had furnished him for that purpose, and while plaintiff was using all due care, became and was caught by and drawn into said gearing and machinery, and plaintiff's right hand was caught and drawn into said gearing and machinery, and was thereby crushed, mangled, and severely injured. The defendant pleaded not guilty, and on a trial before a jury a verdict was returned in favor of plaintiff for \$5,000. The plaintiff remitted \$2,500, and judgment was entered for the remaining sum of \$2,500. The defendant appealed to the appellate court, where the judgment was affirmed.

Gurley & Wood, for appellant. F. W. Bennett and C. M. Hardy, for appellee.

CRAIG, J. (after stating the facts). The appellant operated a mill in Chicago, in which it manufactured linseed oil. Appellee had worked for appellant as a common laborer some two or three years prior to the injury. In October, 1892, the superintendent in charge of the mill directed appellee to oil certain shafting in the mill each evening. A short time thereafter he was relieved of that duty, but in November, 1892, he was directed to resume that service, which he did, and continued oiling the shafting until the 18th of January, 1893, when, in the discharge of his duty, he received the injury complained of. The appellant has filed an elaborate argument, but it is principally devoted to a discussion of questions of fact which are not reversible here. Under the statute it is the duty of the appellate court, in a case of this character, to consider and pass upon questions of fact. That duty has been performed by the appellate court, and, as has been held in numerous decisions, the judgment of that court is conclusive. It is, however, contended on the argument that there is no evidence proving or tending to prove that the oil can in use by appellee at the time he was injured was defective. It was alleged on the declaration that it was the duty of the defendant to furnish plaintiff with an oil can, to oil the gearing and shafting and machinery, that was reasonably safe for that purpose, and that the defendant failed in that regard. It may be conceded that this was a material averment and, if there was no proof whatever in the record to sustain it, the instruction to

find for the defendant should have been given. But upon an examination of the record it will be found that there was evidence tending to establish the averment of the declaration. The first evening plaintiff went to the coke mill to oil the shafting, he testified, "I didn't have the proper kind of can to oil with." He further testified that he went out and borrowed a suitable can of some other employé. The next morning after plaintiff had oiled the shafting for the first time, he called on the superintendent in regard to the can. He testified: "I oiled it that evening. The next morning I went to Mr. Jones, the superintendent, and showed him the can. Says I, 'Mr. Jones, this is not a proper kind of a can to do that work with.' 'What kind of a can do you want?' says he. Says I, 'I want a can with a long spout to it, and a handle to it, so that you can let it run in the cups, and not spill the oil around. It drops lots of oil, so that the mill is all oily.' Says he, 'Well, I will get you one.'" In addition to his testimony, the plaintiff also testified that on several occasions afterwards he called on the superintendent for a different can from the one he had been furnished, and the superintendent promised to furnish a can. When the plaintiff called on the superintendent and showed him the can, and said it was not a proper can, and the superintendent promised to furnish another, he in effect admitted that the can furnished was not suitable; at all events, the evidence clearly tended to prove the allegation of the declaration, and we do not regard the position of counsel sustained by the record.

It is next contended that appellee failed to prove a promise by the defendant to furnish appellee an oil can, as alleged in the declaration, and that he failed to prove that he relied upon any promise of the defendant. We have already set out an interview between plaintiff and defendant's superintendent, in which the latter promised to furnish a suitable can. A short time after that interview, as the plaintiff testified, he met Jones, and inquired if he had got the can. Jones replied, "No; but as soon as they get it at headquarters I will give it to you." Again, in November, plaintiff testified that he called on Jones in regard to the can, and Jones said the "cans had not been received at headquarters, but we must hurry them up." At a later date, on another occasion, plaintiff testified he met Mr. Jones, and said to him he "would sooner do any other work in the house than that [oil]ing]. He promised me again to get a can." On the night before the injury, plaintiff, as he testified, called on Jones again, and Jones said, "You have got to do the best you can until such time as we can get a new can." Here was ample evidence tending to prove a promise on the part of the superintendent, and a reliance on the promise by the plaintiff. Whether the evidence was sufficient to establish the fact was a question for the jury and for the appellate

court,—one that does not arise here. Whether appellee received the injury complained of through the negligence of appellant in failing to furnish suitable appliances with which he should perform the labor he was required to do, whether the use of the oil can in question by appellee contributed to the injury, whether the accident would have been avoided if a long-spouted can had been used, and whether appellee was guilty of negligence contributing to the injury, are each and all questions of fact, which have been ruled against appellant by the judgment of the appellate court, and, as said before, they do not arise on this appeal.

On the trial, plaintiff testified that he applied to Mr. Meany, who was foreman and shipping clerk of the company, to furnish him a can to be used in oiling the machinery, stating the description and character of the can he desired. It is claimed the court erred in denying a motion to exclude this evidence from the jury. The court did exclude the answer made by Meany to the request, and, so far as the rest of the evidence is concerned, it was not of a character to prejudice the mind of the jury. So far as is shown by the record, no substantial error appears in the ruling of the court in the admission or exclusion of evidence.

It is also claimed that the court erred in refusing to give the instructions asked by the appellant, from the sixteenth to the twenty-third, inclusive. No instructions were asked or given for the appellee, and 15 long instructions were given for the appellant. Upon an examination of the instructions given for appellant it will be found that they fully cover all questions of law involved in the case, and there was no necessity for giving other instructions. Moreover, the refused instructions were substantially embraced in the instructions given, and we do not think the court erred in refusing to give them to the jury.

The judgment of the appellate court will be affirmed. Affirmed.

(164 Ill. 518)

EBSEY v. CHICAGO CITY RY. CO.

(Supreme Court of Illinois. Jan. 19, 1897.)

STREET RAILWAY—PERSONAL INJURY—NEGLIGENCE —GENERAL VERDICT AND SPECIAL FINDINGS.

1. A special finding in an action by one who, having fallen from a cable car, was run over by it, that, at the time plaintiff fell, the car was in motion, is inconsistent with a general verdict for plaintiff; the negligence alleged by the complaint being that after he had fallen off, and was on the ground, and while the car was not moving, it was suddenly started forward. 61 Ill. App. 265, affirmed.

2. A special finding that the driver of defendant's car did not know plaintiff was on the ground when he started the car is not necessarily inconsistent with a general verdict for plaintiff, as the conductor regulates the movements of the driver, and the complaint alleged that defendant had notice of plaintiff's position, "through its agents and servants."

Appeal from appellate court, First district.

Action by Christopher Ebsey against the Chicago City Railway Company. From a judgment of the appellate court (61 Ill. App. 265) affirming a judgment for defendant, plaintiff appeals. Affirmed.

This is an action brought by appellant against the appellee company to recover damages for a personal injury. The declaration contains two counts,—an original count and an additional count; but the allegations in the two counts are substantially the same, so far as the point involved in this controversy is concerned. The declaration alleges that on the 10th day of November, 1892, the appellee was operating a street-railway and cable-car system, and grip cars with trailers, in Chicago, on State street, and that south of Congress street on State street appellant became a passenger upon a grip car, and trailers attached thereto, upon defendant's road; that, "when said car was stopped and was not moving," appellant "alighted upon said grip car, and with all due care and diligence was seeking a seat"; that "while plaintiff was seeking a seat, and while said car was stationary and not moving," a team of horses and a wagon collided with appellant, and threw him from the grip car to the ground; that appellee, through its agents and servants, had full knowledge of the fact that appellant had been knocked from said grip car, and was then and there upon the ground and by the side of said grip car, endeavoring to protect himself against being injured and against being run over by said grip car or trailers; that it was the duty of the appellee to stop the said grip car, and trailing cars attached thereto, a reasonable time to enable said plaintiff to arise from the ground in safety, but that the said appellee, having notice through its agents and servants of appellant's situation, by its said servants negligently and carelessly caused the said grip car, and trailers attached thereto, to be suddenly and violently started and moved onward and southward, and thereby the plaintiff was run over by the said grip car, and trailers attached thereto, and one of his hands was run over and crushed and maimed; and that, to save appellant's life, it was necessary to amputate some of the fingers of his hand, and the same were amputated. The defendant filed a plea of general issue. The cause was tried before a jury, who returned the following verdict: "We, the jury, find the defendant guilty, and assess the plaintiff's damages at the sum of \$1,200." The jury also made the following special findings, in answer to the following questions submitted to them, to wit: "First. Did the driver of the defendant's car know that the plaintiff was lying upon the ground at the time he started up his car? A. No. Second. At the time the plaintiff fell, was the grip car in motion? A. Yes."

The bill of exceptions does not set forth any of the evidence in the cause. The bill of exceptions only shows the general verdict and

the special findings above set forth, and that the defendant moved for a new trial, but afterwards withdrew its motion for a new trial, and moved the court for judgment for defendant on the special findings rendered in said cause; and that said motion was sustained, and the judgment was entered in said cause upon the special findings in favor of the defendant and against the plaintiff, to which judgment and ruling of the court the plaintiff then and there duly excepted. An appeal was taken from the judgment so rendered in favor of the defendant to the appellate court. The appellate court affirmed the judgment of the circuit court, and the present appeal is prosecuted from such judgment of affirmance.

D. C. Kelleher, for appellant. W. J. Hynes and H. H. Martin, for appellee.

MAGRUDER, C. J. (after stating the facts). The main assignment of error is that the court erred in not entering judgment for plaintiff upon the general verdict, and in entering judgment for the defendant upon the special findings.

The only question in the case is whether the court erred in not entering up judgment in favor of the appellant upon the general verdict, and in entering judgment for the appellee upon the special findings. In order to determine whether the court erred in the ruling made and in the judgment entered by it, it will be necessary to determine whether the special findings of fact made by the jury were inconsistent with the general verdict. The first section of the statute upon this subject provides that, in any civil case in which the jury rendered a general verdict, they may be required "to find specially upon any material question or questions of fact which shall be stated to them in writing." The third section is as follows: "When the special finding of fact is inconsistent with the general verdict the former shall control the latter, and the court may render judgment accordingly." *Railroad Co. v. Dunleavy*, 129 Ill. 132, 22 N. E. 15. The questions which may be submitted to the jury for such special findings are not questions which relate to mere evidentiary facts, but questions which relate to the ultimate facts upon which the rights of the parties directly depend. A probative fact, from which the ultimate fact necessarily results, would be material. The inconsistency between the special finding of fact and the general verdict, as contemplated by the statute, "can arise only where the fact found is an ultimate fact, or one from which the existence or nonexistence of such ultimate fact necessarily follows." *Railroad Co. v. Dunleavy*, supra. So far as the first special finding is concerned, it may be said that it is not necessarily inconsistent with the general verdict. In such first special finding the jury were asked, "Did the driver of defendant's car know that the plaintiff was lying upon the ground at the time he started his

car?" and they answered, "No." While it may be true that the driver did not know that the plaintiff was lying upon the ground, the conductor of the car may have known such fact. The conductor of the car, as is well known, directs and regulates the movements of the driver of the grip car. It therefore does not necessarily follow that, because the jury were of the opinion that the driver did not know the fact inquired about, they may not have been of the opinion that the conductor knew such fact. The declaration charges that the defendant had notice of such fact "through its agents and servants"; and, if it had such notice through its servant the conductor, its obligation was the same as though it had such notice through its servant the driver of the grip car.

But we are inclined to think that the second special finding made by the jury was inconsistent with the general verdict. In that finding the jury were asked the question, "At the time plaintiff fell, was the grip car in motion?" And they answered, "Yes." The jury thus found that the grip car was in motion at the time the plaintiff fell from the same. The declaration distinctly charges that the car "was stopped and was not moving" when plaintiff boarded it and attempted to find a seat, and that he was thrown from the grip car "while said car was stationary and not moving." The charge in the declaration against the defendant is that, while the plaintiff was lying upon the ground by the side of the grip, the grip car, and trailers attached thereto, were suddenly started and moved. The declaration avers that the defendant was guilty of negligence, in that it started suddenly into motion a car which "was stationary and not moving." The general verdict finds the defendant "guilty"; that is to say, guilty of the negligence charged in the declaration. By their general verdict the jury found that the defendant was guilty of suddenly starting into motion a car which was stationary. But the special finding is that, when the plaintiff fell, the grip car was in motion. The finding that the car was in motion when plaintiff fell is inconsistent with the verdict that the defendant was guilty of starting a car which was stationary. It is true that all reasonable presumptions will be entertained in favor of the general verdict, while nothing will be presumed in aid of special findings of fact; but it is also true that the inconsistency between the special finding and the general verdict will arise where the fact found is one from which the existence or nonexistence of the ultimate fact necessarily follows. In a certain sense the fact that the car was in motion when plaintiff fell is a probative fact, but it is a probative fact from which the ultimate fact of the defendant's negligence necessarily results. *Railway Co. v. Dunleavy*, supra. The declaration is not one which charges a specific act of negligence in starting a stationary car. Undoubtedly, the defendant would have

been guilty of negligence if it had failed to stop the car, or had kept the car in motion, while the plaintiff was getting on it. It is the duty of the managers of a street car to stop the car in order that a passenger may get on, and to stop it in order that a passenger may get off, and it violates its duty to such passenger, if it compels him to get on or to get off while the car is moving. But in the present case the negligence charged is not that of compelling the plaintiff to get on the car while it was in motion, but the negligence charged is that after the plaintiff had fallen off and was lying upon the ground, and while the car was not moving, the defendant suddenly and violently started the car forward. It is not sufficient to say that the allegation that the car was stationary and not moving is the same as the allegation that the car was moving slightly, because the injury alleged to have occurred is an injury resulting from the passing of the wheels of the car over the plaintiff's fingers, and this would have occurred as well while the car was moving slowly as when it was moving rapidly. We have frequently held that a party must recover, if at all, on and according to the case he has made for himself in his declaration, and that he is not permitted to make one case by his allegations, and recover on a different case made by his proof. *Moss v. Johnson*, 22 Ill. 633. In *Railroad Co. v. Magee*, 60 Ill. 529, we held that, where the plaintiff avers in his declaration that defendant carelessly ran and conducted and directed its train, it is error to instruct the jury that they might consider the condition of the brakes employed, as the action was one of carelessness, and not for a failure to properly equip the road. In *Railway Co. v. Foss*, 88 Ill. 551, we held that, in a suit against a car company for damages on account of personal injury alleged to have been caused by defendant's carelessly running its train against a horse, it is not competent for the plaintiff to prove that the railroad track was not properly fenced, or that the cars were not provided with wheel brakes; and we there said: "The plaintiff could not aver negligence in one particular, and on the trial prove that defendant was negligent in another regard." In *Railroad Co. v. Beggs*, 85 Ill. 80, we held that where the suit is against a railway company to recover for a personal injury alleged to have been produced by defective wheels, defective ties, and unskillfulness of the company's servants, it is error to permit the plaintiff to introduce evidence tending to show that the accident was caused by the high rate of speed the train was running. This court is not inclined to allow a general verdict to be set aside by the special finding of a jury, unless the inconsistency between the two is so clear that the special finding necessarily controls the general verdict; but in the present case the fact that the car was stationary and not moving is a material part of the allegation of negligence

charged against the defendant. It necessarily follows that the special finding that the car was in motion when the plaintiff fell therefrom is inconsistent with the general verdict, which found the defendant guilty of suddenly starting a car which was stationary. For these reasons we are inclined to think that the court below ruled correctly in entering judgment for the defendant on the special finding. Accordingly, the judgment of the appellate court affirming that of the circuit court is affirmed. Judgment affirmed.

(164 Ill. 585)

GLOS et al. v. FURMAN.

(Supreme Court of Illinois. Jan. 19, 1897.)

QUIETING TITLE—PARTIES—CLOUD ON TITLE.

1. A bill to remove cloud on title, consisting of a trust deed by defendant G. to defendant B. to secure a note of G. executed to himself, is not demurrable for failure to make the holder of the note a party, it not appearing from the bill that the note had been indorsed and was held by a third person, and it being alleged by the bill that the deed pretended to secure the note, and was executed to annoy complainant and cloud her title.

2. A trust deed purporting to convey "all interest" in a certain lot, executed by one whose only interest was under a tax deed of "the east $\frac{1}{64}$ inch" of the lot, is a cloud on the title to the lot, which will be removed.

Appeal from appellate court, Second district.

Suit by Mary A. Furman against Henry L. Glos and others. From a judgment of the appellate court affirming a decree for complainant, defendants appeal. Affirmed.

This was a bill in equity, brought by appellee to set aside a trust deed executed by Henry L. and Lucy M. Glos to Fred H. Blume, trustee, as a cloud upon her title to the premises described in the bill. The bill of complaint avers that appellee was the owner in fee simple and possessed of the real estate therein described, and that she had a good title in fee simple to the same in law and equity, under good and sufficient conveyances, and now is, and for many years has been, in full possession of the premises under said conveyances; and that appellant, Henry L. Glos, fraudulently intending to annoy and harass her, and to cloud her title to the premises, executed, with his wife, the deed of trust in question for \$7,380, to secure a note payable to themselves one year from date, with interest, etc.; and that neither Henry L. Glos nor his wife had any title to or interest in said premises at the time of the execution of said trust deed, and had no right or authority to execute the same upon said land; and that Fred H. Blume had no interest or title in said land, except as he is made trustee in said trust deed; and that the trust deed was duly recorded on the 28th of December, 1891, in the recorder's office in Kane county, etc., and thereby said trust deed was a cloud up-

on the title of appellee to said premises. The bill prays that said trust deed may be set aside and declared void as against appellee, etc. To this bill appellants Henry L. Glos and Lucy M. Glos filed their answer, in which they set up that the said Henry L. Glos, at the time of making said trust deed, did have an interest in the land described therein, as would appear by the records of the said Kane county, and that the trust deed was executed to secure the payment of the note described therein. Appellant Fred H. Blume filed a demurrer to the bill, and for cause of demurrer stated that the complainant had not in her bill made the owner and holder of the note secured by the trust deed a party defendant. On the hearing in the circuit court, appellee established title to the premises, which are described as follows: "Lot one, southwest quarter of section twenty-five, township thirty-eight, range seven east of the third P. M.; also, lot two, northwest quarter of said section twenty-five, township thirty-eight, range seven east of the third P. M." Appellee also proved that she had been in the possession of the premises under a deed of conveyance for the last 13 years. Appellee also put in evidence the trust deed alleged to be a cloud on her title, which was executed by Henry L. Glos and his wife, and purported to convey "all interest" in the real estate in question to Fred H. Blume, trustee, to secure a note, payable to the order of themselves, for the sum of \$7,380 one year after date, with interest at 6 per cent. The appellants put in evidence a tax deed executed by A. M. Dupee, county clerk of Kane county, Ill., to Henry L. Glos, dated June 14, 1886, conveying the following described real estate: "The east vigintillionth of a vigintillionth of the east $\frac{1}{64}$ inch of lot one in the S. W. quarter of section 25, town 38, range 7, and the east vigintillionth of a vigintillionth of the east $\frac{1}{4}$ inch of lot two in northwest $\frac{1}{4}$ of section 25, town 38, range 7, in the county of Kane and state of Illinois. Recorded in the recorder's office of said Kane county, July 10, 1888, in book 250, page 286." They also put in evidence the tax receipt showing payment of taxes on part of the premises in 1891, 1892, and 1894. The court overruled the demurrer of Fred H. Blume, the trustee, and on the pleadings and evidence entered a decree for complainant as prayed for in the bill. On appeal the decree was affirmed in the appellate court.

F. J. Griffen, for appellants. Charles Wheaton, for appellee.

CRAIG, J. (after stating the facts). It is first claimed in the argument of counsel for the appellants that the court erred in overruling the demurrer of Fred H. Blume, the trustee, to the bill, upon the ground that the owner and holder of the note secured by the trust deed was a necessary party to the bill.

If it appeared from the bill that the note secured by the trust deed had been indorsed, and was, when the bill was filed, owned and held by a third party, there would be much force in the position of counsel that the owner of the note was a necessary party. But the bill contains no allegation that the note had been indorsed, or that it was held or owned by a third party. Upon an examination of the bill it will be found that the allegation, and only one, in regard to the note and deed of trust and the holder of the note, is as follows: "That Henry L. Glos, fraudulently intending to annoy and harass her, and to cloud her title to said premises, on December 23, 1891, executed, with his wife, Lucy M. Glos, to Fred H. Blume, a trust deed on said premises, pretending to secure a note of the said Glos and wife for \$7,380, payable to themselves one year from date, with interest at 6 per cent. per annum, payable annually, and with interest at 7 per cent. after maturity; that said Glos and wife, at the time of the execution of said trust deed, had no title to or interest in said premises in law or equity, and had no right or authority to execute said trust deed, or any trust deed, on said land; charges that the same was executed to annoy your oratrix, and cloud her title to said land." From this allegation no inference can be drawn that the note was owned and held by a third person. As there was nothing in the bill showing that the note was in the hands of a purchaser who was not a party, the demurrer was properly overruled. Moreover, there was nothing in the answer of appellants showing that they had sold and transferred the note, nor was there any evidence introduced on the hearing that such was the fact. As it did not appear from the bill that the note had been sold and transferred, if the appellants desired to raise the question they were required to set up in the answer that they had sold the note, giving the name of the purchaser, and support the allegation by evidence. If appellants had pursued this course, and the court had decided against them, they would have been in a position to properly raise the question now attempted to be raised. But, so far as appears from the record before us, the court did not err in its disposition of the question involved.

But it is said appellants acquired a tax title in the premises, and they merely mortgaged their interest in the premises, whatever that interest was, and hence the mortgage or deed of trust was not a cloud on appellee's title. As has been seen, the land which the appellants acquired by the tax deed was described in the deed as follows: "The east vigintillionth of a vigintillionth of the east $\frac{1}{64}$ inch of lot one in the S. W. quarter of section 25, town 38, range 7, and the east vigintillionth of a vigintillionth of the east $\frac{1}{4}$ inch of lot two in northwest quarter of section 25, town 38, range 7, in the county of Kane and state of Illinois."

A tract of land described as the above may perhaps be pictured in the imagination, but such a tract could not be bounded. It could not be located, nor could a person take possession of such a tract of land personally. Such a tract could have no existence for the purposes for which lands are acquired and held. And as was held in *Carter v. Barnes*, 26 Ill. 455, where land in a deed is so described that it cannot be identified, or the description calls for premises not having an existence, or that cannot be found, the conveyance may be regarded as void. But should it be conceded that appellants had the right to mortgage or convey the land as described in the tax deed, they had no authority to make the mortgage in question. Appellee owned, as has been seen, lot 1 of S. W. $\frac{1}{4}$ section 25, township 38, range 7 E. of third P. M.; and lot 2, N. W. $\frac{1}{4}$ of section 25, township 38, range 7 E. of third P. M. The deed of trust in question executed by appellants does not convey the premises describing them as was done in the tax deed, nor does it declare that the grantees have conveyed all their right, title, and interest, in the premises. But the language of the deed of trust is this: "The grantors convey and warrant all interest in the following described premises: [Describing the property as described last above.]" "All interest" has a broader signification than the language "their right, title, and interest," or "all their right, title, and interest." Giving the words used their common and obvious meaning, the language is broad enough to convey the premises described in the deed.

If this trust deed had been given by the appellants on the land they claimed to have purchased at the tax sale, viz. the east vigin tilllonth of a vigin tilllonth of the east $\frac{1}{64}$ inch, and the east vigin tilllonth of a vigin tilllonth of the east $\frac{1}{4}$ of an inch, of the land, it may be that appellee would have had no ground to find fault with the deed; but when they deliberately give a mortgage on her lands as they are described in the deeds under which she obtained title, for the sum of \$7,380, and that mortgage is placed upon record as a valid and subsisting lien on the premises, a more serious question is presented. Was such a deed of trust a cloud on the title of appellee to the premises in question? We think it was. In *Gage v. Rohrbach*, 56 Ill. 263, it was held that a claim under a void sale in a special assessment was a cloud on a title which a court of equity would remove upon bill filed by the owner of the property. The same doctrine was asserted in *Gage v. Billings*, 56 Ill. 263. In *Hodgen v. Guttery*, 58 Ill. 433, it was held that equity will entertain jurisdiction on behalf of the owner of the fee of lands to remove a cloud upon his title created by a sale of the premises and a deed thereunder under a decree of foreclosure of a mortgage therein. It is there said: "The decree being void as to appellee in the former suit, and he not being liable to pay, or the

land not being chargeable with the mortgage, has appellee any right to maintain this bill? We think he clearly may, to remove a cloud on his title. Here is a decree void as to him, it is true, and a sale and deed made under the decree equally void, but still it is such as to deter some and render others doubtful in the purchase of his title. It is calculated to materially impair the price of the land if put upon the market. * * * For that reason it is such a cloud as authorizes a court of equity to entertain jurisdiction for its removal." What was said in the case last cited applies here. Should appellee undertake to sell her land, here is a mortgage in due form of law for a large sum resting upon it. This, to a person not skilled in titles, would be enough to defeat a sale, although the mortgage was not executed by the owner of the property.

But it is said this court has uniformly held that, where a tax deed or tax sale is void, yet equity required the party seeking to remove the tax claim to do equity by repayment of the amount expended, with interest. That is true; but this is not a proceeding to remove the tax sale or the tax deed held by appellants. No attack has been made by the bill or the decree on the tax deed held by the appellants. It remains unaffected by the decree. The object of the bill here was to remove a deed of trust placed upon lands which, so far as could be determined, were not embraced in the tax deed,—lands which appellants had no authority to mortgage. We regard the decree as correct, and the judgment of the appellate court will be affirmed. Affirmed.

(164 Ill. 614)

SHEA et al. v. MURPHY et al.

(Supreme Court of Illinois. Jan. 19, 1897.)

DEED—MENTAL CAPACITY—UNDUE INFLUENCE—DELIVERY—EVIDENCE—DECLARATIONS OF GRANTOR.

1. The fact that the grantor was 81 years old, and that his mind was somewhat impaired by age, does not show want of mental capacity, where the lawyer by whom the deed was drawn and the notary before whom it was acknowledged testified that they thought the grantor perfectly competent, and that he understood the nature of the deed.

2. Undue influence, to render a deed void, must be such as to deprive the grantor of free agency.

3. There was a delivery of a deed where the grantor handed it to a third person, and instructed him, without reservation, to keep it, and deliver it to the grantee after the grantor's death.

4. In an equity case, in which the verdict is merely advisory, errors in instructions are not ground for reversal.

5. Declarations of the grantor after delivery of the deed are inadmissible to invalidate it.

Appeal from circuit court, LaSalle county; Charles Blanchard, Judge.

Action by Sarah Shea and others against Thomas Murphy and others. From a decree for defendants, plaintiffs appeal. Affirmed.

This was a bill brought by Sarah Shea, Elizabeth Crinigan, Mary A. Gibson, and George A. Murphy, against Thomas Murphy and others, to partition certain lands in Lasalle county, which originally were owned by Patrick Murphy, who died intestate, December 10, 1893, leaving complainants and defendant Thomas Murphy his children and only heirs at law. The lands consisted of 200 acres in Lasalle county and 160 acres in Kansas. On the 14th day of October, 1893, Patrick Murphy executed a deed conveying the S. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$, 31-35-1, to Thomas Murphy for life, with remainder to his sons Thomas Francis Murphy and William Edward Murphy; also the N. $\frac{1}{2}$ S. $\frac{1}{2}$ N. W. $\frac{1}{4}$, 5-34-1, to Thomas Murphy for life, with remainder in fee to his two sons Timothy John Murphy and George Murphy. On the same day Patrick Murphy executed certain other deeds, one conveying to Elizabeth Crinigan 40 acres in Lasalle county for life, with the remainder in fee to the children of said Thomas Murphy; another, conveying to Sarah Shea 40 acres of land in Lasalle county for life, with remainder in fee to the children of George A. Murphy; another, conveying to George A. Murphy and Mary A. Gibson 160 acres of land in Kansas. It was charged in the bill that Patrick Murphy, at the time said pretended deeds purport to have been executed, was not of sound mind and memory; that he was 81 years old, and mentally incapable of transacting such business; that Thomas Murphy exercised undue arts and fraudulent practices, and resorted to falsehood and misrepresentation, to induce said Patrick Murphy to execute said deeds; and that Patrick Murphy was under improper restraint and undue influence. It was also alleged that Patrick Murphy never delivered said deeds, and never allowed them to go out of his control, and that he intended they should take effect only after his death, and that they are void under the statute of wills. Thomas Murphy put in an answer to the bill in which he admitted the death of Patrick Murphy and heirship as alleged in the bill, but denied that Patrick Murphy died seised of said real estate, but avers that, two months before his death, he conveyed it to the defendant, copies of said deeds being Exhibits A and B to the bill, and denies that Patrick Murphy was not of sound mind, and denies that he ever used or exercised undue arts or fraudulent practices, or resorted to misrepresentations, to induce the execution of said deeds. Upon application the court submitted to a jury the following issues of fact: (1) Was Patrick Murphy of sound mind? (2) Were the deeds obtained by undue influence? (3) Were the deeds delivered? (4) Did Patrick Murphy intend that said deeds should take effect only after his death? The jury returned a verdict that Patrick Murphy was of sound mind, that the deeds were not obtained by undue influence, that they were delivered, and that Pat-

rick Murphy did not intend that they should take effect until after his death. Upon a return of the verdict the court overruled a motion to set aside the verdict, and entered a decree dismissing the bill, to reverse which the complainants have brought this appeal.

E. J. Kelly and Brewer & Strawn, for appellants. V. J. Duncan, Walter Panneck, and T. F. Doyle, for appellees.

CRAIG, J. (after stating the facts). While it is true, when the deeds were executed, Patrick Murphy was advanced in years, and was somewhat feeble in body, and perhaps his mind was not as bright and vigorous as it had been in former years, yet we do not find in the record any satisfactory evidence that he was of unsound mind, or incapable of transacting business, such as disposing of property by deeds of conveyance. It appears, from the evidence, that on the evening of October 11, 1893, he made up his mind to send for some person to prepare deeds. On the next morning he sent the defendant to Lasalle for Mr. Haskins, an attorney, to prepare the papers. The attorney came, and prepared the deeds, as he was directed by Murphy. They were read over, but not then executed. Mr. Haskins, in his testimony in regard to the mental capacity of Murphy, testified: "In my judgment, his condition mentally was just as sound as any man I ever met." Two days after the deeds were written, they were executed and acknowledged before a justice of the peace. John Meara, who was present when the deeds were executed, testified: "I think Patrick Murphy understood the nature of the business he was engaged in at the time he signed the deeds." Andrew Whalen, a neighbor, testified that Murphy was able to transact ordinary business. A number of other witnesses corroborate the evidence of those we have referred to. We find no evidence in the record which would justify the jury or the court to find that Patrick Murphy, at the time the deeds were executed, was of unsound mind, or incapable of transacting the business of disposing of his property. The fact that the mind may have been somewhat impaired by age or disease will not justify a court in setting aside a contract or a deed. It is ordinarily enough that the contracting party has sufficient mental capacity to properly understand and comprehend the nature, character, and scope of the business which he undertakes to transact.

In regard to the charge in the bill of undue influence but little need be said. Undue influence, to render a deed void, must be of a character to deprive the grantor of free agency. 1 Redf. Wills, 522; Dickie v. Carter, 42 Ill. 376; Yoe v. McCord, 74 Ill. 44; Brownfield v. Brownfield, 43 Ill. 153; Roe v. Taylor, 45 Ill. 491; Burt v. Quisenberry, 182 Ill. 399, 24 N. E. 622. Nothing of that kind appears here. When the deeds were written

by the attorney Thomas Murphy was not present, and no directions were given or suggestions made by him. Indeed, we find no evidence in the record that Thomas Murphy importuned his father to execute the deeds, or that the father was controlled by him or any other person. On the other hand, so far as appears, the execution of the deeds was the deliberate act of Patrick Murphy.

But it is claimed that the deeds were not delivered by Patrick Murphy, and hence they were invalid. Whether there was a delivery of the deeds depends upon what occurred at the time they were acknowledged, on the 14th day of October, 1893. After the deeds were written two days before, Murphy informed Haskins, the attorney, that he did not intend to sign them that day. The question of delivery was, however, discussed. Mr. Haskins testified: "When we were talking about the signing of the deed, he commenced to ask me questions about what he would have to do with the deeds after they were signed. I believe I said to him, first, that if the deeds were not signed and delivered in his lifetime to the parties to whom they were made, or to somebody for them, they would not be good. Then he asked me about it, and I explained to him that it was essential to the delivery of a deed that it be signed and delivered, during the lifetime of the party, either to the parties named as grantees in the deed, or somebody for them; and the persons to whom they were delivered, if not to the grantees, would have to have the absolute control over them, and he would have to lose the right to recall the deeds,—lose all further control over them. I explained that to him fully, and then he said, when he signed the deeds, he would deliver them to somebody. He did not want to give them directly to the heirs. I suggested to him about making the deeds and reserving a life estate to himself, and then he could deliver them to the parties. He said, 'No;' that he wanted it as it was there; that suited him better; that he would deliver the deeds to somebody; that would be all right for the parties to whom the property was to go." On the morning of October 14th, two days after Haskins had given directions in regard to the delivery of the deeds, Mrs. Meara testified to a conversation she had with Mr. Murphy and his son Thomas. She testified: "We were talking about sickness and dying, and I says to Mr. Murphy that I didn't think he was going to live very long, and I didn't think he was going to die very soon, and I thought he would never get over it; and Mr. Murphy says, 'I have lived longer than anybody that belonged to me.' I don't know what else was said, and then Mr. Murphy says to Tom,—he says, 'I will sign the deeds if you will promise to leave them in the hands of John Meara until after I die,' and Tom says, 'I don't care who has them.' Then he says, 'Go for Hickok.'" After this conversation Mr. Murphy sent for

his friend, Mr. Meara, and he and the justice of the peace, Hickok, arrived at the same time. Hickok testified, in substance, as follows: "I acknowledged these deeds October 14, 1893. He said he had been having some business done by a lawyer from La-salle, and he had to watch the lawyers a little, and he wanted me to look the papers over. I read them to Mr. Murphy. He said, 'That is all right.' He undertook to sign them with a pen, but could not make much of a fist at it, and then he signed them by his mark. I acknowledged them, and placed them on the table. John Meara came up to the table, and Murphy said, 'John, you take those papers, and keep them until I am gone, and give them to the ones they belong to.' Meara said, 'I will see that they are kept safely.'" There was other evidence in corroboration of the justice of the peace who took the acknowledgment, but it will not be necessary to repeat it here. Meara took the deeds, and retained them in his possession until the death of Patrick Murphy. When the deeds were placed in the hands of Meara, Patrick Murphy, the grantor, reserved to himself no right to recall or revoke the deeds during his life. On the other hand, the entire dominion and control of the deeds passed into the hands of Meara, who held them for the grantees therein named. Where a grantor executes deeds, and places them in the hands of a third party, to be held and delivered to the grantees, reserving no control whatever over the instruments, such facts constitute a valid delivery. *Baker v. Baker*, 159 Ill. 394, 42 N. E. 867; *Miller v. Meers*, 155 Ill. 291, 40 N. E. 577. In the *Baker Case*, supra, where the facts in regard to a delivery were similar to the facts here, we said: "In *Stone v. Duvall*, 77 Ill. 475, we held that the delivery of a deed for land to a third party, to be retained until the death of the grantor, and then to be delivered to the grantee, is not an absolute delivery, and will not operate to vest an immediate estate in the land; but it will be good to pass the title, at the grantor's death, to the grantee or his heirs. * * * In the case under consideration the grantor passed the deeds into the possession and absolute control of Joseph [the son]. The grantor retained no control whatever over them, but Joseph took and retained the entire control, and they never passed out of his possession until the death of the grantor, when he delivered them over to the respective grantees. Under the facts as they were proven, we entertain no doubt in regard to the validity of the delivery of the deeds."

Counsel for appellants have assigned some of the instructions given for the appellees. In a case of this character where the verdict of the jury was merely advisory, if the decree rendered by the court is sustained by the evidence, as it is here, erroneous instructions would not be ground for reversing the decree.

Complaint is also made that the court erred in refusing to permit appellants to prove what Patrick Murphy said in reference to his property. It is a familiar rule that statements made by a grantor are inadmissible for the purpose of invalidating a deed. Where a person has executed a deed, he cannot invalidate it by any parol declarations he may make. *Francis v. Wilkinson*, 147 Ill. 384, 35 N. E. 150; *Nicewander v. Nicewander*, 151 Ill. 156, 37 N. E. 698. As the offered evidence could have no bearing, except to invalidate the deeds, it was properly excluded. The decree of the circuit court will be affirmed.

(164 Ill. 549)

BORRELLI v. PEOPLE.

(Supreme Court of Illinois. Jan. 19, 1897.)

HOMICIDE—INSUFFICIENT EVIDENCE—JURY—ILLEGAL PANEL—CHALLENGE TO ARRAY.

1. On a trial for murder it appeared that while defendant and the deceased were fighting at night in the rear of a saloon, in a dimly-lighted space, defendant struck the deceased in the face with some metallic knuckles, and the deceased called for help; that the fatal shot quickly followed the call; that defendant had shown the knuckles to several persons during the day, and had said that he was going to use them on deceased; that no one saw him otherwise armed except two witnesses, who testified that they saw defendant fire the shot, and throw the revolver away, but they placed the men in such relative positions that the shot, as shown by the course of the ball, could not have been fired by defendant. The witnesses were both impeached. No other witness attempted to say who did the shooting. C. was near the men when the shot was fired, and one witness testified that in the flash of the revolver he saw three men or more. After the shooting, defendant ran into a shop near by, and exclaimed that C., in attempting to shoot him, had shot the deceased instead. The theory of the defense was that C., who lived with the deceased, and was seen with a revolver two days before, ran to his assistance, and fired the shot, as claimed by defendant. Defendant was convicted. *Held*, that under the evidence he was entitled to a new trial.

2. Under Act 1874, § 12, which provides that if for any reason, during the term of court, the panel of jurors shall not be full, the clerk of the court may draw, in the office of the county clerk, such number of jurors as the court may direct to fill the panel, and that the jurors so drawn shall be summoned by the sheriff, where the court has discharged the entire panel it is error to order a venire to issue to the sheriff commanding him to summon 50 jurors from the body of the county.

3. The legality of a panel of jurors cannot be questioned except by a challenge to the array.

Error to criminal court, Cook county; Philip Stein, Judge.

Silverio Borrelli was convicted of murder, and brings error. Reversed.

W. S. Elliott, Jr., for plaintiff in error. M. T. Moloney, Atty. Gen., for the People.

PHILLIPS, J. The plaintiff in error was indicted by the grand jury of Cook county for the murder of Dominick Parento, and at the April term, 1895, was tried, convicted, and sentenced to be hanged. From that

judgment this writ of error is sued out, and various errors are assigned. An encounter between the accused and the deceased occurred on Sunday night, November 25, 1894, which was not of a serious character, but in which the accused received some slight bruises, which aroused in him a considerable degree of animosity, and an apparent determination to have revenge. With this object in view, the accused procured metallic knuckles, which he exhibited to several persons at different times when he was explaining how he came by the bruises and scratches which he claimed he received at the hands of the deceased and one Carmine Colantonio in the Sunday night encounter. When displaying those metallic knuckles, he declared an intention to use them in the next conflict, which the evidence shows he was determined to bring about; but no other weapon was exhibited, or other threats made, at those times. On the night of November 28, 1894, between 8 and 9 o'clock, the accused and deceased casually met in an open shed immediately west of and adjoining a saloon kept by one Volz at the northwest corner of Sixty-Ninth and Page streets in the city of Chicago. A few feet to the west of the shed, and upon the north side of Sixty-Ninth street, stands a two-story frame building, constituting the home of Dominick Parento and his family, in the rear of the upper story of which lived Carmine Colantonio and wife, witnesses in this case. About a half a block northward from Sixty-Ninth street, on the east side of Wood street, which is one block west of Page street, stands the house of Raffael Apata, at the beginning of this trial one of the co-defendants herein. About the same distance northward, on the west side of Page street, stands the house of Silverio Borrelli, the defendant. On the northeast corner of Page and Sixty-Ninth streets stands the saloon of Mr. Navigato, within which, just prior to the time of the alleged homicide, the two witnesses Antonio Papio and James Taglier are alleged to have been standing near the stove. To the northward of Navigato's saloon, upon the east side of Page street, and fronting to the west, just across the alley from the premises of Navigato, stands the barber shop of Frank Special, another witness, in whose shop were congregated, upon the night of the homicide, several congenial friends engaged in social convivialities. All of these parties, in moving to and fro in the discharge of their social and business relations, necessarily came to Sixty-Ninth street in going to and from each other's homes, and to the saloons and barber shop mentioned. So far as developed by the evidence, the only artificial light relied upon by the residents of the described locality was that furnished by the city electric lamps, located, one each, at Wood and Sixty-Ninth streets and Page and Sixty-Ninth streets. Each of these lights is at least 300 feet from the scene of the homicide. On

meeting in this shed, a conversation commenced between the accused and the deceased, and in a few moments the quarrel was renewed, and a fight commenced between them, in which the accused struck the deceased several brutal blows in the face with his hand wearing the metallic knuckles. The deceased cried out in a loud voice, which attracted the attention of various persons, among others Carmine Colantonio, who ran towards the shed. At about that time a pistol was fired, the ball from which struck and killed Dominick Parento. It is claimed by the prosecution that the shot was fired by the accused, while on the part of the defense it is urged that Carmine Colantonio, a friend and a godson of the deceased, fired the shot at the accused during the struggle, missing him, and striking Parento.

The testimony of Dr. Louis J. Mitchell, the coroner's surgeon who examined Parento's body, is that there was a wound on the nose and face of the deceased which might have been made with metallic knuckles; there was a bullet wound below the left armpit, and five inches from and on a line with the nipple, and its track was from left to right, and slightly forward and upward. The bullet was taken from the body, and was of 38 caliber. Tony Papio says that, about five minutes before the deceased was shot, he drank with him at Navagato's saloon, and shortly afterwards heard him calling for help, and he (Papio) ran out of Navagato's saloon, and says he saw the accused at the south door of Volz's saloon, and Parento had his hands up to his face; that that was the first thing he saw when he got out of the saloon; that he ran west, and, just as he got to the corner, Borrelli shot, and threw the revolver away; that Parento was at the southwest corner of a water trough which was 4 or 5 feet from the saloon; that Parento stood with his knees against the trough when shot, and witness was 12 or 15 feet distant when he was shot; did not see Apata, Colantonio, or Mrs. Volz, or anybody; that Colantonio was stabbed after the shot, and came there first after the shooting. Witness says he followed Borrelli to Special's barber shop, where he charged him with the killing. James Taglier testifies that he was with and just behind Papio, and saw Borrelli shoot as soon as he got out of Navagato's saloon, and saw no one but Borrelli and Parento, and they were punching their faces; that Parento's face was smashed up; that Parento was between the trough and saloon, facing north,—facing the door; when shot, he fell forward, got up, and fell again; did not see Apata or Colantonio; that Borrelli threw gun away after the shot. Thomas J. Haughey left the Volz saloon with his son, and heard quarrelling in the shed. He walked to Wood street, one block west of Page, turned around, and saw the flash of a gun, and believes he saw three men; and, when the shot was first fired, it was within three or four feet of the shed. He crossed

Sixty-Ninth street, went up on the south side of the street to Page, and crossed on Page, and came to Volz's saloon, and saw Papio going towards Volz; and saw Colantonio in the saloon when he got to the place where Parento was lying on the walk. Mrs. Louise Volz was in the saloon, and heard a shot; rushed to the door; saw Colantonio and Parento standing up and Borrelli lying down; and, as she was in the door, Borrelli sprang up, and rushed into the house, pushing her aside, and disappeared at the back part of the saloon. William Schenkel, a son of Mrs. Volz, testified to Borrelli's rushing into the saloon just after his mother opened the door. Raffael Apata testifies that he heard the quarrelling between Borrelli and Parento, saw the blows struck, heard Parento halloo, and saw Colantonio running towards him with a pistol in his hands; and he threatened to shoot the witness, who struck Colantonio with a knife on the shoulder blade, and started to run away. When he got a short distance, he heard a shot. He passed on to his home, and returned at once to Special's shop, where he saw the defendant, who said he was fighting with Parento, when Colantonio came up and shot at him, but hit Parento. Borrelli testifies that he was fighting with Parento, when Colantonio came up, and snapped his gun at him two or three times before it was fired, and at the shot Parento cried out. A revolver was found near the body of Parento which was a 38 caliber, and contained one unexploded cartridge, unmarked and unpunctured; one unexploded cartridge marked "C. C. C.," punctured; one empty shell marked "U. M. C."; one empty shell marked "C. C. C."; and there was one empty chamber. Colantonio had borrowed of James Snow a revolver, which was returned to him a day or two before this difficulty. Snow says all the chambers of that revolver were loaded when it was loaned, as also when it was returned to him, and had not been fired. He got it at Colantonio's house, and, when it was handed him, Colantonio took another from a table, and put it in his pocket, as Snow testifies. Snow's revolver was a 32 caliber, and he got the same from Colantonio between 5 and 6 o'clock on Monday morning; and, the night before, Mrs. Colantonio desiring to attract the attention of the police, fired a revolver twice. She says it was Snow's she shot. She also says she loaded it again from cartridges she had in the house. Colantonio says he loaded it after it was shot off by his wife. If Colantonio had another revolver than Snow's, as the latter testifies, then, if Mrs. Colantonio fired that one off instead of Snow's, and it was loaded as claimed, it might explain the different make of cartridges in the one found. It is apparent that the death of Parento resulted from a shot from the revolver found near his body.

From this evidence one cannot avoid the conclusion that Tony Papio and James Taglier did not see Borrelli fire the shot, because

they say they came to the corner, and did not see Colantonio and Apata, who fought at the Volz corner, between Navagata's saloon and the place where Borrelli and Parento were fighting. Mrs. Volz, who looked out of the saloon door, and saw Borrelli and Parento and Colantonio, did not see either of them. Thomas J. Haughey saw Paplo coming from Navagata's when he came from Wood street a block west, and crossed to Volz's saloon. Paplo and Taglier did not describe the location of Borrelli and Parento like any of the other witnesses. They have Borrelli with his left hand on the door of the saloon, and Parento at the end of the trough, with his hands to his face, facing northward, with Borrelli a little west of him. In this position the shot could not have been fired by Borrelli, and entered the left side, under the armpit, of the deceased. In addition to this, these witnesses are both impeached,—one by testimony impeaching the general reputation of the witnesses, and the other by contradictory statements made out of court. Facts and circumstances detailed by the other witnesses who were in a position to see contradicts the testimony of these witnesses. Their evidence out of the case, and all that is left is the fact that Borrelli and Parento were fighting, and the latter was shot. No other persons pretend to say who did the shooting. Colantonio was near the men, as Mrs. Volz testifies. They were right close together right after the shot. Colantonio admits he was only a short distance away, and Haughey, when he saw the flash, saw three men or more. Colantonio seems to try to know a great deal about the case, and yet to put himself in such relation that he could not have fired the shot. He heard Parento calling, and ran towards him, as Apata testifies, and, as he testifies, he had a gun, and threatened to shoot him (Apata), who with a knife struck Colantonio on the shoulder blade. Apata then ran away from Colantonio, and the latter ran on towards Borrelli and Parento; and Apata testifies that, when he got 25 steps away, he heard a shot. Immediately after the shot, Mrs. Volz saw him there. Borrelli testifies he was there, and he admits he was near. Parento was his godfather, and he lived in the house of the latter. He knew of the difficulty on Sunday night, and of the threats that had been made by Borrelli, and it could well be anticipated that he would go to the aid of Parento. Apata says Colantonio had a revolver. He denies it. Snow says Colantonio had a revolver on Monday, and put it in his pocket, when he (Snow) got his from Colantonio. No one saw Borrelli with a gun at any time except as claimed by Paplo and Taglier. No one claims the gun found near the deceased. It was a 38 caliber,—same as the bullet taken from the body of the deceased. Borrelli had metallic knuckles, and showed them, declared his purpose to use them, and did use

them on that night. Borrelli ran through the saloon, and passed over to Special's barber shop, where he stated that Colantonio had tried to shoot him, and hit Parento. He repeated it when Paplo came in and charged him with the killing. The facts and circumstances in the case seem to corroborate the theory of the defense. These are the material facts appearing in this record.

By this record and the supplemental record filed by leave of court it appears that, at the term at which the defendant was tried, a jury had been regularly drawn, which was discharged by the court. The court, by the act of discharging the entire panel, was left without any jurors selected in pursuance of the statute. Thereupon the court ordered a venire to issue to the sheriff, commanding him to summon 50 jurors from the body of the county. This venire was returned served, and in accordance therewith 44 persons reported, were accepted, and ordered to be in attendance on the criminal court to constitute the full panel of petit jurors. No other jurors were in attendance on the court. Section 12 of "An act concerning jurors and to repeal certain acts therein named," in force February 11, 1874, provides as follows: "The judge shall examine the jurors who appear, and if more than twenty-four petit jurors who are qualified and not subject to any exemption, or any of the disqualifications provided in this act, shall appear and remain after all excuses are allowed, the court shall discharge by lot the numbers in excess of twenty-four. If for any reason the panel of petit jurors shall not be full at the opening of such court, or at any time during the term, the clerk of such court may again repair to the office of the county clerk and draw in the same manner as at the first drawing such number of jurors as the court shall direct, to fill such panel, who shall be summoned in the same manner as the others, and, if necessary, jurors may continue to be so drawn and summoned from time to time until the panel shall be filled." The regular panel of jurors having been discharged, and no regular panel in attendance on the court, instead of issuing a venire to the sheriff, commanding him to summon 50 jurors from the body of the county, the court should have ordered the clerk to draw from the box containing the list of jurors in the county clerk's office, in accordance with that provision of the statute. In *Gropp v. People*, 67 Ill. 154, where a similar statute having reference to the jury in civil cases was before this court for construction with reference to organizing a panel of jurors, we held: "Under the 'Act concerning jurors,' of April 10, 1872, which was in force at the time of this trial, the panel of jurors was irregularly filled. Instead of the court ordering the sheriff to summon a sufficient number to fill the panel, the clerk of the circuit court should have drawn from the box in the county clerk's office, containing the list

of persons summoned by the sheriff. Were this a civil cause, no doubt it would have been a good cause of challenge that the panel of jurors was so constituted in violation of this act." The same act was again before this court for construction in *Lincoln v. Stowell*, 73 Ill. 246, and it was there held: "Had there been no provision in the statute for obtaining a jury when at the same time the court was required to be held until the business was disposed of, perhaps recourse might have been had to the common-law power of the court for the purpose of obtaining a jury, as was done in *Stone v. People*, 2 Scam. 326. But in this case no such difficulty had arisen. A mode was provided by the statute by which a jury could be obtained. Under section 13 it is provided: 'If for any reason the panel shall not be full at the opening of the court, or at any time during the term, the clerk of the court shall again repair to the office of the county clerk, and draw in the same manner as the first drawing, which shall be summoned,' etc. Under this section, if none of the jurors first drawn and served should appear at the beginning of the term, it would no doubt be proper to have a full panel drawn and served in like manner. If, during the term, there should be no jury present, for the reason that the time for which they were selected had expired, or other cause, an entire panel could be drawn and then summoned in the mode pointed out in the statute. When, therefore, the court saw a jury would be necessary for the trial of causes for the fourth week of the term, the clerk should have drawn in the manner provided in the statute. This not having been done, but a jury having been selected by the sheriff from the county, the challenge to the array interposed by the defendant was proper, the overruling of which was error for which the judgment will have to be reversed."

The provisions of the act of 1872 and the act of 1874 in reference to the manner of summoning the regular panel are substantially alike. The act of 1874 applies to both civil and criminal cases, while the act of 1872 was by its terms applicable to civil cases only. The act of 1874 was before this court for construction in *Siebert v. People*, 148 Ill. 571, 32 N. E. 431; and it was there held, with reference to the language of section 12 of the act: "It seems to be plain, from the language of the section of the statute relied upon, if for any reason during the term of court the panel of jurors shall not be full, the clerk of the court may draw such number of jurors as the court may direct to fill the panel, and the jurors so drawn are required to be summoned by the sheriff." When the counsel for defendant in this case asked for a list of the panel of jurors, he was handed a list of 44 jurors who had not been selected in pursuance of the statute, and which constituted no panel known to the law. By the express provisions of the

statute, a full panel consists of 24 jurors. The defendant objected to the jury, and was ordered to proceed with the selection of a jury from the list so furnished. In the motion for a new trial the manner of selecting the jury is assigned as one of the causes for a new trial, and the defendant filed numerous affidavits going to show that he was prejudiced injuriously from this cause. Some of these affidavits are to the effect that affiants do not believe a person of Italian extraction, at the hands of a jury chosen in whole or in part from citizens having their places of business upon South Water street in the city of Chicago, could have a fair trial. Two of these affiants state that they (affiants) have been engaged in the commission business on South Water street in said city continuously for the past 20 years; that they now have their place of business at 127 South Water street. "This affiant says that he knows the people doing business on said and neighboring streets in said city, and is well informed as to their estimation of persons of Italian birth in general, from his long association with them, and from the many opinions which he has heard expressed by numberless persons doing business on said South Water Street of said Italian people; and this affiant says that from his said means of knowledge and information he knows that there is a deep-seated prejudice existing among said business men against the average person of Italian extraction. This affiant further says that, judging from his said knowledge and prejudices, and the universality of its existence as observed by this affiant, this affiant does not believe that a prisoner of Italian birth could receive a fair and impartial trial at the hands of a jury composed of citizens drawn wholly or largely from among the men doing business on said South Water street." Forty-seven persons were examined from which to obtain a jury. Of these, eight were residents of South Water street, and the residence of sixteen of those examined is not stated. It is apparent the manner of selecting a jury was not in pursuance of the statute; and that, of the vast population of Cook county, more than one-sixth of those examined were from the very locality where there was a prejudice against men of the nationality of the defendant, is sufficiently indicative that the manner of selection was to the prejudice of the defendant.

The jury was not impaneled in accordance with the statute. We have frequently held, however, that the only manner in which the legality of the panel can be raised is by challenge to the array. The only manner in which the legality of the panel was challenged was by an objection to the jury, which was overruled. This did not raise the question. Where a challenge to the array is made, the challenger must stand ready to prove his challenge by proof of its illegality. This proof may be made by oral evidence or

by affidavits. The better practice is to make the proof by affidavits. In this manner the question as to the sufficiency of the panel can be determined. It cannot be by an objection to the jury. From the evidence in this record we are constrained to hold that a new trial should have been awarded. The judgment of the criminal court of Cook county is reversed, and the cause is remanded for a new trial.

(151 N. Y. 579)

DOING v. NEW YORK, O. & W. RY. CO.
(Court of Appeals of New York. Feb. 2, 1897.)
NEGLECT—INJURY TO EMPLOYEE—QUESTION FOR THE JURY.

1. Where a partially loaded car was shunted on the track leading into a railroad repair shop, by employes working in the yard, with such force that it crashed through the closed doors of the shop, and killed an employe working inside, who could not see its approach, and it appeared that the shunting of cars on such tracks towards the shops was a common practice, and the existence of a rule against it was in dispute, the question of whether the railroad company was negligent in failing to furnish the deceased a reasonably safe place to work was one for the jury. 26 N. Y. Supp. 405, reversed.

2. Whether the company was negligent in failing to furnish its employes with suitable appliances, which negligence was the proximate cause of the injury, was also a question for the jury, there being evidence that the brake was defective, and that the fact was known to the foreman in charge.

Gray, J., dissenting.

Appeal from supreme court, general term, Fourth department.

Action by Loren Doing, as administrator of Robert P. Hare, against the New York, Ontario & Western Railway Company, for negligently causing the death of plaintiff's intestate. A nonsuit granted by the circuit court was affirmed by the general term of the supreme court (26 N. Y. Supp. 405), and plaintiff appeals. Reversed.

George W. Ray, for appellant. Howard D. Newton, for respondent.

O'BRIEN, J. The plaintiff's intestate was killed on the 3d day of March, 1890, while at work in the defendant's repair shop, and it is claimed that his death was the result of negligence on the part of the defendant. At the trial, when the plaintiff's proofs were closed, the court, on motion of defendant's counsel, granted a nonsuit, and the complaint was dismissed, to which ruling the plaintiff excepted. The judgment cannot be sustained if, in any fair view of the case, there was any evidence for the consideration of the jury on the question of defendant's negligence. The proofs established, or tended to establish, the following facts: The deceased was at work repairing a crippled car in the repair shop, which occupied the whole of a building 50 feet wide and about 200 feet in length. Three tracks passed through the shop through doors which were kept closed, and there were no windows on

the side where the tracks entered the building from the yard. These tracks ran from the shop out into the yard, and were connected with the main track and other tracks by switches. The three tracks were used for the purpose of moving crippled cars and material into and from the shop to the main and side tracks. The cars were moved by being kicked or shunted by means of force applied to them by engines some distance from the shop, and in that way propelled by the momentum into or near the shop doors, and controlled while in motion by the brakes. On the day that the deceased was killed, some of the men who worked in the yard or about the shops were moving cars on the tracks outside the shop for the purpose of collecting and moving scrap iron. There was a pile of this iron near one of the tracks, about 20 feet from the shop door, and the men wanted to load it upon a car. With this end in view, they placed a car already loaded with 24,000 pounds of scrap iron on one of these tracks at a point about 800 feet from the doors, and there kicked or shunted it towards the shop. The brakeman evidently saw that the force applied would send the car past the pile of iron where they intended to have it stop, and possibly through the doors, and he attempted to control the movement with the brake, but, for some reason, it did not work, and the car ran past the pile of iron, crashed through the doors, and killed the deceased, who was working inside under one of the crippled cars. He had no means of guarding against such a peril, as it was impossible for him to see the approaching car, even if the work at which he was employed would permit him to be on the lookout, since the doors were closed, and there were no windows.

The question is whether this was an accident, or the result of some neglect or breach of duty on the part of the defendant. A loaded car was driven through the door of a workshop filled with busy men, and one of them was killed. That the defendant's workmen, in attempting to move cars in this manner in the yard were engaged in a very dangerous, if not reckless, experiment, cannot well be denied. The danger of the experiment consisted in moving cars in such a way that no one could tell exactly when or where they would stop. If, upon the occasion in question, the force applied was so measured that the car would stop at the pile of scrap iron, the deceased would not have been killed; but if the force applied was sufficient to send it 20 feet further, and it could not be controlled by the brake, the danger to the men inside the shop was so obvious that the manner in which this part of the defendant's work was carried on may very well be characterized as reckless. We will assume, then, what cannot be questioned, that the workmen were doing the defendant's work in a dangerous and reckless

manner. But these workmen were doing nothing but what, according to the testimony, they had been doing for years before. If the defendant permitted its employes to carry on its operations upon these three tracks outside the shop in such a manner as to endanger the lives of those inside, who could not protect themselves, it failed to discharge to the deceased the duty which the law imposed upon it of furnishing him a reasonably safe place to do his work. The defendant had the power to control and regulate its business. The law imposed upon it the duty of making and enforcing such reasonable rules and regulations for the government of the men in its service as to prevent or guard against injury by one servant to another in so far as that was reasonable and practicable. It could certainly put an end to the practice of propelling cars upon these tracks by a force that could not be controlled, and it could provide for moving them in some other and safer way. In other words, it could change this method of doing the work by making proper rules and regulations to that end. The jury could have found from the evidence that the practice of kicking or shunting cars upon these tracks in the direction of the doors of the repair shop was known to the defendant. The danger to be apprehended from such a practice was so obvious that the defendant, in the proper discharge of the duties which it owed to its employes, was bound to guard against it by proper rules and regulations, so far as that was reasonable and practicable. *Abel v. Canal Co.*, 128 N. Y. 662, 28 N. E. 663; *Morgan v. Iron Co.*, 133 N. Y. 670, 31 N. E. 234; *Berrigan v. Railroad Co.*, 131 N. Y. 582, 30 N. E. 57. When the defendant's employes were known to be doing their work in a reckless and dangerous manner, it was the duty of the master to change the manner of operation by some regulation or rule. It was bound only to reasonable care in this respect, it is true, but the danger involved in the methods in use was so obvious that the result could well have been anticipated. The plaintiff gave in evidence the published rules of the company, and it is conceded that they contain no provision relating to this subject. The plaintiff attempted to prove the case by witnesses who were in the employ of the defendant at the time of the trial and at the time of the death of the intestate. It is claimed that the testimony of these witnesses establishes the fact that the defendant made and published proper rules on this subject by posting on blackboards or otherwise. The testimony with respect to rules published in this manner was so vague and indefinite that, in view of the fact that nothing of the kind was inserted in the general printed rules, it became a question for the jury to determine as matter of fact whether the defendant had ever made or promulgated any proper rules to guard against accidents

from moving cars in this manner upon the tracks leading to the shop. If the men in the defendant's employ were acting in violation of a known and established rule, the death of the intestate might be attributed to the misconduct of co-servants. On the other hand, if the men were acting without any known rule or regulation, and simply following a dangerous practice, sanctioned by time and custom, the result might be imputed to the neglect of the defendant in omitting to change the method of doing the work, and adopting a safer one. The trial court could not hold, as matter of law, upon the proofs as they appear in the record, that the defendant performed its duty in that respect, nor that the evidence was of such a character that the plaintiff failed to show any fault in that regard on the part of the defendant.

We have seen that what the trainmen attempted to do was to remove a pile of scrap iron from a point within 20 feet of the doors of the shop upon a car, already partially loaded, and which had been kicked or shunted towards the doors, and that the brakeman was unable to control it with the brake. It was a question whether the men were using a defective car, or, rather, one with a defective brake. If they were, and this defect was the proximate cause of the injury, the defendant might be held liable on the ground that it failed to furnish suitable appliances for the performance of the work by the servants. The injury to the deceased was on Monday, and the evidence tended to show that on the Saturday previous the same car was used for a like purpose on another track, and when shunted the brakeman attempted to control it with the brake, and failed. On that occasion it would have escaped from the control of the men as it did on the Monday following, but for the fact that before it reached the point it was blocked upon the track by one of the workmen. The failure of the brake to stop the car on Saturday was in the presence of the foreman of the shop, who had charge of the men and of the work, and who, it must be presumed from what appears, represented the defendant. If the defendant had notice on Saturday that the car or the brake was out of order or defective for the purpose for which it was used, the fact that it was used for the same or a similar purpose on Monday, with still more fatal results, was some proof of negligence. The jury could, we think, have found that either the car or brake was unsuitable and unsafe for the purpose for which it was used, or that it was impracticable to control the speed at all by the use of a brake before it reached the doors. If the latter alternative was the fact, then the reckless and dangerous character of the practice of moving the cars in that way, at that point, becomes still more apparent, since it depended largely upon chance whether the car would go

through the doors or stop before reaching them. It was important that the car which the defendant furnished to be moved on these tracks could be kept under control, and, if it could not, either because it was unsuitable or the brake defective, the master was at fault. We think there was some evidence for the jury on these questions. The evidence produced by the plaintiff did not, it is true, make a strong case, but we are bound upon the appeal to give him the benefit of the most favorable view of it that can fairly be taken, and all facts and inferences that might fairly be drawn from it by the jury are to be deemed to be established. The case was not so destitute of proof as to warrant a nonsuit, but it should, we think, have been submitted to the jury. The judgment should be reversed, and a new trial granted; costs to abide the event. All concur (HAIGHT, J., in result, and VANN, J., on first ground), except GRAY, J., dissenting, and MARTIN, J., not sitting. Judgment reversed.

(151 N. Y. 463)

TRUSTEES, ETC., OF TOWN OF EASTHAMPTON v. VAIL et al.

(Court of Appeals of New York. Jan. 19, 1897.)

REVIEW ON APPEAL — GRANT — CONSTRUCTION — DESCRIPTION — INDIAN DEED.

1. Where each party requests the direction of a verdict in his favor, and he whose request is denied does not thereupon ask to go to the jury, a verdict directed for the other party stands as the finding of a jury, and is reviewed under like rules.

2. A patent describing the premises as stretching east from Southampton to Ft. Pond Bay; thence still east to the extent of Long Island; and bounded on the north "by the bay," and on the south by the ocean; together with all havens, harbors, etc., to said tract appertaining, within the described limits,—does not, as a matter of law, show that Ft. Pond Bay was south of the northern boundary, and that the land beneath it passed by the grant. 24 N. Y. Supp. 583, affirmed.

3. Where the construction of a deed depends on the sense in which the words were used, or on facts aliunde, in connection with the writing, the question is a mixed one of law and fact.

4. A deed from the Indians in 1660 conferred no title on the grantee.

5. A grant of public rights will be construed most strictly in favor of the people, and against the grantee.

6. The fact that a town never exercised acts of ownership over land alleged to have been included in a patent till about the time it brought ejectment therefor, 200 years after the patent issued, is a practical interpretation of the grant by the parties and will be considered in determining their rights.

Appeal from supreme court, general term, Second department.

Ejectment by the trustees of the freeholders and commonalty of the town of Easthampton against Jeremiah H. Vail and another to recover land under the water of Ft. Pond Bay, on the northerly side of Long Island. From a judgment, entered on the order of the general term (24 N. Y. Supp.

583), overruling plaintiff's exceptions, and directing a judgment for defendants on a verdict, plaintiff appeals. Affirmed.

B. F. Tracy and Theodore D. Dimon, for appellant. Thomas Young, for respondents.

MARTIN, J. This action was in the nature of ejectment, to establish an exclusive right in the town of Easthampton to a tract of land covered with water, and known as "Ft. Pond Bay." It is alleged in the complaint that the plaintiff is a body corporate, incorporated under a colonial charter or patent granted December 9, 1686, by Thomas Dongan, then governor of the province of New York under James II., king of England, and duly ratified and confirmed by laws of the colony of New York and by the constitution of the state; that by virtue of such patent, and of another granted to the town of Easthampton, March 13, 1686, by Richard Nicholls, governor of the colony of New York, the plaintiff is the owner of the land in question; and that the defendants are unlawfully withholding the possession thereof. The defendants, by their answer, admit most of the allegations of the complaint, but deny the plaintiff's title and right of possession. To establish its title, the plaintiff relied upon two patents. The first was issued March 7, 1686, by Gov. Nicholls, and conveyed to the plaintiff certain premises which are described as: "Beginning from the East Limits of the Bounds of Southampton (as they are now laid out, and Stak't, according to Agreement and consent) so to stretch East, to a certaine Pond, commonly callee the Fort Pond, which lyes within the old Bounds of the Lands belonging to the Muntauke Indyans, and from thence to go on still East, to the utmost extent of the Island; On the North, they are Bounded by the Bay, and on the South by the Sea, or Maine Ocean. All which said Tract of Land, within the Bounds and Limitts before mentioned, And all, or any Plantation thereupon, from hence forth, are to belong and appertaine, to the said Towne, and bee within the Jurisdiction thereof; Together with all Havens, Harbors, Creekes, * * * waters, Lakes, Rivers, fishing, Hawking, Hunting and fowling, And all other Profitts, Commodities, Emoluments and hereditaments, to the said Tract of Land and pr'misses within the Limitts and Bounds afore mentioned described, belonging, or in any wise appertaining." The second was issued on December 9, 1686, by Gov. Dongan, which, after reciting the prior patent issued by Gov. Nicholls; that there was a part of a certain tract of land within the bounds and limits, commonly called "Montauk," which remained unpurchased from the Indians; and that some of the freeholders of the town of Easthampton, at the request of the rest, had made application for liberty of the freeholders of the town to purchase that tract of the Indians.

and for a confirmation of the premises by patent under the seal of the province,—ratified and confirmed to Thomas James and others, freeholders and inhabitants of Easthampton, "all the aforesaid tracts and necks of lands within the limits and bounds aforesaid with all and singular the * * * Creeks, harbours, highwayes and easements, fishing, hawking, hunting and fowling." On the trial the plaintiff introduced these two patents in evidence. 'It also introduced two Indian deeds,—the first dated August 6, 1660, which purported to transfer to the grantees the neck of land called "Montauk"; the other was dated July 25, 1687, and, in form, transferred to the freeholders of Easthampton "all our tract of Land att Meantauk bounded by part of the fort pond & Fort Pond bay west; ye English land South by a line run from ye fort pond to ye great pond and soe from ye south End or ye great pond over to ye south sea and soe to the utmost extent of ye Island from sea to sea bounded by ye main Ocean on the South and by ye bay or sound on the north side." May 6, 1691, an act was passed by the colonial legislature of the province of New York by which all letters patent executed under the seal of the province to the cities, towns, or manors, and also to the several freeholders within the province, were declared to be good, as against the crown. On the trial, at the close of the evidence, the plaintiff and defendants asked the court to direct a verdict in its or their favor, whereupon the court directed a verdict for the defendants. To this direction the plaintiff excepted, and the exceptions were ordered to be heard in the first instance at the general term. They were subsequently argued and overruled, and judgment was directed for the defendants upon the verdict, with costs.

Practically, the only question before this court is whether the evidence so clearly and conclusively established the plaintiff's title to the land under the waters of Ft. Pond Bay that, as a matter of law, it was entitled to the direction of a verdict in its favor. If it failed to establish its title, then it is manifest that the court properly directed a verdict for the defendants. It is equally true that, if there was sufficient evidence tending to show that the title did not rest in the plaintiff to authorize the submission of that question to the jury, then by asking for the direction of a verdict the plaintiff waived its right to have it thus submitted, and consented that it should be determined by the court, and its determination thereof is final. In the language of Andrews, J., in *Thompson v. Simpson*, 128 N. Y. 270, 283, 28 N. E. 627: "The effect of a request by each party for a direction of a verdict in his favor clothed the court with the functions of the jury, and it is well settled that in such case, where the party whose request is denied does not thereupon request to go to the jury on the facts, a verdict directed for the

other party stands as would the finding of a jury for the same party, in the absence of any direction, and the review in this court is governed by the same rules as apply in cases of ordinary verdicts rendered without any direction. All the controverted facts, and all inferable facts in support of the judgment, will be deemed conclusively established in favor of the party for whom the verdict was directed."

The plaintiff contends that the court should have held, as a matter of law, that Ft. Pond Bay was south of the northern boundary, and included within the lands conveyed by the patents under which it claims title. The premises were described in those patents as bounded on the north "by the bay." No particular bay was mentioned or designated, although what are now known as Gardner's, Napeague, and Ft. Pond Bays lie immediately north of the peninsula upon which the town of Easthampton is located. The plaintiff insists that the bay referred to in its patents as the northern boundary was not Ft. Pond, or any other bay, but Block Island Sound. As evidence to sustain that proposition, it introduced the Indian deed made in 1687, which conveyed that portion of Montauk lying east of Ft. Pond Bay, and described it as being bounded on the north by the "bay or sound." It is argued that the language employed in that description shows that the words "bay or sound" were used interchangeably, at about the time those patents were issued, to designate what is now known as "Block Island Sound," and, hence, that it was the sound that was referred to and intended as the northern boundary of the plaintiff's purchase. While it may be that at that time Block Island Sound was sometimes called a "sound," and at others a "bay," and that the parties interested intended to bound the premises conveyed on the north by that body of water, yet the deed is far from conclusive evidence of that fact. The infirmity of that conclusion lies in the fact that, if that was the sheet of water referred to, it was not in fact a bay, but was a sound. Again, it is not at all certain that the terms "bay" and "sound" were used interchangeably as to any single body of water. When we remember that both adjoin that portion of the peninsula on the north, it would seem quite as probable that the words "bay or sound" were intended to refer to Ft. Pond Bay and Block Island Sound, as that both were used as descriptive of the sound. Moreover, it is not unusual, in conveyances of land, to find a description bounding it on one side by the lands of one adjoining owner, or the lands of another, or by one or another of two named objects or monuments, when it is in fact bounded by both, especially where the deed was drawn by a layman, or other person unaccustomed to conveyancing, or unused to the correct and precise meaning of words or technical terms usually employed. Indeed, we often

find in deeds, other conveyances, and elsewhere, the word "or" used improperly, instead of the word "and."

It is further urged that it is absurd to suppose that the word "bay," in the patents, referred to Ft. Pond Bay, which is but about 2 miles in width, while the northern boundary of the land embraced therein extended from Southampton to Montauk Point, with a coast line of about 30 miles. Although it must be admitted that this suggestion is not without force, yet we regard it as in no wise conclusive. At that time but a small portion of the peninsula was settled. The chief settlements were evidently near the present site of the village of Easthampton, south of Gardner's Bay, which extends from the westerly bounds of the premises purchased to Napeague Beach. The eastern portion was a mere peninsula or bar of sand, valueless and practically unknown. Under such circumstances, it is not wholly improbable that the words "the bay" were intended to refer to Gardner's Bay, that being the northern boundary of the land conveyed of which the parties then had any definite knowledge. Indeed, it is perhaps quite as probable that the bay intended was either Gardner's or Ft. Pond Bay as that Block Island Sound was the subject referred to.

Again, it is said that it is not to be presumed that the grantees in the Indian deed of 1687 intended to obtain a different northern boundary from that given in the Nicholls and Dongan patents. That may be, but, inasmuch as a different description was in fact given, it can hardly be a legal presumption that no change was intended. The history of the negotiations and dealings between the early settlers and the Indians is not of a character to create any very strong presumption that the grantees intended to describe only the lands to which they had previously acquired title.

A study of the evidence renders it obvious that it cannot be properly held, as a matter of law, that the land in dispute is included in the premises conveyed to the plaintiff by the Nicholls and Dongan patents. Most favorably considered, the question whether the northern boundary of the plaintiff's premises is Ft. Pond, Gardner's, some other bay, or is Block Island Sound, was a question of fact, which has been decided adversely to the plaintiff, and that decision is controlling upon this court. While it is a general rule that the construction of a written instrument is a question of law for the court, yet where its interpretation depends upon the sense in which the words were used, or depends upon facts allunde, in connection with the written language, to ascertain the intent of the parties, the question becomes a mixed question of law and fact. *White v. Hoyt*, 73 N. Y. 505; *Bank v. Dana*, 79 N. Y. 108; *Kenyon v. Association*, 122 N. Y. 247, 254, 25 N. E. 299; *Stokes v. Mackay*, 140 N. Y. 649, 35 N. E. 786.

The plaintiff also urges another ground for reversal. It claims that, under the provisions of the Nicholls and Dongan patents, it acquired title to all havens and harbors, and that Ft. Pond Bay was a harbor, and consequently passed under those conveyances. In discussing this question, it must be assumed that the northern boundary of the land conveyed is south of Ft. Pond Bay. That being so, how can it be said that the plaintiff acquired title to the land under the water of that bay, even if it is a harbor or haven, as the description restricts the conveyance to such as are within the limits or bounds mentioned? Moreover, nearly all the oral evidence introduced was addressed to the question whether Ft. Pond Bay was a harbor or haven. It was conflicting, and plainly presented a question of fact. Upon that question the court found for the defendants, and its determination cannot be reviewed by this court.

The fact that there was no proof that the plaintiff ever claimed any title or exercised any acts of ownership over the waters under Ft. Pond Bay until about the time of this action must be regarded as a practical interpretation of the patents by the parties interested in them, and is important in determining their rights. *Town of Southampton v. Mecox Bay Oyster Co.*, 116 N. Y. 1, 11, 22 N. E. 387. The evidence, as well as the absence of any evidence that the plaintiff ever made any claim of title to the land under the bay, is significant, and indicates that the idea of its ownership of the property in dispute is of recent origin.

The deed from the Indians to the freeholders of Easthampton, given in 1680, has no important bearing upon the question involved in this case. The Indians had no title which they could grant that would be recognized by the courts of this country, and consequently their deed conferred no title upon the plaintiff. *Town of Southampton v. Mecox Bay Oyster Co.*, 116 N. Y. 1, 22 N. E. 387. Furthermore, it related entirely to premises other than those involved in this controversy.

We have carefully examined the authorities cited by the learned counsel for the appellant, and find no occasion to disagree with any of the principles actually established by them. The doctrine of those cases had no application to the question involved here. Nor do we deem it necessary to especially examine or discuss any of them, except *Lowndes v. Town of Huntington*, 153 U. S. 1, 14 Sup. Ct. 758. As the appellant claims that that case is conclusive upon the question involved in this, it may be proper to observe that the sound was the northern boundary of the premises then in controversy, so that Huntington Bay was unquestionably included within the express provisions of the grant. It is true that the question whether it was a part of the sound was also involved, and it was held that it was not. The court in that case decided that the

title to the land under the bay passed to the grantee, not because the bay was a harbor or haven, but because it was within the limits of the description contained in that grant. Thus, we see that the question in that case is essentially different from the question here, and has no practical bearing upon it. As is conceded by the appellant, the only question at issue in this case is whether the plaintiff has established as a fact that the northern boundary of the premises conveyed by the Nicholls and Dongan patents was north of Ft. Pond Bay. Moreover, the patents in this case were intended to convey to the plaintiff certain rights which belonged to the public. Under such circumstances, the rule seems to be that their language should be construed most favorably to the people, and all reasonable doubts in construction solved against the person claiming under the grant; and words or phrases which are ambiguous, or admit of different meanings, are to receive a construction most favorable to the public. *People v. Railroad Co.*, 126 N. Y. 29, 36, 26 N. E. 961, and cases cited in opinion.

We are of the opinion that the plaintiff's evidence was insufficient to require the trial court to hold, as a matter of law, that it had title to the premises in question; that upon all the proof, and facts to be inferred therefrom, the court was justified in finding that it had not, and in directing a verdict for the defendants.

Several other interesting questions were discussed on the argument, but as none of them would, in any event, affect the result we have already reached, we deem it unnecessary to examine or determine them at this time. The judgment and order should be affirmed, with costs. All concur, except GRAY, J., not voting. Judgment and order affirmed.

(151 N. Y. 570)

**PEOPLE ex rel. RITZENTHALER v.
HIGGINS et al.**

(Court of Appeals of New York. Feb. 2, 1897.)

BASTARDY—ADJOURNMENT—UNDERTAKING—LIABILITY OF SURETY—PROCEDURE.

1. Cr. Code, § 849, relating to bastardy, and providing that the magistrates may, on the application of defendant, and for good cause, adjourn the examination not exceeding 30 days, authorizes but one adjournment, not exceeding the time limited; and it is not modified by the charter of Rochester, which confers jurisdiction in such proceedings on the municipal court of that city, and which, in prescribing the form of undertaking to be given on such an adjournment (Laws 1890, c. 561, § 245, subd. 15), requires it to be conditioned for the appearance of defendant at the adjourned time, and at such other time or times to which adjournment may be had. 28 N. Y. Supp. 458, reversed.

2. An undertaking, given on an adjournment in bastardy proceedings, requiring the defendant to appear at the time and place to which the hearing has been adjourned, "and at such other time or times to which adjournments may be had, for the purpose of the examination and determination therein," binds a surety only for

the appearance of the defendant at the time named, and on such further adjournments as may be had, from time to time after the hearing has been commenced, for the purposes of the trial; and he is not bound for the defendant's appearance at times to which adjournments may subsequently be made, by consent of the parties, before the hearing has been entered upon.

3. The provisions of the charter of Rochester (Laws 1890, c. 561) conferring jurisdiction in bastardy on the municipal court of the city, and authorizing the court to be held at any stage of the proceedings by a single judge, do not change the requirement that the defendant shall be brought before the magistrate who issued the warrant, nor authorize a part of the proceedings to be had before one judge and a part before another; and an undertaking required and taken before a judge of the court other than the one who issued the warrant, on an adjournment granted by him, is void.

Appeal from supreme court, general term, Fifth department.

Proceeding on relation of Bernard Ritzenthaler, as overseer of the poor of the city of Rochester, against Edward F. Higgins, impleaded with others. A judgment of the county court affirming a judgment of the municipal court in favor of plaintiff was affirmed by the general term (28 N. Y. Supp. 458), and defendant Higgins appeals. Reversed.

Edward F. Wellington, for appellant. A. J. Rodenbeck, for respondent.

O'BRIEN, J. The defendant who brings this appeal was one of the sureties upon a bond given upon an adjournment of bastardy proceedings which had been instituted by the people, on the relation of the overseer of the poor of the city of Rochester, against one Dorian Clapp. The procedure in such cases is regulated by title 5, c. 1, of the Code of Criminal Procedure, as modified by certain provisions of the charter of the city of Rochester, conferring jurisdiction in such cases upon the municipal court of that city. Laws 1890, c. 561. That court is created and organized by the city charter, with two justices or judges, either of whom may hold courts and render judgments in such cases as fall within the jurisdiction conferred. By section 842 of the Code of Criminal Procedure, the officer who issues a warrant or makes an examination in a proceeding of this character is defined and designated as a magistrate; and the principal, if not the only substantial, change made by the charter, aside from conferring jurisdiction in such cases upon the local court, was to provide that upon the return of the warrant, and at any stage of the proceedings, except during the examination and determination, the court could be held by a single justice, whereas, by section 848 of the Code, the magistrate, when the warrant is served and the defendant brought before him, must associate with himself another magistrate, and all the proceedings must be conducted before a court organized with two members. In all other respects the procedure is gay

erned by the general provisions of the Code of Criminal Procedure. The defendant is not only entitled to insist that he shall not be held liable except according to the very terms of his obligation, but he may also defend upon the ground that the instrument was not given according to the requirements of the statute, and that the officer who took it was without jurisdiction. It appears by the findings that upon the defendant's arrest, on the 23d of February, 1891, he was brought before one of the judges of the municipal court, was arraigned, and pleaded not guilty, and upon his request the hearing was adjourned to the 9th of March following. It is conceded by the learned counsel for the plaintiff that, under the Code of Criminal Procedure, there could have been but one adjournment, to some time not exceeding 30 days, but in this case the cause was again adjourned on March 9th to March 25th, and again to April 8th, and finally to May 4th, when, upon the failure of the defendant to appear, an order was entered directing the prosecution of the bond. It does not appear to us that the language of the city charter has enlarged the scope or the power of the court in such proceedings with respect to the granting of adjournments. That statute contains no affirmative provision on that subject, and it does provide that in all other respects the procedure prescribed by the Code must be followed; and, as already suggested, section 849 contemplates but one adjournment, and that upon the application of the defendant, for good cause shown, and then not exceeding 30 days.

The charter (section 245, subd. 15) contains some provisions as to the form of the bond which the defendant is required to give as a condition of the adjournment, but there is no reason to believe that the legislature intended, when prescribing the form of the bond, to enlarge the power of the court to grant adjournments. A general provision of the Code regulating the procedure in this class of cases is not to be deemed to be modified or changed, in its application to a particular locality of the state, by words of doubtful import, relating to another subject. The bond in this case follows the language of the statute, and its true scope and meaning must be determined in order to ascertain the extent of the defendant's obligation. After reciting the charge against the defendant, and his arrest, the instrument proceeds as follows: "And whereas, at the request of said Dorlan Clapp, and for sufficient reasons given, the said judge has determined to adjourn the examination and determination of the said matter and charge, upon the execution of this bond, until the 9th day of March, 1891, at 9:30 o'clock in the forenoon, at the court room of said municipal court in Rochester aforesaid: Now, therefore, if the said Dorlan Clapp shall personally appear before the said municipal court at the time and place last aforesaid, and at such other time

or times to which adjournments may be had, for the purpose of the examination and determination therein, and will render himself amenable to any process, order, or commitment that may be issued or made in such proceedings, then this obligation to be void, otherwise to remain in full force and virtue." The sureties upon this instrument undertook that their principal should appear before the court on the 9th of March, and they have been held liable in this case for failure to appear on the 4th day of May. The judgment proceeds upon the theory that when such a bond is once given the surety remains liable, through an indefinite number of adjournments made by the consent of the parties to the proceeding, and for their own convenience, but without the consent of the surety. The statute does not contemplate that a proceeding of this character shall be kept alive by successive adjournments by consent of the parties, and for their convenience. The parties, by their consent or agreement to adjourn the cause from time to time, cannot bind the surety, unless he was so bound in the first instance. The surety was bound if his principal failed to appear on the 9th of March, "and at such other time or times to which adjournments may be had, for the purpose of the examination and determination therein." These last words were not intended to cover the case of successive adjournments by the consent of parties, but such a case as was before this court in *People v. Millham*, 100 N. Y. 273, 3 N. E. 196, where the bond provided for the appearance of the party before the justices on a certain day, and he did so appear, and the trial or examination was entered upon, but not concluded for some days thereafter, when the party escaped before the final determination, and while the trial was in progress. It was held that the nonappearance of the defendant under these circumstances was a breach of the conditions of the bond, since the meaning of the condition, when read with the statute, was to secure the attendance of the defendant, not only on the adjourned day, but during the trial, and until it was terminated. It was said in that case, however, that a different rule might apply when a further adjournment was granted before the commencement of the hearing. It seems to us that the language used in the city charter with respect to the form of the bond was intended to cover just such a case, and not to change the general provisions of the Code. The words relate to an adjournment "for the purposes of the examination"; that is, for the purpose of completing an examination already commenced. The adjournments in this case were not for the purposes of the examination, in the sense in which these words are used in the bond, but for the convenience of the parties, or some other purpose of their own. The condition of the bond was satisfied by the appearance of the defendant be-

fore the court on the 9th of March, and had the trial commenced on that day, without being completed, the obligation of the surety would also extend to subsequent adjournments from time to time for the purposes of the trial and determination. But neither the statute nor the terms of the bond contemplate or provide for successive adjournments from time to time, for an indefinite period, without entering upon the trial, as were had in this case. It may be that such adjournments, when made by consent of the parties, would preserve the jurisdiction of the court over the case, and over the parties themselves, but such consent could not enlarge the obligation of the surety. The statute and the instrument itself should be construed in such a way that the surety would be able to know in advance of the execution the full scope and extent of the obligation which he is about to assume. If the parties, without his consent, can continue the proceeding by adjournments for an indefinite time, it would be impossible for him to know when his liability is to end. If these views are correct, the failure of the defendant in the proceeding to appear before the court on the 4th of May was not a breach of the conditions of the bond, as the surety was not bound for his appearance at that time.

A bond given in such a proceeding is not to be considered merely as a contract between the parties. It is something more. It is part and parcel of a judicial proceeding, and unless the officer who required the party to give it, as a condition of the adjournment, had jurisdiction of the person and of the case, it is void. The application for the warrant in the proceeding was made to Justice Warner, and he issued the warrant. Under the provisions of the Code, the party when arrested must in such a case as this be brought before the magistrate who issued the warrant; but it appears that he was in fact brought before the other justice of the court, before whom he was arraigned and required to plead. It was this officer who required the bond, fixed the amount of the penalty, and adjourned the case till the 9th of March. The various sections of the Code of Criminal Procedure which regulate the practice in such cases do not authorize one magistrate to issue the warrant, and another to let the defendant to bail. Jurisdiction of the case is acquired by the sworn complaint, and the officer to whom it is presented, and who issues the warrant, has no power to turn the case over to another, either for the purpose of an adjournment or otherwise. The sole jurisdiction remains with the magistrate before whom the proceedings were instituted, except that on the final hearing he must associate with himself another magistrate. None of the provisions of the Code have been changed in this respect by the city charter. That provides that the municipal court, at any stage of the

proceeding, may be held by one of the judges, which means nothing more than that one judge may hold the court. But it does not mean that a part of the proceedings may be had before one of them, and part before the other. Such a method of procedure in a cause pending before a court of special and limited jurisdiction would be so anomalous that it cannot be supposed that it was within the intention of the legislature, in the absence of language clearly manifesting such intention; and surely such a conclusion cannot be drawn from a provision that the court, in all stages of the proceedings, may be held by one of the justices. The findings of the trial court, incorporated in the decision, are to the effect that all the proceedings were before the same justice; and, if these findings were supported by the evidence, it would, of course, be a good answer to this point. But the difficulty is that they are, in this respect, contrary to the admissions of the pleadings, to the proofs, and to a special finding on the subject made at the request of the defendant. The complaint alleges, and the answer admits, that the bond was given upon an adjournment after an arraignment and plea by the accused before Justice White. The recitals of the bond show the same facts. The constable who arrested the party testified to the same effect, and the court, at the request of the defendant on the trial of this action, made a finding which substantially imports that such was the fact. In view of all this, the finding that the bond was given upon an adjournment made by Justice Warner, upon the return of the warrant, is not sustained by the proofs; and the case must be decided upon the facts as they appear by the pleadings, by the recitals in the bond, the proofs, and the special findings. These are clearly to the effect that the application was made to Justice Warner, and that he issued the warrant; that the accused was brought before Justice White, was arraigned, pleaded not guilty, applied for the adjournment to March 9th, which was granted upon the execution of the bond in suit. We think that Justice White had no jurisdiction of the case, and consequently the bond was void. The judgment should be reversed, and a new trial granted; costs to abide the event. All concur, except ANDREWS, C. J., and GRAY, J., not voting. HAIGHT, J., taking no part. Judgment reversed.

(151 N. Y. 552)

GILLIG v. GEORGE C. TREADWELL CO.

GRANT v. SAME.

(Court of Appeals of New York. Feb. 2, 1897.)

APPEAL — REVERSAL — RESTITUTION — INSOLVENT
CORPORATIONS—MOTIONS—SERVICE ON
ATTORNEY GENERAL.

1. Plaintiff and a receiver recovered judgments against defendant. A motion by plain-

tiff for an order requiring the sheriff to sell other property of defendant held by him under the receiver's attachment to pay a balance due on plaintiff's judgment was refused. The order was reversed, and the motion granted on appeal. The sheriff meantime had sold the goods under the judgment of the receiver, and paid over to him the proceeds. Plaintiff obtained an order requiring the receiver to pay back the money so received to the sheriff, and for the sheriff to pay the same to plaintiff, under Code Civ. Proc. § 1323, providing that, where a judgment or order is reversed, the court may compel restoration of property of a right lost by the erroneous judgment. *Held* that, as the payment that was made by the sheriff to the receiver was not in pursuance of any order which had been reversed by the court, it could not, on motion, summarily restore the proceeds.

2. A motion to compel the receiver of an insolvent corporation to pay over certain moneys must be made in the action in which the receiver was appointed, on notice to the attorney general under Laws 1883, c. 378, § 8, providing that a copy of all motions in actions for the distribution of assets of a corporation must be served on the attorney general.

3. Under Laws 1883, c. 378, § 9, all applications relating to distribution of assets of an insolvent corporation must be made in the judicial district where the principal office of such corporation is located.

Appeal from supreme court, appellate division, Third department.

Actions by Henry F. Gillig against George C. Treadwell Company, and by Hugh J. Grant, receiver of the St. Nicholas Bank, against George C. Treadwell Company. From an order (41 N. Y. Supp. 1116) affirming an order of the special term, Hugh J. Grant appeals. Reversed.

John M. Bowers and Latham G. Reed, for appellant. Scherer & Downs, for respondent.

HAIGHT, J. On the 9th day of January, 1894, the plaintiff in the first action procured a warrant of attachment to be issued and delivered to the sheriff of Albany county, who made a levy thereon upon the property of the defendant. The next day the plaintiff, Grant, in the second action, also procured an attachment to be issued and delivered to the sheriff of the same county, who also levied that attachment upon the goods of the defendant. Gillig obtained judgment in the first action on the 5th day of January, 1895, and issued execution thereon to the same sheriff. Under it certain of the property attached was sold, and the proceeds paid over to him, but not sufficient to satisfy his judgment. Gillig thereupon moved at special term for an order requiring the sheriff to sell other of the property of the defendant held by him under the Grant attachment sufficient to satisfy the amount remaining unpaid upon his judgment. This motion was denied, the general term affirmed, but the order was reversed in this court, and the motion granted. 148 N. Y. 177, 42 N. E. 590. In the meantime, the sheriff had sold the goods held by him under the attachment of Grant in his action, and paid over to him the proceeds, amounting to the sum of \$3,685.49. The venue of both of the above actions is laid in the city of New York. This motion

was for the purpose of compelling restitution. The order entered requires Grant, as receiver, to pay over the amount received by him to the sheriff, and the sheriff to pay the same over to Gillig. We think the order cannot be sustained. Section 1323 of the Code of Civil Procedure provides that: "Where a final judgment or order is reversed or modified, upon appeal, the appellate court, or the general term of the same court, as the case may be, may make or compel restitution of property or of a right, lost by means of the erroneous judgment or order; but not so as to affect the title of a purchaser, in good faith and for value." Under this provision it has been held that the court has power to restore, in a summary manner, property or rights which have been lost by the judgment which it has reversed. It is thus enabled to make its reversal effectual, and undo what has been done under an erroneous judgment, without the institution of a new action, but it cannot interfere in this summary manner to restore property which has been taken and sold under other judgments, even though the effect of the reversal is to decide that the property was taken from the party legally entitled to it. *Murray v. Berdell*, 98 N. Y. 480-483. The payment that was made by the sheriff to Grant was not by reason of or pursuant to any order of the court which has been reversed. The order reversed merely refused to direct the sheriff to sell the goods and pay over to Gillig. Gillig, as the first attaching creditor, had the right to have the goods attached in the hands of the sheriff sold and applied in satisfaction of his execution, and the payment by the sheriff of the money derived from such sale over to Grant before satisfying Gillig's claim was a violation of his duty as sheriff, and unauthorized. Had it been done under an order or judgment subsequently reversed, restitution could have been ordered; but, the payment having been made upon his own responsibility, the court, under the provisions of the Code, cannot, upon motion, summarily restore.

It is now urged that, independent of the provisions of the Code providing for restitution, a court of equity has power to require the receiver to pay over the money, and that Grant is liable to Gillig as for moneys had and received, under the authority of *Haebler v. Myers*, 132 N. Y. 363, 30 N. E. 963. Possibly this is so, but, in order to procure such an order, Gillig should have petitioned in the action in which Grant was appointed receiver, upon notice to the attorney general, and in the district in which that action is pending. The Laws of 1883 (chapter 378, § 8) provide that "a copy of all motions and all motion papers, and a copy of any other application to the court, together with a copy of the order or judgment to be proposed thereon to the court in every action or proceeding now pending for the dissolution of a corporation or a distribution of its assets, or which will hereafter be commenced for such purpose, shall in all cases

be served on the attorney general in the same manner as provided by law for the service of papers on attorneys who have appeared in actions." Section 9 provides that "all applications to the court contemplated by this act shall be made in the judicial district where the principal office of the insolvent corporation was located." Section 769 of the Code provides that "a motion, upon notice, in an action in the supreme court, must be made within the judicial district in which the action is triable, or in a county adjoining that in which it is triable; except that when it is triable in the First judicial district, the motion must be made in that district." The order in this case was made in the Third district; the venue in all of these actions was in the First district. It appears from the order entered that a preliminary objection was made to the jurisdiction of the court to hear the motion, and that it was overruled. For the reasons stated, the order was irregular, and cannot be sustained. The respondent, in his brief, first takes the position that the order is not appealable, but subsequently he admits that his application was a special proceeding. If a special proceeding, it was a final order therein, and is appealable, under the express provisions of section 190 of the Code. Under the concessions made, we have not thought it necessary to further consider or discuss the question of the appealability of the order. The order, in so far as it affects the rights of Grant, as receiver, should be reversed, with costs, but without prejudice to a renewal if counsel shall so advise. ANDREWS, C. J., and GRAY, BARTLETT, and MARTIN, JJ., concur. O'BRIEN and VANN, JJ., dissent in favor of dismissal. Order reversed.

(151 N. Y. 511)

IN re PEEKAMOSE FISHING CLUB.

(Court of Appeals of New York. Jan. 26, 1897.)

CORPORATIONS — DISSOLUTION — JURISDICTION OF COURT—NOTICE—APPEALABLE ORDERS.

1. In a proceeding to dissolve a corporation, a defendant obtained an order based on an affidavit, the original petition, the referee's report, with the exceptions thereto, and the testimony taken by him, and all the papers in the proceeding, to show cause why a final hearing should not be had, and a final order made dismissing the proceeding. The affidavit set out all the proceedings, and averred that petitioner had omitted to serve notice for a final order, and his delay was causing injury, and that affiant believed that the referee's report, though delivered to petitioner, was in effect a decision in favor of defendant. *Held*, that on the hearing the court had jurisdiction to make an order of dissolution, though such defendant did not appear, and none of the other defendants were present, and Code Civ. Proc. § 2428, provides that the application for a final order in such proceeding is to be made by petitioner.

2. In a proceeding to dissolve a corporation, the omission to give the attorney general formal notice of a motion to dismiss (Laws 1883, c. 378, § 8), on the hearing of which an order of dissolution was made, was immaterial, where he was served with the motion papers on the order to show cause, and with the order applied for,

and, two days before the hearing, admitted due service of the proposed order of dissolution, and of notice of settlement.

3. The propriety of refusing to set aside an order dissolving a corporation, entered on default, cannot be questioned in the court of appeals.

Bartlett, Martin, and Vann, JJ., dissenting.

Appeal from supreme court, appellate division, First department.

Application by one of the two trustees of the Peekamose Fishing Club, a corporation, for its dissolution. From a judgment dismissing an appeal from an order dissolving the corporation, and a judgment affirming an order denying a motion to open a default (39 N. Y. Supp. 124), and also from a judgment affirming an order denying a motion to vacate the order of dissolution, and an order directing a sale of the corporation's property (40 N. Y. Supp. 959), defendants appeal. Dismissed.

B. C. Chetwood and Benjamin F. Tracy, for appellants. David McClure, for respondent.

ANDREWS, C. J. There are four orders of the First appellate division presented for review on this appeal: First. An order which dismissed an appeal taken by Whiton and Dimock from an order of the special term dated October 25, 1895, as resettled November 6, 1895, dissolving the corporation; the dismissal proceeding on the ground that the order of dissolution was entered upon default of the appellants and that they therefore had no right to appeal. Second. An order dated May 15, 1896, which affirmed an order of the special term which denied a motion made by Whiton to open his default on the motion in which the order of dissolution was made. Third. An order which affirmed an order of the special term, entered July 6, 1896, denying a motion made by Dimock and Howard to vacate the order of October 25, 1895, dissolving the corporation. Fourth. An order which affirmed an order of the special term, dated July 6, 1896, directing the receiver to sell the property of the corporation.

We have examined with care the record, and have reached the conclusion that if the special term had jurisdiction to make the order of October 25, 1895, dissolving the corporation, the orders appealed from must be affirmed. No serious question is made in respect to the regularity of the proceedings up to the time that order was made. The proceedings were instituted under section 2420 of the Code of Civil Procedure. The proper parties were brought in. Dimock and Whiton, the appellants, answered the petition. The matter was referred to a referee to hear the proofs, and determine the facts, and report to the court. The referee on July 30, 1895, made and delivered his report to the petitioner, in which, while he found facts bearing upon the question of the number of existing trustees of the corporation when the

proceeding was instituted, he did not determine the question whether the number exceeded two; but he did find that the petitioner, Ward, and the appellant Dimock, trustees, disagreed, and still disagree, as to the management of the club. Before the report was filed or served, and on the 23d of August, 1895, the appellant Whiton obtained an order requiring Ward, Dimock, and Howard to show cause why the proceeding for dissolving the corporation should not be dismissed upon the ground that the report of the referee and the testimony had not been filed with all convenient speed, etc. The motion came on to be heard August 27, 1895, and, the report meanwhile having been filed, the motion was denied. On the same day Whiton and Dimock separately filed exceptions to the report. Three days afterwards, on the 30th day of August, 1895, Whiton obtained another order, entitled in the proceedings, founded on the affidavit of his attorney, the original petition, and all the subsequent papers in the proceeding, including the referee's report and the testimony taken by him, and the exceptions to the report, requiring the petitioner, Ward, and Dimock and Howard to show cause at a special term on September 6, 1895, "why a final hearing should not be had and a final order should not be made herein, dismissing this proceeding, and denying the prayer of the petitioner for a dissolution of the above-named corporation, or for such other or further relief in the premises as the court may deem equitable and just." The order, reciting the papers on which it was founded, was duly served on Ward, Dimock, and Howard, and on the attorney general, together with a copy of the order proposed by Whiton. On the return day of the order all the parties appeared by counsel. The hearing was adjourned, on motion of Ward's attorneys, until the second Monday of October. On the adjourned day all the parties again appeared,—Whiton by his counsel, Dimock and Howard by their counsel, and Ward by his counsel. On the application of the counsel for Dimock and Howard, the hearing was again adjourned until the 23d of October, 1895. On the 23d of October the petitioner, Ward, appeared by his counsel; and Dimock and Howard appeared by counsel, and requested a further postponement, which was denied, and their counsel then withdrew. Whiton did not appear on that day. The counsel for the petitioner, Ward (the counsel for the other parties not being present), thereupon submitted the matter to the court, and the court granted an order confirming the report of the referee and for the dissolution of the corporation.

It is insisted that the order of the special term was without jurisdiction, and void, for the reason that the only order it was authorized to make upon the default of Whiton, who made the motion, was an order dismissing his application, and that it could not

proceed to make a final order dissolving the corporation,—the exact opposite of the relief sought by Whiton. On the other hand, it is claimed in behalf of the petitioner that, under the circumstances disclosed, the whole matter was before the court, and that the petitioner was in the same position, and the court possessed the same power, as if the motion had been brought on on due notice by the petitioner of an application for the confirmation of the report of the referee, and an order dissolving the corporation. Under section 2428 of the Code, the application for a final order in a proceeding of this character is to be made by the petitioner. The section does not in terms so declare, but we think this is implied in what is expressed. The motion is to be made upon notice to each person who has made himself "a party to the proceeding" by filing a notice of his appearance, etc. It is also in accordance with the general rule that the party who institutes a proceeding is the one to apply for the relief sought. But where, in a proceeding to dissolve a corporation, the petitioner, after a receiver has been appointed, neglects or refuses to proceed, we have no doubt that it is competent for the court, on special application of any person interested, to direct the petitioner to move, so that the interests of all may be protected. So, also, we see no reason to doubt that, if all the parties appear before the court for the purpose of procuring a final order, the court would be authorized to dispose of the matter, although no formal notice had been given by the petitioner. What was done in this case, taking as we are bound to do, for the purpose of upholding the order of October 25, 1895, the facts most favorable to the respondent, was at least equivalent to a voluntary appearance by Whiton, Dimock, and Howard, and a consent that on the motion of Whiton the court should determine the merits of the controversy, and make a final order in the premises. In the first place, the order to show cause, of August 30, 1895, construed in connection with the papers on which it was founded, shows that it was intended to bring the whole matter before the court for final adjudication, and was not a mere motion to obtain a dismissal of the proceeding for want of prosecution. The affidavit presented to the court on the application for the order set out the proceedings which had been taken, the making of the referee's report, its delivery to the petitioner, the filing of exceptions, that the petitioner had omitted to serve any notice for a final order, and that his delay was causing injury to the parties interested; and it is declared that the affiant believes that the referee's report, "notwithstanding that it was delivered to the petitioner, is in effect a decision in favor of the respondent herein." Upon this affidavit, and the papers and proceedings in the matter, the applicant obtained the order to show cause in the terms heretofore stated. It is

quite clear, we think, that a final order on the merits was contemplated as the result of the motion.

The counsel for Whiton claimed, and now claims, that the legal inference from the facts found by the referee is that there were more than two legal trustees of the corporation when the proceeding was instituted, which, if true, would defeat the proceeding, and require its dismissal. We concur in the statement of the general term that the true view of Whiton's application is that it was an application for a final order in this special proceeding, and that, although the final order he demanded was one dismissing the proceeding, it was none the less an application for a final hearing of the special proceeding. When the parties appeared on the return of the order, not only was no objection made to the scope of the relief asked, but, as appears from the proofs on the part of the petitioner, on one of the adjournments the question was directly raised before the judge, and he decided that the whole matter was before him as an application for a final order; and all the parties, including Dimock and Whiton, acquiesced in this view, and the matter was adjourned to the 23d of October for a final hearing. The whole matter was, by the acts and conduct of the parties, in possession of the court; and the court, we think, acquired jurisdiction to proceed on the adjourned day, as upon notice formally given by the petitioner to all the parties in interest of an application for a final order.

The objection founded upon the omission to give formal notice to the attorney general is without merit. He was served with the motion papers on the order to show cause of August 30, 1895, and of Whiton's proposed order. On the 23d day of October, 1895, he admitted in writing due and timely service of the proposed order dissolving the corporation, and of notice of settlement. This was a sufficient compliance with section 8, c. 378, of the Laws of 1893. The object of that section was attained by what was done, and there is no reason for denying the attorney general the power to accept short notice of proceedings referred to in the statute. The result is that the order of dissolution of October 23, 1895, was, as against Dimock, Whiton, and Howard, an order obtained upon default, from which they could not appeal. Code, § 1294. The order made on Whiton's motion to open his default was in the discretion of the courts below, from which no appeal lies to this court. The order denying Whiton and Dimock's motion to vacate the order of October 25, 1895, was also addressed to the discretion of the court, and, no abuse of discretion appearing, is final in this court. The order instructing the receiver as to the sale of the property of the corporation, was an ordinary exercise of the jurisdiction of the court, and cannot be reviewed here. The four appeals are therefore dismissed, with costs against the respective appellants in

favor of the petitioner. All concur, except BARTLETT, MARTIN, and VANN, JJ., dissenting. Appeals dismissed.

(151 N. Y. 557)
In re DE CAMP.

WEEKS et al. v. DE CAMP.

(Court of Appeals of New York. Feb. 2, 1897.)

ESTABLISHMENT OF HIGHWAY—APPEALABLE ORDER.

Laws 1890, c. 568, relating to highways (section 89), provides that decisions of commissioners appointed by the county court may be confirmed or vacated by such court, and that its decision shall be final. *Held*, that such decisions, while final as to the question of the necessity of a highway, and as to the amount of damages, are not final in respect to questions of power and jurisdiction, and an appeal lies therefrom. 29 N. Y. Supp. 99, reversed.

Appeal from supreme court, general term, Fourth department.

Application by Daniel De Camp to lay out a highway. From an order assessing damages, Edwin R. Weeks and others appeal to the general term. Appeal dismissed, and they again appeal. Reversed.

In May, 1893, an application in writing was made by Daniel De Camp to the commissioner of highways of the town of Lansing, in the county of Tompkins, "to lay out a highway in said town, commencing about twenty-five rods east of Henry Houser's residence, at or near the foot of the hill, which proposed highway will pass through the lands owned and occupied by John H. Miller, Jane Miller, Dennis Kelly, William Patterson, Stephen Malone, Perry Ross, and Edwin Weeks, who do not consent to the laying out of the highway. This proposed highway runs in a northeasterly direction on the east bank of the creek or swamp, so called, to and connecting with a road leading to Locke, running in the same direction." De Camp, on the 9th day of June, 1893, presented to the county court of Tompkins county a verified petition, under section 83 of the highway law of 1890, for the appointment of three commissioners to determine the necessity of the proposed highway, and to assess the damages of the landowners. Upon the presentation of the petition, the county court made an order appointing three commissioners, pursuant to section 84, to certify as to the necessity of laying out and opening a highway in said town, beginning or "commencing about twenty-five rods east of Henry Houser's residence, near the foot of the hill, which proposed highway will pass through the lands owned and occupied by John H. Miller (and other persons named in the petition), and assess the damages by reason of laying out such highway." The commissioners qualified, and notice of the time and place of meeting of the commissioners to examine the proposed highway was duly posted and served, as provided by

section 85. The notice embraced a description of the proposed highway, somewhat more specific than the description contained in the petition of De Camp. At the time and place appointed for the hearing, the commissioners met, and having heard the parties interested, and taken evidence upon the questions of the necessity of the proposed highway and the damages to the land-owners, made their decision in writing, as follows:

"Tompkins County, Town of Lansing. The undersigned, by an order of the county court of Tompkins county, dated the tenth day of June, 1893, on the application of Daniel De Camp, having been appointed commissioners to certify as to the necessity of laying out and opening a highway in the town of Lansing, in said county, commencing about twenty-five rods east of Henry Houser's residence, at or near the foot of the hill, which proposed highway will pass through the lands owned and occupied by John H. Miller, Jane Miller, Dennis Kelly, William Patterson, Stephen Malone, Perry Ross, and Edwin Weeks, who do not consent to the laying out of the highway, and to assess the damages to be caused thereby, now, therefore, we, the said commissioners, having given due notice of the time and place at which we would meet, and all having met pursuant to said notice, at the hotel at North Lansing, in said town of Lansing, on the — day of —, 1893, and having taken the constitutional oath of office, and the proof of the services and posting of the notice by the applicant, pursuant to section 85 of the highway law, having viewed the proposed highway and the land through which it is proposed to be laid out and opened, and having heard all the allegations of the commissioner of highways, and all the parties interested therein, and the evidence of all the witnesses produced, do thereupon certify that, in our opinion, it is necessary and proper that the highway be laid out and opened pursuant to the said application of Daniel De Camp, dated the twenty-fifth day of May, 1893, and we have assessed the damages required to be assessed by reason of laying out and opening such highway, as follows:

John H. Miller and Jane Miller.....	\$ 50 00
Dennis Kelly	125 00
William Patterson	120 00
Perry Ross	5 00
Edwin Weeks	70 00
Stephen Malone	10 00

"Nelson Stevens,

"A. O. Hart,

"F. A. Todd,

"Commissioners.

"Dated this eleventh day of July, 1893."

After the decision was rendered, certain property owners, whose lands were crossed by the proposed highway, made a motion to the county court upon the papers and proceedings, and upon affidavits and notice, to

set aside and vacate the proceedings and the decision of the commissioners, under section 89 of the highway law, upon the grounds, among others, that the description of the proposed road in the petition and in the order of the commissioners was too uncertain and indefinite; that the property of the contestants had been taken without proper regard to their rights under the constitution and laws; that the damages awarded were insufficient; and that the county court never obtained jurisdiction of the proceedings; and that the decision of the commissioners was void. On the hearing of the motion, affidavits were presented to the county court on both sides, and the motion resulted in an order of the court increasing the award of damages made by the commissioners to John H. Miller and Elizabeth (Jane) Miller from \$50 to \$100, and in all other respects confirming the decision of the commissioners. From the order so made, John H. Miller, Elizabeth J. Miller, and Edwin B. Weeks appealed to the general term of the Fourth department, where the appeal was dismissed without examining the merits, on the ground that the decision of the county court from which the appeal was taken was final, under the provisions of section 89 of the act.

W. W. Hare, for appellants. H. Greenfield, for respondent.

ANDREWS, C. J. (after stating the facts). Section 89 of the highway act (Laws 1890, c. 568), upon which the general term relied in dismissing the appeal, is as follows: "Within thirty days after the decision of the commissioners shall have been filed in the town clerk's office, any party interested in the proceeding may apply to the court appointing the commissioners for an order confirming, vacating or modifying their decision, and such court may confirm, vacate or modify such decision. If the decision be vacated, the court may order another hearing of the matter before the same or other commissioners. If no such motion shall be made, the decision of the commissioners shall be deemed final. Such motion shall be brought on upon the service of papers upon the adverse parties in the proceeding, according to the usual practice of the court in actions and special proceedings pending therein; and the decision of the county court shall be final, excepting that a new hearing may be ordered as herein provided." The declaration in this section that the decision of the county court shall be final must be given its natural and reasonable meaning. It is competent for the legislature to restrict the right of appeal in actions or special proceedings where its power over the subject is not restrained by the constitution. The constitution fixes the manner in which compensation shall be ascertained for private property taken for public use. Article 1, § 7. But, when ascertained in the constitutional method, what

review shall be permitted of the action or determination of the jury or commissioners, within their jurisdiction, rests in the discretion of the legislature. The courts affirmed this principle in the construction of section 18 of the general railroad act of 1850, and gave to the language of the section its natural interpretation. It was held that the declaration that the decision of the commissioners on a second hearing should be "final and conclusive" precluded any further appeal. Section 89 of the highway act of 1890 was intended, we think, to apply the same principle to proceedings in invitum for the laying out of a highway. The act gives to the landowner two opportunities to be heard as to the necessity of the highway and the damages he will sustain by its construction: First, before the commissioner; and, second (if the decision is adverse), before the county court, on an application to vacate or modify the proceeding. The application to the county court, moreover, is in the nature of a rehearing, on which new proofs may be presented bearing upon the questions in controversy. It is not unreasonable to suppose that the legislature, in enacting that the "decision of the county court shall be final," intended to stop the litigation at that point on the two questions as to the necessity of the proposed highway, and the compensation to which the landowner was entitled. No other construction is consistent with the language, and we therefore concur in the general view taken by the general term of the construction of section 89. But the declaration that the decision of the county court shall be "final" is necessarily subject to the limitation that the county court had jurisdiction to make the order which it made. So, also, if the decision confirmed the order of commissioners laying out a highway, but the order of the commissioners was so defective in the description or location of the highway that the highway could not legally be located or ascertained, then we apprehend the order of the county court could not, in the nature of things, be final. The order of the county court is "final" within its proper scope and purpose. It determines, finally, the question of the necessity of the proposed highway. It concludes the landowner as to the amount of damages when the order confirms the award of the commissioners. It is final as to both these questions, and errors of law or fact in the course of the proceedings, unless jurisdictional, do not affect the conclusiveness of the decision of the county court. But it would be an anomaly to say that such an order would be final or conclusive in respect of questions of power and jurisdiction. They will continue to be open, notwithstanding the decision of the county court. And where such difficulties exist, fundamental in their character, the principle of finality declared in the statute does not, we think, apply. To permit an appeal upon such questions does not contravene the pur-

pose of the statute, and its denial would be inconvenient in practice. See *McMahon v. Rauhr*, 47 N. Y. 72.

We think there are two questions presented by the record before us which the general term should have passed upon. The first is: Was there any sufficient description, by reference or otherwise, in the order of the commissioners, of the highway proposed to be laid out? The second question is: Was it competent for the county court, after having reached the conclusion that the damages awarded by the commissioners to the appellants Miller were inadequate, to determine the amount by which they should be increased, or were the landowners entitled to have the case sent back for a reassessment of damages by commissioners appointed as provided by the constitution? See *In re Middletown*, 82 N. Y. 202. We do not decide these questions, or either of them. They must be first decided by the general term (now appellate division) before our jurisdiction to pass upon them attaches. The dismissal of the appeal below shows that the questions were not passed upon in that court. The order should be reversed, and the case remitted to the Third appellate division for further consideration. All concur, except MARTIN, J., not sitting, and VANN, J., not voting. Order reversed.

(151 N. Y. 564)

EMMETT v. PENOYER.

(Court of Appeals of New York. Feb. 2, 1897.)

PAROL EVIDENCE TO EXPLAIN WRITING.

In a suit to recover the price of goods delivered under an instrument reciting, "P. bought of E. [plaintiff] the marble counters * * * \$2,500," parol evidence is admissible to prove that the agreed price was more than the sum mentioned. 28 N. Y. Supp. 234, reversed.

Appeal from supreme court, general term, Fifth department.

Action by Harold J. Emmett against William J. Penoyer. From a judgment of the general term (28 N. Y. Supp. 234) reversing a judgment entered on a verdict for plaintiff, he appeals. Reversed.

Charles Van Voorhis, for appellant. Isaac N. Miller, for respondent.

O'BRIEN, J. This was an action to recover a portion of the purchase price of certain goods and fixtures in a store which were sold by the plaintiff to the defendant. The complaint alleges that the sale was made by agreement of the parties on or about the 28th day of December, 1891; that the defendant, in consideration of the sale, was to surrender to the plaintiff certain notes which he held against him, and was to pay to the plaintiff, in addition, the sum of \$1,000, as soon as he could dispose of the property; that the defendant did dispose of the property on or about the 1st day of

March, 1892; and that thereupon the sum of \$1,000 became due to the plaintiff. The defendant's answer admits the purchase from the plaintiff of the property, and the subsequent sale of the same to a third party, and denies all the other allegations of the complaint. The answer then alleges new matter by way of counterclaim. At the trial the plaintiff was sworn as a witness in his own behalf, and testified that the contract of sale to the defendant was in writing. He produced the writing, of which the following is a copy:

"W. J. Penoyer bought of H. J. Emmett the marble counters, marble floor, glass and silver show case, desks, mirrors and all personal property bought of W. J. Penoyer, besides all drugs, medicines and all personal property now in said store, No. 309 Fourth avenue, N. Y., it being a part originally bought of W. J. Penoyer, and since purchased, \$2,500.

"New York, Dec. 10, 1891.

"[Signed] H. J. Emmett.

"Witness: W. R. Hitchcock."

The plaintiff was then asked by his counsel what the defendant was to pay him for the property. The defendant's counsel objected to the question upon the ground that the consideration was expressed in the writing. The court overruled the objection, and the defendant's counsel excepted. The plaintiff then gave oral testimony tending to prove the allegations of the complaint, namely, that the real consideration of the sale, or the price the defendant agreed to pay, was \$3,500; that is to say, \$2,500 of plaintiff's notes held by the defendant, and which were to be surrendered, and \$1,000 in cash, which the defendant was to pay the plaintiff when he made sale of the property to some third party. There was some conflict of testimony as to what the parties actually agreed upon and intended, and the court submitted the question to the jury, and a verdict was found in favor of the plaintiff. The general term affirmed the verdict of the jury upon the facts, but reversed the judgment upon the exception taken to the admission of the parol proof of consideration. The appeal therefore presents the single question whether the ruling of the trial judge as to the admissibility of this proof was error.

There are, no doubt, many cases where the consideration expressed in a deed, a receipt, and perhaps other instruments, is open to parol proof. Many of these cases are referred to in the learned opinion below. They embrace numerous exceptions to the general rule which forbids the parties to vary or change any of the terms of the writing by oral testimony. Where the consideration is expressed, and that part of the instrument is in the nature of a receipt or acknowledgment that it has been paid, the amount, whether more or less, is generally open to parol proof. But, without further reference

to this class of cases, it may be safely asserted that in an action to recover the purchase price of property delivered to the purchaser under an executory contract of sale, in writing, expressing the consideration, or stating the purchase price, that part of the agreement is as conclusive upon the parties as any other term of the contract. It is in that respect, as well as in every other, deemed to be the final repository and evidence of the mutual obligations into which the parties have entered, and have consented to be bound. The rule does not, of course, apply where it has been shown that fraud, mistake, or duress has intervened, nor where the writing, upon inspection, appears to contain but a part of the agreement, and is in that respect imperfect or incomplete upon its face. But where the paper appears to be incomplete in any respect, or where words or phrases used, in their application to the agreement of which they form a part, are ambiguous or unintelligible, parol proof is admissible to supply the incomplete term, to aid in the interpretation, and to explain what is obscure or doubtful. These principles are familiar, and are illustrated by numerous cases, to some of which it will be sufficient to refer without further comment. *Elghmie v. Taylor*, 98 N. Y. 288; *Corse v. Peck*, 102 N. Y. 513, 7 N. E. 810; *Engelhorn v. Reitlinger*, 122 N. Y. 76, 25 N. E. 297; *Thomas v. Scutt*, 127 N. Y. 133, 27 N. E. 961; *Case v. Bridge Co.*, 134 N. Y. 78, 31 N. E. 254; *Brigg v. Hilton*, 99 N. Y. 517, 3 N. E. 51; *Schmittler v. Simon*, 114 N. Y. 176, 21 N. E. 162; *Bagley & Sewall Co. v. Saranac River Pulp & Paper Co.*, 135 N. Y. 626, 32 N. E. 132; *Routledge v. Worthington Co.*, 119 N. Y. 592, 23 N. E. 1111; *Chapin v. Dobson*, 78 N. Y. 74; *Potter v. Hopkins*, 25 Wend. 417.

The learned court below has assumed that the paper in question is evidence of a complete and perfect contract of sale, in which the price or consideration is expressed; and, if the premises from which the argument and final conclusion proceed be admitted, the result is doubtless correct. We are constrained, however, to differ from the learned court below with respect to the character and legal effect of the instrument in question as a contract. It does not appear upon inspection to be such a complete and perfect contract as to be conclusive upon the plaintiff with respect to the consideration. It belongs, we think, to the class of contracts where the parties have failed to state in any intelligible manner what the purchase price of the property was, and hence parol proof on that point was admissible. The figures and characters at the end of the paper do not necessarily import that the purchase price agreed upon was \$2,500. In order to arrive at that conclusion, some words must be supplied which the parties have not used. It does not state the price at all, in any appropriate or intelligible terms. The contents of the paper are not inconsistent with the

(55 Ohio St. 573)

STATE v. HUTCHINSON.

(Supreme Court of Ohio. Jan. 26, 1897.)

PURE FOOD LAW — AFFIDAVIT — FORM OF AVERMENT — DEFINITION OF ADULTERATION.

1. The proviso contained in section 3 of the pure food laws of the state, as amended April 22, 1890 (87 Ohio Laws, 248), applies to the whole act, and is not descriptive of any particular offense therein defined; and, for such reason, a negative averment of the facts within the proviso is not required in an affidavit charging an offense against the act, but the facts may be offered in evidence as a defense under the plea of not guilty.

2. A charge to a jury that would preclude it from considering evidence tending to show that the defendant, in making a particular sale, complied with the requirements of the proviso, is erroneous.

3. A sale of beer as food, containing salicylic acid in any quantity, without a label on the package, notifying the purchaser that it contains such an ingredient, is, when found to be poisonous or deleterious to health by its continuous or indiscriminate use, an offense against the pure food laws of the state, under the definition of an "adulteration" contained in clause 7, par. b, § 3, of the act, as amended April 22, 1890.

(Syllabus by the Court.)

Joseph C. Hutchinson was convicted under the pure food law before a justice, which judgment was reversed by the court of common pleas, and the state brought exceptions. Overruled.

F. S. Monnett, Atty. Gen., Joseph Dyer, Pros. Atty., Charles Case, and J. K. Richards, for the state. Samuel Hambleton and Edmund Smith, for defendant.

MINSHALL, J. The defendant, Hutchinson, was arrested on the warrant of a magistrate charging him with a violation of the pure food laws of the state. The affidavit was founded on the seventh clause of paragraph b of section 3 of the act, as amended April 22, 1890 (87 Ohio Laws, 248). It charged that the defendant "did unlawfully sell to Willis Sells a package of a certain article of human food, to wit, beer, which article, so sold as aforesaid, was then and there adulterated by having added thereto a quantity of a certain substance, to wit, salicylic acid, which is injurious to health. The said sale of said article as aforesaid was contrary to the statutes in such case made and provided." The magistrate charged the jury: "The law in this state prohibits, as an ingredient of an article of human food, the use of any article that is poisonous or injurious to health. The law does not say that the particular quantity of such alleged injurious substance as may be found present in the one particular sample or quantity of food must be found to be injurious to health; and the court is of the opinion that the legislature, in enacting this law, did not intend it to be so understood. The purpose and intention of the law is to prohibit the use of any substance in human foods, whenever the indiscriminate or continuous use of such substance in the food in any quantity would

plaintiff's claim with respect to what the agreement really was, and the parol proof given did not contradict the writing, within the meaning of the rule, though it did explain it. If the defendant, when he drew the paper as he did, had placed the figures at the top, instead of at the end, they would be just as intelligible as they are now. The obligation to pay the further sum of \$1,000 depended upon the contingency of a resale by the defendant, and it may very well be that he omitted for that reason to insert in the writing a condition of the sale that might or might not become operative. The characters and figures are not so connected with the words in the body of the paper as to warrant a court in holding, as matter of law, that they import the consideration for the sale, or express the price to be paid. They may, it is true, have been intended for that purpose, but it is just as reasonable to suppose that they were intended only to denote the amount in notes which the defendant was to surrender to the plaintiff, which was but a part of the consideration. There can be no doubt that the instrument was open to parol proof as to the manner in which the consideration was to be paid, whether in cash, or by the surrender of the seller's notes, and this for the reason that the writing contained no stipulation on that point. For the same reason, proof was competent to show the amount of the consideration. It may be, and probably is, impossible to affirm with any degree of confidence what the figures mean, but that is the reason why oral testimony was admissible to explain terms which in themselves expressed no intelligible idea. It is not necessary to account for the use of the terms, or to ascertain the purpose for which they were used. It is enough if we can fairly say that they do not express the idea that the price to be paid for the property was \$2,500, and no more. At most, it was a question as to what the parties intended by the use of such characters and figures. They were so placed with reference to the rest of the writing that they expressed no definite thought or idea, and were unintelligible. This presented a case for parol proof to aid the jury in ascertaining what the parties really agreed upon. Since that could not be determined from the writing alone, all the facts and circumstances attending the execution could be resorted to, and it was then for the jury to find whether the figures represented the whole purchase price, or only a part of it. Our conclusion is that, whether this paper be regarded as incomplete, ambiguous, or unintelligible, the ruling of the learned trial judge was correct, and that the exception was untenable. The judgment of the general term should be reversed, and that entered upon the verdict affirmed, with costs in all courts to the plaintiff. All concur, except HAIGHT, J., not sitting. Judgment accordingly.

result injuriously to health. If, therefore, you find, from the evidence, that the defendant, in the manner and form as charged in the affidavit, did sell beer, to which was added salicylic acid, and you further find that salicylic acid is a substance the continuous or indiscriminate use of which in foods would result injuriously to health, then I charge you that the sale of such article of food so adulterated is in violation of law, and you should find the defendant guilty." The defendant was convicted, and, on error to the common pleas, the court held that the charge was erroneous, reversed the judgment, and remanded the cause to the magistrate for further proceedings. To this ruling the prosecuting attorney took a bill of exceptions, and the case is here for the decision of this court on the ruling so made.

Section 3 of the act contains this provision: "Provided, that the provisions of this act shall not apply to mixtures or compounds recognized as ordinary articles or ingredients of articles of food, if each and every package sold or offered for sale be distinctly labeled as mixtures or compounds, with the name and per cent. of each ingredient therein, and are not injurious to health." It is claimed by the defendant that, in any event, the conviction was properly reversed, because the affidavit did not negatively aver that the beer so sold is an ordinary article of food, and that each package sold was distinctly labeled as a mixture or compound, with the name and per cent. of each ingredient therein, and is not injurious to health. On examination, it will be found that the proviso in the statute, on which this argument is based, applies to the whole act, and is not made descriptive of any particular offense made punishable by it. It was not, therefore, necessary that the affidavit should have contained the negative averments as claimed by the defendant. *Becker v. State*, 8 Ohio St. 391; *Stanglein v. State*, 17 Ohio St. 461; *Billigheimer v. State*, 32 Ohio St. 435; *Hirn v. State*, 1 Ohio St. 16. Such facts constitute a defense, and may be proved by the defendant under his plea of not guilty. The question, then, arises whether the magistrate erred in his charge to the jury. We think he did, but not in what he said, but in what he omitted to say. Under the charge given, the jury would have been required to convict, although it may have been shown that the beer sold was an article of food, and that each package was labeled as a mixture or compound, with the name and per cent. of each ingredient therein, and not injurious to health. The bill of exceptions here does not contain the evidence that was before the magistrate, and was incorporated in the record reviewed by the common pleas, nor does it purport to set out all of the charge of the magistrate to the jury, nor does it appear whether instructions were asked by the defendant and refused by him. It is entirely consistent with this record that the magis-

trate may have been requested to qualify what he said, so that the defendant could avail himself of the provisions of the proviso, if the evidence warranted it. The presumption is that the common pleas did not err; and we cannot say that it did, unless we know that, in the record before it, there was no evidence tending to show that the defendant was within the proviso of the statute, and so not guilty of the offense charged. For this reason we cannot find that the common pleas erred. If, however, there was no evidence before the magistrate of the character just adverted to, the charge as given was unexceptionable. A sale of beer as a food, containing salicylic acid, without a label on the package notifying the purchaser that it contains such an ingredient, is, when found to be poisonous or deleterious to health by its continuous or indiscriminate use as a food, an offense against the pure food laws of the state, under the definition of an adulteration contained in clause 7, par. b, § 3, of the statute above cited. Exceptions overruled.

(55 Ohio St. 332)

CITY OF GALION v. LAUER.

(Supreme Court of Ohio. Dec. 8, 1896.)

DEFECTIVE SIDEWALK — ACTION FOR DAMAGES — EVIDENCE—PRESUMPTIONS.

1. In an action against a municipal corporation to recover for injuries caused by a defective sidewalk, evidence that the plaintiff was married, and had a family of small children depending on him for support, is incompetent. The tendency of such evidence is to enhance the damages beyond the sum legally recoverable.

2. Whether or not a presumption would arise from such evidence alone that the verdict had been affected thereby, and the evidence therefore prejudicial, yet such presumption should be held to exist where in such case the court said in its charge that the jury, in estimating the damages, might, among other matters, consider the ability of the plaintiff "to labor and earn money. * * * and to provide for himself and family, before and after the accident." (Syllabus by the Court.)

Error to circuit court, Crawford county.

This action was brought by William Lauer, defendant in error, to recover of the city of Galion on account of injuries received by him by reason of a defective sidewalk. He recovered a judgment in the court of common pleas, which the circuit court affirmed on error, and the city brings error. Reversed.

R. C. Tracht, City Sol., J. W. Coulton, and R. W. Johnston, for plaintiff in error. I. G. Meuser, Dan Pabst, Jr., and Finley, Beer & Bennett, for defendant in error.

BRADBURY, J. The entry on the Journal of the court of common pleas in this case, allowing the bill of exceptions, is similar to that held to be sufficient by this court in the case of Railroad Co. v. Kernochan (recently decided) 45 N. E. 531. The bill of exceptions being valid, the questions arising thereon

were before the circuit court when the case was in that court, and are now before this court for determination.

The action was instituted by the defendant in error to recover against the city of Gallion damages claimed by him to have been sustained on account of a defective sidewalk. During his examination in chief his counsel asked him the following questions: "Had you, or had you not, a family at that time?" Answer: "I had a wife and four children." "How old were your children at that time?" Answer: "The oldest was ten years and the youngest was one year old." This evidence was admitted over the objections of the plaintiff in error. This evidence was not pertinent to the issue joined between the parties. The plaintiff's right of action did not depend upon the question of his marriage, nor upon that of his fatherhood, and the defendant was bound to no higher duty towards a married man or a father than to one who bore neither of these characters. If the right of action existed, the damages lawfully recoverable should be no more affected by those circumstances than the right of action itself.

The only serious question is whether the admission of the evidence was prejudicial to the defendant below (plaintiff in error). Doubtless, this error could have been cured by an instruction cautioning the jury against increasing the amount of their verdict on account of the plaintiff below having a wife and young children depending on him for support. This, however, was not done. On the contrary, the court seemed to be of opinion that the jury might, in fixing the amount of recovery, take into consideration those circumstances. On this point the instructions were as follows: "You will take into consideration the age of the plaintiff at the time of the accident, his occupation, his ability to labor and earn money and enjoy life, and provide for himself and family, before and since the accident. * * *" This language would authorize a jury to enhance the damages because the person injured had a family. The fact that the plaintiff below had a family of young and helpless children depending upon him for maintenance had been put in evidence. We think the natural tendency of that fact was to arouse the sympathies of the jury, and, in view of the language employed by the court, the reasonable inference is that the amount of the verdict was increased on account thereof. This is the view of the question taken by the supreme court of the United States, in *Pennsylvania Co. v. Roy*, 102 U. S. 451. That court, speaking through Justice Harlan, using the following language: "There was, however, an error committed upon the trial, to which exception was duly taken, but which does not seem to have been remedied by any portion of the charge appearing in the bill of exceptions. The plaintiff was permitted, against the objection of the defendant, to

give the number and ages of his children, a son ten years of age, and three daughters, of the ages, respectively, of fourteen, seventeen, and twenty-one. This evidence does not appear to have been withdrawn from the consideration of the jury. It certainly had no legitimate bearing upon any issue in the case. The manifest object of its introduction was to inform the jury that the plaintiff had infant children dependent upon him for support, and, consequently, that his injuries involved the comfort of his family. This proof, in connection with the impairment of his ability to earn money, was well calculated to arouse the sympathies of the jury, and to enhance the damages beyond the amount which the law permitted; that is, beyond what was, under all circumstances, fair and just compensation to the person suing for the injuries received by him. How far the assessment of damages was controlled by this evidence as to the plaintiff's family, it is impossible to determine with absolute certainty, but the reasonable presumption is that it had some influence upon the verdict." Judgment reversed.

(55 Ohio St. 577)

BRICKER v. ELLIOTT.

(Supreme Court of Ohio. Jan. 26, 1897.)

ACCOUNTING OF TRUSTEE—APPEALABLE JUDGMENT.

A suit to compel a trustee to account to the beneficiaries of his trust, and for a judgment for the amount which, upon such accounting, may be found in his hands, is not an action for the recovery of money only; and, from the judgment of the court of common pleas in such action, either party may appeal to the circuit court.

(Syllabus by the Court.)

Error to circuit court, Knox county.

Action by David B. Elliott, administrator of the estate of Indiana Bricker, against Hiram Bricker. From an order of the circuit court dismissing an appeal from the court of common pleas, defendant brings error. Reversed.

The defendant in error brought suit in the common pleas court against the plaintiff in error, alleging his appointment and qualification as administrator of the estate of Indiana Bricker, deceased; that David Bricker, who was the husband of said Indiana Bricker, and the father of said Hiram, had died in 1878, leaving a will, whereby he devised to said Hiram real and personal property of great value, but charged with an annuity of \$150, payable to said Indiana during her life, which the defendant accepted, subject to said charge; that said David also devised to said Indiana, in lieu of dower, certain described real and personal estate for life; that said Indiana survived her said husband about eight years, but was, at the time of his death, very old, and infirm in both mind and body, and continued to be so infirm until her death; that, in consequence of such infirmity, she was incapable of man-

aging her said property, or of transacting any business whatever, and that the defendant, her son, assumed the active control and management of all her affairs, including the annuity and property so devised, and continued therein as her agent and trustee from the death of her said husband until her death, receiving in that capacity the proceeds of said annuity and said property of a policy of fire insurance belonging to her; that the plaintiff is unable to state the sums so received by said defendant as such trustee, or the amount paid out by him, or the amount of interest with which he is chargeable; and that the defendant holds and is liable to account to the plaintiff for said annuity, moneys, and rents, with interest thereon. The prayer of the petition is as follows: "Wherefore the plaintiff prays that the defendant may be required to answer, and set forth fully the amount of rents and profits received by him as such agent and trustee from the rent of said property as aforesaid, together with the dates and amounts when so received; also state explicitly what payments the defendant has made to the said Indiana Bricker, or on her account, out of said annuity, insurance fund, and moneys arising from said rents and profits, together with the dates and amounts thereof when so paid; and that, upon a final hearing of this cause, the defendant be required, by a proper decree of this court, and adjudged, to account and pay over to this plaintiff all balance that may be found in his hands of said annuity, insurance fund, and moneys arising from said rents and profits, together with interest on each annual installment of annuity when the same became due and payable, and the interest on said insurance fund, from the date of the receipt thereof, and on said moneys received from the said rents and profits from said property from the dates of the several receipts of the same; and for such other and further and different equitable relief as shall be just in the premises." An answer and reply were filed, but they did not change the character of the issues tendered by the petition. In the common pleas the case was tried to the court. The judgment being unsatisfactory to the defendant there, he appealed the cause to the circuit court, where the administrator moved to dismiss the appeal, "upon the ground that the action is not one in which the defendant has the right to appeal." The order of the circuit court sustaining the motion to dismiss is the subject of the petition in error here.

John Adams, for plaintiff in error. Critchfield & Graham, for defendant in error.

SHAUCK, J. (after stating the facts). The administrator in this case stands upon the rights of his intestate, and the question submitted is to be determined as though she had brought the suit in her lifetime. If, up-

on the trial of these issues in the court of common pleas, either party was entitled to demand a jury, the appeal was properly dismissed; and that right existed if the action was for the recovery of money only. The adjudications of this court determine that, if the action is for that purpose only, it is triable by jury, even though the principles upon which a recovery is sought are equitable in their nature and origin. They also determine that cases are so triable if the remedy of accounting in equity is not necessary to full and adequate relief, even though disclosures from the defendant may be desired. *Chapman v. Lee*, 45 Ohio St. 336, 13 N. E. 736; *Gunsaulus v. Pettit*, 46 Ohio St. 27, 17 N. E. 231.

But an action is not for the recovery of money only if it invokes the exercise of equitable jurisdiction, which, in cases of this character, must be found, if at all, in that prolific source of equitable jurisdiction,—the inadequacy of legal remedies. In the original petition, the plaintiff did not allege an indebtedness for a definite amount due from the defendant. He alleged facts which excused him from doing so, by showing that, although the parties were adversary in the suit, they had not been so in the transactions out of which it arose. The case alleged showed that the defendant was a trustee; that, in consequence of the trust and confidence reposed in him by his mother, he was in possession of funds belonging to her, whose amount he knew, and she did not. The case was not for money only. It invoked the exercise of equitable jurisdiction, to compel the trustee to render an account necessary to the ascertainment of the amount due, and for a judgment for that amount when ascertained. *Pom. Eq. Jur. § 1421*, and notes. Judgment reversed.

(55 Ohio St. 613)

HAGERTY, Judge of Probate Court, v.
STATE ex rel. DYER, Prosecuting
Attorney.

(Supreme Court of Ohio. Jan. 26, 1897.)

COLLATERAL INHERITANCE TAX — CONSTITUTIONAL
LAW.

1. The act of April 20, 1894 (91 Ohio Laws, p. 169), amending "An act imposing a collateral inheritance tax," is not repugnant to any provision of the constitution, because of its discriminations among collateral kindred.

2. The property "which shall pass by sale," within the meaning of the act, is such only as passes in transactions which are in fact gifts, though in form sales, and the act does not restrict the right to dispose of property by sale for a valuable consideration, which the parties, in good faith, deem adequate.

(Syllabus by the Court.)

Error to circuit court, Franklin county.

Application by the state, on the relation of Joseph H. Dyer, for a writ of mandamus to Lorenzo D. Hagerty.

The prosecuting attorney filed a petition in the circuit court for a peremptory writ of

mandamus, commanding the probate judge to appoint three disinterested persons to view and appraise the personal and real property left by Elizabeth Noble, deceased, for the purpose of assessing thereon the tax provided for by the act entitled "An act imposing a collateral inheritance tax," passed January 27, 1893, as amended April 20, 1894, said judge refusing to make such appointment because he believed said acts to be unconstitutional and void. A demurrer to the petition was overruled, and a peremptory writ allowed as prayed for, and defendant brings error. Affirmed.

Harrison, Olds & Henderson, for plaintiff in error. Joseph H. Dyer and Henry A. Williams, for defendant in error.

PER CURIAM. The only question raised by the demurrer is the constitutional validity of the legislation referred to. Its validity is denied because of the provisions of the first section of the amended act, which is as follows:

"Section 1. That all property within the jurisdiction of this state, and any interest therein, whether belonging to inhabitants of this state or not, and whether tangible or intangible, which shall pass by will or by the intestate laws of this state, or by deed, grant, sale or gift made or intended to take effect in possession or enjoyment after the death of the grantor, to any person in trust or otherwise, other than to or for the use of the father, mother, husband, wife, brother, sister, niece, nephew, lineal descendant, adopted child, or person recognized as an adopted child, and made a legal heir under the provisions of section 4182 of the Revised Statutes of Ohio, or the lineal descendant thereof, or the lineal descendant of any adopted child, the wife or widow of a son, the husband of the daughter of a decedent, shall be liable to a tax of five per centum of its value, above the sum of two hundred dollars, seventy-five per centum of such tax to be for the use of the state, and twenty-five per centum for the use of the county wherein the same is collected and all administrators, executors and trustees, and any such grantee under a conveyance made during the grantor's life, shall be liable for all such taxes, with lawful interest as hereinafter provided, until the same shall have been paid as hereinafter directed. Such taxes shall become due and payable immediately upon the death of the decedent, and shall at once become a lien upon said property, and be and remain a lien until paid."

Most of the objections urged against the validity of the act are answered in *State v. Ferris*, 53 Ohio St. 314, 41 N. E. 579. The act there held invalid made an inhibited distinction as to the value of property received, the right to receive being there, as here, the real subject of the imposition. No such distinction appears in this act, which lays a uni-

form tax upon the reception of all amounts above \$200, and that exemption is expressly authorized by the constitution in the levying of taxes upon property.

This act is said to be invalid because of its discriminations among the collateral kindred, the tax being imposed upon the value of the property received by some and not upon that received by others. The power exercised by the general assembly in this instance is legislative, and vested by the first section of the second article of the constitution. Since the right to receive property by inheritance is not guaranteed by the constitution, it prescribes no limitation upon the power of the general assembly to designate the persons who may thus receive. The discrimination is based upon and justified by the fact that there are degrees in collateral kinship.

It is further objected that the act is invalid because the provision that all property "which shall pass by will, * * * sale or gift" shall be subject to the imposition, invades the owner's guaranteed right to sell and convey property, which right is embraced within its enjoyment. But the meaning of the word "sale," as used in the statute, is to be determined by the maxim, "Noscitur a sociis," and it includes only transactions which, though in form sales, are in fact gifts. Since the act is within the legislative power granted, and not within the letter or spirit of any limitation thereon, it is valid.

The conclusion of the circuit court is well sustained by its opinion in the case. 12 Ohio Cir. Ct. R. 606. Judgment affirmed.

(167 Mass. 420)

COMMONWEALTH v. UHRIG.

(Supreme Judicial Court of Massachusetts.
Suffolk. Jan. 11, 1897.)

BURNING A WAREHOUSE—INDICTMENT—UNNECESSARY AVERMENT—NOL. PROS.—JUVENILE OFFENDER—WAREHOUSE DESTROYED.

1. Under Pub. St. c. 203, § 2, which provides a punishment for whoever shall, in the nighttime, burn a warehouse, which, with its contents, is of the value of \$1,000; and section 4, which provides a lesser punishment for whoever burns a warehouse other than is mentioned in section 2,—an indictment which charges only that defendant, "in the nighttime," burned a warehouse, charges an offense under section 4, and the words "in the nighttime" are unnecessary.

2. The indictment charges but one offense, and is not bad for uncertainty.

3. As to an unnecessary part of an indictment, the commonwealth may enter a nol. pros. before the jury is impaneled.

4. Pub. St. c. 89, §§ 18-22, relating to the punishment of juvenile offenders and the procedure in police, district, and municipal courts, do not take away the jurisdiction of the superior court to try a defendant under the age of 17 years for the burning of a warehouse, in violation of chapter 203, § 4.

5. A building used only by the owner in storing therein the tools and materials used by him in his personal business is a warehouse, within the meaning of Pub. St. c. 203, §§ 2, 4, providing punishment for whoever shall burn a warehouse.

Exceptions from supreme judicial court, Suffolk county.

Frank N. Uhrig was convicted of burning a warehouse, and brings exceptions. Overruled.

John D. McLaughlin, Second Asst. Dist. Atty., for the Commonwealth. J. E. Bates, for defendant.

FIELD, C. J. This is not an indictment under Pub. St. c. 203, § 2, because it is not alleged that the warehouse, with the property therein contained, was of the value of \$1,000. It is an indictment under section 4 of that chapter. *Com. v. Smith*, 151 Mass. 491, 24 N. E. 677. It is an offense, under section 4, willfully and maliciously to burn a warehouse, whether the warehouse be burned in the daytime or in the nighttime. The allegation that the burning was in the nighttime was, therefore, unnecessary. The attorney of the commonwealth had the right to enter a nolle prosequi as to this part of the indictment before the jury were impaneled. *Com. v. Tuck*, 20 Pick. 356. It may be that without a nolle prosequi the allegation that the burning was in the nighttime could be rejected as surplusage. It was not a constituent element of the offense, and perhaps it could be regarded as not so far descriptive of the offense that it must be proved as laid; but it is unnecessary to decide this. The indictment is not bad for duplicity. But one offense is charged in it; nor is it uncertain what the offense is. *Com. v. Hamilton*, 15 Gray, 480. The demurrer to the defendant's special plea in bar was rightly sustained. Pub. St. c. 89, §§ 18-22, do not take away the jurisdiction of the superior court to try a defendant under the age of 17 years on such an indictment. See *Fanning v. Com.*, 120 Mass. 388. As the offense was not punishable with death or imprisonment for life, the defendant was entitled to but two peremptory challenges. Pub. St. c. 170, § 86. No error is shown in the refusal of the court to give the first, second, and third instructions requested. The indictment was sufficient, and, as the evidence is not set out in the exceptions, we cannot say that the evidence was insufficient to warrant the verdict. The fifth instruction requested was given in substance. The thirteenth instruction requested was given, except the final sentence, which relates to the sufficiency of the evidence to prove that the building burned was a warehouse. There was evidence that the "building was occupied and used by him [Williams] for the storing of his tools and stock; the latter consisting of paints, oils, varnish, shellac, etc., but it did not appear that the building had been occupied by him for any other purpose than as a place for storing such material as was privately used by him in the prosecution of his personal business." Warehouses may be public or private, and a building may be

used as a warehouse for storing only the goods of the owner of the building. *Reg. v. Hill*, 2 Moody & R. 458; *Ray v. Com.*, 12 Bush (Ky.) 397. The court therefore rightly refused to rule that the evidence was insufficient to show that the building was a warehouse. Exceptions overruled.

(146 Ind. 611)

SUTHERLAND et al. v. McKINNEY.

(Supreme Court of Indiana. Jan. 26, 1897.)

INTOXICATING LIQUORS — REMONSTRANCE — WITHDRAWAL OF NAMES.

Under Act March 11, 1895, § 9, providing that a remonstrance to an application for liquor license must be filed with the board of commissioners three days before the session, a remonstrator cannot withdraw his name from the remonstrance after the expiration of the time for filing. *State v. Gerhardt* (Ind. Sup.) 44 N. E. 469, followed.

Appeal from circuit court, Washington county; S. B. Voyies, Judge.

John D. McKinney having applied to the board of commissioners of Washington county for a license to sell liquor, Henry B. Sutherland and others filed a remonstrance. A motion by applicant to withdraw the names of some of the remonstrators having been overruled, he appealed to the circuit court, where the motion was sustained, and a license ordered issued. The remonstrators appeal. Reversed.

Harvey Morris, for appellants. Mitchell & Mitchell and Zaring & Hottel, for appellee.

MONKS, J. Appellants filed with the auditor of Washington county a remonstrance in writing under section 9 of an act approved March 11, 1895 (Acts 1895, p. 251), commonly known as the "Nicholson Law," against the granting of a license to appellee for the sale of intoxicating liquors under the laws of this state. The remonstrance was filed before the session of the board of commissioners, and within the time fixed by said law, and was signed by a majority of the legal voters of Washington township, in which appellee desired to carry on said business. On the fifth day of the regular session of the board of commissioners, appellee filed a written motion, signed by 52 of the persons who had signed said remonstrance, that said board of commissioners dismiss said remonstrance as to them, and that their names be stricken therefrom, stating as the reason therefor that they each had signed said remonstrance "under mistake and misapprehension." This motion was overruled by the board, and the application of appellee for said license was denied under said section 9. Appellee appealed said cause to the circuit court, where said motion as to said 52 persons was renewed, and was sustained by the court, and said remonstrance was dismissed as to them. Not counting the signatures of these 52 persons, the remon-

strance was not signed by a majority of the legal voters of said township. The trial of said cause resulted in a finding in favor of appellee, and a judgment that he be granted a license, etc. The action of the court in sustaining said motion to dismiss as to said 52 persons is called in question by the assignment of errors. It appears from the record that the trial court sustained said motion upon the ground that a remonstrant has the right to withdraw his name at any time before the cause is submitted to the board of commissioners for trial. This court has held that a remonstrant has no right to withdraw his name after the expiration of the time for filing a remonstrance. *State v. Gerhardt* (Ind. Sup.) 44 N. E. 469; *Conwell v. Overmeyer* (Ind. Sup.) 44 N. E. 548; *White v. Prifogle* (Ind. Sup.) 44 N. E. 928. Appellee insists that, as the motion states that the remonstrance was signed by said persons under mistake and misapprehension, they had the right to withdraw their names from the remonstrance. Whether there is any exception to the rule declared by the court in the cases cited, we need not determine in this case, for the reason that the motion did not state any facts showing that the persons named signed said remonstrance "under mistake and misapprehension." It follows that the court erred in sustaining said motion to dismiss the remonstrance. The remonstrance being signed by a majority of the legal voters of said township, and filed within the time limited by law, the court below had no jurisdiction or power to grant said license to appellee. *Flynn v. Taylor* (Ind. Sup.) 44 N. E. 548. It is due to the learned judge of the court below to say that this cause was tried and determined by him before the case of *State v. Gerhardt*, supra, and other cases under the "Nicholson Law," had been decided by this court. Judgment reversed, with instructions to overrule said motion to dismiss the remonstrance as to said 52 persons, and for further proceedings not inconsistent with this opinion.

(146 Ind. 600)

RICHMOND GAS CO. v. BAKER.

(Supreme Court of Indiana. Jan. 26, 1897.)

NEGLIGENCE—EVIDENCE—DAMAGES.

1. Where a gas company, in connecting a house with its main in a city, used a cracked elbow, which it was often called to repair, it was liable for injuries resulting from an explosion of gas leaking through such elbow, where it had failed to remove it, or to close the crack known to exist therein.

2. Where a gas company, being notified of a leak in a pipe connecting a house with the main, sends one of its agents to repair the leak, and he assures the family that all is safe, and that the smell of gas in the house comes from a leak in the street, and a member of the family remaining in the house is injured by an explosion of gas, such person is not guilty of contributory negligence.

3. In an action to recover for personal injuries, the fact that plaintiff's life has been short-

ened thereby cannot be considered in assessing the damages.

Appeal from circuit court, Wayne county; D. W. Comstock, Judge.

Action by Sarah Baker against the Richmond Gas Company. Judgment for plaintiff, and defendant appeals. Reversed.

Thos. J. Study, for appellant. Jackson & Starr, for appellee.

HOWARD, J. This was an action for damages, brought by appellee, for injuries alleged to have been received by her by reason of an explosion of artificial gas, caused by the negligence of appellant. The questions arising on the appeal relate chiefly to the allegations and proof made as to negligence on the part of the company, and contributory negligence on the part of the appellee. As bearing upon these questions, the briefs of counsel are almost exclusively taken up with a discussion of the sufficiency of the complaint, and the correctness of the court's action in giving and refusing instructions. The complaint is in three paragraphs. The first paragraph counts on negligence of the company in the laying of its mains in the street, and the making of connection of the same with the house pipe, whereby, as alleged, gas escaped from the mains into the house. The second paragraph counts on negligence in repairing leaks in the house pipe after defects therein had been discovered and made known to the company, and the repair had been undertaken, but not properly made, by its agents, thus causing the gas to escape through the house. The third paragraph counts on a defective joint of pipe which the company used to connect its street mains with the house pipe, from which defective joint the gas leaked into the house. The allegations in each paragraph seem to be sufficient, including allegations as to the appellee's freedom from contributory negligence, although as to the latter allegations the complaint was perhaps subject to a motion to make more specific and certain. With their general verdict, the jury returned answers to interrogatories submitted to them; and from these answers, as also from the evidence, it appears: That the appellee is an aged woman, living in the family of her grandson, Thomas Crabb; and that on December 18, 1892, the appellant began to furnish gas to the house of Mr. Crabb, having entered into a contract with him for that purpose. The gas was received by a pipe passing through the outer wall of the cellar, in which a meter was placed by the company. Mr. Crabb's family consisted of himself, his wife, their child, and the appellee. He was engaged in daily work away from home, and his wife conducted a small store on the ground floor, and in the front part of the house. The house had already been properly piped for gas by Mr. Crabb, who had also extended a pipe into the cellar, ready to be at-

tached by the company to its gas main in the street, and the company did so attach the house pipe to its main by a connecting pipe. A short time after the attachments were so made, and the gas began to be furnished, it was noticed by the family that gas was escaping into the store and other rooms of the house. Before notifying appellant of the leak, a man was sent into the cellar to examine the pipe, and he found that the gas was leaking through a part of the pipe put in by the company, consisting of a cracked elbow attached to the house pipe. The leak was temporarily closed by candle grease. Very soon, however, the gas again began to escape, and to permeate the house, and notice was sent to the gas company to repair the leak. In response to this request, the company sent an employé named Brannon, who applied what is known as "plumber's cement" to the cracked elbow, and thus, for the time, stopped the flow of gas. The jury find that Brannon did not know how to apply the cement properly, and soon after his work the gas again began to escape. The explosion occurred on Wednesday evening, January 18, 1893,—just one month after the gas had been introduced into the house. On the Sunday morning preceding, the gas was noticed in dangerous quantities; and Mr. Crabb shut it off from the street, to stop the flow into the house. On Monday afternoon he again turned on the gas. At the time when the house pipes were attached to the street mains to supply the house with gas, the company placed an appliance, being a stopcock, with a wrench ready for use, between the wall of the building and the meter, for the purpose of cutting off the gas whenever it should be desired to do so. The manner of using this appliance was at the time pointed out to Mr. Crabb, and he understood it, and had no trouble in shutting off the gas on Sunday morning, and turning it on again on Monday afternoon. When the gas was so shut off at the stopcock, the flow from the mains ceased entirely, and there was no escape of gas into the house. After the gas was turned on by Mr. Crabb on Monday afternoon, it soon began to escape again into the rooms, and notice was again sent to the company that afternoon to come and repair the pipe. On the next (or Tuesday) afternoon, being the day before the explosion, the company sent the same employé, Brannon, to attend to the leak. After such examination and repair as he made, he turned on the gas, and informed Mrs. Crabb that it was now all right; and it appears that on the same evening this information was communicated by her to appellee. The gas, however, still continued to escape from the cracked elbow into the house, and in greater quantities, until the evening of the next day, when it exploded. The appellee had lived for some time with her grandson, and as a member of his family. She had been there continuously during the month, from the day

when the gas was admitted into the house until it exploded and wrecked the house, on the day of her injury. During all the time that there had been the smell of escaping gas, she had been in and about all the rooms of the house, and had ample opportunity of detecting the odor. Except that her hearing was not good, she had the full use of all her faculties and her senses, including the sense of smell, and was a person of ordinary intelligence and understanding. During the day of the explosion, and the days immediately prior thereto, the odor of escaping gas was plainly discernible in all parts of the house, and Mr. Crabb and his wife were told by persons visiting them that the gas then escaping into the house was dangerous. At the same time the appellee was in daily communication with Mr. and Mrs. Crabb, and was in and about all the rooms of the house, including the store in which the explosion took place. The jury further find that on the day of the explosion, and on the Sunday, Monday, and Tuesday preceding, the odor of gas was plainly discernible to any one using ordinary diligence. The cellar did not extend under the store room, but there was a shallow place thereunder, between the ground and the floor, separated from the cellar by a wall. Through this wall there was an aperture by which the gas escaping from the cracked elbow entered into the space beneath the floor of the store room, and thence penetrated above. At one end of the store was a closet, and into this the gas was collected in an excessive amount, and from this point the explosion originated. Mrs. Crabb had sold a cigar to a customer, and gave him a match to light it. The appellee was at the time present with Mrs. Crabb. The customer stood close to the closet when he struck the match, and immediately the gas took fire and exploded.

We do not understand that the able and ingenious counsel for appellant contends seriously that these facts do not show negligence on the part of the company. The company was supplying the house of Thomas Crabb with artificial gas,—a penetrating, elusive, and explosive material, and hence one that was at any moment liable to become dangerous, unless carefully guarded. The company therefore owed a duty to all persons who might be injured by the gas to use ordinary and adequate care in delivering the substance into the residence in question. Even if the company did not know of the cracked elbow at the time it was attached to, and made a part of, the conducting pipe from the street mains to the house, yet it did know of this defect after the repeated calls for its repair, but still wholly failed to make the repair, by removing the cracked elbow, or by effectually closing the crack known to exist in it. Moreover, the company's agent, after professing to have made a final examination, turned on the gas, and assured the family that everything was

now all right, and that they might therefore rest secure, notwithstanding the strong odor of gas, which he told them must come from the lamp-post on the street. No refinements of reasoning can show that such conduct was not culpable negligence.

But counsel for appellant does earnestly contend that the facts found by the jury, and shown in the evidence, disclose contributory negligence on the part of the appellee, or at least that she has not established her freedom from such contributory negligence. In this, also, we are unable to agree with counsel. Because the gas had penetrated the various parts of the house in dangerous quantities, it does not follow that the occupants were aware of the full extent of their danger. They had good reason to rely upon the superior knowledge of the gas company, and of its agents who had made the connections of its mains with the house, and who had afterwards assumed charge of making repair of the connecting pipes, and then assured the family that all was now safe, and that they need not be alarmed about the odor, which they were assured came from the gas post on the street corner. The company could not thus lull the members of the family into a belief in their security, and then, when injury came, turn on the family, and charge them with negligence in relying on the assurance of safety so given by the company itself. The company had assumed the responsibility of making the repairs or changes in the piping necessary for the safe delivery of gas to the house, and thereafter continued to deliver the gas with full knowledge of all the conditions, including a knowledge of the family's reliance upon its assurance of safety. *Jamieson v. Gas Co.*, 128 Ind. 555, 28 N. E. 76; *Mississinewa Co. v. Patton*, 129 Ind. 472, 28 N. E. 1113; *Trust Co. v. Perrego*, 144 Ind. 350, 43 N. E. 306. And see *Machinery Co. v. Brady* (Ill. Sup.) 45 N. E. 486. Moreover, even if it could be shown, as appellant argues, that Thomas Crabb or his wife were negligent, such negligence could not be imputed to appellee. She could be charged only with any negligence of which she had herself been guilty. *Town of Knightstown v. Musgrove*, 116 Ind. 121, 18 N. E. 452; *Miller v. Railway Co.*, 128 Ind. 97, 99, 27 N. E. 339; *Railway Co. v. McIntosh*, 140 Ind. 261, 38 N. E. 476. Appellee, in common with the rest of the family, had not only the assurance of the company that there was no danger to be apprehended from the gas, but this assurance was fortified in her mind by the confidence of Mr. and Mrs. Crabb. They remained quietly attending to their duties in all confidence, as she could see. They suffered their child to be with them about the house. Mrs. Crabb was attending to the store, and Mr. Crabb was sitting quietly at the stove, reading, at the moment of the explosion. The appellee could not possibly have any grounds for apprehension of danger, under these circumstances,

and could not be required to leave her home, in midwinter, to avoid the presence of the smell of gas, which the words of the company, as also the conduct of the family, had assured her was altogether free from peril, whatever might be the disagreeable odor of the gas in the house. She had been lulled into a feeling of security.

The condition of the evidence and the findings of the jury thus disclosed, showing, as they do, negligence on the part of the appellant, and freedom from negligence on the part of the appellee, make it quite unnecessary to follow counsel in a great part of what is said as to instructions given and refused by the court. The instructions given by the court, in so far as they bear upon the question of negligence, were correct, as applied to the evidence, as was also the action of the court in refusing instructions asked for by appellant in relation to the same matter. Upon the subject of damages the court gave to the jury two instructions, the first of which is admitted to be correct, and the second of which is complained of by appellant as being erroneous. The two instructions are as follows: "No. 15. If you find a verdict for the plaintiff, you should award her a sum sufficient to fairly compensate her for all damages, if any, that it is shown, by a fair preponderance of the evidence, she has sustained. In estimating such damages, you should consider the nature and extent of her physical injuries, if any, whether permanent or otherwise; the effect produced thereby, and the probable effect that such injuries will directly produce, if any, upon her general health, and all physical pain and suffering occasioned thereby; expenses incurred for medical attention, if any, shown by the evidence. And if you find from the evidence that she has sustained any permanent disability, having considered the nature of the same, you may award her such prospective damages on account thereof as in your opinion the evidence may warrant you in believing she will sustain, if any, as the direct result thereof in the future. And you have the right, in fixing her damages, to consider her present age, and the probable duration of her life. No. 16. If, as a direct result of the injuries, if any, received by the plaintiff, her expectancy of life has been shortened, this circumstance may be taken into consideration by the jury, should they find a verdict in her favor, in estimating the damages, if any, that they may award to her; and on this point the jury may consider all facts, proved by a fair preponderance of the evidence, as to the plaintiff's physical condition, health, vigor, activity, and the daily work done by her, prior to the said explosion." The first charge above given is full and complete, covering every element of damage suggested by the evidence, unless it should be damages for the shortening of life, as referred to in the second charge. It is as to this question that

counsel differ. Counsel for appellant contend that instruction No. 16 is erroneous, for the reason that this is a common-law action, and the common law does not admit of compensation in money for the taking of human life, or the shortening of its duration; that if appellee were injured by the wrong of appellant, and without her own fault, the damages provided for in instruction No. 15 were therefore all that could be allowed her. And counsel cite 3 Lawson, Rights, Rem. & Prac. § 1016; Cooley, Torts, 27, 28; 2 Thomp. Neg. 1272, 1273, §§ 72, 73; Connecticut Mut. Life Ins. Co. v. New York & N. H. R. Co., 25 Conn. 265; Hyatt v. Adams, 16 Mich. 180. See, also, Jackson v. Railway Co., 140 Ind. 241, 39 N. E. 663. Counsel for appellee, on the other hand, earnestly contend that there may be a pecuniary compensation for the taking of human life apart from the question of damage or loss sustained by any one thereby. And they cite Turnpike Co. v. Andrews, 102 Ind. 138, 146, 1 N. E. 364; Railroad Co. v. Hecht, 115 Ind. 443, 17 N. E. 207; Hecht v. Railroad Co., 132 Ind. 507, 32 N. E. 302; Railway Co. v. Selby, 47 Ind. 471; Magee v. City of Troy (Supp.) 1 N. Y. Supp. 24; Railway Co. v. Baddeley, 54 Ill. 19; Railway Co. v. Ewing (Tex. Civ. App.) 28 S. W. 638; Cooper v. Railway Co. (Minn.) 56 N. W. 42; Railway Co. v. Higby (Tex. Civ. App.) 26 S. W. 737; Cunningham v. Railroad Co., 49 Fed. 439; Reed v. Railroad Co., 56 Fed. 184; Peterson v. Railway Co. (Minn.) 39 N. W. 485. None of the cases cited by appellee, as we believe, sustain the contention of counsel. In general, these cases reach to this: That in an action for injury by the wrong of another the actual condition of the injured person, as caused by the accident, may be considered for the purpose of determining the amount of damages, present and prospective, which should be awarded. And, if the condition of the injured person is such that a shortening of life may be apprehended, this may be considered, in determining the extent of the injury, the consequent disability to make a living, and the bodily and mental suffering which will result. This, however, falls far short of authorizing damages for the loss or shortening of life itself. The value of human life cannot, as adjudged by the common law, be measured in money. It is, besides, inconceivable that one could thus be compensated for the loss or shortening of his own life. And, if any one else could maintain an action for the death of the injured person, it must be because the person bringing such action would be able to show pecuniary loss or damage to himself by reason of the death of such other person. Of that nature are various statutory actions authorized to be brought by, or for the benefit of, persons regarded as having a pecuniary interest in the lives of others. Railway Co. v. Mugg, 132 Ind. 168, 31 N. E. 564; Railway Co. v. Wright, 134 Ind. 509, 34 N. E. 314; Rev. St. 1894, § 267 (Rev. St. 1881, § 266);

Rev. St. 1894, § 283 (Rev. St. 1881, § 282); Rev. St. 1894, § 285 (Rev. St. 1881, § 284); Rev. St. 1894, § 7473. If it should be contended that the instruction here objected to might be upheld as intended simply to draw the attention of the jury to the probable shortening of life as an indication of the severity of the injury, and consequently of present and future pain, it may be answered that the instruction was evidently drawn with no such purpose in mind, but merely with the view of authorizing the jury to consider the shortening of her life as an element which of itself, simply, might be taken into account by them in awarding her damages in case they should find in her favor. This, however, as we have seen, was unauthorized. The instruction, at best, was misleading. Neither are we able to say, from the evidence and the answers to interrogatories, that this instruction was harmless, or that it might not have unduly influenced the verdict of \$4,600 in appellee's favor. Without saying that such damages were excessive for a person 85 years of age, and injured only to the degree shown, we are yet unable to know whether the jury would have awarded damages to that amount had they not considered the shortening of appellee's expectancy of life as a legitimate element in making their award. The judgment is reversed, with instructions to grant a new trial.

(146 Ind. 629)

GUY et al. v. BLUE et al.

(Supreme Court of Indiana. Jan. 27, 1897.)

APPEAL—WAIVER OF ERRORS.

Where an order sustaining a demurrer to the complaint, in that the action is barred by the statute of limitations, is assigned as error on the ground that the complaint shows that the action is excepted from the operation of the statute, the question thus raised goes to the sufficiency of the facts stated in the complaint, and a failure to discuss the question of sufficiency will be considered a waiver of the error.

Appeal from circuit court, Kosciusko county; E. Haymond, Judge.

Action by Susan Guy and others against Simeon Blue and others. From a judgment for defendants, plaintiffs appeal. Affirmed.

Wood & Bowser and L. W. Royse, for appellants. Hiram S. Biggs and M. H. Summy, for appellees.

McCABE, J. The appellants sued the appellees, in a complaint of two paragraphs, to set aside certain deeds of conveyance of certain lands in Kosciusko county. The issues joined were tried by the court, resulting in a finding and judgment for the defendants. The only error assigned calls in question the action of the trial court in sustaining a demurrer to the amended second paragraph of the complaint. The substance of that paragraph is as follows: The plaintiff Susan Guy and her husband, Lorenzo D. Guy, complain of the defendants, and say

that on April 21, 1885, and for several years prior thereto, one William Blue was the owner in fee simple of certain lands, which are particularly described, in Kosciusko county, Ind.; that on said day said William was over 80 years old, and was then, and had been for more than 5 years prior thereto, greatly enfeebled, both in body and mind, and so continued until his death, and, by reason thereof, easily susceptible to the influence, arts, and persuasion of others; that during said period of time the defendants Simeon, Benjamin, Samuel, and Peter W. Blue, sons of said William, well knowing his weak and enfeebled condition aforesaid, corruptly conspiring, contriving, and intending to profit thereby, and to cheat and defraud said William of said lands, made frequent visits to him, and by means of persistent, continuous, and undue persuasion, and undue, corrupt, and overpowering influence exercised by said defendants over and upon said William, so wrought upon the mind and inclinations of said William that said day, April 21, 1885, they procured the said William to execute to each of said defendants Simeon, Benjamin, Samuel, and Peter W. Blue a separate deed, purporting to convey to each a certain described portion of said land; that said defendant Sarah M. Blue, being then the wife of said William, joined in said pretended conveyances; that at the time of the execution of said instruments said lands were of the value of \$18,000; that said instruments were procured by the defendants Simeon, Benjamin, Samuel, and Peter W. through the corrupt, fraudulent, and dishonest practices and means aforesaid, by which the will and intent of the said William were by said defendants wholly overpowered and controlled; that said defendants, by means of said corrupt, fraudulent, and dishonest practices and means aforesaid, continued to so control the will and judgment of said William up to the time of his death, and thereby continued to prevent him from obtaining a knowledge or discovering that he had, by the aforesaid means, been defrauded of his said lands; that during his lifetime he did not discover the same, and, by the means aforesaid, defendants concealed from said William the fraud that had been practiced upon him; that in February, 1893, the said William departed this life, leaving surviving him, as his only heirs, his widow (and defendant), Sarah M. Blue, who was his second wife, and by whom he had no children, and defendants Simeon, Benjamin, Samuel, and Peter W., and the plaintiff Susan, his children by a former marriage; that, unless said deeds are set aside, they will deprive the plaintiff Susan of the one-fifth of said lands which she would inherit from her father; that before bringing this suit she rescinded and disowned said deeds, and notified said defendants Simeon, Benjamin, Samuel, and Peter W. thereof. Wherefore, etc.

The only question discussed by counsel on both sides relates to the question, not whether the facts stated in the paragraph are sufficient to constitute a cause of action, but whether the court was justified in sustaining the demurrer on the ground that the facts stated in the pleading showed that the cause of action was barred by the statute of limitations. Against the bar of the statute, the appellants contend that the pleadings showed that the alleged fraud had been so concealed that the action is exempted from the operation of the statute, but, if the action is to be regarded as one for relief against fraud, then the court's ruling in holding the paragraph bad is justified, because no fraud is charged. If epithets liberally applied to the defendants were sufficient, the paragraph might be regarded as good. But it has long been well established that the use of epithets in a pleading is not sufficient to show fraud, but the facts constituting the fraud must be distinctly averred. An intention to deceive must appear, and that in reliance upon the facts, with use of ordinary care, they were acted upon in good faith, and the deception accomplished, to the prejudice of the other party. *Hardy v. Brier*, 91 Ind. 95; *Machine Co. v. Brown*, 78 Ind. 209; *Fry v. Day*, 97 Ind. 348; *Bennett v. McIntire*, 121 Ind. 231, 23 N. E. 78; *Conant v. Bank*, 121 Ind. 323, 22 N. E. 250; *Stroup v. Stroup*, 140 Ind. 179, 39 N. E. 864; *Jackson v. Myers*, 120 Ind. 504, 22 N. E. 90, and 23 N. E. 86. The appellants' counsel contend that the statute of limitations furnishes no excuse for the ruling of the circuit court. But the ground of the contention is a misconception. They contend that the pleading showed that the action was exempted from the operation of the statute because of the concealment of the cause of action alleged in the paragraph, and cite in support of such contention *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 38 N. E. 208. It is there said: "The rule is that where the limitation in a certain case is absolute, and there are no exceptions to the running of the statute, and the complaint shows upon its face that the action is commenced after the time limited, the question can be raised on demurrer. But where there are exceptions to the period limited by statute in any case, and the complaint shows upon its face that the action was not brought within the time limited, still the question cannot be raised by demurrer to the complaint, unless it also shows that the particular action is not within any of the exceptions to the statute. The complaint in the case under consideration does not show this. The law in this state is adverse to the contention of the appellant corporation. *Hanna v. Railroad Co.*, 32 Ind. 113; *Potter v. Smith*, 36 Ind. 231; *Harlen v. Watson*, 63 Ind. 143; *Baugh v. Boles*, 66 Ind. 376; *Kent v. Barks*, 67 Ind. 53; *Cravens v. Duncan*, 55 Ind. 347. At the time the plaintiff's cause

of action accrued, she was an infant, and might also have labored under some other supervening disability that arrested the progress of the statute, and exempted her from its effect, or she might have rested under divers other legal incapacities, for aught that appears in the complaint." Rev. St. 1894, §§ 293-307 (Rev. St. 1881, §§ 292-306). There are many exceptions and disabilities mentioned in this statute, exempting cases coming within them from the operation of the statute. For instance, the plaintiff might have been under disability, and hence the question whether the action was brought too late, under the statute, could not be presented or raised by the demurrer. Hence the correctness of the ruling of the court in overruling the demurrer to the paragraph must depend upon the question whether the facts stated in the paragraph are sufficient to constitute a cause of action. Just such a paragraph of complaint was involved in *Wray v. Wray*, 32 Ind. 126. The trial court there, as here, had held the paragraph bad; and this court, holding that the same evidence was admissible under the other paragraph, setting up substantially the same facts, with the addition of the allegation of unsoundness of mind, held that "there was no available error in sustaining the demurrer." But this court, in that connection, remarked that: "We do not wish to be understood, however, as holding that the paragraph to which the demurrer was sustained is good. To say the least, it is not a good specimen of pleading." The first paragraph in this case, like that of the case last cited, set up the same facts, with the additional allegation of unsoundness of mind; but, unlike that case, the first does not allege fraud and undue influence. But as to whether the facts stated in the paragraph, including the allegations of fraud and undue influence, are sufficient to constitute a cause of action, neither the appellants nor the appellees have said one word in their briefs. As said in *Bonnel v. Shirley*, 131 Ind. 362, 31 N. E. 64, "Nor is there even a suggestion of any reason or ground for holding the action of the court below erroneous." The demurrer, the sustaining of which was assigned for error, challenged the sufficiency of the facts stated in the paragraph. Not a single reason is assigned, nor authority cited, in appellants' brief, why such facts are sufficient to constitute a cause of action, or why the trial court erred in holding them insufficient in sustaining the demurrer. It is said by Judge Elliott, in his Appellate Procedure, that: "It is essential that all points be made in the brief, and properly made. If not so made, they are waived. Many cases affirm this doctrine, although the phrase employed usually—not always, however—is, 'All questions not made in the briefs are regarded as waived.'" The cases cited in support of the text are *Telegraph Co. v. Kilpatrick*, 97 Ind. 42;

Wright v. Abbott, 85 Ind. 154; *Stockton v. Lockwood*, 82 Ind. 158; *Fairbanks v. Meyers*, 98 Ind. 92; *Railroad Co. v. Nichless*, 73 Ind. 382; *Daniels v. McGinnis*, 97 Ind. 549; *Kennell v. Smith*, 100 Ind. 494; *Railroad Co. v. Williams*, 74 Ind. 462. We therefore hold that if there was any error in sustaining the demurrer to the amended second paragraph of the complaint, such error was waived by appellants' failure to discuss the question in their briefs. Judgment affirmed.

(146 Ind. 613)

CITY OF EVANSVILLE et al. v. MILLER.
(Supreme Court of Indiana. Jan. 26, 1897.)

NUISANCE—WHAT CONSTITUTES—POWERS OF CITY COUNCIL.

Under Acts 1895, c. 135, § 23, authorizing city councils to declare what shall constitute a nuisance, the council has no power to declare a partially burned building a nuisance, irrespective of its actual condition as affecting public or private safety and health.

Appeal from circuit court, Vanderburgh county; John H. Foster, Judge.

Action by John A. Miller against the city of Evansville and others. There was judgment for plaintiff, and defendants appeal. Affirmed.

Geo. A. Cunningham and Elmer Q. Lockyear, for appellants. Gilchrist & De Brulcr, for appellee.

JORDAN, C. J. This action was instituted by appellee to prevent the collection of certain assessments levied by the board of public works of the city of Evansville on certain real estate owned by appellee, and situated within the city. The theory of the complaint is that this assessment of \$199 is void by reason of the invalidity in part of an ordinance under which the city undertook to levy said assessment. A trial resulted in a finding by the court in favor of the appellee, and a judgment awarded canceling the assessment, and adjudging void the lien claimed thereunder by the city. The facts in the record show that the appellee, Miller, in May, 1895, became the owner by purchase of lots 6, 7, 8, and 9 in block 7 of Goodsell's enlargement of the city of Evansville, and that the dwelling house situated on said premises at the time he became the owner thereof had been partially destroyed by fire. On June 24, 1895, the common council of that city passed an ordinance defining nuisances, etc. The first section of this ordinance provides as follows: "Be it ordained by the common council of the city of Evansville, that any building, shed, outhouse or structure of any kind that shall be partially destroyed by fire, or from any other cause, and shall be suffered by the owner thereof to remain in such condition, after being notified by the department of public works to remove, repair, or rebuild the same, shall constitute a nuisance. Any building, shed,

outhouse or structure of any kind that shall become filthy or unwholesome is hereby declared to be a nuisance." The part assailed by the appellee as invalid is indicated by italics. Section 2 provides that whenever the department of public works shall have knowledge "that any nuisance such as is defined in section one of this ordinance exists in said city, it shall thereupon make an order requiring the owner thereof to abate the same within such time as said department may fix." This section further provides for giving notice to such owner of the order, and declares it lawful for said department to remove such buildings or structures, in whole or in part, by persons employed by it, or by letting such work by contract, etc. Section 3 contains provisions for assessing the cost of the removal of the building against the real estate in like manner as assessments of benefits are made. On July 13, 1895, the department of public works of the city, under this ordinance, made an order as follows: "And now it is ordered by the department of public works of the city of Evansville: That whereas, the buildings situate on lots 6, 7, 8, and 9 in block 7 in Goodsell's enlargement in said city have been partially destroyed by fire, and have been suffered by the owner thereof to remain in such condition for a period of twelve months, and by reason thereof have created a nuisance: Now, therefore, it is ordered by said department that the owner of said real estate abate said nuisance by the removal of the whole of said building, or so much thereof as remains unconsumed, together with all offal, dirt, debris of every kind, situate thereon, on or before the 17th day of August, 1895. And, it appearing that John A. Miller, the owner of said real estate, is a non-resident of the city of Evansville, it is ordered that he be notified of this resolution by publication in a newspaper published in said city. At the expiration of said time, if such owner shall not have abated such nuisance, this department will proceed to abate the same by the removal of such structure, and by such other means as may be deemed necessary." After the time designated in this order for the removal of the building, the appellee, the board of public works, made the following order for its removal: "It is hereby ordered and directed by the board of public works of the city of Evansville that the clerk advertise for bids for removing all that part of the 'Jordan Giles' residence on Washington avenue, above the stone foundation, stacking all good lumber and brick on the premises, and removing all rubbish and burnt lumber from the premises."

It was admitted by the parties in the lower court that the proceedings by the city in the matter in controversy were regular, and consistent with the requirements of the ordinance, and that the assessment to the amount of \$199 was made against the real estate of ap-

pellee as alleged in the complaint, and that appellant Schwacke had complied with his contract in removing the partially destroyed building from the premises in question. It is clear, we think, that the city of Evansville, through her duly-constituted authorities, in ordering the removal of this partially destroyed building, and in assessing the expense of such work upon appellee's real estate, proceeded under that part of section 1 of the ordinance which declares that any building, etc., that shall be partially destroyed by fire, etc., and suffered by the owner to remain in such condition after being notified, etc., to remove, repair, etc., shall constitute a nuisance. The controlling question, therefore, for our decision is that which relates to the validity of this portion of the ordinance, for as this is the basis upon which the city's proceedings rest, its invalidity must necessarily render them inoperative and void. Counsel for appellee deny that the common council of the city of Evansville has, either expressly or impliedly, the power to declare by an ordinance that a building partially destroyed and suffered to remain in that condition shall, by reason of such facts alone, necessarily constitute a nuisance. It will be seen that the ordinance in dispute ordains that any building, etc., partially destroyed by fire, or any other cause, and suffered to remain in such condition after notice to the owner, etc., shall constitute a nuisance. The latter is declared to exist as the result of these naked facts, and authority is given to the department of public works to abate such declared nuisance at the expense of the owner of the property. These facts alone are the test. The ordinance erects no other standard by which the supposed nuisance is to be measured or determined. No reference or regard whatever is had as to the condition, character, situation, or surroundings, which might tend to render the buildings unsafe in any manner to the public, or a detriment to the health or inconvenience of the public. There is an entire absence of facts declared, tending to show that, if such partially destroyed building is suffered to remain, it may be productive of annoyance or injury to the public. That such a building may become a nuisance, if maintained, by reason of the ruinous and weak condition of its walls or other parts, thereby rendering them liable to fall and do injury to persons passing by, or resulting in injury to an adjoining owner, is a well-established legal proposition. It is said by an eminent author that such a building as last mentioned, on a public street, is a public nuisance, and a private nuisance to those owning property adjacent to it. Wood, Nuis. § 109. It is evident, however, that in such a case the nuisance would consist, not alone in the fact that the building was one that had been partially destroyed, but in its being maintained in its unsafe or dangerous condition. It may, however, be main-

tained in a partially destroyed condition, and yet be harmless in all respects; the unsafe condition thereof depending upon the extent of the destruction; and another feature to be considered would be whether it was remote from a public street or passway. But the ordinance does not take into account any of these facts or features, but expressly condemns and outlaws as a nuisance the maintaining of any partially destroyed building without regard to its character as to danger by reason of its weak condition, or location or surroundings. By section 23 of the act under which the city of Evansville is operating, its common council is empowered to declare what shall constitute a nuisance, and to require its abatement, and to assess the expenses of its removal against the person causing the same or suffering it to exist. Acts 1895, p. 259. But the rule is well settled that a municipal corporation, although empowered by law to declare what shall constitute a nuisance, may not declare that to be one which in fact is not. *Bank v. Sarlls*, 129 Ind. 201, 28 N. E. 434, and authorities there cited; *Baumgartner v. Hasty*, 100 Ind. 575; *Village v. Poyer*, 123 Ill. 348, 14 N. E. 677; *City of Denver v. Mullen*, 7 Colo. 345, 3 Pac. 693; *Everett v. Council Bluffs*, 46 Iowa, 66; *Yates v. City of Milwaukee*, 10 Wall. 497; *Tied. Lim.* § 122; *Wood, Nuis.* §§ 742-744; *Lippman v. City of South Bend*, 84 Ind. 276; *Dill. Mun. Corp.* § 374; *State v. Mayor, etc., of Jersey City*, 29 N. J. Law, 170; *Beach, Pub. Corp.* §§ 1026, 1029, 1031. In *Yates v. City of Milwaukee*, supra, the supreme court of the United States, in considering the power conferred upon the city of Milwaukee to declare what shall constitute a nuisance, per Justice Miller, said: "It is a doctrine not to be tolerated in this country that a municipal corporation, without general laws, either of the city or of the state, within which a given structure can be shown to be a nuisance, can, by its mere declaration that it is one, subject it to removal by any person supposed to be aggrieved, or even by the city itself. This would place every house, every business, and all property of the city at the uncontrolled will of the temporary local authorities." In the case of *Town of Lake View v. Letz*, 44 Ill. 81, it is said: "There are some things which in their nature are nuisances, and which the law recognizes as such. There are others which may or may not be so, their character in this respect depending on circumstances." In *Tied. Lim.*, supra, it is said: "A certain use of lands, harmless in itself, does not become a nuisance because the legislature has declared it to be so." In *City of Denver v. Mullen*, supra, the supreme court of Colorado, in construing a provision in the charter of the city of Denver conferring authority upon its council to declare what shall be a nuisance, and to prevent and abate the same, held that such conferred power did not authorize the council to arbitrarily de-

clare any particular thing a nuisance which had not theretofore been pronounced such by law, or so adjudged by a judicial determination. In the course of the opinion, on page 353, 7 Colo., and page 697, 3 Pac., the court said: "The proper construction of this language is that the city is clothed with authority to declare, by general ordinance, what shall constitute a nuisance; that is to say, the city may, by such ordinance, define, classify, and enact what things or classes of things, and under what conditions and circumstances, such specified things are to constitute and be deemed nuisances. For instance, the city might, under such authority, declare by ordinance that slaughterhouses within the limits of the city, carcasses of dead animals left lying within the city, goods, boxes, and the like, piled up or remaining for a certain length of time on the sidewalks, or other things injurious to the health, or causing obstruction or danger to the public in the use of the streets and sidewalks, should be deemed nuisances; not that the city council may, by a mere resolution or motion, declare any particular thing a nuisance which has not theretofore been pronounced to be such by law, or so adjudged by judicial determination." We think it is clear under the authorities that the common council, by the ordinance in controversy, attempted to declare that a nuisance which in fact under the law cannot be so considered, and therefore transcended the power with which it was invested. As asserted by the authorities, it would be a dangerous doctrine, and fraught with much evil, to recognize the authority of a municipal legislature to declare that a nuisance which its own caprice might deem proper to outlaw as such. Even though such power is expressly conferred by the legislature, it is utterly inoperative, unless the thing so declared to be a nuisance is one in fact, or was created or erected after the adoption of the ordinance, and in defiance thereof. *Wood, Nuis.* § 744. What the legislature cannot do directly in this respect it cannot authorize a municipal corporation to do. Without further extending this opinion, we are, under the authorities cited, constrained to hold that the part of section 1 of the ordinance as indicated by the italics is void for the reasons herein stated, and the proceedings thereunder by the city, involved in the case at bar, consequently cannot be maintained. Judgment affirmed

(146 Ind. 490)

STEINAUR v. CITY OF TELL CITY et al.
(Supreme Court of Indiana. Jan. 5, 1897.)

DEDICATION—ACCEPTANCE—EVIDENCE.

1. An acceptance of the dedication of a lot on the part of the public is necessary in order to complete it.
2. A plat of a certain town did not separate a small triangular lot, at the intersection of

two streets, from the streets. The lot was not of sufficient depth to consider as a building lot, and was apparently left over for that reason. There was no evidence that the owner, in laying out the ground, intended this lot for any public purpose, nor was there any evidence of an acceptance by the public. *Held* insufficient to show a dedication to public use.

Appeal from circuit court, Perry county; Edward Gough, Judge.

Action by August Steinaur against the city of Tell City and another. Judgment for defendants, and plaintiff appeals. Affirmed.

Gilchrist & De Bruler, for appellant. Jewett & Jewett and Iglehart & Taylor, for appellees.

JORDAN, C. J. Action by the appellant to enjoin the appellees, city of Tell City and the Louisville, Evansville, etc., Railroad Company, from erecting and maintaining a freight and passenger depot on a triangular strip of ground situated within said city, which strip the appellant contends is a part of a public street adjacent to his residence. Upon the issues joined between the parties, there was a trial by the court, and a special finding of facts; and, upon the conclusions of law thereon, the court rendered its judgment in favor of appellees. The only errors assigned are those arising under the court's conclusions, based upon the special finding. The theory upon which appellant's complaint proceeds is that the strip of land upon which the depot of the railroad company is about to be erected, by virtue of a grant of right from the city, is a part of Seventh and Front streets, of the city of Tell, and had been dedicated as a portion of these streets by the Swiss Colonization Society, which laid out and platted this city in 1859. Equitable relief by injunction was sought, under the facts alleged in the complaint, against the wrong and injury which the appellant alleged he would especially sustain as an owner of abutting property.

The facts material to a determination of the controversy involved are disclosed by the special finding, as follows: "First. In the year 1859 the Swiss Colonization Society was the owner in fee simple of all the real estate upon which the defendant the city of Tell City is now situated, and in that year said Swiss Colonization Society laid out and founded Tell City, caused a map or plat of said real estate to be prepared by A. Pfaefflin, a surveyor, and caused the same to be recorded in the recorder's office of Perry county, on the 18th day of October, 1859. [A copy of said plat, as so recorded, is attached to and made a part of the findings.] Second. After making said plat, on the 21st day of March, 1859, prior to recording the plat, said society, for a valuable consideration, conveyed lot one (1) of block C, as shown in said plat, to August Peters, by deed specifying said lot as described in map of Tell City, surveyed and drawn by A. Pfaefflin. Said deed was duly recorded in

the recorder's office of Perry county, Indiana, on the 18th day of October, 1859. Third. On the 6th day of August, 1859, said society made a deed of lot No. two (2) of block C to Peter Pfaefflin, which was duly recorded in the recorder's office of Perry county, on the 15th day of August, 1859, before the plat of Tell City was recorded. On the 10th day of May, 1859, said society made a deed of lot three (3) of block C to Charles Steinaur, and the same was on the same day recorded in the recorder's office of Perry county. That on the 17th day of April, 1859, the said society conveyed lot two (2) of block fifty-one (51) to Louisa Heck; and on the 20th day of May, 1859, the said society conveyed lot three (3) of block fifty-one (51) to Susannah Snider. Both of said deeds last named were duly recorded in the recorder's office of Perry county, within ten (10) days after their execution. That after the conveyances had been made by said society, which was before the plat of Tell City was recorded, and before the plaintiff had obtained title to any of the real estate hereinbefore mentioned, said society caused a corrected plat of Tell City to be made and acknowledged. Said plat was duly recorded in the office of the recorder of deeds of Perry county on the 28th day of January, 1861, and has never since been modified or changed. That, in the acknowledgment and dedication of said last-named plat, the following statements and reservations were made, namely: 'All lying between the blocks fronting the Ohio river and said river, and not inclosed by lines on the map, are expressly reserved to said society.' That the triangular piece of ground in controversy in this action was a tract of ground lying between a block fronting on the Ohio river and said river, and was one of the parcels of ground referred to in said statement and reservation. On the 5th day of May, 1862, the said August Peters conveyed said lot one (1) of block C to the plaintiff herein, by deed which specified that it was the same lot which was conveyed by Swiss Colonization Society to August Peters, who conveyed all property, with the privileges and appurtenances to the same belonging. On the 21st day of August, 1862, said Peter Pfaefflin conveyed, by deed, lot two (2) of block C to the plaintiff. That on the 21st day of June, 1862, the said Charles Steinaur conveyed, by deed, lot three (3) of block C to the plaintiff. That on the 12th day of May, 1862 (about sixteen months after recording the corrected plat), the said society conveyed to Steinaur and Wegman lot four (4) in block fifty-one (51); and that after the 12th day of May, 1862, and in or before the year 1865, by a certain mesne conveyance, the title of Louisa Heck to lot two (2), block fifty-one (51), the title of Susannah Snider to lot three (3), block fifty-one (51), and the title of Steinaur and Wegman in lot four (4) in block fifty-one (51), were conveyed to this plaintiff. That each and

all of the deeds hereinbefore found to have been executed to plaintiff in referring to the real estate conveyed in such deed referred to the plat of Tell City; and that each of said deeds was duly recorded in the recorder's office of Perry county, within ten (10) days after its execution. That, soon after the plaintiff received the deeds for lot one (1), two (2), and three (3) in block C, he took possession of the same, and within a year thereafter he erected upon said lots one (1) and two (2) a two-story brick residence, at an expense of several thousand dollars, for a family residence; and plaintiff with his family has ever since lived in said house. Said house was built with its principal front on Seventh street, and with another front upon the triangular space at the intersection of Front and Seventh streets, which last-named front had two doors and three windows in the lower story, and four windows in the upper story. Said residence was surrounded by a fence. This fence was built along the line of plaintiff's lot on Seventh street, and along the line of plaintiff's lot on Front street. Instead of building the same on the line of lot one (1) and said triangular space of ground, said plaintiff built said fence twelve (12) feet east of the line of lot one (1); so that during all this time he has inclosed by his said fence part of said triangular piece of ground, the entire width of the same north and south, and about twelve (12) feet in length east and west. Plaintiff built this fence at this point upon the statement of the city engineer that it was the line of plaintiff's lot. There was no opening or gate in the fence in front of plaintiff's house, where the same fronts upon the triangular piece of ground aforesaid, nor has there ever been any entrance to or exit from said house, through said fence, into said triangular piece of ground. Fourth. That in the year 1865, and soon after receiving the conveyances of lots two (2), three (3), and four (4) of block fifty-one (51), the plaintiff erected a large flouring custom mill upon said lots, and has maintained the same in the same place ever since; and said mill has during all said time been operated by the plaintiff, and is now operated by him, in grinding for customers, and doing other work at said mill, and said mill has obtained a large custom and business from farmers and others in the neighborhood of Tell City. Fifth. At all times since the making of the said plat, the triangular space at the intersection of said Seventh and Front streets has been kept open, and no structures of any kind have been placed upon it, except that a public scale has been maintained upon it by the plaintiff, with consent of the city of Tell City, for the general use of the people of Tell City, and of the surrounding country, the plaintiff paying an agreed consideration to Tell City for the privilege of having said scale in said place. Said scale is on the level of the surrounding soil, and is no obstruc-

tion to the passage, and is the ordinary kind placed in streets or other open places. Seventh street, in said city, has been improved by graveling. Front street has not been improved, and the triangular space at their intersection has not been improved, and has not been much traveled on, but at all times has been open for persons to pass and repass. No sidewalks have been made around said triangular space. The defendant railway company, with the permission of the plaintiff, and of the city of Tell City, a number of years ago, laid its track on Front street, opposite plaintiff's lot, and opposite the triangular space aforesaid, and has operated its railway ever since, over said track." The sixth finding may be summarized as follows: That, prior to the beginning of this action, Tell City agreed to convey to its co-appellee, the railroad company, the strip of ground in dispute, upon the agreement of the latter to erect and maintain thereon a passenger and freight depot. The appellees threaten to carry out their respective agreements, and will do so unless restrained by the court. That the station or depot to be erected and maintained by the railway company is to be separated by a space of 37 feet from the fence on the east side of plaintiff's lot, and a distance of 49 feet from the rear line of plaintiff's lot 1 in block C, and said depot building will cover said triangular strip. A driveway is to be left between said depot and the fence south of plaintiff's house, on the east side of the strip. On the side next to Seventh street the company intends to construct a switch track. That the company has neither tendered nor offered to pay any damages to plaintiff, and declares that it does not intend to do so. The further finding is that the necessary effect of trains stopping or standing at the station will be to cut off access to plaintiff's real estate, in block C, from said strip of ground, and also to interfere with access to his real estate in block 51, on the east side of Seventh street; that the said structure and track, and the use of the same by the railroad company, will not interfere with access to plaintiff's real estate in block C from Seventh street, nor will the same interfere with access to his real estate from Front street, other than the same is now interfered with by the track laid, with the permission of the plaintiff. Neither will said depot or the laying of said switch in any way obstruct the street in front of his property in block 51, up to the middle line of said street. On September 2, 1878, said Swiss Colonization Society, by deed, conveyed all fractions and fractional blocks fronting on the Ohio river, as shown on the map of Tell City, to the city of Tell City, for uses and purposes set forth in said deed.

The trial court, upon the facts found, stated its conclusions of law in favor of appellees, and rendered its judgment accordingly. As stated, the appellant asserts that the strip in

dispute is a part of the public streets upon which his premises abut, and that the same is a street within the city, by virtue of its being dedicated by the Swiss Colonization Society, under its plat recorded October 18, 1859. This disputed fact seems to be the basis upon which he rests his right. Counsel for appellee controvert this contention, and insist that the facts found do not support it. They further contend that if the facts can be held to sustain appellant's theory, that it was the intention of the original owner and founder of Tell City, namely, the Swiss Society, to dedicate this strip of ground to the public for use as a street, it does not appear that there was an acceptance thereof either on the part of the public or public authorities. It is also insisted that, if it can be said that a dedication was intended by the plat first recorded, such dedication was revoked before any acceptance took place, by the corrected plat, recorded in January, 1861. The questions, therefore, presented for determination, are: (1) Was there a dedication and acceptance of this strip, as contended by appellant? (2) If there was an intention to dedicate the strip to the public as a street under the original plat of 1859, was it revoked by the owner before its acceptance by the corrected plat, made and recorded in 1861?

In order to make a dedication of a highway or a street complete on the part of the public as well as the owner of the ground, it must be shown that there was an acceptance of such dedication by the public or proper local authorities. *Elliott, Roads & S.* 113; *Mansur v. Haughey*, 60 Ind. 364; *Ross v. Thompson*, 78 Ind. 90; *Tucker v. Conrad*, 103 Ind. 349, 2 N. E. 803; *City of San Francisco v. Canavan*, 42 Cal. 541; *People v. Underhill*, 144 N. Y. 316, 39 N. E. 333. The holding of the above authorities, together with a long line of other decisions, well establishes the rule that, to constitute a valid and complete dedication, two things must occur, to wit, an intention by the owner of the land clearly and unequivocally indicated, by his words or acts, to dedicate, and also an acceptance of the dedication by the public. *Vide Elliott, Roads & S.* 120. Before there is an acceptance by the public, as a rule, the authorities hold that the owner may at any time revoke his dedication. *Id.* 113, and cases cited under note 1.

As disclosed by the finding, the Swiss Society was the owner of the lands upon which the city is situated. In 1859 it made a plat of the town, which was not recorded until in October of that year. All of the lots in question of which appellant is the owner were sold to the persons through whom he claims title in 1859, prior to the recording of the first plat. This plat, for some reason, seems to have been incorrect, and a corrected one was made by the society, and recorded January 23, 1861. By this latter plat it appears from the finding that the strip of ground in controversy was reserved by the society. After the recording of this plat, appellant, in 1862, and

subsequent to that year, acquired title to the lots mentioned in block C and block 51. This triangular strip, it appears, lies between lot 1, owned by appellant, in block C, and the point where the line of Seventh street and the east line of Front street meet. It is not within the boundaries of either of these streets; and from its situation, as shown by the map, it does not appear to be of any use to these respective streets, or to afford any reasonable or necessary use to the public as a way. While it is true that the plat in question did not separate it from the streets by lines, nevertheless we think the reason for this is apparent. The lots owned by appellant, and composing the fractional block C, ran from Seventh to Front street, and were marked and bounded so long as there was sufficient depth to constitute a lot; and this little triangular fragment of land, it would seem, was left over for that reason, without specifically indicating the purpose it was to serve. Under all the circumstances, we do not think this is sufficient to reasonably raise the presumption that the society intended to dedicate it to the public. There is no express finding by the court showing that the society intended this ground for any purpose. Evidentiary facts, tending to prove an intended dedication, or from which the same might possibly be presumed, are not of themselves such intended dedication. *Tucker v. Conrad*, supra; *Shellhouse v. State*, 110 Ind. 509, 11 N. E. 484. If it could be said that there was an intended dedication by the Swiss Society under its first plat, it does not appear that it was accepted by the public or public authorities before it was recalled, as the court finds, by the corrected plat. If, under the facts, it could be held that the strip was in any way dedicated as a street, there is no finding of facts sufficient to prove that the public at any time accepted such dedication. This, as the authorities cited show, is essential. This strip has not been in any way improved as a street. Neither has it been traveled or used to any extent, as the finding discloses. There being an absence of use sufficient to constitute an acceptance, there must be proof of an acceptance on the part of the public authorities of Tell City, by some formal act of theirs, showing an unmistakable intention to accept the land dedicated, and for the purposes for which it was intended by the dedicator to be used. *People v. Underhill*, supra. There seems to be virtually an entire absence of any such facts. Considering the acts of appellant, it does not appear that he himself recognized this ground as having been dedicated as a public street. He appears to have inclosed part of it within his own premises. After the conveyance by the society, in 1878, to the city, he leased it from the latter, and located his scales thereon, paying a rental for this privilege. Neither of the parties to this controversy, appellant or the city, appears to have treated the strip now in dispute as public street prior to the time the controversy arose. The acts of appellant in using it as a

location for his scales, with the permission of the city, and paying a rent for this use, are of themselves to some extent inconsistent, at least, with his present contention that the strip was dedicated as and for a public street. We think, under the facts, the court correctly held the law to be with appellee, and the judgment is therefore affirmed.

(146 Ind. 621)

BARTLETT et al. v. MANOR et al.

(Supreme Court of Indiana. Jan. 27, 1897.)

WILLS—SUBSTITUTION OF UNPROBATED WILL FOR PROBATED WILL—LIMITATIONS.

A proceeding to substitute a will not probated for one probated involves a contest of the latter, and must be brought within the three years after the offering thereof for probate given by Rev. St. 1894, § 2766 (Rev. St. 1881, § 2596), for contest thereof, notwithstanding the former will has been concealed, and section 301 (section 300) provides that a cause of action which has been concealed may be prosecuted within the period of limitation after its discovery.

Appeal from circuit court, Delaware county; A. O. Marsh, Special Judge.

Proceeding by Elisha Bartlett and others against Albert C. Manor and others. Judgment for defendants, and plaintiffs appeal. Affirmed.

J. N. Templer & Son and Gregory & Silverberg, for appellants. Ryan & Thompson, for appellees.

HACKNEY, J. The appellants, heirs of James L. Bartlett, instituted this proceeding in the circuit court against the appellees, heirs of Mary A. Watt. The amended complaint alleged that in the year 1855 said James L. Bartlett, by the provisions of his will then executed, devised the lands in controversy, in fee simple, to his wife, Mary A. Bartlett, who after his death married one Watt; that in the year 1861 said James executed another will, in which he devised to said Mary an estate in said lands for life, and revoked the will of 1855; that said Mary was given the custody of said two wills, which she held until after the death of said James, when, in 1861, she offered the will of 1855 for probate in the office of the clerk of the common pleas court of Delaware county, and made proof of the execution thereof by the affidavit, taken before said clerk, of one of the attesting witnesses, and caused the said will and proof to be recorded in the proper record of wills in said office. There were allegations of the fraudulent concealment by the said Mary of said will of 1861, the ignorance of its existence by the appellants, the death of its attesting witnesses and the scrivener who drew it, and the discovery of its execution before this proceeding was instituted, in June, 1892. The relief sought was the overthrow of the will of 1855, with the steps taken in probate thereof, and the establishment and probate of the

alleged will of 1861. The circuit court overruled demurrers by the appellants to answers by the appellees alleging that the cause of action sued upon did not accrue within the three years next preceding the bringing of the action. That ruling presents the only question for decision by this court. There is much said by counsel of the theory of the case as presented by the complaint, the principal difference between them relating to the inquiry as to whether the establishment and probate of the will of 1861 was the primary and controlling element of the cause of action, with the cancellation of that of 1855, together with the probate thereof, as the mere incident, or that the contest of the validity of the will of 1855, with the probate thereof, was the essential feature of the cause, and the establishment of the later will as an incident.

The right to set aside a will and its probate is given by statute. Rev. St. 1894, § 2766 (Rev. St. 1881, § 2596). And the right to establish a lost or destroyed will is of equitable cognizance, and has statutory recognition only in respect to the proof required, the record of the decree, and the restraining of proceedings in relation to the estate pending the litigation. Rev. St. 1894, § 2777 et seq. (Rev. St. 1881, § 2607 et seq.); Wright v. Fultz, 138 Ind. 594, 38 N. E. 175. This latter right, however, is as firmly settled as the former. No question is here made but that the two rights may be enforced in one proceeding, and that they may have been recognized by this court as proper. Burns v. Travis, 117 Ind. 44, 18 N. E. 45; Roberts v. Abbott, 127 Ind. 83, 26 N. E. 565; McDonald v. McDonald, 142 Ind. 55, 41 N. E. 336. Assuming the right to so proceed, the essential purpose and object of the complaint was to substitute for one will and its probate another will, and to secure the probate thereof. The right of substitution involved the overthrow of the will of 1855 as clearly and as certainly as it involved the establishment of that of 1861. Both were essential elements of the cause of action, and neither could have been held merely an incident to the other, in pleading the facts and outlining the theory of the action. Both were of the essence of the single, definite theory upon which the pleading proceeded to the attainment of the one object,—that of substituting one will and its probate for another. This conclusion is of vital importance in passing upon the sufficiency of the answers in question, since it must bring before us a consideration of the limitation which applies to an action to set aside the probate of a will and overthrow such will. If the primary question were the establishment of the will of 1861, and the other question were but an incident, and not essential to the theory of the action, we would have but little consideration of any such nonessential incident. It has been distinctly decided by this court that a proceeding to substitute one will, not probated, for

another which has been probated, involves the contest of the latter will, and requires an observance of the rules of procedure declared by statute. *Burns v. Travis*, supra. That holding necessarily involves an adherence to the conclusion we have here reached, that the theory of the case includes as one of its primary features the overthrow of the will of 1855, and its probate. If, as there held, such an attack upon the probated will is a contest thereof, we must look to the statutory provisions governing contests to learn if the limitation pleaded is there provided. Chapter 9, art. 3, §§ 2765-2776, Rev. St. 1894 (§§ 2595-2606, Rev. St. 1881), include the provisions governing the contest of wills and their probate, prescribing in detail the procedure throughout. Section 2766 (section 2596) provides that "any person may contest the validity of any will, or resist the probate thereof, at any time within three years after the same has been offered for probate, by filing in the circuit court * * * his allegation in writing, verified by his affidavit, setting forth the unsoundness of mind of the testator * * * or any other valid objection to its validity or the probate thereof. * * *" Appellants' learned counsel expressly concede that under this provision the right to contest a will or the probate thereof is only given upon the condition or limitation that the complaint or petition be filed within three years after the will has been offered for probate, but they insist that by section 301, Rev. St. 1894 (section 300, Rev. St. 1881) the limitation was extended. That section provides that a cause of action which has been concealed may be prosecuted within the period of limitation after discovery. It is, however, a part of the general Code, and one of numerous sections providing the limitation of actions under the Code. One of said sections—Rev. St. 1894, § 295 (Rev. St. 1881, § 294)—provides that "in special cases, where a different limitation is prescribed by statute, the provisions of this act shall not apply." It would seem, therefore, that, by legislative declaration, the limitation prescribed by section 2766 (section 2596), supra, is not extended by said section 301 (section 300). However, it is fully established that when a right is given, and the procedure for its enforcement is provided by a special statute, the procedure so provided excludes resort to another or different procedure. *Bank v. Culbertson* (Ind. Sup.) 45 N. E. 657; *Edgerton v. Huntington School Tp.*, 126 Ind. 261, 26 N. E. 156; *Ryan v. Ray*, 105 Ind. 101, 4 N. E. 214; *Storms v. Stevens*, 104 Ind. 46, 3 N. E. 401; *Fisher v. Tuller*, 122 Ind. 31, 23 N. E. 523.

Of this proposition, counsel for the appellants say: "We are free to admit that in Indiana this doctrine seems to be advocated by this court in the *Fisher* and *Tuller* Cases, supra. In other words, our supreme court seems to have laid down the rule that, if the statute which gives the right of action con-

tains its own limitations, no exceptions can be ingrafted upon it by the courts, but that the law must be applied as it is written; and we take this to mean that the exceptions contained in the general statute of limitations heretofore referred to do not apply to such cases." Counsel make this concession consistent with their contention that section 301 (section 300), supra, extends the period of limitation, by their insistence that the cause of action alleged in the complaint is primarily for the establishment of a lost or destroyed will, the right to which action is not given by the special statute for the contest of wills and their probate, and the procedure for which is governed by the Civil Code. If the premises assumed were correct, the conclusion would seem to follow; but, from what we have said of the theory of the action, but little remains to demonstrate that the premises so assumed are not correct. It is manifest that, for the repose of titles by devise, the legislature included in the provisions of section 2766 (section 2596), supra, the requirement that the contest of a will or of its probate should be instituted within three years from the time of offering the will for probate. This wise object, so clearly manifested, cannot be lightly passed over or set aside, but we must give it full force without ingrafting conditions upon it. The will of 1855 is conceded to have been genuine, and the allegations of the complaint do not deny the efficacy of the proof and recording to constitute a legal probate. This being true, regarding section 2766 (section 2596), supra, as closing the door against contest, and accepting the holding of *Burns v. Travis*, supra, that contest is here involved, we meet with an insurmountable obstacle to the recognition of the relief sought by the appellants. As long as the bar stands against the contest, we have a barrier against establishing a will to substitute for it. Substitution includes as much the overthrow of one as the proof that another existed. The relief sought includes both, and neither demand can stand without the other. Since contest is forbidden, and the will of 1855, with its probate, must stand, substitution becomes impossible.

If this result can be said to be a hardship, considering the importance of the reasonable security of titles, and the possibility of fraudulent concealment of later wills, the hardship must be due to the failure of the legislature to ingraft an exception upon the limitation of section 2766 (section 2596), supra. The courts are powerless to create an exception, but, if they had such power, they would be confronted with a serious question of the wisdom of exercising it, since the repose of titles, the possible fraudulent concealment of a last will revoking a former which is probated, and the equally possible fraudulent creation by parol after more than 30 years of repose, of a substituting will, would call for a cautious hesitancy before taking

the step. In *Fisher v. Tuller*, supra, this court refused to extend, on account of fraud, the period of limitation created by a special statute including no exception, and held that, notwithstanding the fraud, no power existed in the courts to ingraft an exception upon the statute. It is true that this holding was with reference to a purely legal liability, involving no equitable demand, but it rested upon a special statute containing a special limitation. That section 301 (section 300), supra, extending, on account of concealment, the period of limitation provided in that special statute, could not be considered as affecting the question, is manifest, not only from the provisions of section 295 (section 294), supra, denying its application, but from the rule which holds the limiting provisions of such special statutes to be of the essence of the right, rather than to simply cut off the remedy, as with general statutes of limitation. This rule is stated in 13 Am. & Eng. Enc. Law, p. 689, as follows: "Where time is of the essence of the right created, and the limitation is an inherent part of the statute or agreement under which the right in question arises, so that there is no right of action independent of the limitation, * * * such special limitations extinguish the right, rather than affect the remedy." This statement of the rule is supported by *The Harrisburg*, 119 U. S. 199, 7 Sup. Ct. 140; *Taylor v. Coal Co.*, 94 N. C. 525; *Finnell v. Railway Co.*, 33 Fed. 427; *Hudson v. Bishop*, 32 Fed. 519, 35 Fed. 820; *Smith v. Tripp*, 14 R. I. 112. Such statutes are not extended by disability or fraud. 13 Am. & Eng. Enc. Law, p. 690; *Taylor v. Coal Co.*, supra; *Suggs v. Insurance Co.*, 71 Tex. 579, 9 S. W. 676; *Cochran v. Young*, 104 Pa. St. 333; *Luther v. Luther*, 122 Ill. 558, 13 N. E. 166. The last two cases involved the contest of probated wills instituted after the period within which the right to contest was given. See, also, *Spicer v. Hockman*, 72 Ind. 120; *Horton v. Hastings*, 128 Ind. 103, 27 N. E. 338; *Potts v. Felton*, 70 Ind. 166,—holding that a special right, given by law, to be exercised within a time or manner prescribed, is exclusive as to such time or manner. It cannot be seriously questioned that our statute of wills is special, with reference to the right of contest, that it creates a right not existing in its absence, and that the right is given upon the condition that it be exercised within three years. As to this right, it cannot be doubted, we think, that the general statute of limitations has no effect. Nor do we think that the rules of equity, as applied to general statutes of limitation, where the right sought to be enforced is of equitable cognizance, or is of concurrent jurisdiction of both law and equity, may be applied to the right to contest a will, so as to lift the case out of the special limitation. That right is, as we have indicated, one of purely legal origin, and is given upon a condition not extended by any exception; and an exception

interposed from any supposed equitable considerations would deny the force of the statute, and ascribe to equitable jurisdiction a power to control the exercise of a purely legal right, notwithstanding the expressed inhibitions of the law granting such legal right. We do not understand the learned counsel for the appellants to contend that such overruling power exists in equity, but we understand them to insist that, considering their action to relate to the establishment of the will of 1861,—a question of equitable jurisdiction,—the rules of equity, in view of the alleged fraud, would extend the right of action, or suspend the period of limitation, until the discovery of the fraud. The case before us, however, presents, as we have shown, the assertion of an equitable right dependent upon a legal right which has been lost by delay beyond the period in which the right is given. It is not a case of concurrent legal and equitable jurisdiction, nor of exclusively equitable cognizance. It is a case where a legal right and an equitable right are sought to be blended and enforced under our practice, where the distinction between actions at law and in equity is abolished; but such blending fails, because the legal right has lapsed, and has existence no more than if it had never been created. The ruling of the lower court was right, and the judgment is affirmed.

MONKS, J., was not present.

(16 Ind. App. 598)

**MARSHALL FARMERS' HOME FIRE
INS. CO. v. LIGGETT.**

(Appellate Court of Indiana. Jan. 26, 1897.)
**MUTUAL FIRE POLICY—ASSESSMENTS—WAIVER OF
FORFEITURE.**

Forfeiture of a mutual fire policy for non-payment of assessments is waived if the company, with knowledge of the loss, collects from the insured, and retains, the amount of the delinquent assessments.

Appeal from circuit court, Marshall county; A. C. Capron, Judge.

Action by Robert Liggett against the Marshall Farmers' Home Fire Insurance Company. Judgment for plaintiff, and defendant appeals. Affirmed.

Charles Kellison, for appellant. Samuel Parker, for appellee.

COMSTOCK, C. J. This was an action commenced by the appellee, on a certificate of membership and policy of insurance held by him on his dwelling house and contents, in a farmers' mutual insurance company (organized under the laws of this state in Marshall county, and doing business in said county under the name of the "Marshall Farmers' Home Fire Insurance Company"), to recover damages for their destruction by fire. At the time of the loss, appellee was delinquent, having failed to pay two assess-

ments made against him for the purpose of paying the losses of other members of the company. The company refused to pay the loss, on the ground of such delinquency; and it was claimed by appellee that the company had waived the right to insist upon the condition in the policy, for the reason that the company had collected two assessments from the insured after his loss, with full knowledge, and retained the same. The appellant contended that under the provisions of the policy issued by it, and under the facts connected with the collection of the assessments, there was no waiver of the condition of the policy. The cause was tried by a jury, and a verdict returned and a judgment rendered for \$822 in favor of appellee. The errors assigned challenge the correctness of the ruling of the court upon the demurrers to complaint and reply, in overruling appellant's motion for a new trial, in overruling appellant's motion for judgment, and in overruling appellant's motion in arrest of judgment. Exceptions were taken to the rulings of the court in making up issues, to the giving and the failure to give instructions, and to the ruling of the court upon the admission and exclusion of testimony.

The controlling question of the case is whether the appellant waived the forfeiture of the policy in suit by accepting the payment of two delinquent assessments from the plaintiff after the loss had occurred, to recover which this suit was brought. The facts set out in the pleadings, and proven by the evidence, essential to the decision of the case, are that on the 9th day of December, 1892, the appellant, being a farmers' mutual insurance company, and doing business under the laws of the state, issued her certain certificate of membership and policy of insurance to the appellee, on his dwelling house, valued at \$500, and its contents, valued at \$300, insuring them from loss from fire for the term of five years from said December, 1892; that appellee paid appellant \$2.50, and entered into an agreement to pay his just and equal proportion of any loss sustained by any member of said company, according to the rules and laws of the appellant; that in March, 1895, the dwelling house and contents were entirely destroyed by fire, through no fault of appellee; that, prior to and at the time of said loss, appellee was delinquent upon two assessments due other members of the company for loss sustained by them; that, although he was notified of such assessments, he had failed and refused to pay them; that on the morning after the fire, which occurred on the 15th day of March, 1895, a director of the company, who was acting as collector for the company, with knowledge of the appellee's loss, collected from him the two delinquent assessments, and subsequently paid them to the treasurer of the company, with other delinquent assessments which he had collected

from other members of the company; that, immediately after the fire, appellee notified the company, in writing, of the same, and on the 25th of March, 1895, the company informed him, in writing, that his claim for loss would not be paid, for the reason that he had forfeited his policy because of said delinquency. The company retained the assessments paid by appellee.

Upon the facts stated, if the appellant should be held to have waived its right to insist upon the forfeiture of the policy, the appeal is not well taken. The certificate of membership, agreement, constitution, and by-laws of the company are all set out in the pleadings. Section 4 of the constitution reads as follows: "The officers of the company shall be a president, secretary, treasurer, and one director in which the company insures." Section 5: "The officers of the company are to constitute a board for the transaction of all the official business of the company, a majority of whom shall constitute a quorum for the transaction of any business of the board." Section 27: "Any person insuring in this company is to be considered a member thereof." Section 33: "Any member wishing to withdraw from the company, or have his insurance canceled, must give notice thereof to the secretary, who shall note thereon the precise time of receiving it, also, on the back of entries." Section 34: "No member can withdraw from this company without first paying all assessments levied or liable to be assessed on him up to the time of his notice to the secretary." Section 11 of the by-laws: "Any person failing to pay his distributive share of any assessment shall forfeit his insurance during such delinquency." Section 37 of the constitution: "The treasurer, upon receiving such assessment from the secretary, shall immediately proceed to collect the same, by demand, or by suit, if necessary, and pay over to the member sustaining such loss the amount thereof until one month after receiving such assessment, and take his receipt therefor."

Appellant contends that under the provisions of the policy issued, and the facts connected with the collection of the assessments, there was no waiver of the conditions of the policy; that appellee's loss did not occur during any period of the term of the policy for which he paid. Appellee contends that the facts show the intention of the company to waive the forfeiture; that the acceptance of appellee's money with knowledge of his loss is waiver. In support of the proposition of waiver, appellee cites *Insurance Co. v. Tomlinson*, 125 Ind. 84, 25 N. E. 126, to the effect that forfeitures are not favored in law, and that courts will put such a construction on the conduct of parties as will produce a waiver thereof, if possible; that the right to declare a forfeiture for the failure to perform a condition therein may be waived, and the waiver manifested as

well by conduct as by words,—citing, also, *Insurance Co. v. Hick*, 125 Ill. 351, 17 N. E. 792. Appellant contends that this case is not in point, for the reason, among others, that it was a stock company, while the appellee is a mutual.

In *Richards, Ins.* p. 80, the author says: "The tendency of the courts seems to be to deny the distinction between mutual and stock companies altogether, in respect to the power of the officers and agents to waive conditions, and estop the company from insisting on forfeitures. For, as a matter of fact, the applicant rarely knows anything about the charter or by-laws, and could hardly be expected to be acquainted with them at the time of his application. * * *

Universally it is held that the acceptance of an assessment premium by the home office is a waiver by the company of all forfeitures known." In *Insurance Co. v. Young*, 86 Ala. 421, 5 South. 116, it is said: "On breach of condition and forfeiture of insurance, the defendant had the election to avoid the policy, or waive its right to claim its forfeiture. Conditions in a policy of insurance limiting or avoiding liability are strictly construed against the insurer, and liberally in favor of the assured. Though a waiver may be in the nature of an estoppel, and maintained on similar principles, they are not convertible terms. The courts, not favoring forfeitures, are usually inclined to take hold of any circumstance which indicates an election to waive a forfeiture. A waiver may be created by acts, conduct, or declarations insufficient to create a technical estoppel. If the company, after knowledge of the breach, enters into negotiations or transactions with the assured which recognize and treat the policy as still in force, it will be regarded as having waived the right to claim the forfeiture." To the same effect is *Titus v. Insurance Co.*, 81 N. Y. 410. In *McGurk v. Insurance Co.*, 56 Conn. 528, 16 Atl. 263, the court, after citing a number of cases, quotes from *Insurance Co. v. Wolff*, 95 U. S. 326, as follows: "It is true that, where an agent is charged with the collection of premiums upon policies, it will be presumed that he informs the company of any circumstances, coming to his knowledge, affecting its liability, and, after the premiums are received by the company without objection, any forfeiture incurred will be presumed to be waived,"—and adds: "These cases, and many others that might be cited, fully establish the doctrine that knowledge affecting the rights of the insured, which comes to an agent of an insurance company while he is performing the duties of his agency, in procuring applications for insurance, delivering policies, and collecting premiums, becomes the knowledge of the company; and, if the latter afterwards collects premiums of such parties, it waives all objections with regard to matters of which it has such knowledge." In *Insurance Co. v. Raddin*, 120 U. S. 183, 7

Sup. Ct. 500, the court says: "The acceptance by insurers of payment of a premium after they know that there has been a breach of the condition of the policy is a waiver of the right to avoid the policy for that breach." Vide, also, the authorities therein cited. When the director called upon appellee to collect the delinquent assessments, he looked at the ruins of the house, and said, "I suppose you know what is lacking." Nothing was said about a forfeiture, but the assessments were then paid, and the appellee instructed that he should notify the company in writing. For months before the fire, the company knew of the delinquency. Notices had been given in November previous, and in placing these assessments, with others, in the hands of one of the directors for collection, nothing was said about forfeiture. The instructions were to leave them with a justice of the peace for collection if the agent himself failed to collect them. In *Insurance Co. v. Bowen*, 40 Mich. 149, the opinion was given by Cooley, C. J., and is as follows: "The defendant in error in 1865 effects with plaintiff an insurance upon his house and household furniture, subject to the payment of such assessments as should be made by the company from year to year to meet losses suffered and expenses incurred. In February, 1875, the house and furniture were destroyed by fire. At that time there were two unpaid assessments. Defendant in error had been notified. One of the by-laws of the company provided that, when assessments were overdue and unpaid, the assured should forfeit all claims against the company for any loss or damage sustained during such delinquency. Immediately after the fire, Bowen paid up the assessments to the local agent of the insurance company, who received the assessments with knowledge of the loss, but forwarded the money to the company without mentioning the loss, of which the office at that time had received no notice from any other quarter. March 16, 1875, the board of directors of the insurance company adopted a resolution 'that the secretary and chairman of the board of directors be instructed to draw an order in favor of William Bowen for the amount of Bowen's loss, on the recommendation of the auditing board, when said loss is adjusted.' On the 2d day of April following, the board passed another resolution, that they did not consider the company liable, on account of the nonpayment of the assessments. An adjustment of the loss was therefore refused. The circuit judge was quite right in holding the company by its reception of the assessments and recognition of the loss." The similarity of this case and the one at bar justifies this lengthy quotation. The forfeiture clause in each policy is practically the same. The same reason is given in both for refusing to pay the loss. The assessments in each case were for earned premiums. When appellee paid his

assessments, he was no longer delinquent. He owed the company nothing. In assessment companies there is no advance payment of premiums. The forfeiture claim is for the benefit of the company. It may waive it. If the company accepts and retains the amount of the assessments after default, the reciprocal rights of the parties stand unimpaired. This condition is entirely within the control of the company. It may declare forfeit the policy, and then cut off the delinquent members from all benefits, or it may collect delinquent assessments, waiving forfeiture. There is no evidence that appellee intended to withdraw from the company. He made no attempt to do so. There is no evidence that the company intended to forfeit his policy. It is quite clear that appellee and the director of appellant, at the time payment was made of the delinquent assessments, believed that appellee was entitled to payment for loss. Directions as to the manner of giving notice to the company of the loss would, in any other view, have been meaningless. The evening before the fire the director who collected the assessments was informed that appellee wished to pay them, and the morning after the fire he said to the appellee, in the presence of the ruins, "I guess you know what is lacking," and appellee answered, "I do. Have you got any blanks?" The blank receipt was produced and filled up; the money was paid, and receipt given, signed by the treasurer of the company, whose name the director had authority to sign. These facts are pertinent on the subject of the intention of the parties, and were proper to go to the jury determining the question of waiver. From a careful examination of the record, we conclude that the merits of the case have been fairly tried, and that it contains no error for which the judgment of the court below should be reversed. The judgment is affirmed.

BLACK, J., absent.

(16 Ind. App. 615)

KELSO v. KELSO et al.

(Appellate Court of Indiana. Jan. 27, 1897.)

APPEAL—RECORD—BILL OF EXCEPTIONS.

1. Under Burns' Rev. St. 1894, § 1476 (Horners' Rev. St. 1896, § 1410), which provides that the party entitled to the use of the reporter's original longhand manuscript of the evidence may file it with the clerk of court, and on appeal it shall be the duty of the clerk, if requested, to certify the same when it shall have been incorporated in a bill of exceptions, the manuscript must be filed in the clerk's office before it is incorporated in a bill of exceptions, and the record must affirmatively show such filing.

2. The record must affirmatively show that the bill of exceptions was filed in the clerk's office after it had been signed by the judge.

On petition for rehearing. Overruled.
For former report, see 44 N. E. 1013.

WILEY, J. Appellant has filed a petition for rehearing, in which he earnestly contends that the court, in its original opinion, "overlooked the plain and unmistakable record," in holding that the bill of exceptions was not properly in the record, and could not be considered. In view of the earnest appeal of the appellant in his brief in support of his petition for a rehearing, we have examined the record with much care. The record shows that appellant's motion for a new trial was overruled June 26, 1893, "to which decision of the court the defendant at the time excepts, and ninety days' time is given in which to prepare and file his bill of exceptions." We have quoted the exact language of the record, from which it appears that the time for filing the bill of exceptions expired 90 days from June 26th, which would be September 23, 1893. Section 1476, Burns' Rev. St. 1894 (section 1410, Horners' Rev. St. 1896), provides: "Whenever in any cause, such verbatim report shall have been made by an official reporter, the original longhand manuscript of the evidence, by him made, may be filed with the clerk of the court by the party entitled to the use of the same, and in case of an appeal to the supreme court * * * it shall be the duty of the clerk, if requested to do so by said party, to certify the original manuscript of evidence, when the same shall have been incorporated in a bill of exceptions, to the supreme court or other court of appeal, instead of a transcript thereof; and the said original manuscript of evidence may be used in the supreme court, or other court of appeal, in the same manner and for all purposes in and for which a certified transcript thereof might heretofore be used." Under the provisions of the statute just quoted, and the repeated decisions of the supreme and this court, it is the settled law in this state that the original longhand manuscript of the evidence must be filed in the clerk's office before it is incorporated in a bill of exceptions, and the record must affirmatively show such filing. *Hamrick v. Loring* (Ind. Sup.) 45 N. E. 107; *De Hart v. Board*, 143 Ind. 363, 41 N. E. 825; *Joseph v. Wild* (Ind. Sup.) 45 N. E. 467; *Carlson v. State* (Ind. Sup.) 44 N. E. 660; *Rogers v. Eich* (Ind. Sup.) 45 N. E. 93; *Smith v. State* (Ind. Sup.) 42 N. E. 1019; *Beatty v. Miller* (Ind. Sup.) 44 N. E. 8; *Marvin v. Sager* (Ind. Sup.) 44 N. E. 310; *Holt v. Rockhill* (Ind. Sup.) 40 N. E. 1090. The only evidence in the record that the original longhand manuscript was ever filed in the clerk's office is the certificate of the clerk that "the annexed and subjoined longhand report of the evidence in said cause * * * was filed in my office December 21, 1893." It appears, therefore, on the face of the record, that the "longhand report of the evidence" was not filed in the clerk's office until nearly three months after the time fixed by the court for filing a bill of exceptions; and, as such filing of the evidence must precede the filing of the

bill of exceptions, it follows that the evidence is not properly in the record. Appellant contends, under the provisions of section 641, Burns' Rev. St. 1894 (section 629, Horner's Rev. St. 1896), that delay of the judge in signing and filing the bill of exceptions should not deprive the party objecting of the benefit thereof. In this contention appellant is right, but in this case appellant, by reason of the delay of the judge in signing the bill of exceptions, was not in any way harmed. The trouble here is that the longhand manuscript of the evidence was not filed with the clerk before it was embraced in a bill of exceptions, and the further fact that the bill, after having been signed by the judge, does not appear, from any file mark, any certificate of the clerk, or anything in the record, to have been filed in the clerk's office. The failure of the record to affirmatively show that the bill was filed in the clerk's office after it had been signed by the judge is fatal, and the bill is not properly in the record. *Railway Co. v. Meadows*, 13 Ind. App. 155, 41 N. E. 398; *Davee v. State*, 7 Ind. App. 71, 34 N. E. 308; *Gish v. Gish*, 7 Ind. App. 104, 34 N. E. 305; *Prather v. Prather*, 139 Ind. 570, 39 N. E. 310. In the absence of an affirmative showing of these facts, we must hold, in harmony with the decisions above quoted, that the evidence is not in the record. Petition for rehearing overruled.

(16 Ind. App. 697)

STAEDING v. STROUSE et al.

(Appellate Court of Indiana. Nov. 29, 1897.)

Petition for rehearing. Overruled.

For original opinion, see 45 N. E. 193.

COMSTOCK, C. J. We have carefully considered the argument of the learned counsel on petition for rehearing, and have examined the questions presented by the record. In our opinion, the conclusion reached by Lotz, C. J., is correct. The petition for rehearing is therefore overruled.

(16 Ind. App. 591)

DILTZ v. SPAHR.

(Appellate Court of Indiana. Jan. 26, 1897.)

PLEADING—AMENDMENT—ACTION FOR COMMISSIONS—FINDINGS.

1. In the absence of a showing of prejudice, a judgment will not be reversed because the court, after the close of the argument, allowed plaintiff to add a count which was identical with the original count, except that it was not accompanied with a bill of particulars.

2. Findings by the court under a count for 4 per cent. commission for procuring a loan of \$8,000 on a first mortgage; that defendant agreed to pay such commission; that plaintiff unsuccessfully negotiated with a member of a firm for a loan from it; that plaintiff introduced defendant to such partner; and that thereafter, without plaintiff's knowledge, defendant procured from such partner a loan of

\$2,000 of his individual funds, on a second mortgage,—will not support a conclusion of law that defendant was indebted to plaintiff for \$80. "being a commission of four per cent. of \$2,000."

Appeal from superior court, Marion county; J. L. McMasters, Judge.

Action by William H. Spahr against Amos K. Diltz. Judgment for plaintiff, and defendant appeals. Reversed.

Upton J. Hammond and Edwin St. G. Rogers, for appellant. Geo. W. Spahr, for appellee.

WILEY, J. The appellee sued the appellant to recover a commission for services in procuring a loan. The original complaint was in one paragraph, and was in the statutory form upon an account stated. With this paragraph, the appellee filed, as an exhibit, a bill of particulars, as follows: "Indianapolis, Ind., Dec. 24, 1894. Amos K. Diltz to William H. Spahr, Dr. To commission securing \$8,000 loan, \$320.00." The appellant answered by general denial, and the cause was submitted to the court for trial, without the intervention of a jury. After the introduction of all the evidence, and the conclusion of the arguments of counsel, the appellee, over the objection and exception of appellant, was permitted to file an additional paragraph of complaint, which paragraph was in the words and figures following, viz.: "The plaintiff, for a further and second paragraph of complaint herein, says the defendant is indebted to him in the sum of three hundred dollars (\$300.00) for work and labor done, which work and labor was done at the special instance and request of the said defendant, and that the same is due and wholly unpaid, wherefore plaintiff prays judgment for \$500.00," etc. This second paragraph of complaint is identical with the first, except that it is not accompanied with a bill of particulars, as an exhibit. Upon the filing of the second paragraph of complaint, the record recites the following: "And, on plaintiff's motion, the said defendant is ruled to answer the said second paragraph of complaint herein, and, the defendant declining so to do, the court now takes this case under advisement." The court, on its own motion, made a special finding of facts, and stated its conclusions of law thereon, and such proceedings were had as that judgment was rendered against appellant for \$80. The appellant reserved exception to the conclusions of law, and has in this court assigned errors as follows: "(1) The court erred in allowing the plaintiff to amend his complaint by filing the second and further paragraph thereof, on and after the trial of the cause; and (2) the court erred in its conclusion of law on the findings." We will consider these assignments of error in their order.

Counsel for appellant earnestly insist that the court erred in permitting the appellee to file an additional paragraph of complaint

after the close of the evidence and the conclusion of the argument. With this contention we cannot agree. Our statute and the adjudicated cases thereunder are very broad and liberal on the question of amendment to pleadings, and this court will not reverse a judgment unless it affirmatively appears from the record that such amendment was prejudicial to the adverse party, and it must also appear that the trial court has abused its discretion. It seems clear to us that the second paragraph of the complaint was not filed under the provisions of section 399, Burns' Rev. St. 1894 (section 394, Horner's Rev. St. 1896), wherein it is provided that "the court may at any time, in its discretion, and upon such terms as may be deemed proper, for the furtherance of justice, direct * * * any material allegation to be inserted, struck out or modified—to conform the pleadings to the facts proved, when the amendment does not substantially change the claim or defense." The additional paragraph filed does not seek to amend the original complaint; neither does it add to or take from it; nor was it made to "conform the pleadings to the facts proved." It follows, therefore, that the additional paragraph was filed under section 394, Burns' Rev. St. 1894 (section 396, Horner's Rev. St. 1896), which provides generally for amendments to pleadings. While we are unable to see any necessity for filing the second paragraph of complaint, or how the appellee was to be benefited thereby, yet there was no reversible error in permitting it to be done. In any event, the amendment was not prejudicial to the appellant, as it did not state a different cause of action than that contained in the first paragraph. It required no additional proof, and there is nothing in the record to show he was misled thereby. It has been repeatedly held that where the trial court has permitted amendments to be made to pleadings during the progress of the trial, and after the conclusion of the evidence, the adverse party must affirmatively show that he was prejudiced before he will be entitled to a reversal of the judgment on that ground. *Adams v. Main*, 3 Ind. App. 232, 29 N. E. 792; *Leib v. Butterick*, 68 Ind. 199; *Judd v. Small*, 107 Ind. 398, 8 N. E. 284; *Levy v. Chittenden*, 120 Ind. 37, 22 N. E. 92; *Fork Co. v. Mullen*, 1 Ind. App. 204, 27 N. E. 448.

That there may be a clear understanding of the facts, and an intelligent discussion and determination of the second assignment of error, it is necessary for us to copy into this opinion the special findings of the court and its conclusion of law thereon. They are as follows: "(1) That the defendant orally promised the plaintiff to pay him a commission of four (4) per centum of eight thousand dollars (\$8,000) if he (plaintiff) would procure some person to lend him (defendant) that sum on the security of a first mortgage on his farm. (2) Thereupon the plaintiff, with the

knowledge of the defendant, began to negotiate with a co-partnership, composed of ten members, and doing business under the firm name and style of the Anderson Banking Company, to the end of procuring it to lend the defendant that sum on said security. (3) That the plaintiff so negotiated with and through one Baker, a member of said co-partnership and its president, and took said Baker to inspect said farm, and then made said Baker and said defendant acquainted with each other, and talked over with them of the borrowing and lending of said sum on said security. (4) That said Baker then expressed his personal willingness, as a member of said co-partnership, to lend the said sum of said security, but said in that connection that he would have to go to Anderson, Indiana, and submit the matter to, and obtain the consent of, his co-partners, before the same could be done. (5) That, upon such submission of said matter by said Baker to his said co-partners, they refused their assent to lend said sum on said security. (6) That afterwards, and while the plaintiff was resting in the belief that said matter was still under consideration and undetermined by said Baker and his co-partners, the said Baker and the defendant came together, without the knowledge or participation of the plaintiff, and, with the apparent intent of wholly ignoring the plaintiff, the said Baker made in his individual capacity, and with his individual money, and the defendant took, a loan of two thousand dollars (\$2,000) on the security of a second mortgage upon the said farm. * * * (7) That said farm was before and at the time of said defendant's promise to the plaintiff incumbered by a mortgage debt of six thousand dollars (\$6,000), accruing due on September 15, 1896, and bearing interest at the rate of six per centum, payable semiannually, upon which the defendant was in default as to an installment of interest in the sum of one hundred and eighty dollars (\$180), which fell due September 15, 1894; and that it was understood between the said defendant and said plaintiff that said mortgage was to be paid and discharged out of the proceeds of said contemplated loan of eight thousand dollars (\$8,000), but, under the loan as finally consummated by said Baker, his two thousand dollar mortgage was taken subject to the above-named incumbrance of six thousand dollars (\$6,000)." Upon the foregoing facts, the court stated its conclusions of law as follows: "That the defendant is indebted to the plaintiff, and the plaintiff is entitled to recover of and from the defendant, on the second paragraph of his complaint filed herein, by leave of the court, on the 3d day of May, 1895, the sum of eighty dollars (\$80), being a commission of four (4) per centum of two thousand dollars."

We are unable to understand upon what theory the conclusions of law as stated by

the trial court can be maintained. From the facts found by the court, there are no facts appearing in the record upon which any judgment in favor of the appellee on his second paragraph of complaint could be predicated. The pivotal and controlling facts as found by the court are these: (1) That appellant promised to pay appellee 4 per centum on \$8,000 if he would procure for him (appellant) a loan of that amount, to be secured by mortgage on real estate; (2) that appellee did negotiate with one Baker, representing a co-partnership, to the end that said loan might be consummated; (3) that the appellee failed to procure and consummate said loan; (5) that, in negotiating with said Baker for said loan, the appellee brought the appellant and Baker together, and made them acquainted; and (6) that, after the said co-partnership refused to make said loan of \$8,000, the appellant and Baker "came together without the knowledge or participation of the plaintiff," and that Baker made appellant a loan of \$2,000, "in his individual capacity, and with his individual money." There are no facts found by the court showing that the appellee had performed his part of the contract in procuring for appellant a loan of \$8,000, but, on the contrary, it is expressly found that he had failed to do so. The complaint was drawn, and the trial proceeded, upon the theory that appellee was entitled to recover from the appellant 4 per centum of \$8,000, or \$320. Counsel for appellee, in his brief, still insists that this was the correct measure of damages. We are not deciding the question, for it is not presented by the record, whether or not in an action upon the quantum meruit, upon a proper allegation and proof, the appellee could recover from the appellant a commission on \$2,000, which the appellant borrowed of Baker. We hold, however, that the appellee, if he is entitled to recover at all, must recover upon the theory of his complaint. It is the settled rule in this state that a party must recover *secundum allegata et probata*, or not at all. *Railway Co. v. Renicker*, 8 Ind. App. 404, 35 N. E. 1047; *Boesker v. Pickett*, 81 Ind. 554; *Hewitt v. Powers*, 84 Ind. 295; *Telegraph Co. v. Reed*, 96 Ind. 195; *Ivens v. Railway Co.*, 103 Ind. 27, 2 N. E. 134; *Railroad Co. v. Bills*, 104 Ind. 13, 3 N. E. 611; *Pennsylvania Co. v. Marion*, 104 Ind. 239, 3 N. E. 874; *Railway Co. v. Godman*, 104 Ind. 490, 4 N. E. 163; *Spencer v. McGonagle*, 107 Ind. 410, 8 N. E. 266. There is no evidence, disclosed by the special finding of facts, to make a case for appellee, under the theory of the complaint and the issues joined, and he was not entitled to recover any judgment thereunder. The court erred in stating its conclusions of law, and the judgment is reversed, with directions to the court below to restate its conclusions of law, and render judgment for appellant.

BLACK, J., not present.

(164 Ill. 560)

PEIRCE et al. v. WALTERS.

(Supreme Court of Illinois. Jan. 18, 1897.)

REVIEW ON APPEAL—BILL OF EXCEPTIONS—RAILROADS—INJURY TO TRESPASSERS—INSTRUCTIONS—MISJOINDER—WAIVER OF OBJECTIONS.

1. Denial of a motion to remove the cause to a federal court cannot be reviewed unless the motion, affidavit, and bond, the ruling of the court, and exception thereto, are preserved by bill of exceptions.

2. A railroad company is liable for injury to a trespasser on the track if the engineer failed to exercise ordinary care to prevent the injury after he became aware of the danger. 63 Ill. App. 562, affirmed.

3. Defendant cannot complain of instructions given for plaintiff which are similar to others given at defendant's request.

4. An instruction that an engineer has a right to presume that a trespasser on a high railroad bridge will leave the track in time to escape injury, and that he may continue to run the train until he discovers that such person is heedless of danger, was properly refused. 63 Ill. App. 562, affirmed.

5. The fact that plaintiff was attempting to rescue a child from danger at the time he was struck will not relieve the company from liability, if the engineer failed to exercise ordinary care after the discovery of plaintiff's peril.

6. Where instructions are given at defendant's request, which assume that questions of fact necessary to make out plaintiff's case are properly before the jury, a peremptory direction to find for defendant, requested on final submission, is rightly refused.

7. The objection that defendants were improperly joined is waived by taking issue on the declaration joining them. 63 Ill. App. 562, affirmed.

Appeal from appellate court, Third district.

Action by George Walters against P. B. F. Peirce, successor to Samuel R. Callaway, late receiver of the Toledo, St. Louis & Kansas City Railway Company, and another. From a judgment of the appellate court affirming a judgment for plaintiff (63 Ill. App. 562), defendants appeal. Affirmed.

This suit was brought by the appellee against appellants in the circuit court of Coles county, to recover damages for a personal injury received by being struck by a locomotive. The accident occurred on a railroad bridge of the company in June, 1893, the road at that time being in the hands of Samuel R. Callaway as receiver. The original declaration was of two counts, charging that the injury resulted from the gross negligence and willful misconduct of the servants of the receiver. On the return day, he appeared and filed his petition and bond for the removal of the case to the United States circuit court for the Southern district of Illinois, but the petition was denied. Afterwards plaintiff amended his declaration, by joining Keep, the engineer in charge of the locomotive at the time of the accident, as a party defendant. On the first day of the next term, Pierce, successor to Callaway as receiver, also filed a second petition for the removal of the cause to the United States court, but it was also denied. After making

Keep a party, the declaration was further amended, two additional counts being filed. They each, in substance, aver that, after the engineer Keep and other servants of the defendant in charge of the train saw the plaintiff upon the bridge, they could, by the exercise of ordinary care after becoming aware of his position, have brought the train under control, and avoided striking and injuring him, but negligently failed to do so. The second of these counts also charges that, after seeing him, the defendant Keep and other servants of the defendant receiver willfully and wantonly ran the engine upon him. A plea of not guilty was filed, and a trial by jury resulted in a verdict and judgment for the plaintiff for \$2,500. That judgment having been affirmed by the appellate court, this appeal is prosecuted.

W. P. Tyler and Charles G. Guenther, for appellants. Hughes & Hayes and J. W. Craig, for appellee.

WILKIN, J. (after stating the facts). It is first insisted the court below erred in refusing to transfer the cause to the federal court. That question is not presented by this record for our decision, the bill of exceptions containing no motion for such removal, affidavit, or bond; neither does it appear that any exception was taken to the denial of the motion. *Transportation Co. v. Joesting*, 89 Ill. 152; *Wabash, St. L. & P. Ry. Co. v. People*, 106 Ill. 652.

The other errors assigned question the correctness of the decision of the case upon its merits. The declaration proceeds throughout upon the admission that the plaintiff was wrongfully upon the bridge at the time of the accident, and could only recover by proving that the conduct of the defendants was wanton and willful, or that, after discovering his perilous position, they did not exercise ordinary care to avoid the accident. The last two counts are upon the latter theory, and the trial was had upon the issue formed on these counts. Thus, the court instructed the jury, at the instance of the defendants: "(9) You are instructed that, if it appears from the evidence in this cause that the plaintiff was a trespasser upon the track or bridge of the defendant receiver at the time he was struck and injured, then said defendant receiver was not required, and the law did not impose any duty whatever upon his engineer, to discover the plaintiff's presence upon the same, but only required him, after he discovered the plaintiff, and had knowledge that he was in a perilous position, to exercise reasonable care and prudence to avoid collision; and if it further appears that the engineer did exercise such care and prudence,—did everything within his power to prevent the train from colliding with said plaintiff after he discovered him,—then your verdict must be for the defendants. (10) The defendants are liable in this case

only if the engineer failed to exercise ordinary care to prevent the injury, after he became aware of the danger to which the plaintiff was exposed; and by ordinary care is meant such care as would be ordinarily used by a prudent person performing a like service under similar circumstances." Two instructions were given on behalf of the plaintiff, and they each lay down the same rule as to the defendants' liability stated in the foregoing instructions, and correctly announce the law, as held in *Railroad Co. v. Noble*, 142 Ill. 578, 32 N. E. 684, and *Railroad Co. v. Jones*, 163 Ill. 167, 45 N. E. 50. Moreover, it is well settled that the defendants, having asked the court to instruct the jury as it did, cannot now be heard to question the correctness of those given on behalf of the plaintiff to the same effect. *Coal Co. v. Haenni*, 146 Ill. 621, 35 N. E. 162, and cases cited.

A large number of instructions were given at the instance of the defendants, and we think, with the appellate court, that the law of the case was as fully and fairly stated on their behalf as they could reasonably ask. Whatever may be said as to the weight of the testimony on the question whether the engineer did exercise due care to avoid the injury after he discovered the plaintiff, as an original question, it must be conceded that it is foreclosed by the judgment of affirmance in the appellate court. Three instructions asked by the defendants were refused, but they did not go to that question of fact; and if they had been free from objection, in view of those given, there would have been no reversible error in their refusal. They did not, however, state the law correctly. The eighth states that an engineer is not bound to stop his train the moment he sees a person on the track, but has the right to presume that such person will leave the track in time to escape danger, and, without being negligent, may continue to run the train until he discovers that such person is heedless of danger. This instruction ignores the fact that the plaintiff was upon a bridge of considerable elevation, and could not therefore step out of danger. A similar instruction was condemned in the case of *Railroad Co. v. Slater*, 139 Ill. 199, 28 N. E. 830. The seventeenth instruction, which was also refused, was to the effect that, if the plaintiff was endeavoring to rescue the little girl from danger at the time he was struck, he could not recover unless the injury was willfully inflicted. We have already seen that it became the duty of the engineer, upon discovering the perilous position of the plaintiff, to use reasonable care to avoid injuring him; and it is clear that what he may have been doing at the time could in no way lessen that duty,—that is to say, the fact that he may have been attempting to save the child would furnish no excuse for less care on the part of the engineer than if he had been otherwise engaged. What he was doing at the time,

whether attempting to rescue the little girl or doing nothing, could only be material in the case as affecting the question as to whether he used due care for his own safety.

There was submitted by the defendants, with the other instructions, a peremptory direction to the jury to find for the defendants; and it is insisted that the court erred in refusing to give it. The defendants did not, at the close of the plaintiff's testimony, nor at the close of all the testimony, ask to have the case taken from the jury, nor to have it peremptorily instructed to return a verdict for the defendants, but, as we have seen, submitted the case to the jury upon instructions which assumed the questions of fact necessary to make out plaintiff's case were properly before it. In other words, they submitted the case to the jury for its determination upon the facts, thereby conceding that there was a question for its decision. The refusal of the instruction when asked upon the final submission of the case was proper, because it sought to take away from the jury all questions of fact, and require it to determine, as a matter of law, that there was no evidence before it tending to support the plaintiff's cause of action. If the defendants desired the court to pass upon the legal question as to whether or not there was any testimony before the jury tending to prove the plaintiff's case, and to bring that question before this court for review as a question of law, it must have done so by asking to have the case withdrawn from the jury before the final submission. There was no error in the refusal of either of these instructions.

The question as to whether the engineer was properly joined with the receiver cannot be raised, issue having been taken on the declarations so joining him. In view of the manner in which this case was tried, and the decision of the appellate court, no reversible error is here shown. Affirmed.

(164 Ill. 470)

FLYNN v. COAKLEY et al.

(Supreme Court of Illinois. Jan. 19, 1897.)

STATUTES—TITLES OF ACTS—CONSTITUTIONAL LAW.

Act June 5, 1889, entitled "An act to regulate the foreclosure of chattel mortgages on household goods, wearing apparel and mechanic's tools," provides, in section 2, that no chattel mortgage executed by a married man or married woman on household goods shall be valid unless joined in by the spouse. *Held*, that such section is not unconstitutional on the ground that it is not embraced in the title. *Gains v. Williams*, 34 N. E. 934, 146 Ill. 452, follow.

Appeal from circuit court, Knox county; John J. Glenn, Judge.

Action of replevin by D. W. Flynn against I. N. Coakley and another. From a judgment in favor of defendants, plaintiff appeals. Affirmed.

Forrest F. Cook, for appellant. Thomson, Shumway & Wassen, for respondents.

WILKIN, J. This was an action of replevin by appellant against appellees to recover possession of a piano. Both parties claimed the property under chattel mortgages executed by Mrs. H. J. Hislop. It appears from the evidence that she purchased the instrument on April 5, 1892, for \$365, from W. C. Parker, a general dealer in musical instruments, and executed to him a mortgage thereon, securing a note for the price thereof. But the mortgage was neither entered on the docket of a justice of the peace, or recorded in the recorder's office of the county, but was acknowledged before a justice of the peace, in the same form as though it had been a mortgage upon real estate. Mrs. Hislop took and remained in possession of the property, and on April 9, 1895, executed a mortgage upon it to appellant, to secure him for certain borrowed money. At the time this mortgage was executed, she was a married woman, residing with her husband, who did not join in its execution. It was admitted upon the trial that appellant had no knowledge of any prior claim or lien upon the instrument at the time he took his chattel mortgage. After the execution of this mortgage, appellee Coakley, a constable, acting for appellee Guest, who had become the legal holder of the Parker mortgage, took possession of the piano, under a clause in that mortgage providing that the mortgagee should have the right to do so after Mrs. Hislop incumbered or attempted to incumber the same. Thereupon appellant brought this action, which, upon a trial, resulted in a finding and judgment in favor of the defendants, from which this appeal is prosecuted. The case was tried in the circuit court, without a jury.

The only proposition of law submitted by the plaintiff to be held as the law of the case was "that section 2 of an act to regulate the foreclosure of chattel mortgages on household goods, wearing apparel, and mechanic's tools, approved June 5, 1889, in force July 1, 1889, is, so far as it is sought to apply such section to the circumstances of this case, unconstitutional and void, because it is class legislation, and because the subject of the section is not expressed in the title of the act," which was refused. The appeal is taken directly to this court, and the only question presented for our decision is the constitutionality of the section of the statute cited in the foregoing proposition. That section is as follows: "No chattel mortgage executed by a married man or married woman on household goods shall be valid unless joined in by the husband or wife, as the case may be." 2 Starr & C. Ann. St. (2d Ed.) p. 2773. On behalf of appellant, the contention is that it is unconstitutional, because not embraced in the title of the act. It is admitted that it was de-

held otherwise in *Gains v. Williams*, 146 Ill. 452, 34 N. E. 934; but it seems to be thought the constitutionality of the section may be sustained on one state of facts, but must be held invalid under the facts of this case. Whether a statute is embraced within the title of a bill, or is germane thereto, is a question to be determined from the title of the act and a construction of the statute, and cannot be made to depend upon the varying facts and circumstances of particular cases. It is true that parts of an act may be constitutional, and other parts not; but that part which is constitutional is valid, no matter what may be the facts and circumstances under which it is invoked. The appellant places himself in the anomalous position of contending that while section 2 is embraced in the title of the act, under one state of facts, it is not so embraced under another state of facts. We are satisfied with our conclusion reached in *Gains v. Williams*, supra, and the reasons there given for that conclusion.

An attempt is made to raise the question in this court as to whether the piano was "household goods," or "necessary household goods," within the meaning of the statute. That is a question of fact, settled by the finding and judgment of the court below, and in no way affects the constitutionality of section 2. The judgment of the circuit court will be affirmed. Affirmed.

(164 Ill. 387)

LAURENCE et al. v. LAURENCE.

(Supreme Court of Illinois. Nov. 23, 1896.)

COMMON-LAW MARRIAGE—VALIDITY—EVIDENCE.

1. The contract of marriage being a contract *jure gentium*, capable of being entered into as of common right, a common-law marriage between a white man and a colored woman, contracted in another state *per verba de presenti*, is valid, in the absence of proof that common-law marriages or marriages between white and colored persons were prohibited by the laws of that state at the time of the marriage.

2. Under Rev. St. c. 51, § 1, removing the common-law disability of a party to a suit or person interested in the event thereof to testify in his own behalf; and section 2, providing that the section shall not apply where any adverse party sues or defends as the heir of any deceased person, except "when called as a witness by such adverse party,"—the plaintiff in partition of the estate of a deceased person, whose common-law wife she alleges herself to have been, which fact is expressly denied by defendant heirs of the deceased, cannot testify in her own behalf to the fact of the alleged marriage, though she formally sues as heir of the deceased. *Pigg v. Carroll*, 89 Ill. 205, limited. *Brown v. Brown*, 32 N. E. 500, 142 Ill. 409, overruled.

3. It appeared that plaintiff, a colored woman, and deceased, a white man, had lived and cohabited together for more than 20 years; that during all that time plaintiff had never claimed to be the wife of deceased; that she occupied the place of housekeeper for deceased; went by her own name; acquired property by that name; associated with colored people, while deceased associated with white; was introduced to the associates of deceased as his housekeeper; took an obligation from deceased for mon-

ey loaned him by her, payable at his death to her by her name, and void in case he should survive her; that she filed her claim against his estate in her own name. Several witnesses testified that deceased had admitted to them that plaintiff was his wife, and had stated that plaintiff and he had agreed to live together as husband and wife. *Held*, that the evidence failed to establish a common-law marriage.

4. Where it is sought to establish a common-law marriage by evidence of cohabitation, consent of both parties, and assumption of the marriage status, letters written by deceased to plaintiff during their cohabitation, shown to be in the handwriting of deceased, signed by him, addressed to plaintiff at the city she was then living in, stamped and postmarked at the city where deceased was then staying, found among the papers of deceased, are admissible as part of the *res gestæ*, for the purpose of showing how deceased regarded plaintiff, without proof that the letters were received by plaintiff.

Appeal from superior court, Cook county; Theo Brentano, Judge.

Suit in equity by Maria Evans Laurence against William J. Laurence and others for partition. Decree for plaintiff. Defendants appeal. Reversed.

Galloway & Traub, for appellants. Anderson & Proudfoot, for appellee.

PHILLIPS, J. This is an appeal from the superior court of Cook county, where appellee had filed her bill against appellants and others, praying for a partition of the estate of Henry Laurence, who died, intestate, in Chicago, in March, 1891. He had resided in Chicago since the year 1877. Appellants were the heirs at law of Henry Laurence. Appellee claimed by her bill to be the lawful widow of the intestate, and, he having died leaving no issue, she claimed to be entitled by the laws of descent to one-half of the real estate, and the personal estate, after the payment of debts. Answers denying the allegation of the bill, and replications thereto, were filed, and the cause was heard by the chancellor upon the oral testimony and depositions of the witnesses. The court found the equities with appellee, and found that in the month of May, 1869, appellee became and was the lawful wife of Henry Laurence, deceased, and so continued up to the time of his death, and found that, as his lawful widow, she was entitled to share in his estate, and so decreed. No celebration of a marriage is claimed, but the bill charges that on or about the 1st day of May, 1869, in the city of New Orleans, in the state of Louisiana, the deceased agreed to be the husband of appellee, and that appellee agreed to be his wife, and that, in pursuance thereof, the deceased and appellee then and there became husband and wife, and so lived and cohabited together up to his death.

Before considering the evidence, which involves the single question whether the appellee is the lawful widow of the deceased, some of the legal propositions presented by appellants, and which are necessary to the determination of the case, should be considered.

Appellants insist that, in the absence of proof of the marriage laws of the state of Louisiana, the law of the forum applies, and that, by a statute of this state then in force, the marriage would be void. The appellee relies upon proof of a contract of marriage per verba de præsenti, claiming it to have been entered into in the state of Louisiana in the year 1869. The evidence shows that the deceased was a white man, and she a woman of color. What the law of the state of Louisiana then was, respecting marriages at common law or marriages between white and colored persons, is not disclosed. Whatever may be the rule governing other contracts, the contract of marriage is a contract jure gentium, and consent and the assumption of the marriage status is all that is required by natural or public law. In the absence of local restrictions or regulations, these parties were capable of contracting marriage as of common right. Restrictions or conditions imposed upon the right to contract marriage are exceptional, and if the evidence establishes a contract of marriage per verba de præsenti, and it is claimed that it falls within such condition or restriction, the burden is upon the party so claiming to show it. Bish. Mar. & Div. 521-528; Hutchins v. Kimmell, 31 Mich. 126.

It is urged by appellants that the court erred in permitting appellee to testify in her own behalf, over their objection, for the reason that they were defending as the heirs at law of Henry Laurence. Section 1 of the Revised Statutes, entitled "Evidence and Depositions," removes the disqualification of a witness which existed at common law by reason of any interest in the event of the suit as a party or otherwise. Section 2, however, provides that "no party to any civil action, suit or proceeding, or person directly interested in the event thereof, should be allowed to testify therein of his own motion or in his own behalf, by virtue of the foregoing section, when any adverse party sues or defends as the heir of any deceased person, except when called as a witness by such adverse party so suing or defending. * * *" Rev. St. c. 51. The appellee was allowed to testify to the alleged fact of marriage, and to other facts as tending to show that the marriage relation existed between the deceased and herself. Was this ruling of the court proper, under section 2, above quoted? It is contended by appellee that she sued in this proceeding as an heir of the deceased, and that under the rule as laid down by this court in Pigg v. Carroll, 89 Ill. 205, she was a competent witness. The appellee, by her bill, in which she conceded that appellants were the heirs of the deceased, alleged that she was also an heir, and entitled to all of the personal and one-half of the real estate of the deceased, and to dower in the remainder of the real estate, because, as she alleged, she had been married to the deceased, and was therefore his

lawful widow. These allegations were not conceded or admitted by the heirs, but were expressly denied by them. In order to establish her right to share in the distribution of the estate, she must first establish the marriage, and until then she is not the heir, and not entitled to share in the estate. The case of Pigg v. Carroll, supra, was a controversy between the heirs over the distribution of the estate, where the value of certain advancements to several of his children were in dispute; but as said in the opinion in Comer v. Comer, 119 Ill. 170, 8 N. E. 796, in commenting on the case of Pigg v. Carroll: "The parties litigating held a title derived from the same identical source, and the litigation concerned property it was conceded belonged to the parties to the suit." The rule in Pigg v. Carroll was further explained in Mueller v. Rebhan, 94 Ill. 142, and in Ebert v. Gerding, 116 Ill. 216, 5 N. E. 591, where it was said that the statute "was intended to protect the estates of deceased persons from the assaults of strangers, and relates to proceedings wherein the decision sought by the party testifying would tend to reduce or impair the estate." The rule to be announced from these cases is that where, among those who are conceded to be the heirs, there arises a controversy as to the distribution of the estate among them, they may testify, as such testimony does not tend to reduce or impair the estate among them.

Appellee was not an heir until she established the marriage which she alleged, and which was denied by the heirs; and until such marriage was established by proof, or conceded, she was a stranger to the estate, and incompetent to testify; and the court erred in permitting her to do so, over appellants' objection. In the case of Brown v. Brown, 142 Ill. 406, 32 N. E. 500, not referred to by counsel in this case, it was held that where there was no record of a marriage required to be kept, and where the justice and all persons present at the marriage were dead, the wife is a competent witness to establish the fact of marriage. It does not appear that the question of the competency of the witness was raised in that case; and, so far as the views there expressed are not in harmony with the views expressed in this opinion, they are overruled. It is necessary to a valid marriage that both parties should consent to the marriage agreement, and assume the marriage status. Bish. Mar. & Div. 521-528; Hutchins v. Kimmell, 31 Mich. 126. It is impossible to fix a standard by which the evidence of a marriage in every case should be measured. Each case must depend upon its own facts and attending circumstances. Those circumstances or shadows which usually attend the lives of those who assume the marriage relation are important in determining the question of whether a marriage does or does not exist. The conduct and bearing of the parties are regarded by their friends and relatives, and

by those with whom they associate. Introducing each other as husband and wife, and holding each other out to the world as such, are circumstances of more or less weight, as they have relation to the length of time the parties have lived together, and the like. These are circumstances or shadows which we know by observation almost universally attend the married state, and are always expected to attend it; and their presence or absence is highly important in determining whether a marriage without ceremony has been entered into. To ignore them would open the door to fraud and imposition, invite perjury, threaten the legitimacy of children and the rights of heirs, and endanger the social fabric which rests on the institution of marriage. Marriage will sometimes be presumed from cohabitation, but this presumption may be overcome, as cohabitation may be, and frequently is, meretricious, as well as matrimonial.

There are many contradictions appearing in the evidence among some of the witnesses as to statements and conversations in the past, and it is impossible within the limits of an opinion to point out in detail these contradictions, or wherein witnesses are corroborated. It appears from the evidence that, prior to the war of the Rebellion, the appellee (then named Maria Lewis) was a slave in Yazoo City, Miss., where a man named Evans purchased her, and on the 2d of April, 1846, set her free. She and Evans removed from Yazoo City to New Orleans in 1859, where for many years afterwards she kept a house where she let furnished rooms. Evans, when he died, left her \$15,000. Dr. Laurence, the deceased, knew Evans and appellee well in Yazoo City, where he practiced the profession of a dentist, the appellee looking after his office there. Dr. Laurence left there in 1863, and went to Chicago, and in 1864 went to New Orleans, and engaged in the practice of his profession, where he remained until 1877, when he removed to Chicago. Before going to New Orleans, in 1864, he had some correspondence with Evans, and borrowed some money from him after he reached there, to aid him in starting in business. He roomed at the house of appellee from the time he went to New Orleans until in 1869, when he moved his office into a building at 12 Baronne street (the appellee keeping furnished rooms in the remainder of the house), where he and appellee continued to reside until they removed to Chicago, in 1877, where they lived in the same house, at 3029 Forest avenue, until his death, in 1891. Dr. Laurence owned slaves in Yazoo City before the war. To establish the marriage relation, the appellee introduced a number of witnesses to prove admissions made by Dr. Laurence, and conversations had with him, concerning his relations with appellee. These are said to have occurred from time to time from 1870 down to a time shortly before his death. The wit-

ness Maria Harvey says that in 1870 he told her that he and appellee had agreed to live together as husband and wife for life. Agnes Dennian states that in the summer of 1890 he introduced appellee to her as his wife. Louis Smith says that he called appellee his wife in speaking of her in 1887 or 1888. Appellee was then ill, and the witness was attending her as a nurse. Camilla Kaley, Kate L. Smith, a cousin of appellee, and Josephine Jones all testify to conversations with him at various times, in which he spoke of appellee as his wife. Camilla Kaley also states that in her presence he addressed appellee as his wife; and Josephine Jones states that in 1881 he told her that he and appellee had made an agreement to live together as husband and wife. Kittle Bennett testifies that many years ago he introduced appellee to her as his wife; that witness lived in the same house with them in Chicago; and that they occupied the same bed, and ate at the same table; and that he and appellee had pledged to marry themselves, and live together until death parted them. These witnesses and others testify to the fact that they cohabited, and to facts from which cohabitation may be inferred. They also testify to other facts which show their relations to have been more intimate than should obtain between unmarried persons; also to admissions by Dr. Laurence that he had been greatly aided by the means furnished him by appellee. It appears that the witnesses who testify to these admissions and conversations were neither relatives nor associates nor persons with whom Dr. Laurence had any intimate acquaintance. Some of them were colored persons, and some of them were persons with whom he could have had scarcely any acquaintance. His relations with appellee, whether matrimonial or otherwise, were never disclosed by him to his intimate friends and relatives, except that he expressed himself on more than one occasion as being opposed to the marriage state, and that he preferred his manner of life. If prudential reasons, as suggested by counsel for appellee, forbade these disclosures to his intimates and relatives, it is difficult to understand why he should voluntarily disclose his secret to those with whom he had but a slight acquaintance, and who had no inducement to keep his secrets.

Evidence of admissions made by a person since dead should be carefully scrutinized, and the circumstances under which they were alleged to have been made carefully considered, with all the evidence in the case. Such evidence is liable to abuse. The relations of these parties were peculiar. They resided together many years. Dr. Laurence, prior to 1870, had been investing his earnings, which had been considerable, in Chicago real estate, and had in 1867 and 1868 had large balances in the Union National Bank there. Of the money appellee received

ed from Evans, Dr. Laurence, in 1870, borrowed \$7,000, giving his obligation therefor, which was probably invested there. In this obligation he provides for payment to her in case she survives him; if not, the obligation to be void. This transaction was never disclosed by either of them during his life, except inferentially by him that she had helped him. She purchased a piece of property in Chicago, and conveyed to him two-thirds of it, which they held as tenants in common. Notwithstanding these intimate relations and the evidence of the witnesses who testify to admissions of the deceased, is the evidence sufficient to establish the fact that they consented to be husband and wife, and that they assumed the marriage status? There is nowhere in this record any evidence that, during the quarter of a century the appellee lived with the deceased, she ever claimed to be his wife. Neither by word nor act, during this period, either in his presence or in his absence, did she claim to be his wife. She occupied the position of a servant or housekeeper, not as a wife. While she was on terms of intimacy with him, she did not occupy, or assume to occupy, the position of a wife. Although he had ample means, no servant was ever employed, except when she was unable to do the work. She did it, and, while she ate with him when others were not present, she usually waited upon the table, in the garb of a servant. His associates were with white people; hers, with colored people. He did not escort her or accompany her as a husband. She did not demand it, or seem to expect it. Some of the evidence shows she complained of not receiving enough wages. She took in washing to earn money. She was known generally and called by the name of "Mrs. Evans," to which she did not object. So far as all the relatives, friends, and associates of Dr. Laurence could observe, he always treated her as a housekeeper, never as a wife. He introduced her to them as his housekeeper, "Mrs. Evans." This course of conduct continued through a period of more than 20 years, in New Orleans and Chicago, and long after there were any prudential reasons for this course, the deceased having ceased his practice as a dentist several years before his death.

The obligation given her by Dr. Laurence was made after the alleged marriage; yet the obligation is made payable to "Maria Evans," when, by its terms, it was not payable to her until his death. There could be no prudential reason why she should have accepted this paper payable to her by the name of "Evans," instead of "Laurence." In 1880 property was conveyed to appellee by the name of "Maria Evans," upon which she executed a trust deed by such name. In the same year she executed a deed by the name of "Maria Evans," to the deceased, in which she recites that she is unmarried. After the death of Dr. Laurence, appellee, by the name

of Maria Evans, filed her claim against his estate. As a reason for this, she states that she thought that the name was as good as any.

It would be useless to extend the consideration of the evidence further. The evidence falls short of establishing the necessary elements of a common-law marriage,—that of consent and the assumption of the marriage status. The great weight of the evidence shows that neither of the parties assumed such relation towards the other.

Error is assigned by appellants upon the refusal of the court to admit in evidence defendant's letters, Exhibits 1, 2, 3, and 4. These letters purport to have been written during the month of October, 1873. They were signed by the deceased, and were in his handwriting, and were inclosed in envelopes directed in his handwriting to "Mrs. Maria Evans," 16 Dauphine St., New Orleans. Each envelope bore a postage stamp, and was postmarked "Chicago, Ill.," during that month. The letters and envelopes were in the possession of William J. Laurence, who took possession of all the papers of the deceased. It was error to exclude these letters. They were admissible as parts of the *res gestæ*, to show how the deceased regarded the appellee; and it was not essential to prove that the letters were received by her, before admitting them.

For the errors herein indicated, the cause is reversed, and remanded to the superior court of Cook county, for trial in conformity with the views expressed in this opinion. Reversed and remanded.

(164 Ill. 515)

**PEOPLE ex rel. KOCHERSPERGER,
County Collector, v. EGGERS.**

(Supreme Court of Illinois. Jan. 19, 1897.)

**ASSESSMENT BY LOTS — CONFIRMATION — TIME OF
RAISING OBJECTION.**

An objection that land assessed by lots for a public improvement had never been laid out in lots may be taken in proceedings to obtain a judgment of sale after confirmation of the assessment, since in such case the confirmation is void.

Appeal from Cook county court; O. N. Carter, Judge.

Proceeding by D. H. Kochersperger, county collector, against John C. Eggers, to enforce an assessment. From an order of the county court refusing to enter a judgment for sale of defendant's land, the collector appeals. Affirmed.

J. D. Adair, for appellant. Walther & Langhen, for appellee.

CARTWRIGHT, J. The county collector of Cook county applied to the county court for a judgment for the sale of lots 25 to 48, both inclusive, in the subdivision of a certain block of land in Chicago. These lots had been assessed \$12.50 each in the name of ap-

pellee, for laying a water-supply pipe, under an ordinance of the city of Chicago. The assessment had been confirmed, and the lots returned as delinquent. Appellee appeared, and objected to the entry of an order of sale, because no such lots were shown of record or otherwise. It was proved, and it is conceded, that at the time of making the assessment, and when the assessment roll was confirmed, block 4 was a tract of land containing between 5 and 6 acres, which had not been subdivided into lots, and that as a matter of fact there were no lots in said block. The application for judgment against the supposed lots, which it was conceded had no existence, was denied. It is admitted that the objection sustained would have been a good one if made upon the application for confirmation, but it is claimed that it was too late to make it in this proceeding for a judgment of sale. If the judgment of confirmation was not void, but merely erroneous, this would be true, and the only remedy for such a judgment would be by appeal or writ of error. But, if the judgment of confirmation was void, it could be resisted at any time or place, and as well upon an application for a judgment of sale as elsewhere. *Culver v. People*, 161 Ill. 89, 43 N. E. 812. A proceeding of this character is against the land, and the subject-matter of the judgment must be capable of identification, or the judgment will be void. Where it is not possible to tell what land was assessed, or against what land the judgment of confirmation was entered, the assessment and judgment will be void. *People v. Chicago & A. R. Co.*, 96 Ill. 369; *People v. Dragstran*, 100 Ill. 286; *Sanford v. People*, 102 Ill. 374; *Pickering v. Lomax*, 120 Ill. 289, 11 N. E. 175. Appellee owned block 4, but there was no plat or subdivision from which it was possible to locate any part of the block as the part intended to be described as all or any one of the supposed lots. No lot represented any particular part of the block, and none could be located or identified. The judgment of sale, if entered, would have been a nullity. It is suggested that on this account appellee had no standing in court to object to the entry of judgment; but, as was said in *People v. Dragstran*, supra, the collector could base no claim on that ground to have the judgment reversed. It would be no ground for reversal, since he was not prejudiced by the refusal of the county court to enter a void judgment which could never be enforced. It is also said that appellee's remedy should be by bill in chancery to restrain the collection of the assessment upon the ground that the judgment or sale might be a cloud upon his title to block 4. As appellant was not injured in any way by the refusal to enter a void judgment, that question would be immaterial in this case; but in *Sanford v. People*, supra, where judgment was rendered against the appellant's lot, and there was no plat made or recorded, al-

though the judgment could not affect her title, her objection was sustained, and the judgment was reversed, because a sale might operate to embarrass her title. The judgment of the county court will be affirmed. Affirmed.

(164 Ill. 485)

DE GRAFF et al. v. WENT.

(Supreme Court of Illinois. Jan. 19, 1897.)

ALIENS—ABILITY TO HOLD LAND.

The alien law (Act June 16, 1887), § 1, prohibits aliens from taking lands by devise or otherwise, except that heirs who had acquired title might hold and sell the land within three years. Section 3 provides that a resident alien, who has declared his intention to become a citizen, may take and hold real estate, and during six years dispose of it as a citizen, provided he records a certified copy of his declaration in the recorder's office. In 1891 a proviso was added to section 3, that, where a deed to land is made to an alien, he may convey to a citizen a good title, if the deed is executed before proceedings by the state to seize the land; and any deed "heretofore made" by any such alien shall have the same force against land so conveyed to an alien as if it had been made to a citizen. *Held*, that such proviso only applies to the class of aliens in section 3 of the act of 1887.

Appeal from circuit court, Cook county; M. F. Tuley, Judge.

Bill by P. S. De Graff and others against Sarah Went for partition of certain land. From a judgment dismissing the bill, complainants appeal. Affirmed.

Flower, Smith & Musgrave and Cratty Bros., Gray & MacLaren, for appellants. J. Warren Pease, for appellee.

PHILLIPS, J. William Went, a naturalized citizen of the United States, died, testate, August 10, 1892, seised of certain real estate and personal property within this state, which by his will, dated March 16, 1892, was devised to his wife, Sarah Louis (née Went), in trust for his surviving sisters and their lawful descendants. That will was duly probated in Cook county, and his wife renounced to take under the will, and elected to take under the law. The surviving sisters of William Went were Susannah Went, Jane Holland, Elizabeth Yarnold, and Frances Barnes, who were and are subjects of Great Britain, residing in the United Kingdom. A bill for partition was filed by appellants, from which it appeared that Susannah Went, by her deed of date December 12, 1894, conveyed her interest in said real estate to the appellant De Graff; and said Jane Holland and Frances Barnes, by their separate deeds of date, respectively, November 5, 1894, and October 29, 1894, conveyed their several interests to the appellant Manning. Appellants are now, and have always been, citizens of the United States.

On hearing, the bill was dismissed for want of equity, and complainants appeal. Their contention is that, by virtue of the amendment of 1891 to the "Alien Law," said surviving sisters acquired power, under the

said will of William Went, to convey a good title to their respective interests to citizens of the United States, provided such conveyance was made before proceedings instituted by the state to escheat the property; and, said surviving sisters having so conveyed their respective interests to appellants, citizens of the United States, appellants thereby acquired a good title thereto. This contention involves the construction of the act of 1887 and the amendatory act of 1891, in reference to aliens. By the legislation prior to 1887, aliens could hold or convey, inherit or transmit, by descent or devise, the title to real estate, equally with citizens. By the act of 1887, the right was restricted. The first section of that act provides "that a non-resident alien * * * shall not be capable of acquiring title to, or taking or holding any land or real estate in this state by descent, devise, purchase or otherwise," except (then follow certain exceptions as to heirs or aliens who held title prior to the passage of the act, and certain other exceptions having no bearing upon the case). Section 2 relates to personal property of aliens entirely. Section 3 provides "that an alien resident of the United States, who has declared or shall declare his intention of becoming a citizen of the United States in accordance with the naturalization laws thereof, shall thereupon be authorized and enabled to take and hold lands and real estate of any kind whatsoever to him, and his heirs and assigns, forever, and may during six years thereafter sell, assign, mortgage, devise, and dispose of the same in any manner as he might or could do if he were a natural-born citizen of the United States; provided, that he shall at the time of acquiring such lands cause to be recorded, in the office of the recorder of deeds in the county wherein such lands lie, a certified copy of his declaration of intention to become such citizen." The amendment of 1891 was added to section 3, and is as follows: "Provided, that in all cases where any deed to any land in this state has been or shall be made to any alien, such alien shall have power to convey to a citizen of the United States a good title thereto, or encumber the same in favor of a citizen, and a judgment or decree against such alien shall be a lien on such land, if such deed, encumbrance, judgment or decree shall be made, executed or entered before any legal proceedings are taken to seize said land in behalf of the state of Illinois, and any deed or encumbrance heretofore made by any such alien—shall have the same force and effect against any land so conveyed or to be conveyed to any alien, as if such deed, or encumbrance, had been made by a citizen of the United States." Section 4: "If any alien who has declared his intention of becoming a citizen shall not become a naturalized citizen of the United States within six years after the declaration of his intention, and be living, shall not have sold said real estate to pur-

chasers thereof for value, and in good faith, such real estate acquired by him under the authority of this act, shall revert to, escheat, and become the property of the state of Illinois." The other sections of the act relate to the manner of enforcing escheats.

This alien law of 1887 has been before this court in *Wunderle v. Wunderle*, 144 Ill. 40, 33 N. E. 195; *Schultze v. Schultze*, 144 Ill. 290, 33 N. E. 201; *Schaefer v. Wunderle*, 154 Ill. 557, 39 N. E. 623; *Beavan v. Went*, 155 Ill. 592, 41 N. E. 91; *Ryan v. Egan*, 156 Ill. 224, 40 N. E. 827. In *Wunderle v. Wunderle* this act was held constitutional, and it was further held that the act provided that non-resident aliens should not be capable of acquiring title to or holding real estate, and this language of the act could not be construed as permitting nonresident aliens to hold a defensible title, subject to be diverted only by forfeiture in favor of the state. It was also declared in that opinion that, under article 6 of the federal constitution, provisions in regard to the transfer, devise, or inheritance of property were proper subjects for regulation by the treaty-making power of the United States; and while, at common law, the title to real property must be vested and passed according to the *lex rei sitae*, yet, where there is a treaty between the United States and a foreign power, such a treaty would control or suspend the statutes of a state which were in conflict therewith. *Schaefer v. Wunderle* was an application for leave to file a bill of review in *Wunderle v. Wunderle*. In *Schultze v. Schultze* it was held that where a citizen of the United States died intestate, leaving heirs resident of and citizens of Bremen, who would be his heirs but for their alienage, by reason of section 7 of the treaty between the United States and Bremen, concluded in 1827, such heirs could inherit and would take a fee determinable by the nonexercise of the power of sale within three years, such as provided for by that treaty, and may maintain a proceeding for partition. In *Ryan v. Egan* it was held that nonresident alien devisees could not take lands in Illinois under the will of naturalized citizens. In *Beavan v. Went* the will in the case at bar was before this court, on a bill for partition, filed by Beavan, claiming that he and Sarah Went, widow, were tenants in common of this real estate, as the two sisters and their descendants referred to were nonresident aliens, and incapable of taking real estate under the act of 1887; that his grandmother was a sister of the deceased Went; and that she and his own father and mother were nonresident aliens, he himself being a naturalized citizen. This court held that as Beavan must trace his heirship to the deceased through nonresident aliens, who, if living, could not have inherited, he (Beavan) could not succeed to the estate as next of kin; that an alien is not regarded as having sufficient inheritable blood to transmit the inheritance through col-

lateral heirs who are citizens. These are the only cases under which the act of 1887 has been before this court, and in none of them was the amendment of 1891 under consideration. From these cases we have declared the rule to be that an alien cannot inherit, take by devise, nor is possessed of inheritable blood to transmit to a citizen, except where, by treaty, the statute is suspended as to the citizen of the country with which the treaty is made. "The rule of construction as to a proviso requires a strict interpretation. A proviso in a statute is to be strictly construed. It takes no case out of the enacting clause which is not fairly within the terms of the proviso. * * * The office of a proviso generally is either to except something from the enacting clause, to qualify or restrain its generality, or to exclude some possible ground of misinterpretation of its extending to cases not intended to be brought within its purview." *Potter's Dwar. St.* 118. "A proviso is something ingrafted upon a preceding enactment, generally introduced by the word 'provided.' It is commonly, in the absence of any contrary indication, construed to affect merely the one paragraph to which it is attached." *Bish. Wr. Law*, § 57. In *Rawls v. Doe*, 23 Ala. 240, the court says: "In this aspect of the case, the first question is whether the proviso which is found in the first section of the act of 1843 applies to the whole act, or is to be confined to the section to which it is attached. As the natural and appropriate office of a proviso is to restrain or qualify some preceding matter, we think, upon sound principles of construction, it should be confined to what precedes, unless it is clear that it was intended to apply to subsequent matter. In the present case, we can perceive no good reason why the limitation of the proviso should be extended to the second section. On the contrary, the effect of such an application would be to give to that section a partially retroactive operation, which, although it is allowed, is not a construction favored by courts,"—thus showing that, in the opinion of the court in that case, a proviso may apply to a section to which it is not annexed, if a good reason appears why it should. "In *Savings Inst. v. Makin*, 23 Me. 360, it was held in the case, which led to a great and able discussion, that a saving clause in a statute, in the form of a proviso, restricting, in certain cases, the operation of the general language of the enacting clause, was not void, though the proviso be repugnant to the general language of the enacting clause. The true principle, undoubtedly, is that the sound interpretation and meaning of the statute, on a view of the enacting clause, and proviso, taken and construed together, is to prevail. If the principal object of the act can be accomplished and stand, under the restriction of the saving clause or proviso, the same is not to be held void for repugnancy." 1 Kent, Comm. (13th Ed.) 463, note b. A proviso is to be construed as affecting

the paragraph to which it is annexed. *Spring v. Collector of Olney*, 78 Ill. 107. The principle of construction requires the sound interpretation and meaning of the statute, taking into consideration the enacting clause, the saving clause, and proviso, together with the title of the act in this state. Under the constitution, the title of the act must express the subject-matter. *People v. Gaultier*, 149 Ill. 39, 36 N. E. 576. The act of 1891, by its title, and by the first section thereof, only purports to amend section 3 of the act of 1887, and the only amendment to that section is by the addition of the second proviso. The first section of the act of 1887 was intended to, and did, prohibit aliens from acquiring title to or taking and holding lands by purchase, devise, descent, or otherwise, except that the heirs of aliens who had theretofore acquired title to lands could take and hold title and sell the same within a period of three years. Section 3 had reference to another class of aliens, who, by its provisions, could acquire title to lands, and, within six years after acquiring such title, could sell, assign, mortgage, devise, and dispose of the same to the same extent that a natural-born citizen could do. That class of aliens to which that section referred were alien males, who had declared an intention to become citizens of the United States under its naturalization laws, and also females who in good faith became actual residents, etc., with a declaration of intention to become citizens. The alien male still remains an alien, and he only is a citizen when he has fully complied with the naturalization laws. With an alien female, her intention to become a citizen and an actual resident was by that section sufficient to make her a citizen. The additional proviso to section 3 by the act of 1891 is that, where any deed to any land in this state has been or shall be made to any alien, such alien shall have power to convey, etc. After the act of 1887, no deed could be made to any alien except one designated by section 3. To such, a deed could be made. The proviso made by the act of 1891 could, therefore, only apply to aliens male who had declared their intention of becoming citizens or aliens females who were actual and in good faith residents of the United States. This construction is in accordance with the title of the act, and its letter and spirit. By any other construction, the proviso to section 3 of the act of 1887 by the amendment of 1891 would render null and void section 1 of the act, which provides that a nonresident alien shall not be capable of acquiring title to or holding any lands or real estate. The sisters of the testator were nonresident aliens, and could not inherit, nor could they take by devise. They could therefore convey nothing by their deed. The appellants, claiming under such deeds, have no title, and the bill was properly dismissed. The decree of the circuit court of Cook county is affirmed. Affirmed.

(164 Ill. 458)

**HOME INS. CO. OF NEW YORK v.
MENDENHALL.**

(Supreme Court of Illinois. Jan. 19, 1897.)

**INSURANCE—INSURABLE INTEREST—DISCLOSURE OF
TITLE TO INSURER'S AGENT—QUESTIONS OF
FACT—VACANT BUILDING—FRAUD.**

1. To constitute an insurable interest in realty, the title of the assured need not be one in fee. It is enough if he holds such a relation to the property that its destruction by the peril insured against involves pecuniary loss to him. 64 Ill. App. 30, affirmed.

2. Where one holding an insurable interest in realty fully discloses his title to the agent of the insurer when the insurance is written, his right to recover for a loss under the policy is not barred by the fact that the agent has inserted therein a title different from that stated.

3. It is a question of fact whether a building, at the time of a loss under a policy of insurance, was "vacant and unoccupied," within the meaning of a provision invalidating the policy if the building became vacant or unoccupied without the consent of the insurer.

4. Where the assured has sworn to a proof of loss which contains a statement that he had title to the property in fee simple, when in fact he had only an insurable interest as an heir expectant, it is a question of fact whether the statement was made with fraudulent intent. 64 Ill. App. 30, affirmed.

Appeal from appellate court, Third district.

Action by J. A. Mendenhall against the Home Insurance Company of New York on a fire insurance policy. From an affirmance of a judgment in favor of plaintiff (64 Ill. App. 30), defendant appeals. Affirmed.

This is a suit on an insurance policy, brought by J. A. Mendenhall against the Home Insurance Company of New York. On the 27th day of October, 1889, J. A. Mendenhall procured from W. S. Rearick, the agent of the Home Insurance Company at Ashland, Ill., a policy of insurance on two dwelling houses and certain household goods situated near Pleasant Plains, in Sangamon county, Ill., aggregating in amount some \$5,300. The agent of the company wrote up the policy on the ordinary blanks in use by his company, filling in the blank spaces with the data supplied by Mendenhall. As is usual in such policies, the conditions of the insurance were printed on the face and back of the instrument. Among these conditions were the following: "(1) * * * If the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied without notice to and consent of the company in writing, * * * or if the interest of the assured in the property, whether as owner, trustee, consignee, factor, agent, mortgagee, lessee, or otherwise, be not truly stated in this policy, * * * then and in every such case this policy shall be void. * * * (4) If the interest of the assured in the property be any other than the entire, unconditional, and sole ownership of the property, for the use and benefit of the assured, or if the buildings stand on leased ground, it must be so represented to the company, and so expressed in the written part of the policy; otherwise

the policy shall be void. * * * (9) * * *

All fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy. * * * And it being hereby understood and agreed by and between this company and the assured that this policy is made and accepted in reference to the foregoing terms and conditions, and to the class of hazards and memoranda printed on the back of this policy, which are hereby declared to be a part of this contract, and are to be used and resorted to in order to determine the rights and obligations of the parties hereto in all cases not herein otherwise specifically provided for in writing." On the night of March 5, 1894, the buildings described in this policy were destroyed by fire. Appellant having refused payment under the policy, this suit was begun in the circuit court of Sangamon county. To the declaration, which is in the usual form, the defendant pleaded the general issue, and five special pleas. The first of these alleged that the building was vacant and unoccupied, contrary to the terms of the policy. The second set up a clause in the policy whereby a forfeiture was declared in case the interest of the assured was not truly set out in the policy. The third set up a clause declaring a forfeiture in case the interest of the assured was other than that of unconditional and sole ownership. The fourth set up a clause forfeiting the policy in case of fraud or false swearing, and alleging that the plaintiff swore falsely in making proofs of loss on the occasion of a previous fire, by which another building included in the policy had been destroyed. And the fifth was a formal plea of set-off, under which the defendant proposed to recover back the money paid to plaintiff on the former loss, because of the alleged false swearing in making the proofs, as averred in the fourth plea. Replications were filed, and the issues were submitted to the court, a jury being waived. It appears from the evidence: That the plaintiff was, at the time he made the application, in possession and control of the property. That he then resided upon an adjacent tract of land, which had also been placed in his possession and control by his father, who held the legal title. The father, desiring that the plaintiff should have as much land as his brother, had bought the property in question at a master's sale a few days before the application was made; and, though he had not then received a deed from the master, he caused the plaintiff to be then possessed. That possession continued thereafter, it being the understanding between the father and the plaintiff that the latter was to have the property. The father so provided in his will, which was made, as the evidence tends to show, previous to this application. It was the understanding between the father and the appellee that this land, as well as the other tracts, was to be the appellee's, and he

had full control of the same, and treated it as though he had the absolute title thereto. The facts as to his interests were stated to the agent through whom the insurance was effected, and he was not misled as to the condition of the title. Appellee had entire possession, with the exclusive use and enjoyment, and a reasonable expectation of becoming the owner in fee. The building burned was occupied by a tenant whose term was to expire on March 1st, and appellee had rented it to another tenant, who was ready to enter. The old tenant held over until Friday afternoon, March 2d. The next day the new tenant went into the house, and did some cleaning; and on Monday he placed some of his furniture in the house, put up a stove, and made a fire therein, but, by reason of rain, did not complete his move that day. That night the fire occurred. In the trial before the circuit court, 10 propositions of law were submitted by appellant, some of which were held, and some refused. The court found the issues for plaintiff, and rendered judgment for \$1,500. On appeal to the appellate court this judgment was affirmed, and from that judgment this appeal is prosecuted to this court.

Patton, Hamilton & Patton, for appellant.
Connolly, Mather & Snigg, for appellee.

PHILLIPS, J. (after stating the facts). Three propositions are presented and argued by appellant, urging the reversal of the judgment of the appellate court: (1) That appellee had no insurable interest in the property burned at the time the policy was issued; (2) that the premises were vacant, within the meaning of the clause in the policy relating thereto, at the time they were destroyed; (3) that appellee, in making proofs of loss as to a fire which occurred about four years previous, falsely swore that he was the owner in fee of the premises, wherefore, under the policy, he is barred of recovering in this case. All these propositions are ably argued by counsel for appellant, and any one of them, if sustained, would defeat a recovery under this policy.

At the time of the issuance of the policy herein, the 80 acres of land on which these buildings were located had been purchased by the father of appellee at a master in chancery sale in partition; but the 20 days provided by our statute to intervene between the filing of the master's report and the confirmation thereof had not elapsed, so that no deed had been issued. The presumption, however, is that the father of appellee had complied with the usual decree entered in such cases, and paid to the master a part or the whole of the purchase money, as the decree might provide, and at the expiration of 20 days, if no exceptions were filed to the report, he would receive a deed from the master. Meanwhile, if the buildings burned, the loss would fall on him. His title, it is true, at the time was one in expectancy, but, under

certain conditions, was sure to ripen into one absolute. Where the title of one is such, though not in fee, that he would suffer a loss or damage by the destruction of the premises, he may protect his interest, whatever may be the nature of it, by insurance, and thus it follows that an insurable interest is not always a fee-simple title. It appears from the evidence in this case that the father bought the land for appellee, and so at once informed him. He placed appellee in possession, so that he received the rents and profits, and at once informed him that he had made a will devising these premises to him. Appellee took possession as an heir expectant, and paid taxes, and exercised all acts of ownership over the land. The father had two sons. The other son, by the will, was devised 240 acres, and this 80 was intended by the father to make both sons equal, so that appellee had a reasonable expectancy of inheriting and becoming the owner in fee. In Wood, Ins. § 266, it is said: "It is not necessary that the insured should have either a legal or equitable interest, or indeed any property interest, in the subject-matter insured. It is enough if he holds such a relation to the property that its destruction by the peril insured against involves pecuniary loss to him, or those for whom he acts. It need not be an existing *jus in re*, nor *jus ad rem*." Again, in section 268, the same author says: "The interest need not be vested. It is sufficient if it exists at the time of the insurance and loss, though contingent, and liable never to attach or be perfected by occupancy or possession," and, quoting from a leading case, he adds that: "The contract of insurance is applicable to protect men against uncertain events which may in any wise be of disadvantage to them,—not only those persons to whom positive loss may arise by such events occasioning the deprivation of that which they may possess, but those, also, who, in consequence of such events, may have intercepted from them advantage or profit which but for such events they would acquire, according to the ordinary and probable course of things." In the language of Mr. Justice Gray in the case of *Eastern R. Co. v. Relief Fire Ins. Co.*, 98 Mass. 423: "By the law of insurance, any person has an insurable interest in property by the existence of which he receives a benefit, or by the destruction of which he will suffer a loss, whether he has any title in, or lien upon, or possession of the property itself." May on Insurance says that: "While the earlier cases show a disposition to restrict it [insurable interest] to a clear, substantial, vested, pecuniary interest, and to deny its applicability to a mere expectancy without any vested right, the tendency of modern decisions is to relax the stringency of the earlier cases, and to admit to the protection of the contract whatever act, event, or property bears such a relation to the person seeking insurance that it can be

said with a reasonable degree of probability to have a bearing upon his prospective pecuniary condition. It sometimes exists where there is not any present property,—any *jus in re* or *jus ad rem*. Yet such a connection must be established between the subject-matter insured and the party in whose behalf the insurance has been effected as may be sufficient for the purpose of deducing the existence of a loss to him from the occurrence of an injury to it." *May, Ins.* (2d Ed.) pp. 82, 76. In *McLaren v. Insurance Co.*, 5 N. Y. 151, property was sold at foreclosure sale; and it was held that the purchaser instantly acquired an insurable interest therein, although no deed had been executed, and that the subsequent execution of the deed had relation back to the time of purchase. In the case of *Insurance Co. v. Miers*, 5 Sneed, 139, it was held that where a person bid off real estate at execution sale, although no deed had been executed, or money paid thereon, he acquired an insurable interest in the property. "Generally, persons charged, either specially, by law, custom, or contract, with the duty of caring for and protecting property in behalf of others, or having a right so to protect such property, though not bound thereto by law, or who will receive benefit from the continued existence of the property, whether they have or have not any title to, estate in, or lien upon, or possession of it, have an insurable interest. That the person may suffer loss is a sufficient foundation for his claim to an insurable interest." *May, Ins.* (2d Ed.) pp. 87, 80. A person having a direct pecuniary interest in the property destroyed, so as to be damaged by its destruction, has an insurable interest. *Insurance Co. v. Wagner* (Pa. Sup.) 7 Atl. 103. The assured need not be an owner, if he be so circumstanced with respect to the property that he will derive some pecuniary benefit from the safety of the thing, or its continued existence, and injury from its destruction. *Murdock v. Insurance Co.* (W. Va.) 10 S. E. 778. An interest, to be insurable, does not depend, necessarily, upon the ownership of the property. It may be a special or limited interest, disconnected from any title, lien, or possession. If the holder of an interest in property will suffer loss by its destruction, he may indemnify himself therefrom by a contract of insurance. If by a loss the holder of the interest is deprived of the possession, enjoyment, or profit of the property, or a security or lien resting thereon, or other certain benefits growing out of or depending upon it, he has an insurable interest. *Insurance Co. v. Hyman* (Neb.) 52 N. W. 402 (citing cases); *Phil. Ins.* §§ 175, 342, 346; and *Fland. Ins.* p. 342.

We are referred in this case, by counsel for appellant, to a number of authorities which, it is urged, hold the rule to be other than as above stated. We are not inclined to adopt a rule different from that stated. Especially is this true in view of the fact

that the agent of the insurance company was fully informed of the condition of the title, and the extent of the interest of the insured, at the time the policy was issued. At the time the insurance was taken out and the policy issued, it clearly appears that the local agent of the appellant company was fully informed as to the condition of appellee's title; that appellee was in possession, paying taxes, and receiving the rents and profits, and, from the knowledge and information given him by his father as to the contents of the will, expected to be the owner of the fee. Of these facts, and of the extent of appellee's title, the agent of appellant was fully informed. This court has said in *Insurance Co. v. Hart*, 149 Ill. 513, 36 N. E. 990: "The cases are not uniform throughout the country in respect of when notice to or knowledge of the agent, or representations by him, will bind the company. In this state, however, the decisions are uniform that notice to the agent, at the time of the application for the insurance, of facts material to the risk, is notice to the insurer, and will prevent it from insisting upon a forfeiture for causes within the knowledge of the agent." In *Insurance Co. v. Stocks*, 149 Ill. 319, 36 N. E. 403, where the insured did not have a fee-simple title to the premises insured, but it appeared that in the application it was described as a title in fee simple, though the insured was not informed regarding the meaning of such term, and the agent was fully informed as to the nature and extent of the title of the insured, this court said: "If, when the assured applies to an agent, he discloses the source and nature of his title, and the agent undertakes, or is permitted by the assured, to fill out the application, and, instead of writing the title as given and disclosed, may insert in lieu thereof conclusions of his own, the insurance company may be permitted to insist that the words of the agent, and not of the assured, are warranties, rendering the policy void, the door will be opened to the perpetration of unlimited fraud,—especially so upon that large class of property owners who are unfamiliar with the methods of business pursued by insurance companies." "This rule generally declared by text writers has been almost uniformly adhered to by the courts of this state, and it is now recognized by the courts generally as the correct rule." In the case here presented, appellee did not have a title in fee, but he had such an interest that pecuniary loss would have resulted to him in case of destruction of the premises by fire. The interest he had, such as it was, was fully disclosed to the agent of appellant. Appellant cannot now insist upon a forfeiture for the reason that the title of appellee was not as conditioned in the policy, when the full condition of this title was known to the insurer, through its agent. In *Insurance Co. v. Shimer*, 96 Ill. 580, this court held that, even though the property

destroyed by fire was at the time used for a purpose different from that stated by insured in his application, yet if the agent of the company, when receiving the application and granting the policy, had full knowledge of the manner and purposes for which the property was used at the time of the application, the action would not be barred. In substance, notice to the agent of such condition was held to be notice to the company. We hold: There was an insurable interest in appellee. That his title need not be one in fee. It is enough if he holds such a relation to the property that its destruction by the peril insured against involves pecuniary loss to him. It need not be an existing *jus in re*, or *jus ad rem*. And if his interest was fully disclosed to the agent of the company and he has suffered a loss, his action is not barred because the agent inserted a different title from that stated.

It is also urged by appellant, as reason why there should be no recovery under this policy, that the premises were vacant, within the meaning of the clause of the policy in relation thereto, and which is as follows: "Or if the above-mentioned premises shall be occupied or used so as to increase the risk, or become vacant or unoccupied, without notice to or consent of this company in writing, or the risk shall be increased by the erection or occupation of neighboring buildings, or by any means whatever within the control of the assured, without the assent of this company indorsed thereon, * * * then and in every such case this policy shall be void." The house in this case was rented by a tenant whose term was to expire March 1st. Appellee had already rented it for the new year to Douglass, who was waiting to go in so soon as the old tenant vacated. The old tenant kept possession, and his things in it, until Friday evening, March 2d. Meanwhile appellee had sued him for the rent, and the suit was for trial Monday, March 5th. The tenant was not on good terms with appellee, and therefore did not tell him when he would give up the house, and so appellee kept sending Douglass, the new tenant, over to see when it would be vacated; and not until Saturday morning did they find the house vacant, and the key left on the window sill. The tenant had left the premises in bad order, and the new tenant took possession Saturday morning, and cleaned out the house preparatory to moving in his family Monday from Ashland, some five miles distant. Monday the new tenant, with the aid of appellee, moved one load of the tenant's effects into the house, consisting of a stove and some household goods, and would have had his family in also, had it not rained. The tenant made a small fire in the stove, to dry it off, and then went to attend the trial of the appellee against the former tenant, as his witness. He intended bringing his family to the house the next day, the 6th, but that night (the 5th), about

11 o'clock, the place was totally consumed by fire. The old tenant still had some goods in the smokehouse, a few steps from the house, and some trifling articles still in the house when the fire occurred. Under these circumstances, the question was one of fact as to whether the premises were vacant. "What is meant by the term 'vacant and unoccupied,' in a policy of insurance, is a question of law; but whether the building was at the time of the loss vacant and unoccupied, within the meaning of the policy, is a question of fact." *Insurance Co. v. Storig*, 137 Ill. 646, 24 N. E. 674; *Insurance Co. v. Tucker*, 92 Ill. 64; *Assurance Co. v. Mason*, 5 Ill. App. 141. In this case the appellate court have found, as a question of fact, that the premises were not vacant. Such finding precludes any further discussion of the question by this court.

The point thirdly and lastly urged in the brief of appellant is that the plaintiff, in making proofs of loss as to a fire which occurred more than four years before that which caused the present loss, falsely swore that the building then destroyed belonged to him in fee simple, and therefore, under a provision of the policy that "all fraud or attempt at fraud, by false swearing or otherwise, shall cause a forfeiture of all claim on this company under this policy," the plaintiff was barred of recovery. This question also is one solely of fact, and has been settled adversely to appellant. The appellate court, in its opinion, says: "It appears that the proofs of loss upon which this defense is predicated were prepared by the adjuster, who knew the condition of the title; and the evidence strongly tends to show that the plaintiff, although he signed and swore to the document, which was very lengthy, did not know that it contained the statement in question. Admitting that the plaintiff was negligent in not reading and fully comprehending all that was in the proof of loss before he signed it, still there is no reason to believe that he intended or attempted to commit fraud upon the company. Nor was any such fraud committed." This is conclusive of this question. In our view of the case, the judgment of the circuit court could not have been different from that entered, and there was no error in refusing or modifying the propositions of law complained of. The judgment of the appellate court is affirmed. Affirmed.

(164 Ill. 533)

PEOPLE ex rel. HORAN v. BAIRD et al.

(Supreme Court of Illinois. Jan. 19, 1897.)

NOMINATION TO LEGISLATURE — STATE OFFICE — REVIEWING BOARD.

A candidate for election to the legislature from the First senatorial district, which is wholly within the city of Chicago, and is less than a county, is not a candidate for a state office, within the clause of Hurd's Rev. St. p. 734, § 10, which provides that objections to nomina-

tions for state offices shall be heard before the secretary of state, the auditor, and the attorney general; but a contest over his nomination is governed by a succeeding clause, providing that, in cities having a board of election commissioners, such questions shall be finally determined by such board.

Petition by John J. Horan for a writ of mandamus to Frederick S. Baird and others. Denied.

Pinney B. Smith, for appellant. W. W. Wheelock, for appellees.

PER CURIAM. This was a petition for mandamus to compel the election commissioners of the city of Chicago to place the name of the relator, John J. Horan, upon the official ballot, to be voted for as a candidate for the legislature in the First senatorial district, which is situated wholly within the city of Chicago. The relator was nominated by a Republican convention in the First senatorial district, as a candidate for member of the general assembly, and filed his nomination papers with the secretary of state. The defendants William G. Laub and Charles A. Wathier were also nominated by a Republican convention in the district for the same office, and filed their nomination papers with the secretary of state. Each of the contending parties also filed nomination papers with the county clerk of Cook county. The state board of review, consisting of the secretary of state, auditor, and attorney general, decided that the relator, John J. Horan, was properly nominated, and entitled to have his name on the official ballot. The election commissioners of the city of Chicago, upon a hearing of the claims of the respective candidates, decided and determined that Laub and Wathier were the regular nominees of the Republican convention of the district, and determined that their names should be placed on the official ballot, and refused to place the name of relator on the official ballot.

The question, and the only question, which we are called upon to determine from the record before us, is whether, under the statute, the state board is the proper tribunal to determine who was the regular nominee of the Republican party of the First senatorial district, or whether the election commissioners of the city of Chicago are the proper tribunal to determine the controversy. Section 7 of the Australian ballot law, passed in June, 1891 (Hurd's Rev. St. p. 734), provides: "Certificates of nomination and nomination papers for the nomination of candidates for offices to be filled by the electors of the entire state, or any division or district greater than a county, shall be filed with the secretary of state. * * * All other certificates for the nomination of candidates shall be filed with the county clerk of the respective counties; * * * provided that certificates of nomination and nomination papers for the nomination of candidates for the offices in cities, villages and incorporated towns, and for town offices in counties under township organization, shall be filed with the clerks of the towns, cities,

villages and incorporated towns. * * *

Section 10 of the statute is as follows: "The certificates of nomination and nomination papers being so filed, and being in apparent conformity with the provisions of this act, shall be deemed to be valid, unless objection thereto is duly made in writing. Such objections or other questions arising in relation thereto in the case of nomination of state officers shall be considered by the secretary of state, and the auditor and attorney general, and the decision of the majority of these officers shall be final. Such objections or questions arising in the case of nominations for officers to be elected by the voters of a division less than a state and greater than a county, shall be considered by the county judges of the counties embraced in such division, and the decision of a majority of these officers shall be final. Such objections or questions arising in the case of nominations of candidates for county offices, shall be considered by the county judge, county clerk, and state's attorney for such county, and the decision of the majority of said officers shall be final. Objections or questions arising in the case of nominations of city, town or village officers shall be considered by the mayor or president of the board of trustees, and the city, town or village clerk, with whom one alderman or trustee thereof, as the case may be, chosen by lot shall act, and the decision of a majority of such officers shall be final. Such objections arising in the case of nominations of town officers shall be considered by the board of auditors of such town, and the decision of a majority of such auditors shall be final. In any case where such objection is made, notice shall forthwith be given to the candidates affected thereby, addressed to their places of residence as given in the nomination papers and stating the time and place when and where such objections will be considered; provided, that in cities, towns or villages having a board of election commissioners such questions shall be considered by such board and its decision shall be final." It will be observed that the first clause of section 10 provides that questions in relation to the nomination of state officers shall be considered by the secretary of state, auditor, and attorney general; and it is claimed by the relator that a member of the legislature is used in the statute, and as the secretary of state, auditor, and attorney general are elected in the First senatorial district. It is true that members of the legislature enact laws for the entire state, and, in a general sense, might be regarded as state officers; but they are severally elected in districts by the votes of districts, and not by the electors of the entire state, and we do not regard them as "state officers," in the sense that term is used in the section of the act. We think the term "state officers," as used in the statute, was intended to embrace those officers of the state who are elected on a general ticket by the electors of the entire state, and those alone.

If, then, a member of the legislature is not to be regarded as a "state officer," as that term is used in the statute, and as the secretary of state, auditor, and attorney general are only authorized to pass upon contested nominees of state offices, it follows that the decision made by that tribunal in regard to the relator's nomination was a nullity. The First senatorial district is situated wholly within the city of Chicago, and it is less than a county. By section 7, supra, the nomination papers for the district were required to be filed with the county clerk. The first part of the section requires nomination papers, where the office is to be filled by the electors of the entire state, or district greater than a county, to be filed with the secretary of the state; and the next clause provides that all other certificates shall be filed with the county clerks of the respective counties. This clause includes the senatorial district in question. Why should the papers be filed with the county clerk if they were to be passed upon by the secretary of state, auditor, and attorney general? Upon an examination of section 10 of the statute (and it is the only section of the statute relied upon by relator), it will be seen that it makes no provision whatever for the settlement of a contest over a nomination in a district like the First senatorial district, until you come to the proviso at the foot of the section, which declares: "Provided, that in cities, towns or villages having a board of election commissioners such questions shall be considered by such board and its decision shall be final." Such question refers to a contest over a nomination like the one in question; and we think that the proviso was intended to confer the authority to act in a case like the First senatorial district on the board of election commissioners. Where a senatorial district is composed of one county or less than a county, and the election commissioners act has not been adopted in such county or part of a county, it is difficult to determine from the statute in question what tribunal is empowered to settle a contested nomination; but that fact has no bearing on the question involved here. The writ of mandamus will be denied.

(165 Ill. 56)

**PEORIA SAVINGS, LOAN & TRUST CO.
v. ELDER et al.**

(Supreme Court of Illinois. Jan. 19, 1897.)

**GUARANTY—RELEASE OF GUARANTOR—INTEREST—
PAYMENT—APPLICATION—EXECUTION—SATIS-
FACTION—CONSTRUCTION OF CONTRACT.**

1. The fact that the debtor gave the creditor security for the debt, payment of which was guaranteed, did not discharge the guarantor, where the security was also given expressly for his benefit. 65 Ill. App. 567, affirmed.

2. Where a payee takes judgment on a note given as security for other notes of the same maker, the latter notes became merged in the judgment; hence interest is to be thereafter computed on the judgment at the legal rate, and not on the notes at the rate which they bore. 65 Ill. App. 567, affirmed.

3. Where a payee took judgment on a note given as security for other notes of the same maker, the proceeds of an execution levied thereunder were applicable to the judgment, and not to the notes in the order of their maturity. 65 Ill. App. 567, affirmed.

4. The levy of execution on property of the debtor sufficient to pay the judgment—the property having subsequently been placed in the hands of a receiver appointed for the debtor—is not a satisfaction of the judgment. 65 Ill. App. 567, affirmed.

5. A guaranty of all notes of the prospective debtor discounted by the guarantee, which are presented to the guarantee "from time to time from date" of contract, does not cover a note discounted on the date of the contract.

6. Such a guaranty covers notes presented after the date of the contract, though the contract was not delivered until after their discount.

7. A guaranty reciting that the prospective debtor might, from time to time, present its notes to the guarantee, "to the extent of \$12,000," and guarantying payment of all notes so discounted, did not require, as a condition of the guarantor's liability, that the guarantee should discount notes to the full amount of the sum specified. 65 Ill. App. 567, affirmed.

8. A guaranty of payment of all notes of the prospective debtor discounted by the guarantee after the date of the contract covers notes subsequently discounted, and taken in payment of a pre-existing indebtedness of the debtor to the guarantee. 65 Ill. App. 567, reversed.

Appeal from appellate court, Second district.

Action by the Peoria Savings, Loan & Trust Company against Joseph Elder and others. From a judgment of the appellate court (65 Ill. App. 567) affirming the judgment of the trial court, plaintiff appeals, and defendant Elder assigns cross errors. Reversed.

Appellant prosecutes this appeal to reverse a judgment of affirmance in the appellate court. The action was assumpsit, upon the following instrument, against all the makers: "Peoria, Ill., January 17, 1893. To the Peoria Savings, Loan and Trust Company—Gentlemen: We make this request and guaranty to, viz.: That the Peoria Pump and Implement Co., of this city (incorporated), may from time to time, from date hereof until further notice, present to you its promissory notes and business paper for discount or advance, to the extent of \$12,000.00. In case that it shall do so, we request to discount such notes or said paper indorsed by them, or to make such advance to them, and in consideration of the terms, and one dollar to us in hand paid by you, the receipt of which is hereby acknowledged, we hereby guaranty the prompt payment at maturity of the principal and interest of all promissory notes and business paper or open account made or indorsed by said Peoria Pump and Implement Co., and discounted or advanced upon by you for said company; and we waive notice of the acceptance of this guaranty, and of any and all indebtedness at any time covered by same. Witness our hands and seals at Peoria, Illinois, this 17th day of January, 1893. G. G. Gelger. [Seal.] G. H. Wymond. [Seal.] E. T. Brawley. [Seal.] Joseph Elder. [Seal.]" The first and second counts of the declaration allege that, in consideration of said guaranty, plaintiff discounted and advanced money upon a note of

the pump company for \$2,000, dated January 27, 1893, payable March 26, 1893, with 7 per cent. interest from maturity, and another for \$2,000, dated February 14, 1893, payable 90 days after date, with 7 per cent. interest from maturity, both of which were made payable to the order of plaintiff. The third count alleges discounts and advances upon the following notes by the pump company, payable to the order of the plaintiff, to wit: One for \$500, dated January 17, 1893, due 30 days after date; one for \$1,572.76, dated January 18, 1893, due 30 days after date; one for \$2,000, dated January 23, 1893, due 90 days after date; one for \$2,000, dated January 27, 1893, payable March 21st after date; one for \$2,000, dated January 27, 1893, payable March 26th after date; and one for \$2,000, dated February 14, 1893, payable 90 days after date,—each bearing 7 per cent. interest from maturity. There was no service on the other defendants, and they did not appear. Appellees pleaded nonassumpsit, and certain special pleas. The trial was by the court, without a jury, and the finding for the plaintiff, its damages being assessed at \$1,661.67.

The evidence showed the execution of the several notes described in the third count of the declaration, and the payment of the money thereon, by way of discount or advancement, by the plaintiff. These are plain promissory notes, signed by G. H. Wymond, president of the Peoria Pump & Implement Company, payable to the Peoria Savings, Loan & Trust Company or order. On February 11th the pump company gave the bank a judgment note, for which the latter gave this receipt: "Peoria, Ill., Feb. 11, 1893. Received of the Peoria Pump and Implement Company one certain judgment note executed by the said company to the Peoria Savings, Loan and Trust Company, of Peoria, Illinois, for the sum of \$12,000, dated the 11th day of February, 1893, and payable one year after date, which note is given and is to be used as collateral security for the payment of any loans, advances, discounts, or other liability of the said Peoria Pump and Implement Company to the said Peoria Savings, Loan & Trust Co. now existing or hereafter to be incurred, as well as collateral security for the benefit of the signers of a certain instrument of guaranty to the said Peoria Savings, Loan & Trust Company dated the 17th day of January, 1893, signed by Joseph Elder, G. G. Geiger, G. H. Wymond, and E. T. Brawley, as guarantors; it being the understanding that the Peoria Savings, Loan & Trust Co. is to advance to the said Peoria Pump & Implement Company, from time to time, as long as they shall deem it safe to do so, moneys, to be used in the business, to the amount, if necessary, of \$12,000, including its present liability to said Peoria Savings, Loan & Trust Company. [Signed] Peoria Savings, Loan & Trust Company, Peoria, Ills. C. T. Heald, Cashier."

On the 23d of the same month, judgment by

confession was entered on said note for \$11,122.76; being the amount then due on the six promissory notes above described, and a Pittsburg draft for \$1,000, which the bank had theretofore discounted. Execution issued on this judgment, and was levied upon all the property belonging to the pump company. A suit in chancery was afterwards begun by another of the company's creditors to wind up its affairs, and for the appointment of a receiver. To that action these parties, the corporation and others, were duly served as defendants. A receiver was appointed, who, by order of the court, took possession of the assets levied upon under the bank's execution, and converted the same into money, which, after payment of costs, was turned over to the bank, subject to the rights of all parties interested. Deducting the Pittsburg draft, which had been paid, the amount due the bank on its judgment July 10, 1894, was found to be \$10,822.29. On that day the court ordered the receiver to pay the bank \$6,584.09, and also authorized it to retain \$320.79, balance of deposit in its hands to the credit of the pump company,—in all, \$6,904.88; leaving still due on its judgment, as determined by the court upon this trial, \$3,918.43. This balance, with 5 per cent. interest thereon, from April 10, 1894, to July 25, 1895, the date of the judgment, amounting to \$4,122.51, was found to be due from the pump company to the bank. The court, however, held the defendants, as guarantors, liable only upon three of the six notes included in the confessed judgment, namely, those of January 17th and 18th and of February 14th, for \$500, \$1,572.76, and \$2,000, respectively, amounting to \$4,072.76, and gave judgments against them for the proportionate part of the \$4,122.51 upon that basis, which was found to be the said sum of \$1,661.67. The three notes held not within the terms of the guaranty were those of January 23d and 27th, each for the sum of \$2,000, which were given for notes of the same amount held by the bank at the date of the guaranty, but not then due. The one of January 18, for \$1,572.76, included in the judgment, was given in payment of a note for that amount made by a third party, payable to the pump company, and by it discounted at the bank prior to the date of the guaranty. Plaintiff appealed, and, upon errors assigned upon the record, insisted in the appellate court that the court below erred in not holding the defendants liable for the whole amount remaining unpaid, \$4,122.51, and also insisted that, even if they were not so liable, the bank had the right to credit the amount paid it by the receiver and on deposit upon the notes of the pump company, in the order of their maturity, and, having done so, only the last two, being those described in the first and second counts of the declaration, remained unpaid, and therefore the defendants were at least liable as guarantors for the whole amount due on the \$2,000 note dated February 14, 1893. It made the further contention that interest should have been com-

puted on the amount found in its favor, at 7 per cent. as contracted for in the notes, instead of at the rate of 5 per cent. upon the judgment. The defendant Elder filed cross errors, upon which he contended that the trial court erred in holding him liable for any part of said indebtedness, because the bank had failed and refused to discount or to make advancements to the pump company to the full amount of \$12,000, and because the contract of guaranty was not in fact signed and returned to the bank until after each of the notes had been discounted. Also, that, by a proper construction of the contract sued upon, it did not guaranty the payment of either of the notes dated January 17th for \$500, and January 18th, for \$1,572.76. Further, that the \$2,000 note, dated February 14th, was not within the terms of the guaranty, because the giving of the note of February 11th, with power to confess judgment, amounted to a new arrangement between the pump company and the bank, working a release of all liability on the part of the defendants as guarantors; that the trial court erred in refusing the defendants leave to file an additional special plea during the progress of the trial; and, finally, that the levy of the execution on the confessed judgment upon the assets of the pump company sufficient to satisfy the same operated as a satisfaction of that judgment. The appellate court overruled each of these several alleged errors and cross errors, and affirmed the judgment of the circuit court. Appellant again appeals, and both parties question the correctness of that judgment.

Hammond & Wyeth, for appellant. Jack & Tichenor, for appellees.

WILKIN, J. (after stating the facts). Several of the questions raised may be briefly disposed of. The judgment note of February 11, 1893, did not release the defendants from their liability as guarantors. The receipt given for that note clearly recognized the continuation of that liability, by stating that it was given as collateral security both for the benefit of the bank and the signers of the contract of guaranty dated 17th of January. We agree with the appellate court that the several notes for which it was given as collateral were merged in the confessed judgment by the voluntary act of the bank, and therefore interest was properly computed upon the judgment; also, that the amount paid the bank by the receiver should have been credited on the amount found due it by the judgment, and not upon certain of the notes included in that judgment, as it claimed to have done.

The position of appellee Elder, that the levy of the execution operated as a satisfaction of that judgment, is clearly untenable. The property levied upon was taken from the sheriff, in the chancery proceeding to which he was a party, and, so far as the record shows, the order directing the assets of the company turned over to the re-

ceiver has been acquiesced in by him. The levy of an execution upon sufficient personal property to satisfy a judgment is never an absolute satisfaction of such judgment, but is only so sub modo. Of the plea which the court denied leave to file pending the trial, it need only be said that it presented no defense whatever to the action.

The remaining questions in controversy must be determined from the contract itself. In our opinion, that instrument is clear and unambiguous in its terms, and must therefore be interpreted and construed according to the language used; that is to say, the parties must be presumed to have meant that which their language clearly imports. It is not what one of the parties may have intended, but what is shown by the contract to have been the intention of both parties. *Williams v. Fletcher*, 129 Ill. 356, 21 N. E. 783. It is only when the language used is ambiguous or of doubtful meaning that the court may resort to construction, taking into consideration all the facts and circumstances surrounding the parties at the time the contract was entered into. The rule that the contract of a surety or guarantor must be strictly construed has no application to this case.

1. The undertaking to guaranty the payment of notes presented from time to time, after the date of the contract, is clearly expressed, and the fact that it was not signed and delivered until after certain of the notes had been discounted or advanced upon was of no consequence. The agreement is not a guaranty of the payment of the notes presented after the signing and delivery of the contract, but of such as should be presented "from time to time" after the date of January 17, 1893. *Abrams v. Pomeroy*, 13 Ill. 183.

2. There is nothing in the language employed indicating an intention that it was upon condition that advancements or discounts to the full amount of \$12,000 should be made, as contended by appellee. "To the extent of \$1,200" clearly expresses the intention that the guarantors shall be liable to that limit, and no further. It fixes the extent to which they would be bound, and in no sense is a condition qualifying their liability. This is the plain, well-understood meaning of the language used, and it cannot be changed, varied, or modified by parol evidence. *Abrams v. Pomeroy*, supra.

3. We think it equally clear that the obligation was only for the payment of notes presented subsequent to the date of the contract (January 17, 1893). "From time to time from date hereof" means "after date hereof." The date of the note is prima facie evidence of the time of its delivery, and, in the absence of proof to the contrary, the \$500 note bearing the same date as the contract must be held as having been presented on, and not after, that date. The date of an instrument is understood to be the day on which it is written,

and "from" or "after" that date clearly means some subsequent day. The question is not whether the note was, in point of time, made after the guaranty was written, but was it "presented" to the bank after the date of such guaranty?

4. Counsel for appellees insist that the defendants, though liable for promissory notes and business paper of the pump company presented after that date, and discounted or advanced upon by the bank, are not liable for any such note or notes if they were given in payment of pre-existing indebtedness; and the circuit and appellate courts seem to have sustained that position as to those given in payment of the company's own notes, but not as to the one for \$1,572.76 made by a third party to the pump company, and discounted for it by the bank. The appellant, on the other hand, insists that it was error to refuse judgment for the three \$2,000 notes,—one of January 23d, and two of January 27th. We are unable to see upon what reasoning it can be held that a liability existed upon the \$1,572.76 note, and not upon the other three, and we think that by the terms of the agreement the parties undertook to guaranty the payment of each of them. There is no dispute as to the fact that they were all presented for discount after January 17, 1893; that is, they were each presented to the bank for the purpose of obtaining the money upon them after that date. Whether that money was delivered directly to the pump company, or, by its direction, applied in payment of debts due from it to the bank, could by no fair interpretation of the contract make the slightest difference. Nothing whatever is said in the instrument as to the consideration or object for which notes shall be presented, or the purpose for which the money advanced or received upon them should be used by the company. If, upon their presentation, the bank had discounted them, and paid the money over its counter to the pump company, and that company had immediately paid the same money back in discharge of its indebtedness then due to the bank, it could scarcely have been contended that the guarantors were not liable by the terms of their guaranty. And yet the transaction, as it actually occurred, was in substance the same. The contention of the defendants seems to be that the three \$2,000 notes were mere renewals of notes held by the bank. If by this is meant that the old notes were kept alive, or that this action is in any sense for the purpose of compelling payment of the old notes, the facts do not support the contention. They were fully paid and discharged, and the liability of the parties fixed by the terms and conditions of the new notes made and "presented" to the bank, "from time to time," after the date of January 17, 1893, and this suit is to recover the amount of the new notes remaining unpaid. It is doubtless true, as contended by counsel for appellees, that the object of making the guaranty was to give

the pump company additional credit with the bank, and relieve it from financial embarrassment; but at least one of the necessities for that additional credit was its indebtedness, and we are unable to discover anything in the instrument itself, or in the oral testimony showing the condition and position of the parties, from which it can be said that its liability to the bank was not to be paid with money so obtained, as well as debts owing from it to other parties. It can scarcely be supposed that it was the intention that the bank would advance money from time to time with which to pay other obligations and liabilities, and at the same time leave its own debts wholly unprovided for. At least, there is no such qualification or limitation found in the contract of guaranty, and the court has no power to so construe it.

We do not deem it necessary to enter upon a consideration of the question as to what is regarded by bankers as discounts, but base our conclusion as to the liability of the defendants upon what we regard as the plain, unequivocal meaning of the words of the agreement. We think the circuit court erred in holding the defendants liable for the \$500 note of January 17, 1893, and also in holding them not liable for the amount of each of the three \$2,000 notes,—one dated January 23, and two January 27, 1893. Its judgment, and that of the appellate court, will accordingly be reversed, and the cause will be remanded to the circuit court, with directions to proceed according to the views herein expressed. Reversed and remanded.

(164 Ill. 211)

DINSMOOR v. BRESSLER.¹

(Supreme Court of Illinois. May 12, 1896.)

ATTORNEY FOR DECEDENT'S ESTATE — FAILURE TO TURN OVER COLLECTIONS — PROCEEDINGS IN COMPTENT—JUDGMENT—RES JUDICATA.

1.1 Starr & C. Ann. St. p. 226, §§ 81, 82, provide that if an administrator shall state on oath to a probate court that any person has in his possession goods or money "belonging to any deceased person," and that if such person, after hearing, refuses to turn over such money or property, "or in case the same has been converted, the proceeds or value thereof," the court may commit him to jail. *Held*, that the property "belonging to any deceased person" was not limited to such as had remained unchanged, and was in specie, but included property which came to the hands of the person to be charged before the death of the deceased person, and which was converted before or after such death.

2. An attorney for a decedent's estate, who has collected money on a claim due the estate while acting in the employ of the administrator, cannot be compelled by the probate court to turn over such collections under 1 Starr & C. Ann. St. p. 226, §§ 81, 82, providing for the commitment to jail of any person who refuses to surrender property belonging to a decedent after the administrator has on oath sworn before the probate court that such person has such property in his possession, the remedy being under Rev. St. c. 13, providing for suspension of attorneys, and (section 7) au-

¹ Rehearing denied November 16, 1896.

thorizing the issuance by the supreme court of a rule to show cause why the name of such attorney should not be stricken from the roll.

3. A judgment of the circuit court finding that an attorney had money belonging to a decedent's estate, and ordering him to pay it over, though affirmed on appeal to the appellate court, will not bar an appeal by the attorney from a subsequent judgment of the circuit court rendered after remand, and committing him to jail for failure to pay over the money.

Appeal from circuit court, Whiteside county; John D. Crabtree, Judge.

Statutory proceeding by Benjamin Bressler, as administrator of the estate of Abram Ulmer, deceased, to compel James Dinsmoor and another, who had been employed as attorneys for the estate, to turn over the proceeds of collections made by them in such capacity. A judgment requiring the attorneys to pay a certain sum to the administrator was affirmed on appeal to the appellate court, and an order was entered in the circuit court after remand from the appellate court (56 Ill. App. 207) committing one of the defendants to the county jail for failure to turn over the collections. From such order he appeals. Reversed.

On May 7, 1892, appellee, as administrator of the estate of Abram Ulmer, deceased, filed an affidavit in the county court, under section 81 of the administration act, charging that appellant and one Jarvis Dinsmoor, acting as attorneys for said estate, had collected \$1,030 belonging thereto, and retained and refused to pay over \$730 of said amount to appellee as administrator, although often requested so to do. Citation was issued ordering said attorneys to appear and show cause why they should not be compelled to pay the money so retained by them to appellee, or into court. On October 10, 1892, the county or probate court made an order dismissing the proceeding as to Jarvis Dinsmoor, and ordering appellant to pay \$1,030 to appellee, as administrator, within 10 days, and, in default of doing so, that execution therefor issued against him. Appellant took an appeal from said order to the circuit court, where the matter was tried *de novo*; and on June 5, 1893, the circuit court entered an order or judgment finding that appellant had \$700 in his hands belonging to said estate, and ordered him to pay that amount to appellee, as administrator, for the use of said estate, within 20 days, and, in default of such payment, that appellee have execution therefor. Appellant took an appeal from the judgment of the circuit court to the appellate court. The appellate court affirmed the judgment of the circuit court, except that portion of it awarding execution, and reversed it only as to so much of the judgment as awarded execution against appellant, as may be seen by reference to the opinion of the appellate court in *Dinsmoor v. Bressler*, 56 Ill. App. 207. On January 23, 1895, the remanding order of the appellate court was filed in the circuit court, and on February 4, 1895, the cause was redocketed.

On January 24, 1895, written notice was given to appellant of the filing of said remanding order, and written demand was made upon him for the payment of the \$700. On February 27, 1895, a motion for a rule on appellant to show cause was allowed. On February 29, 1895, an order was entered by the circuit court "that the said defendant be required to show cause by the first day of the next term of court why an attachment should not issue against him for a disobedience of the order of this court made in said case on the 5th day of June, 1893, requiring said defendant to pay the administrator the sum of \$700." Appellant filed an answer to this order. Upon motion of appellee, an attachment writ was issued against appellant. Appellant moved to quash the rule to show cause and the attachment writ, and filed an answer in support of his motion. Appellant's motion to quash was overruled by the circuit court, and that court, upon motion by appellee, entered the following order: "By order of said court, requisition having been duly made on January 24, 1895, upon said defendant, for the payment of said sum of money mentioned in the order of June 5, 1893, and said defendant having refused to pay said sum of money, it is ordered by the court that said defendant, James Dinsmoor, be committed to the county jail until he shall comply with said order," etc.; to the making of which order the defendant excepted. It is from this order that the present appeal is prosecuted.

Sections 81 and 82 of the act in regard to the administration of estates (1 Starr & C. Ann. St. p. 226), under which said affidavit was made, and by virtue of which said order of commitment was entered, are as follows:

"Sec. 81. If any executor or administrator, or other person interested in any estate, shall state upon oath, to any county court, that he believed that any person has in (his) possession, or has concealed or embezzled, any goods, chattels, moneys or effects, books of account, papers or any evidence of debt whatever, or titles to lands belonging to any deceased person; or that he believes that any person had any knowledge or information of or concerning any indebtedness or evidences of indebtedness, or property titles or effects, belonging to any deceased person, which knowledge or information is necessary to the recovery of the same, by suit or otherwise, by the executor or administrator, of which the executor or administrator is ignorant, and that such person refuses to give to the executor or administrator such knowledge or information, the court shall require such person to appear before it by citation, and may examine him on oath, and hear the testimony of such executor or administrator, and other evidence offered by either party, and make such order in the premises as the case may require.

"Sec. 82. If such person refuses to answer such proper interrogatories as may be pro-

pounded to him, or refuses to deliver up such property or effects, or in case the same has been converted, the proceeds or value thereof, upon a requisition being made for that purpose by an order of the said court, such court may commit such person to jail until he shall comply with the order of the court therein."

J. Dinsmoor, for appellant. V. S. Ferguson and J. G. Manahan, for appellee.

MAGRUDER, J. (after stating the facts). The contention of appellant is that the original affidavit filed in the county court under section 81 of the administration act charges appellant with having in his possession money belonging to the estate of the deceased intestate, and not money belonging to the deceased. It is said that section 81 only contemplates a case where the person charged has money or effects, which came into his hands during the lifetime of the deceased, and not a case where the person charged has received money or effects which came into his hands after the death of the deceased. The theory of counsel is that property spoken of in the statute as "belonging to any deceased person" means such property only as remains unchanged or in specie, and that has not been collected or administered. There is much force in this view. In *U. S. v. Walker*, 109 U. S. 258, 3 Sup. Ct. 277, the supreme court of the United States said: "The goods and chattels, personal estate, and property of the deceased are such only as remain unchanged and in specie. When a debt due the deceased is collected, or a chattel of his estate is sold, the money received becomes the property of the administrator, and he is accountable therefor to those beneficially interested in the estate. * * * When assets have been turned into money by an executor or administrator, and the money mingled with his own, the assets have ceased to exist as assets or estate of the decedent. * * * The authorities we have referred to all concur in the proposition that, where personal property of an estate under administration has been sold, or a debt collected, the proceeds are not property of the decedent, but are the individual property of the administrator." We are not prepared to adopt as strictly accurate the broad statement that money of an estate collected by the administrator thereof is the individual property of such administrator; but the statement of the above extract that money or property belonging to the deceased means such money or property as remains unchanged and in specie, is in harmony with the early decisions of this court, which construed section 90 of the statute of wills as it existed in 1845. Said section 90 was as follows: "If any executor or administrator or other person interested in any estate shall state upon oath to any court of probate, that he believes

that any person has in possession, or has concealed or embezzled any goods, chattels, moneys or effects, books of account, papers or any evidences of debt whatever, or titles to land, belonging to any deceased person, the court shall require such person to appear before it by citation, and may examine him on oath, touching the same, and if such person shall refuse to answer such proper interrogatories as may be propounded by the court, or person interested as aforesaid, or shall refuse to deliver up such property or effects as aforesaid, upon a requisition being made for that purpose by an order of the said court of probate, such court may commit such person to jail, until he shall comply with the order of the court therein." Rev. St. Ill. 1845, p. 556. Sections 81 and 82 of the administration act of April 1, 1872, and the amendment to section 81, passed on March 19, 1873, which are sections 81 and 82 as they now appear in the Revised Statutes, and as they are quoted in the statement preceding this opinion, were finally substituted for said original section 90 of the statute of wills. St. Ill. 1871-72 (Myer's Ed.) p. 383; 3 Gross' St. p. 457; Rev. St. 1874, pp. 118, 119.

In *Williams v. Conley*, 20 Ill. 643, where *Williams* was cited to appear before the probate court upon an affidavit made under said section 90, then in force, charging him with having money belonging to the deceased, who was his wife's father, and which money he supposed had been given to his wife by the deceased in his lifetime, we said: "There is no probability, nor do we presume, that the court found that *Williams* still had the money in his possession in specie, though it is undoubtedly true that he was indebted to the estate for the amount received by his wife of her father for safe-keeping. We think the statute quoted was not designed to afford the means of collecting debts due to estates, but for the purpose of obtaining the possession of money, books, papers, or property which remained in specie, and which was capable of being identified and pointed out. Unless *Williams* had the identical money in his possession which had been received by his wife, the court could not properly order him to pay it over to the administrator, nor would it be possible for him to comply with such order. The payment of other money to an equal amount would not be a compliance with the statute, nor of a proper order of the court made under the statute, any more than it would be to deliver one horse when he had received another. We think the court misconstrued the statute, and its judgment must be reversed, and the cause remanded." *Wade v. Pritchard*, 69 Ill. 279, was another case which arose under section 90 of the statute of wills. There, under an affidavit made under that section, a person having two notes belonging to an estate was ordered to surrender them to the administrator;

and we said, in relation to section 90: "The purpose of the enactment was to enable executors and administrators, and parties having an interest in the estate, to discover assets; and it was designed to afford a more speedy and less expensive mode than by detinue, trover, or replevin. The remedy was cumulative to those, and the only change it intended to introduce from an ordinary trial was to enable the court to compel the person charged with having the property to discover on oath whether he had property in his possession."

It will be noticed that by sections 81 and 82, as adopted in 1872 and amended in 1873, there was a provision not only for examining the party charged under oath, but also for hearing the testimony of the administrator or executor, "and other evidence offered by either party," and a provision to punish, not only for refusing to answer questions and for refusing to deliver up the property or effects, but also for refusing to deliver up "the proceeds or value thereof" in case the same had "been converted." When the statute required the party to deliver up the proceeds of property which had been converted, or the value of property which had been converted, it required something more than the delivery of property "which remained in specie, and which was capable of being identified and being pointed out." Sections 81 and 82 are, therefore, materially different from the old section 90. The words, "if such person refuses * * * to deliver up such property or effects, or in case the same has been converted, the proceeds or value thereof," as used in section 82, evidently refer back to the property mentioned in section 81 as "belonging to any deceased person." Hence it would seem to be plain that the statute refers only to property which came to the hands of the person charged before the death of the deceased person, and which was converted before or after such death. But in the case of *Blair v. Sennott*, 134 Ill. 78, 24 N. E. 969, which arose under the statute as it now exists, it appeared that Blair had acted as agent of the deceased, and made loans and taken securities for him in his lifetime, and, after the death of the deceased, had collected money "on account of such loans and from such securities," and upon affidavit made under section 81 was ordered to pay over the money to the administratrix; and we there said of section 81: "In our opinion, this does not mean merely goods, chattels, money, etc., placed in the hands of the party charged by the deceased in his lifetime, but we think it includes also goods, chattels, money, etc., which belong to the estate of the deceased, and which have come into the hands of the party charged since the death of the deceased. The language contemplates present ownership, and, since a dead man can own nothing, 'belonging to any deceased person' can only mean 'belonging to the estate of any deceased person,' * * *

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money of the principal in the hands of the agent is still the money of the principal, and the agent has no right to use it or pay it out for his own private purposes. While he has this money, he is not, technically, the creditor of his principal, but his trustee. * * * It is, in such case, therefore, always the legal presumption, that the money in the hands of the agent is the identical money that he received, and he will not be heard to allege his embezzlement or breach of trust to escape a liability arising from that presumption." It is to be noticed that in the *Blair Case*, although the money was collected upon the securities after the death of the deceased, yet the securities themselves were taken during his lifetime, and the party charged was the agent of the deceased in his lifetime, and obtained such securities as his agent before his death; and, because of his relation to the deceased as agent or trustee, the money in his hands was presumed to be the identical money which he received. Although the money collected in the *Blair Case* was collected after the death of the deceased, yet there is nothing to show that he collected it as the agent of the administratrix, or under an employment by the administratrix for that purpose, but rather by reason of his agency for the deceased while the latter was alive, and by reason of his possession of the securities acquired through that agency. The doctrine of that case should be limited to the facts thereof, and its language should be qualified so as to conform to such facts. In the case at bar the affidavit upon which the proceeding in the county court was commenced is as follows: "Benjamin Bressler, of said county, in state aforesaid, being first duly sworn, on oath says that he is the administrator with will annexed of the estate of said Abram Ulmer, deceased, duly appointed and commissioned as such by said court on the 6th day of March, 1890. Affiant says that on or about the 19th day of January, 1891, the circuit clerk of said Whiteside county, or the First National Bank of Morrison, paid to James Dinsmoor and Jarvis Dinsmoor, acting as attorneys for the estate of said Abram Ulmer, deceased, the sum of about ten hundred and thirty dollars, belonging to said estate; that out of that sum affiant is informed said Dinsmoors paid the sum of about \$300 on the award of Nancy Ulmer; that the remainder of said \$1,030, to wit, about \$730, said Dinsmoors retain in their possession and refuse to pay the same to this affiant as such administrator, although often requested so to do by affiant. And affiant therefore asks that said James Dinsmoor and Jarvis Dinsmoor be ordered by citation of this honorable court to appear within a short day, and show cause, if any they have, why they should not be compelled by this court to pay the said money so retained by them as aforesaid to this affiant as such administrator, or pay the same into this court for affiant." This

affidavit shows that nearly two years after the administrator was appointed, appellant and Jarvis Dinsmoor, acting as attorneys for the estate of the deceased, collected the money which they were subsequently ordered to pay over. Their collection of the money was not merely after the death of the deceased, as was the fact in the Blair Case, but they collected it while "acting as attorneys for the estate" of the deceased. There is no complaint in the affidavit that they did not have the right to collect the money. The complaint is that they retained it in their possession, and refused to pay it over. If they rightfully collected it while "acting as attorneys for the estate," they must have been employed for that purpose by the estate; that is to say, by its lawful representative, the administrator. They could not have been rightfully "acting as attorneys for the estate" in pursuance of any previous employment by the deceased in his lifetime, because the authority of an attorney to collect for a client is revoked by the death of the client, and he has no authority to proceed further without a new retainer by the personal representative of the client. *Turnan v. Lemke*, 84 Ill. 236. We think the affidavit shows upon its face that the money was collected by appellant while acting as attorney for the administrator of the estate. Moreover, the answer of appellant filed in support of his motion to quash the writ alleges that he collected the money as attorney for appellee as administrator, after a protracted litigation in the cause of Benjamin Bressler, administrator, against the First National Bank, in the circuit and appellate courts, conducted under contract with said administrator. The charge against appellant was in the nature of an attachment for contempt, and, where such is the case, the respondent ought to be permitted to purge himself by his answers. In *re Paschal*, 10 Wall. 483; *Buck v. Buck*, 60 Ill. 105.

The case at bar resolves itself into this: An administrator of an estate employs an attorney to bring suit against a bank. Suit is brought accordingly, and the money is collected by the attorney, who does not pay it over to the administrator. Can such administrator go into the probate court, and make an affidavit under said section 81, and secure a commitment of the attorney to jail by the summary process provided for in said sections 81 and 82? We think not. We are of the opinion that those sections were not designed for any such purpose. It is well settled that debts created after the death of the intestate or testator cannot be proved in the probate court. 1 Woerner, Adm'n, § 152, p. 348. For the same reason, and upon the same principle, a debt due from an attorney to the administrator of an estate, growing out of a contract between the two, and so created after the death of the intestate, cannot be collected in the probate

court through the machinery of the proceedings authorized by sections 81 and 82. The summary proceeding in the probate court to compel the production and delivery of property "is not the proper remedy * * * to try contested rights and title to property between the executor and others." 2 Woerner, Adm'n, § 325, p. 681. "Nor does the power conferred upon probate courts to subpoena and examine parties alleged to conceal or withhold property of the estate authorize such courts to try the title to the property in dispute." 1 Woerner, Adm'n, § 151, p. 347; Schouler, Ex'rs, § 270. If sections 81 and 82 could be used to settle contested rights to property as between executors and administrators on the one side and third persons on the other, they would operate as an infringement upon the constitutional right to trial by jury, as they contain no provision for a jury trial. *Howell v. Fry*, 19 Ohio St. 556; *Meinzer v. Bevington*, 42 Ohio St. 325; *Matter of Beebe*, 20 Hun, 462; *Ex parte Casey*, 71 Cal. 269, 12 Pac. 118; *Eans' Adm'r v. Eans*, 79 Mo. 53; *Gibson v. Cook*, 62 Md. 256. It is said that an attorney who refuses to pay over money collected by him for a client is guilty of embezzlement, and for this reason may be proceeded against under sections 81 and 82. This may be true where an attorney, who has acted for a deceased party in his lifetime, embezzles money in his own hands at the time of his client's death, or collected upon securities taken by him before his client's death. *Blair v. Sennot*, supra. But where an attorney has collected moneys under a contract of employment entered into with the administrator of an estate, he is to be proceeded against, not in the probate court, but by the methods pointed out for the punishment of faithless attorneys in other tribunals. Section 6 of the act of March 28, 1874, in relation to attorneys, being chapter 13 of the Revised Statutes, provided that any judge of a circuit court shall have power to suspend any attorney from practice in the court over which he presides. Section 7 of the same act provides that, where an attorney has collected money belonging to a client, and refuses to pay it over after demand and tender of reasonable fees and expenses, application may be made to the supreme court of the state for a rule upon him to show cause why his name should not be stricken from the roll. Section 79 of division 1 of the Criminal Code provides that, if any attorney at law shall refuse to pay over money collected by him, less his proper charges, on demand, etc., he shall be fined not exceeding double the amount retained by him, or confined in the county jail not exceeding one year, or both, and be removed from office, etc. 1 Starr & C. Ann. St. p. 777. Where an application is made to compel an attorney to pay money into the court in which the suit has been prosecuted as a result of which the money has been obtained, such application

is a quasi criminal proceeding, and, "if no dishonesty appears, the party will be left to his action." In *re Paschal*, *supra*.

Appellee claims that the judgment of the circuit court finding that appellant had the money, and ordering him to pay it, is *res judicata*, inasmuch as it has been affirmed by the appellate court, and no appeal was taken from the judgment of affirmance. But it is to be remembered that, after the remanding order from the appellate court was filed in the circuit court, a new judgment was rendered, committing the appellant to jail. The absence of authority in the court making the order for attachment may be shown in a proceeding for contempt. A party cannot be in contempt of court for disobeying an order which the court had no authority to make. *Leopold v. People*, 140 Ill. 552, 30 N. E. 343; *People v. Weigley*, 155 Ill. 491, 40 N. E. 300. There the affidavit made under section 81 is jurisdictional in its character, and, if the affidavit does not show a case which gives the court jurisdiction, the subsequent proceedings, including the judgment, are void, and may be attacked collaterally. For the reasons already stated, the affidavit was not sufficient, within the meaning of section 81, to authorize the proceedings based upon it. The judgment of the circuit court is accordingly reversed, and the cause is remanded to that court for further proceedings in accordance with the views herein expressed. Reversed and remanded.

(167 Mass. 474)

DICKINSON v. DICKINSON.

(Supreme Judicial Court of Massachusetts. Hampshire. Feb. 5, 1897.)

DIVORCE — JURISDICTION — SUFFICIENCY OF EVIDENCE.

1. A court of Indiana has jurisdiction to decree a divorce, where the marriage took place and the cause for divorce occurred in another state, only when the applicant has, in good faith obtained a domicile in Indiana.

2. The fact that a husband abandons the wife and goes into another state, and there applies for a divorce soon after he acquires the statutory residence, in connection with the facts that the marriage was a compulsory one, that the husband left shortly after it took place, and that he returned within two years after obtaining a decree, warrants a finding that he went into such other state to obtain a divorce.

Report from superior court, Hampshire county; Justin Dewey, Judge.

Libel by Julia A. Dickinson against Marshall D. Dickinson for divorce, in which there was a decree nisi for libellant. Submitted on report. Affirmed.

Henry C. Nash, Jr., and Stephen S. Taft, for libellant. Wm. G. Bassett and T. G. Spaulding, for libelee.

LATHROP, J. The only question which is raised by the report in this case is whether the judge who presided in the court below was justified by the evidence in entering a

decree for the libellant. This raises a question of law, for in divorce cases we have no authority to revise the findings of the judge who heard the case on matters of fact, if the evidence is sufficient to warrant the findings. *Smith v. Smith*, 167 Mass. 87, 45 N. E. 52. The libelee set up in his answer a divorce obtained by him, in the state of Indiana, from the libellant in the present case, in January, 1873, on proceedings begun by him in February, 1871. The judge found that this divorce was obtained by due and regular proceedings in the proper court in Indiana, and in accordance with the laws of that state; but that he went to Indiana for the purpose of obtaining it, for a cause which occurred here while the parties resided here, intending to return to this commonwealth to live, after it was obtained, and that he did so return, and has lived here ever since.

It is provided by Pub. St. c. 146, § 41, as follows: "A divorce decreed in another state or country according to the laws thereof, and by a court having jurisdiction of the cause and of both the parties, shall be valid and effectual in this commonwealth; but when an inhabitant of this commonwealth goes into another state or country to obtain a divorce for a cause which occurred here, while the parties resided here, or for a cause which would not authorize a divorce by the laws of this commonwealth, a divorce so obtained shall be of no force or effect in this commonwealth." Whether, if the libelee had acquired a domicile in Indiana at the time he filed his application for a divorce there, we should recognize his divorce as valid, under article 4, § 1, of the constitution of the United States, providing that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state," we find it unnecessary to decide. By the laws of Indiana, a divorce may be decreed, for certain causes stated, "on petition filed by any person who, at the time of the filing of such petition, shall have been a bona fide resident of the state one year previous to the filing of the same." The only ground upon which the courts of Indiana put their jurisdiction to decree a divorce, where the marriage has taken place and the cause for divorce has occurred in another state, is that the party applying for a divorce in Indiana had obtained, in good faith, a domicile there. *Tolen v. Tolen*, 2 Blackf. 407. See, also, *Wilcox v. Wilcox*, 10 Ind. 436; *Prettyman v. Prettyman*, 125 Ind. 149, 25 N. E. 179. So, too, in *Cheever v. Wilson*, 9 Wall. 108, 123, where a divorce obtained in Indiana by a woman against her husband was held to be valid, it was put upon the ground that the decree in Indiana was at least *prima facie* evidence, and that, giving the fullest effect to the adverse testimony as it appeared in the record, it only raised a suspicion that the animus manendi may have been wanting. In delivering the

opinion of the court, it was said by Mr. Justice Swayne: "The only question is as to the reality of her new residence and of the change of domicile." While the judge, in terms, has not said that the libelee did not acquire a domicile in Indiana, we are of opinion that this is fairly to be implied from the language used, taken in connection with the evidence. If the libelee did not acquire a domicile in Indiana, the court there had no jurisdiction, under the decisions last cited, to dissolve the marriage with the libellant, for a cause occurring here. See, also, *Sewall v. Sewall*, 122 Mass. 156; *Ross v. Ross*, 129 Mass. 243; *Burien v. Shannon*, 115 Mass. 438; *Cumming v. Belchertown*, 149 Mass. 223, 21 N. E. 435; *Winship v. Winship*, 16 N. J. Eq. 107. The case at bar is distinguishable from *Loker v. Gerald*, 157 Mass. 42, 31 N. E. 709, for the reason that it was there found that the husband did not leave the state to obtain a divorce in another state.

The main contention of the libelee is that the finding of the judge was not warranted by the evidence. It is true that the libelee testified that he did not leave the commonwealth to obtain a divorce, and that the idea did not occur to him until he had been in Indiana for some time; but there was evidence sufficient to justify the judge in not believing him, and in finding to the contrary. The evidence tended to show that both parties were domiciled in Amherst, in this commonwealth, at the time of the marriage, on September 15, 1868; that the marriage was a compulsory one, being made nine days after the libellant gave birth to a child of which the libelee was, as she contended, the father; that the parties never lived together as husband and wife after the marriage, except that he occupied the same room with her overnight three or four times during two weeks after the marriage; that he never did anything for her support; that he left Amherst about a year after the marriage, without saying anything to her about going away; that, after being in Ohio a few weeks, he went to Indiana. The precise date of his arrival there does not appear, but he testified that he went to Winchester in December, 1869, and stayed there about a year, and then went, in January or February, 1871, to Lebanon, where his complaint for divorce, as appears by the record, was filed on February 22, 1871. The divorce was granted on January 7, 1873, and in September, 1874, the libelee returned to Amherst, where he has since resided. Neither the complaint nor the order of notice by publication states the residence of the wife, although this was known to the libelee. It is further to be noticed that the evidence introduced in the case in Indiana to show one year's residence fixes no date of knowledge of the complainant's being in Winchester earlier than February 19, 1870. It often has been held by this court that the fact that a man who abandons his wife and goes into

another state, and there applies for a divorce soon after he is able to do so, warrants the inference that he goes there for that purpose. *Lyon v. Lyon*, 2 Gray, 367; *Chase v. Chase*, 6 Gray, 157, 162. In *Smith v. Smith*, 13 Gray, 209, the presumption arising from such a fact is said by Chief Justice Shaw to be "violent, if not conclusive." See, also, *Sewall v. Sewall*, 122 Mass. 156. In the case before us, not only does the early application for a divorce appear, but the other evidence which we have stated tends strongly to show that the judge was justified in his finding, and in entering a decree nisi for the libellant. Decree affirmed.

(56 Ohio St. 39)

FELIX v. GRIFFITHS.

(Supreme Court of Ohio. Feb. 2, 1897.)

COVENANT OF LEASE — DESTRUCTION OF LEASED PROPERTY — PAYMENT OF RENT — PROVISIONS OF LEASE.

1. At common law, where there is a covenant on the part of the lessee to pay rent for the term, and buildings on the demised premises are destroyed by fire, the tenant is not relieved from the payment of rent unless he has protected himself by a provision in the lease to that effect.

2. In giving construction to a provision of a statute, or a contract, which attempts to abrogate or modify a well-established rule of the common law, the scope of the provision should not be extended beyond the plain import of the words used, if reasonable effect can otherwise be given to it.

3. A lease for years, at a rental of \$1,500 per year, payable \$125 monthly in advance, contained the following clause: "It is agreed by and between the parties to this lease that in case any building now standing on said premises shall be destroyed or injured by the elements or other cause, so as to be unfit for occupancy, without any fault or neglect on the part of the second party, said second party shall not be liable to pay rent for said premises from and after the time the said second party shall have surrendered possession of said premises to said first party." After payment, during the term, of a month's rent, and before the expiration of the month, a fire occurred, without fault of the lessee, which so injured the buildings as to render them unfit for occupancy. Thereupon the tenant surrendered possession, and brought action to recover of the lessor a portion of the advance payment, claiming it as still unearned. Held, that the provision in the lease above quoted reserves no right to recover back any portion of a monthly installment of rent once paid, and that the action cannot be maintained.

(Syllabus by the Court.)

Error to circuit court, Cuyahoga county.

Action by Albert L. Griffiths against John F. Felix. Judgment for plaintiff, and defendant brings error. Reversed.

The defendant in error was plaintiff in the court of common pleas. His action was founded upon a petition, of which the following is a copy: "Plaintiff avers that on or about the 8th day of October, 1890, he entered into a written lease with the said defendant, whereby the said defendant leased to him a certain two-story frame building and barns, known as 'Nos. 393 and 395 Ontario Street,' in Cleveland, Ohio, and also the second story of the frame building known

as 'No. 391 Ontario Street,' in said city, for a term of seven years from and after October 9, 1890, at a rental of \$1,500 a year, payable \$125 per month, on the 9th day of each and every month, in advance; said lease being recorded in volume 15, page 141, Cuyahoga County Record of Leases. Said lease contained the following clause and agreement: 'It is agreed by and between the parties to this lease that in case any building now standing on said premises shall be destroyed or injured by the elements or other cause, so as to be unfit for occupancy, without any fault or neglect on the part of the second party, said second party shall not be liable to pay rent for said premises from and after the time said second party shall have surrendered possession of said premises to said first party.' Plaintiff avers that on the 9th day of January, 1893, he paid to said defendant the rent for the ensuing month, being the said sum of \$125; and that on the 13th day of January, 1893, said leased premises were, without any fault or neglect on his part, so destroyed and injured by fire as to be unfit for occupancy, and thereupon he quit and surrendered possession of the same to said defendant, and has not since occupied the same or any part thereof. Plaintiff says that, at the time of said destruction and surrender of possession of said premises, there was still unearned, of the \$125 which he had paid as rent in advance, the sum of \$112.63, which sum defendant refuses to pay, though oft requested. Wherefore, by reason of the premises, there is due to said plaintiff the sum of \$112.63, with interest from January 13, 1893, for which he prays judgment." Answer was filed, raising an issue; and, the cause coming on for trial, the plaintiff was called as a witness. Objection was interposed to any evidence being given, on the ground that the petition did not state facts sufficient to constitute a cause of action. The objection was overruled, and exception duly taken. The trial resulted in a judgment for plaintiff below, which was affirmed by the circuit court. To reverse these judgments, the present proceeding is brought.

Willson & David, for plaintiff in error.
Hessenmueller & Bemis, for defendant in error.

SPEAR, J. (after stating the facts). The question is as though there were a demurrer to the petition. This pleading asks to recover of the lessor a portion of a month's rent paid by the lessee upon a lease which provided for the payment of \$1,500 per year for the demised premises, payable \$125 per month, in advance, on the ground that the premises, having been destroyed by fire, and injured so as to be unfit for occupancy, had been surrendered by the lessee to the lessor, by virtue of the clause in the lease permitting surrender on account of fire. Do these allegations give a right of recovery?

The common-law rule is that where there is a covenant on the part of the lessee to pay rent for the term, and the buildings are destroyed by fire, the tenant is not relieved from the payment of rent unless he has protected himself by a provision in the lease to that effect; and, to show that this is the rule in Ohio, we need but cite *Linn v. Ross*, 10 Ohio, 412, where the principle is expressed in these words: "If a tenant agrees expressly, whether under seal or not, to pay rent, and makes no reservation on account of unavoidable accidents, he is bound to pay the rent for the whole term, notwithstanding the premises in the meantime are destroyed by fire." The rule, it is said, grew out of a custom founded upon the consideration that, as the destruction is usually by means of an accident for which neither lessor nor lessee is responsible, it is but equitable to divide the loss, and, as the lessor must lose the property, the lessee should lose the term, and the further reason that exemption from loss would tend to make the tenant less careful, and that the public, as well as landlords, is interested in the prevention of destruction of buildings by fire. But, whether the rule is believed to be well founded or ill founded, its existence is not open to question.

This being the rule governing the subject about which the parties were negotiating, the further inquiry is as to the effect of the provision of the lease abridging the lessee's liability, which is a virtual incorporation of section 4113, Rev. St.; and here we must keep in mind that where it is attempted to abrogate or modify a well-established rule of the common law by statute, or by a provision in a contract, the scope should not be extended beyond the plain import of the words used, where reasonable effect can be given to the amendment without such extension. That provision is that, in case any building should be destroyed or injured by the elements or other cause, so as to be unfit for occupancy, without any fault or neglect on the part of the lessee, he should not be liable to pay rent after a surrender of possession. It is thus shown that the parties had before them the subject of the lessee's liability in case of destruction of the buildings, and undertook to stipulate with reference to that contingency. They also had before them the fact that the lease required the lessee to pay each month's rent in advance, which would naturally suggest a condition in which there might be a destruction of the buildings after the payment, and before the expiration of the month. In this situation, they selected the terms in which the exemption from liability should be couched, and, in distinct language, limited that exemption to exoneration of the lessee from payment after the surrender; leaving, as it seems to us, a plain inference that, where paid before the surrender, the ordinary rule would apply. The proposition now is that

the court should add to this expressed exemption additional words, which the parties did not see fit to place in the contract, giving a cause of action to recover back a portion of the rent paid. It is the old story of a party asking a court to do for him that which he had the opportunity to do for himself, but failed to improve it. This lessee was in a position where, if it had been at the time of the making of the contract agreed that he might reserve a right to recover money that had been paid, suitable words, looking to that end, might have been incorporated in the lease. He did not so protect himself as to advance payments, but was content to stop short of it. How can a court, acting reasonably, now help him? It is the court's province to enforce contracts, not to make them. There are two parties to the contention. How can the court say that, if further exemption from liability had been demanded, it would have been acceded to by the lessor? Surely, we cannot; and the latter has a right to stand on the contract as it was made, and not be required to accept a contract which the lessee now wishes he had obtained.

As to the monthly installments, the contract is entire; and we think that where an installment was once paid, in conformity with the terms of the contract, it became the money of the lessor absolutely, and was not subject to be recovered back at the election of the lessee.

The precise question has not heretofore been before this court, and but little light is thrown upon it by consulting adjudications of other courts. Attention has been called to several cases in Massachusetts, which counsel of each party insists sustain his position. We incline to think their tendency is in support of the judgments below, but we are not content to follow them. Our conclusion is that in the construction of this lease the courts below were in error, and this leads to a reversal of the judgments, and to judgment for plaintiff in error.

(55 Ohio St. 596)

EWAN v. BROOKS-WATERFIELD CO.

(Supreme Court of Ohio. Jan. 26, 1897.)

NOTE—PAYABLE TO MAKER—INDORSEMENT NECESSARY—BLANK INDORSEMENT OF THIRD PERSON—CONSIDERATION—PAROL EVIDENCE.

1. The indorsement of the maker's name on the back of a promissory note payable to his order, and its delivery in that form to another for value, are essential parts of the execution of the note, which then becomes, in legal effect, payable to the holder or bearer; but the maker does not thereby become an indorser in the legal sense of the term, nor contract any liability but that of a maker.

2. The undertaking of a third person who places his name in blank on the back of such a note before or at the time it is so delivered by the maker rests upon the consideration which supports the note in the hands of the holder, and prima facie is that of a surety of the maker for the payment of the note; and

he will be held accordingly, unless he can show a different understanding or agreement between the parties, which it is competent for him to do.

(Syllabus by the Court.)

Error to superior court of Cincinnati.

The original action was brought by Emma V. Ewan against George W. Cox and the Brooks-Waterfield Company, in the superior court of Cincinnati, in which she filed the following petition:

"The defendants, George W. Cox and the Brooks-Waterfield Company, which is a corporation under the laws of the state of Kentucky, are indebted to plaintiff on a promissory note, of which the following is a copy, with all the credits and indorsements thereon:

"\$3,500. Cincinnati, O., Jan. 25, 1889. On or before May 1st, 1889, after date, I promise to pay to the order of myself thirty-five hundred dollars, at the office of the Globe Tobacco Warehouse. Value received, with interest from date until paid; interest payable every 30 days. Geo. W. Cox."

"On the back thereof:

"Geo. W. Cox. The Brooks-Waterfield Co., L. H. Brooks, President.

"\$700.00. May 17th, 1889. Received on the within note the sum of seven hundred dollars.

"\$500.00. Sept. 17th, 1889. Received on the within note five hundred dollars.

"\$300.00. Dec. 21st, 1889. Received three hundred dollars on the within note."

"Plaintiff says that the name of the Brooks-Waterfield Company was so signed on the back of said note at the time of its execution by said George W. Cox, and said note was delivered to her at the date thereof by said George W. Cox, for a valuable consideration; the name of the Brooks-Waterfield Company then being thereon. There is due plaintiff from defendants on such note the sum of twenty-one hundred and sixty-one and twenty-five hundredths dollars, with interest thereon from the 21st day of December, 1889, for which she prays judgment."

Judgment was rendered against Cox on default, leaving the action to proceed against the company, which answered as follows: "Now comes the defendant the Brooks-Waterfield Company, and, for answer to the petition, admits that it is a corporation under the laws of the state of Kentucky; but it denies that it was a joint maker with George W. Cox of the note set forth in the petition, and alleges that it distinctly assumed the position of indorser upon said note. It denies that its name was upon the back of said note at the time of its execution by said Cox. It does not know the correctness of the statements of said petition as to indorsements on said note, and denies the same for want of knowledge, and denies all other allegations in the petition not herein expressly admitted. This defendant denies that it received any notice of the maturity and nonpayment of said note. Wherefore this defendant prays

to be hence dismissed, with its costs in this behalf expended." A reply was filed, which avers that the company was a joint maker of the note, and denies it assumed the position of indorser.

On the trial of the issues, the plaintiff put in evidence the note, with the indorsements thereon, which are correctly copied in the petition, and testified in her own behalf to the following facts, namely: That she purchased and received the note from Cox on the day of its date, and either paid him its face value in money, or received it for that amount in payment of a previous note then held by her against Cox, which had been given for money she had loaned him; that the name of the Brooks-Waterfield Company was indorsed on the back of the note when she received it; and that she had no conversation with any representative of the company, nor with Cox, concerning the company's signature, or the agreement under which it was placed on the back of the note; and, further, that the credit of \$500 indorsed on the note, as shown by the petition, was paid by the check of the company, made payable to her. The plaintiff gave no further evidence. The defendant offered none, but moved for judgment in its favor upon the plaintiff's evidence; whereupon, as the record shows, the cause was reserved to the general term for decision on the motion, where the motion was sustained, and judgment rendered for the defendant. To reverse that judgment the case is brought here on error. Reversed.

Richards & Richards, Thomas McDougal, and Willis M. Kemper, for plaintiff in error. Ramsey, Maxwell & Ramsey, for defendant in error.

WILLIAMS, C. J. (after stating the facts). The allegation of the answer, that the Brooks-Waterfield Company, by signing its name on the back of the note, assumed the position of an indorser, is an admission of the due execution of the note, and of the genuineness of the company's signature thereon; but the nature of the obligation the company thus contracted must be determined from the facts attending the transaction, which, as shown by the record, are substantially that the name of the company was signed on the back of the note when it was delivered to the plaintiff, and it was purchased and received by her from the maker on the day of its date, without information of any agreement concerning the company's obligation, other than that derived from the note itself. The note, being payable to the order of the maker, was incomplete in its execution until indorsed by him, and delivered to another for value; and it was so indorsed when received by the plaintiff, who paid to the maker its full value. The execution of the note being thus completed, it then, for the first time, became a valid obligation, and, in legal effect, was payable to the plaintiff or bearer. At

that time it bore the signature of the company written on its back. There is here no room for any inference that the note had been previously transferred by the maker to the company, and thereafter indorsed by it, in order to transfer the title. If the company had thus become the indorsee, the note, in due course of business, could only have found its way back into the hands of the maker upon its surrender on payment or other satisfactory discharge; and its indorsement by the company on such surrender would be so entirely out of the usual course of business as to raise a presumption against it. The note being found in the hands of Cox on the day of its date, with the company's name indorsed upon it, is inconsistent with the theory that it had been indorsed and transferred to the company as the owner of the note, or that it had been taken up by payment. A more reasonable inference would be, that the note was then in the maker's hands, with authority from the company to negotiate it for his accommodation. "If a holder produce a note having a blank indorsement of one not the payee, the presumption is that it was made at the inception of the instrument." *Good v. Martin*, 95 U. S. 90. So that, upon presentation of this note to the plaintiff, she was authorized to deal with it as belonging to Cox, with the signature of the company indorsed thereon at the time of its execution, in order to give it credit, and aid in its negotiation; she not having been informed of any different agreement or understanding between the parties.

Precisely what is the nature of the legal obligation contracted by a stranger who indorses his name in blank on the back of a negotiable promissory note before or at the time it takes effect is a question upon which the courts have widely differed; some holding that his obligation is that of a second indorser; others have held him liable as a guarantor; and still others as a maker with the rights of a surety. The rule established in this state is that, when the name of such third party appears upon the note at the time it takes effect, his undertaking rests upon the consideration which supports the note; and the presumption is he intended to be liable as a surety for its payment, and is held accordingly, unless he can show that there was a different agreement or understanding between the parties, which it is competent for him to do. *Bright v. Carpenter*, 9 Ohio, 139; *Champion v. Griffith*, 13 Ohio, 228; *Robinson v. Abell*, 17 Ohio, 38; *Seymour v. Leyman*, 10 Ohio St. 284; *Seymour v. Mickey*, 15 Ohio St. 515; *Castle v. Rickly*, 44 Ohio St. 490, 9 N. E. 136. And it is said in *Rand. Com. Paper*, § 831, that "the view which finds most support is probably that which holds the indorsement of a negotiable note by a stranger before or at the time of this delivery to the payee to be *prima facie* an original undertaking as

joint maker, with an implied liability as such to the payee and all holders for value." The present case must be governed by this rule, unless it is rendered inapplicable by the fact that the note in suit is payable to the order of the maker, and his name appears indorsed thereon above that of the defendant in error. There are cases in which that distinction is made. *Bigelow v. Colton*, 13 Gray, 309; *Dubois v. Mason*, 127 Mass. 37; *Bank v. Payne*, 111 Mo. 291, 20 S. W. 41; *Bank v. Nordgren*, 157 Ill. 663, 42 N. E. 148. These decisions are placed upon the grounds that the liability of the parties whose names appear on the back of a negotiable note is conclusively determined by the position of the signatures with reference to those of the other parties when the note takes effect, and that, as a note payable to the maker's order cannot take effect until indorsed by him, a third person, in placing his name on the back of the note previous to its indorsement by the maker, intends to become liable only as a second indorser. He understands that to be the nature of his liability, it is said, and a different intention or agreement cannot be shown by parol proof. In one of the cases (*Bank v. Nordgren*, supra) the reason of the decision is stated as follows: "Inasmuch as the note can never have validity until the name of the payee appears upon it as an indorser, the person writing his name in blank upon the note understands that, when the note takes effect, his name will appear upon it as a second indorser; and it is reasonable to conclude that such was the position which he intended to occupy."

The real foundation on which these decisions appear to rest is that the maker, by placing his name on the back of the note to give it effect, becomes the first indorser, and the third person who places his signature on it, though done before that of the maker is indorsed on it, contracts the obligation of a second indorser. It is undoubtedly true that such a note is without any validity so long as it remains in the hands of the maker, and its indorsement and transfer by him to a holder for value is necessary to give it obligatory effect. But it is equally true that by indorsing his name on the back of the note, and delivering it in that form to the holder, the maker does not become an indorser, in the commercial acceptance of that term. He is, nevertheless, the maker of the note, his signature on its back being an essential part of its execution, and his liability is that of a maker only. He does not thereby enter into the contract of an indorser, which is to pay the note if the maker, upon demand, fail to do so at maturity, and due notice thereof be given. It would be a useless ceremony, if not a palpable absurdity, to require the holder to make demand of the maker, and give him notice of his own default in order to charge him with the payment of the note. He is liable as a maker, without demand and notice, and sustains no other legal relation to

the paper, which, it must be presumed, is within the knowledge of third persons who place their names on the note while in the maker's hands. It is no less true that such third person, whose name appears on the back of a note of that kind before or at the time its execution is completed by the indorsement of the maker's name thereon, is not an indorser, in the proper and legal sense of the term. There is a popular sense in which the term is used, that is sufficiently comprehensive to include any person who lends his name in any form to another on commercial paper. But courts do not use it in that sense. In its well-understood legal and commercial meaning, the indorsement of a note in blank amounts to a contract on the part of the indorser, with and in favor of the indorsee and every subsequent holder to whom the note is transferred, that the indorser had a good title to the instrument at the time of its indorsement, and was competent to transfer that title, which he undertook to do by the indorsement and delivery of the instrument to his indorsee; so that, to give rise to the contract and relation of an indorser, it is necessary that he should have been the payee or indorsee of the paper. *Beckwith v. Angell*, 6 Conn. 317; *Story, Prom. Notes*, § 135. Hence neither the indorsement of the maker's name on the back of a note payable to his order to complete its execution, nor that of a third person in blank before or at the time of its execution and delivery, constitutes a regular indorsement of commercial paper, nor creates the contract arising from a regular indorsement in blank, the terms of which are distinctly defined by law, and are therefore not subject to be varied by parol. The indorsement of the third person in such case belongs to that class known as irregular or anomalous indorsements, whose obligation depends upon the agreement of the parties; and, being ambiguous in that respect, parol evidence becomes admissible to show the terms of the agreement as actually made by the parties, or other facts showing their intention at the time.

The assumption that the stranger who places his name in blank on the back of a negotiable note, payable to the order of the maker, intends to contract as a second indorser, is based upon the consideration that he knows the note cannot become effectual without the indorsement thereon of the maker's name. But he must also know the latter does not become the first indorser, nor contract the liability of an indorser at all, and that his own signature placed on the note before or at the time of its delivery creates no such contract; and, since he does not thereby contract the liability of a regular indorser, the presumption that he did not intend to do so would be quite as reasonable and legitimate as that he intended to do what he knew his act would not accomplish. It is not doubted that such third person may, by proper stipulation, prescribe the extent

of the liability he intends to incur by his indorsement, and make it that of a second indorser, or whatever else he chooses; but, in the absence of such stipulation, the nature of his undertaking, like that of other irregular indorsers, must be determined from the circumstances of the case. That neither the order in which the names appear on the back of the paper, nor the order in point of time in which they were placed there, is conclusive of the relation of the parties to the paper, or to each other, or the liability incurred where the paper is for the accommodation of the maker, was held in the early case of *Douglas v. Waddle*, 1 Ohio, 413, and in the late case of *Castle v. Rickly*, 44 Ohio St. 490, 9 N. E. 136. In the first case, a note drawn by Barnes, payable to the order of Waddle, was indorsed by Waddle, and afterwards by Douglas, and then discounted for the maker's benefit. Douglas paid half of the note after maturity, and sued Waddle for reimbursement, claiming that, as second indorser, he had recourse on Waddle, the first indorser, and that parol evidence was inadmissible to show any different relation between the parties. But the court sustained Waddle in his claim that, as the indorsements were made before the discount of the paper, to give it credit, for the maker's accommodation, the obligation of Waddle and Douglas was that of co-sureties for the maker, and therefore Douglas, having paid no more than his share of the debt, was not entitled to recover against Waddle. The court say that: "When a note is indorsed and transferred by a payee, the indorsement is an actual contract between the indorser and indorsee of the note, that the latter received it for a consideration paid, and therefore the indorsement, like the making, is evidence of a debt due from the indorser to the indorsee, and the former is bound to pay if the maker, upon demand, fails to do so, and the requisite notice is given the indorser. But when the transaction between the parties is different, when it is a mere accommodation transaction, neither the reason of the rule nor the justice of the case admits of its application." And the court further say that "Douglas knew that Waddle did not in fact own the note, but had indorsed it for the accommodation of Barnes, as surety. He knew that he himself indorsed it for the same purpose, and not as owner. It was intended to pay a debt due from Barnes, who, and not Waddle, was the person benefited. Douglas himself never had a beneficial interest in the note, and the money paid by him was paid for Barnes." So, it may be said in this case, the defendant in error must have known when it placed its name on the back of the note in suit, while in the hands of Cox, that its indorsement by him could have no other effect than to complete its execution, and that he would not thereby become a regular indorser of the paper, and that the defendant in error was not the owner of the note, nor had any benefi-

cial interest in it, and therefore could not, and did not, become a regular indorser, but that the effect of its signature on the note was to give it credit, and enable Cox to negotiate it for his benefit. Speaking of irregular indorsements of this character, and of the understanding of parties to them, the court in *Douglas v. Waddle*, supra, said: "In this country the parties to this description of paper have usually understood their relation to be that of principal and surety, and, upon this understanding, have generally acted both in creating the paper and adjusting their liabilities upon it." And in *Rand. Com. Paper*, § 888, that author says: "That in a great majority of instances the purpose of all the original parties to such irregular indorsements was to furnish additional security, by way of guarantor or surety, to the actual or nominal payee."

That the defendant in error intended and understood its liability to be that of a surety, and not of a second indorser, is manifest from its subsequent conduct. The payment of \$500 on the note by the defendant in error was made long after the maturity of the note, and after the failure to make the demand and give the notice necessary to charge the company as an indorser. It then was aware that, if its liability originally was that of an indorser only, that liability had then ceased; and it was under no obligation to make any payment to the plaintiff. It is not to be supposed that the check was given the plaintiff as a gratuity. The evidence shows it was a payment on the note, which is a recognition of the validity of the demand. The payment, therefore, is at variance with the claim that the liability of the company was conditional, dependent upon proper demand and notice, and amounts to an unequivocal acknowledgment of an absolute and unconditional liability at the time of payment. And this construction by the defendant in error of its obligation is in harmony with what we have considered it to be, both on principle and in view of the former adjudications of this court,—that of a surety for the payment of the note. This conclusion has not been reached without a careful consideration of the cases which hold otherwise. But we have found ourselves unable to concur in their holdings, reluctant as we are to differ with the courts by which they were decided, and desirable as it is that there should be uniformity of decision on so important a question of commercial law. Judgment reversed.

(65 Ohio St. 581)

GERMAN FIRE INS. CO. v. ROOST.

(Supreme Court of Ohio. Jan. 26, 1897.)

FIRE INSURANCE POLICY—EXEMPTION FROM LOSS BY EXPLOSION—CONSTRUCTION OF CONTRACT—REMOTE AND PROXIMATE CAUSES.

1. The meaning of a contract is to be gathered from a consideration of all its parts, and no provision is to be wholly disregarded as incon-

sistent with other provisions unless no other reasonable construction is possible.

2. A special provision will be held to override a general provision only where the two cannot stand together. If reasonable effect can be given to both, each is to be retained.

3. A fire insurance policy on a house and contents contained, in the printed portion, a provision that "this insurance does not apply to or cover any loss by explosion, unless fire ensues, and then the loss or damage by fire only," and had attached thereto a special clause providing "that this policy insures against any loss or damage caused by lightning to the interest of the assured in the property described, not exceeding the sum insured, and subject in all other respects to the terms and conditions of the policy." There was stored in a certain powder house, situate across the street from the building insured, and 71 feet distant therefrom, over which house neither party had any control, two tons of powder. The powder house was struck by lightning, causing an explosion of the powder, by force of which explosion the insured house and contents were totally destroyed. *Held* that, within the meaning of the clauses recited, the loss was occasioned by explosion, which was not included in the risk, and that the company is not liable.

(Syllabus by the Court.)

Error to circuit court, Richland county.

Action by Henry Roost against the German Fire Insurance Company. Judgment for plaintiff, and defendant brings error. Reversed.

The action was upon a policy of fire insurance, with lightning clause attached, issued upon a house and furniture therein; the allegation of the petition as to loss being that "on the 3d day of June, 1890, said house and furniture were wholly destroyed by lightning." The answer admitted the issuing of the policy as alleged, and denied the other allegations. At the trial a jury was waived, and the cause submitted to the court. Being requested to find its conclusions of fact and law separately, the court found as follows: "That said policy of insurance was issued by said defendant company as alleged. That the following clause was contained in the general contract of insurance: 'Sec. 2. This insurance does not apply to or cover * * * any loss caused by explosion, unless fire ensues, and then the loss or damage by fire only.' That upon a printed and written slip, pasted upon the body of the policy, is the following clause, which is a part of said contract of insurance: 'It is hereby specially agreed that this policy insures against any loss or damage caused by lightning to the interest of the assured in the property described, not exceeding the sum insured, and subject in all other respects to the terms and conditions of the policy hereby referred to,'—i. e. the policy in question. That the insurance was \$400 on house and \$100 on furniture therein. That the house and furniture were totally destroyed by the force of the explosion. That the house stood on the west side of a street 40 feet wide, and 21 feet from the street. That on the east side of said street, and opposite said house, was located a powder house. Neither plaintiff nor

defendant had any interest in or control over said powder house. That, shortly before January 3, 1890, there was stored in said powder house two tons of powder, and on said January 3d said powder house was struck by lightning, causing said explosion, which destroyed said property as aforesaid. As its conclusion of law the court find that said damage was not caused by the explosion, as contemplated by the exception contained in said policy, but that said loss was caused by an explosion occasioned by lightning, and was included in the risk." Judgment for plaintiff followed, which was affirmed by the circuit court. To reverse these judgments the present proceeding is brought.

John H. Doyle and Jenner & Weldon, for plaintiff in error. Donnell & Marriott, for defendant in error.

SPEAR, J. (after stating the facts). The plaintiff in error urges two propositions, either one of which being found in its favor would result in a reversal of the judgments: (1) That the proximate cause of the fire was the explosion, the lightning being only the remote cause, and the loss is, therefore, not within the terms of the lightning clause of the policy. (2) That whether the lightning clause, taken alone, would, under the facts, create a liability or not, yet, when that provision is considered in connection with the entire policy, it is plain that the loss which occurred was not, within the contemplation of the parties at the time of the making of the contract, one which was intended to be covered.

1. Respecting the first proposition it may be said that undoubtedly the rule is that the proximate and not the remote cause of the loss is to be regarded in determining liability. As said by Lord Bacon: "It were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore, it contenteth itself with the immediate cause, and judgeth of acts by that, without looking to any further degree." And it is contended here, with much effect, that the true rule is that, where a new cause has intervened between the fact accomplished and the alleged cause, such new cause must be considered the real cause; that in this case the lightning striking the powder house was inadequate to produce the disruption of the insured property without the intervention of some other and nearer cause; that the force and energy which produced the mischief came, not from the lightning, but from the explosion, and therefore the explosion was a new cause, which intervened, and hence must be regarded as the proximate cause. While, on the other hand, it is insisted that the law seeks the first efficient cause, which will be regarded as the *causa proxima*, however many other agencies may have intervened, and that in this case the lightning was the efficient cause and the other merely

Incidental, and therefore the mere agent or instrument through which the cause operated. Attention has been called to a formidable array of decisions, pro and con, giving a review of the question of proximate and remote cause, as the same has arisen and been decided in a great variety of cases, and these decisions bring before the mind, as a subject of study, the general doctrine of proximate and remote causes. But we would regard it as unprofitable labor to seek through the cases for a satisfactory expression of the rule, since no general rule will be found suited to all conditions, and each case, as it arises, must, after all, be decided upon the special facts belonging to it, and often upon the very nicest discriminations. And it seems not worth while to pursue the point in considering the present case, because, as it appears to us, there is no necessity for such inquiry, inasmuch as the case may be satisfactorily disposed of upon the second proposition.

2. It is contended, in support of the judgment below, that, inasmuch as the lightning clause is not a part of the original policy, but is attached thereto as a modification, it must, therefore, control where it is inconsistent with other portions of the policy, and that it is inconsistent with that part of section 2 which relates to loss by explosion. It is a rule of construction, founded in reason and resting upon abundant authority, that the meaning of the contract is to be gathered from a consideration of all its parts, and that no provision is to be wholly disregarded because inconsistent with other provisions, unless no other reasonable construction is possible, and that a special provision will be held to override a general provision only where the two cannot stand together. If reasonable effect can be given to both, then both are to be retained. Are the two provisions referred to irreconcilably inconsistent? The lightning clause insures against loss or damage caused "by lightning to the interest of the assured in the property described"; but it is "subject in all other respects to the terms and conditions of the policy." That is, while affording protection to the property insured from lightning, the other terms of the policy are to have full effect. Recurring, now, to the other provision involved, we find that the insurance "does not apply to or cover any loss caused by explosion, unless fire ensues, and then the loss or damage by fire only." Here there was no fire. We think that these two clauses are not inconsistent, but that each can be given effect without destroying the other. Construed together, they made the company liable for any damage to the building and contents in case the same were injured by lightning, but that in no event would the company be liable if the loss were occasioned by an explosion. The provision is against loss by lightning to the property insured, subject to the terms of the policy; i. e. provided the loss is not occa-

sioned by an explosion. This, it seems to us, gives a reasonable construction to each clause, and does no violence to any part of the contract.

We think, also, without stopping to refine upon the doctrine of proximate and remote causes, that, within the meaning of these provisions, the loss in this case was by explosion, and not by lightning. And this, it is reasonable to assume, must have been the understanding of the parties in the making of this contract, for, while it is unlikely that either had actually in mind the extent of the peril from the proximity of the powder house across the way, yet no more apt language could have been used to exclude liability for this very peril had the parties contracted with full knowledge of its existence and dangerous character. Construed with reference to the subject-matter, the language used is equivalent to a declaration on the part of the company that it will not be held for any loss, whether it comes within the general peril of lightning or not, and without undertaking to consider whether it does or not, if such loss occurs by explosion, unless fire ensues. If fire follow an explosion, then liability attaches; if not, there is none. Nor can it reasonably be urged that the insured did not understand the meaning of the language of this provision, for it is obvious. He could not, as a reasonable man, in the face of such an exception, have expected the company to be liable for any loss, save from consequent fire, if such loss should accrue from explosion. Although the explosion of gunpowder by means of lightning happens but rarely, yet it is a possible peril, and sometimes occurs, which fact may account for the company declining to take such risk, while its infrequency may account for the willingness of the insured himself to bear it. But, whether the latter actually had the extent of this risk in mind or not when he entered into the contract, he must be held in law to have assented to an exception which, upon its face, takes risks by explosion out of the perils insured against. That destruction by explosion of a house 71 feet away from one struck by lightning should be deemed a natural result of the lightning is at least a doubtful proposition. But, be that as it may, when there follows in a policy, after a lightning clause, a provision which distinctly excludes liability for loss by explosion, it appears plain that, within the contemplation of the parties at the time of the making of the contract, a loss by explosion could not have been understood to be embraced within the protection of the policy.

The conclusions stated are sustained by abundant authority. True it is that cases are to be found which declare principles of construction which, if applied here, would make the company liable for this loss, if its liability were measured wholly by the lightning clause. But in no case which has come within our observation, and we have examined a great

many, has a liability been found to attach where there was a provision excluding liability for loss by explosion, and the loss was caused by fire, or, as here, by lightning, taking effect in a distant building, and the damage being wrought to the insured property by an explosion produced by the fire or the lightning, without either of the latter agencies coming in contact with the insured property. *Everett v. Assurance Co.*, 115 E. C. L. 126; *Caballero v. Insurance Co.*, 15 La. Ann. 217; *St. John v. Insurance Co.*, 11 N. Y. 516; *Briggs v. Insurance Co.*, 53 N. Y. 446; *Montgomery v. Insurance Co.*, 16 B. Mon. 427; *Heuer v. Insurance Co.*, 144 Ill. 393, 33 N. E. 411.

Judgments of the circuit court and of the court of common pleas reversed, and judgment for plaintiff in error.

(55 Ohio St. 558)

BRINKERHOFF et al. v. TRACY.

(Supreme Court of Ohio. Jan. 26, 1897.)

MORTGAGE IN TRUST FOR PREFERRED CREDITORS—RIGHTS OF OTHER CREDITORS AND MORTGAGOR.

Where one in embarrassed circumstances makes and delivers a chattel mortgage to a third person in trust for certain of his creditors, with the requirement that he shall sell the property at retail, and apply the proceeds to the claims of the preferred creditors until paid in full, and afterwards, with the consent of his other creditors, to continue to sell and apply the proceeds to their claims pro rata, and the property so mortgaged is largely in excess of the amount of the claims of the preferred creditors, the legal effect of such mortgage is to hinder and delay his other creditors, within the meaning of section 6344, Rev. St., and no action for damages can be maintained by the mortgagor against the trustee for a failure to execute the trust.

(Syllabus by the Court.)

Error to circuit court, Richland county.

The suit below was brought by Philopena L. Harrison to recover damages from the defendants for the breach of a contract set forth in the petition. The defendants demurred to the petition. The demurrer was sustained by the common pleas, but on error was overruled by the circuit court, and the case is brought here for a reversal of the latter court. Reversed.

The petition is as follows:

"That the defendant Roeliff Brinkerhoff did on the 5th day of January, 1891, acting for himself and as the agent of the defendant the Mansfield Savings Bank, enter into a contract with plaintiff, in writing (a copy of which is hereto attached, marked 'Exhibit A'), by which contract the defendant Roeliff Brinkerhoff promised and agreed, for himself and for said bank, for a valuable consideration, and in consideration that the plaintiff would execute and deliver to defendant, as trustee for the Mansfield Savings Bank and others, her chattel mortgage on the stock of goods, consisting of dry goods, ladies' and gents' furnishing goods, notions, and all of

the goods and merchandise, of every kind and description, together with all furniture and fixtures, in and connected with the store then owned by her in Smith's Opera House Block, in Mansfield, Ohio, and thus secure a claim of about \$5,300 held by the said Mansfield Savings Bank, that he, the said Roeliff Brinkerhoff, for himself and for said bank, would accept a conveyance of said stock of goods, furniture, fixtures, etc., by said chattel mortgage and by the said contract, and that he would employ in the conducting of the business, and the sales to be made from said stock, Charles S. Harrison, a competent salesman, who had theretofore had charge of business and stock for plaintiff, and was fully acquainted with it and the trade, to superintend the business and sales; that said business should be run, and enough of said stock and furniture and fixtures sold, until sufficient amount had been realized to pay the claim of said bank, and, if satisfactory to other creditors, until enough had been realized to pay all the creditors of plaintiff, and that after the payment of all her indebtedness the balance of the stock, etc., or the proceeds thereof, should be turned over to her. And she avers that said stock of goods, etc., were more than double in value the whole amount of her indebtedness, and that she was the owner of a large amount of real estate in addition to the goods, etc., above described.

"Plaintiff says that the Mansfield Savings Bank is a corporation organized under the laws of Ohio, and that at the time of the execution of said contract it held a claim against her for about \$5,300; that said Roeliff Brinkerhoff was and is one of the largest stockholders of said bank, and that he and various members of his family were and are the principal stockholders of said bank; that on the 5th day of January, 1891, at 3 o'clock p. m., plaintiff did, in accordance with the terms and conditions of the contract above described, execute and deliver to the said defendant her chattel mortgage in accordance with the terms of said contract, which chattel mortgage was duly filed with the recorder of Richland county at 3 o'clock of said day. Plaintiff further says that by said chattel mortgage she turned over and delivered to defendant Roeliff Brinkerhoff, as such trustee and agent aforesaid, property of the cash value of \$25,000, and that the said defendant Roeliff Brinkerhoff was placed in possession of the same at 3 o'clock of said 5th day of January, 1891. Plaintiff says that the defendants, in violation of said contract and agreement by virtue of which said goods, furniture, fixtures, etc., were turned over to them on or about the 5th day of January, proceeded to Ashland county court of common pleas, and, in violation of their duty toward plaintiff in the premises, fraudulently procured a judgment against her, and had issued on said judgment an execution to the sheriff of Richland county, and had the same

levied on said stock of goods, furniture, fixtures, etc., and the same taken from the possession of said Roeliff Brinkerhoff, acting as aforesaid.

"Plaintiff says: That the facts constituting the fraud in taking said judgment and the levy of the execution, and defendants' violation of said agreement, are as follows: The said bank had agreed on or about September 1, 1889, in consideration of the transfer to it of a judgment plaintiff had against Charles S. Harrison, for about the sum of \$7,000, to loan the plaintiff a sum, the principal of which should not exceed \$5,000, for three years, and that said defendants on or about the 5th day of January, A. D. 1891, in consideration of said agreement of September 1, 1889, made the contract hereinbefore alleged, and accepted the chattel mortgage, by the terms of which mortgage the sum owing said bank was not due until four months from the said 5th day of January, 1891. And she further alleges that the said defendants made said agreement, and procured her to execute and deliver the said chattel mortgage and the possession of the said stock of goods, furniture, and fixtures to them, for and in consideration of an extension of four months, as alleged herein, of the time of payment of money owing to said bank, and she says there was nothing owing said bank, at the time said judgment was taken, that was due; and she avers that the defendants falsely and fraudulently represented to her that if she would put into the possession of said Roeliff Brinkerhoff said stock of goods, furniture, and fixtures, that they would satisfy the claims of all her creditors, and carry on said business and sell said stock, etc., as in said agreement provided, but she says that said defendants did not intend to perform the said agreement, but, on the contrary, they falsely and fraudulently induced her to enter into it, for the purpose of procuring from her the possession of said stock of goods, etc., and to hold possession thereof until they could secure the said judgment and levy. That said judgment so taken against plaintiff in Ashland county was in favor of the Mansfield Savings Bank, and that the said defendant Roeliff Brinkerhoff was at the time the judgment was so taken, and at the time of accepting the trust hereinbefore stated, and entering into the contract before set forth, vice president of the said bank, and the acting business manager of said bank, and that the said defendants caused the said sheriff of Richland county to take possession of the goods and property of plaintiff specified in said chattel mortgage, and of which defendant Roeliff Brinkerhoff was trustee and agent as aforesaid, and that they, the said defendants, neglected and refused to advise the creditors as to the value of the large amount of property thus held by them, or to advise them of the terms and conditions of the contract above set forth; and by his failure so to advise the creditors, and his refusal to carry out

the trust according to its true intent and meaning, all of creditors of plaintiff caused judgments to be taken against plaintiff, and executions to be issued on said judgments, and levies made on her said property. And the said defendants, instead of securing the services of competent parties to invoice said stock and to superintend the sale thereof, caused the same to be done by persons wholly unfamiliar with the value of said property, and caused said stock of goods and property to be appraised greatly below its real value. And by reason of his violation of said contract, and the manner of selling and disposing of said goods, and their failure to advise all other creditors of plaintiff of their said contract and the value of the property turned over to defendants, as well as the value of the real estate of plaintiff, they caused the same to be sold at less than half its actual value, by reason of which wrongful acts and fraud on the part of defendants plaintiff has been damaged in the sum of fifteen thousand dollars (\$15,000). Wherefore plaintiff prays judgment against defendants for the sum of \$15,000, her damages so as aforesaid sustained by her, and for costs of suit.

"A. J. Mack, Jenner & Tracy,
"Attorneys for Plaintiff."

Exhibit A. "This agreement witnesseth: That whereas Philopena L. Harrison has this day executed and delivered to R. Brinkerhoff, as trustee for the Mansfield Savings Bank, Mollie V. Harrison, Hiram R. Smith, and Jenner & Tracy, her chattel mortgage on her stock of goods, consisting of dry goods and ladies' and gents' furnishing goods, notions, and all of the goods and merchandise, of every kind and description, together with all the fixtures and furniture, in and connected with the store now owned by her in Smith's Opera House Block, in Mansfield, Ohio. Now, it is agreed by the parties hereto that the said trustee shall first pay off the indebtedness to the parties for whom he is trustee, and all necessary expenses of running the business, together with the sum of \$—— per month to Roeliff Brinkerhoff, Jr., for his services in taking possession, superintending the sale of goods, and taking charge of the proceeds thereof, as the representative of the trustee; and it is further agreed that said trustee shall employ Chas. S. Harrison to superintend the sale of said stock of said goods, and that he shall receive twenty-five dollars per week. It is further agreed that after a sufficient amount has been realized to pay off the claims represented by said trustee, and the expenses attending the same, that, if it shall be satisfactory to the other creditors of Philopena L. Harrison, the said trustee shall continue to act, under said chattel mortgage, as trustee for all other of the creditors of Philopena L. Harrison, and that he shall continue to sell and dispose of said goods, furniture, and fixtures, and that, whenever the sum of one thousand dollars shall be in the hands of said trustee,

a dividend shall be paid on the claims of each and all of the other creditors of Philopena L. Harrison not represented by said R. Brinkerhoff, trustee, and, after the payment of all the indebtedness, the remainder of said stock to be turned over to Philopena L. Harrison, her assigns or legal representatives. Signed by P. L. Harrison. R. Brinkerhoff, Trustee."

Cummings & McBride and R. Brinkerhoff, Jr., for plaintiffs in error. Jenner, Jenner & Weldon, for defendant in error.

MINSHALL, J. (after stating the facts). The point made on the demurrer is that the agreement for the breach of which the action is brought was made to hinder and delay creditors, and no action will lie for the breach of it. There is no averment in the petition from which it can be inferred that it was made in contemplation of insolvency. If that were so, then there is no question but that under section 6343, Rev. St., it would have inured to the benefit of all the plaintiff's creditors; and the only remedy she would have had in such case would have been to have caused it to be administered, by the appointment of a proper trustee, in the probate court of the county. The agreement attached to the petition tends to suggest that it was made under such circumstances, but, in the absence of a positive averment or admission of that kind, a court would hardly be warranted in drawing such inference from it. But, though the mortgage was not made in contemplation of insolvency, still does it not appear from the agreement of the parties that it was made to hinder and delay creditors, within section 6344, Rev. St., as claimed by the demurrer? We think it does, and that no action will lie on behalf of the plaintiff for the breach of it, for this reason. From the petition it appears that the plaintiff, at the time named, made and delivered a chattel mortgage on her stock of goods, and on the furniture and fixtures, in her store in Mansfield, Ohio, to Roeliff Brinkerhoff, in trust for certain of her creditors, among whom was the Mansfield Savings Bank, its claim being about \$5,300. By the agreement made at the same time, the property so mortgaged was placed in the possession of the mortgagee, to be disposed of at retail in the usual way, he employing certain persons named to attend to the business. The business was to be so run until enough should be realized from the sale of the property to pay the claim of the bank and the other preferred creditors, and then, if satisfactory to her other creditors, it was to be continued until enough had been realized to pay all her other creditors; and for any balance he was to account to her. The property so mortgaged to the trustee, Brinkerhoff, is averred to have been of the cash value of \$25,000, and double the value of all her indebtedness. It is also averred that she had a large amount of real estate in addition to the property so transferred, but it

is not averred that it was sufficient to satisfy the claims of her other creditors. Now, what was the necessary effect of this mortgage, as to her creditors, not provided for in it? If the mortgage, as to them, was a valid one, they could not touch a dollar of the property covered by it until the preferred creditors were paid, although the value of the property was double the amount of all her indebtedness. As to this property, they could take no steps to subject it to their claims during the continuance of the trust. The legal effect of this mortgage was, then, to hinder and delay her other creditors in any effort to obtain from any part of the property included in the trust mortgage satisfaction of their claims, although largely in excess of the claims of those preferred by it. It is not like the case where a debtor in failing circumstances prefers a creditor by executing to him a mortgage on property as a security for his debt. This may be done. *Cross v. Carstens*, 49 Ohio St. 548, 31 N. E. 506. But in such case the mortgage must be directly to the creditor, and not to another for his use, and the creditor must deal with an eye single to his own interests. *Dickson v. Rawson*, 5 Ohio St. 218; *Pendery v. Allen*, 50 Ohio St. 121, 33 N. E. 716. Here the mortgage is to a trustee for the use and benefit of certain of the creditors of the mortgagor, and all others are hindered and delayed, with respect to the property mortgaged, until the favored creditors are satisfied by the execution of the trust. If what a debtor does in disposing of his property necessarily tends to hinder and delay his creditors, the law presumes that his intention corresponded with his act, and adjudges all such acts as contrary to its policy. A court, in such case, can afford him no relief from the consequences of his act, nor sustain any action in his favor founded on any agreement in regard to it. *Trimble v. Doty*, 16 Ohio St. 118; *Pride v. Andrew*, 51 Ohio St. 405, 38 N. E. 84; *Emery v. Candle Co.*, 47 Ohio St. 321, 24 N. E. 660. As said by Boynton, J., in *McCortle v. Bates*, 29 Ohio St. 419: "It is one of the oldest rules of the common law that contracts contrary to sound morals, or against public policy, will not be enforced by courts of justice,—*'Ex facto illicito non oritur actio'*; and the court will not enter on the inquiry whether such contract would or would not, in a given case, be injurious if enforced. It being against the public interest to enforce it, the law refuses to recognize its claim to validity." The legal duty of the trustee, Brinkerhoff, was, under the circumstances disclosed by the petition, to have filed the agreement with the mortgage in the probate court, and have had the trust administered as an assignment for the benefit of all the creditors of the plaintiff; for such, in law, was its legal effect. But neither he nor the preferred creditors were under any legal duty to the mortgagor to carry out the agreement. And whatever right of action accrued from the course pursued by them accrued to the

creditors, and not to Mrs. Harrison. Judgment of the circuit court reversed, and that of the common pleas affirmed.

(56 Ohio St. 627)

FARLEY v. LISEY.

(Supreme Court of Ohio. Jan. 26, 1897.)

WITNESS—COMPETENCY—TRANSACTIONS WITH DECEDENT.

1. In an action by one executor or administrator against another, the parties are adverse, within the purview of section 5242 of the Revised Statutes, and neither is competent to testify against the other to any matter not within one of the exceptions contained in that section.

2. When such party is called to give testimony not permitted by either of the exceptions, an objection by the adverse party to the proposed testimony, on the ground that it is incompetent, is sufficient; it is not necessary to object to the witness as incompetent.

(Syllabus by the Court.)

Error to circuit court, Cuyahoga county.

Suit was brought in the court of common pleas of Cuyahoga county, by Farley, as executor of the estate of Mary A. Montpelier, against Isaac Lisey, to recover rent alleged to be due under a lease made by the plaintiff's testator to the defendant, of premises in the city of Cleveland. The petition sets up the lease, and alleges that a certain modification of it, by which the rent was reduced, and an additional covenant entered into by the lessor, was without consideration, and seeks to recover according to the original lease. That allegation was denied by answer, and a breach of the additional covenant averred, by reason of which the lessee was discharged from the payment of the rent sought to be recovered. Before the trial, the lessee died, and the executrix of his estate was made the party defendant, and the suit thereafter prosecuted against her. At the trial, the plaintiff was called as a witness in his own behalf to testify to conversations which it was claimed had occurred between him and the lessee, and between the parties to the lease in his presence, touching the consideration for the modification of the lease, and for the purpose of showing it was without consideration. The proposed testimony was objected to by the defendant, as incompetent, and the objection was sustained. Judgment having been rendered for the defendant, which was affirmed by the circuit court, the plaintiff prosecutes error here, assigning the exclusion of the testimony referred to as a ground of reversal, with others. Affirmed.

H. C. Bunts and Boynton & Horr, for plaintiff in error. George B. Solders and Thomas H. Hogsett, for defendant in error.

PER CURIAM. At the trial, the defendant, as executrix, was a party to the action adverse to the plaintiff, within the purview of section 5242 of the Revised Statutes, and the testimony excluded does not come within either of the exceptions contained in that

section. True, the plaintiff was prosecuting the action in his representative character, as executor of the lessor; but the issues in the action were joined between him, as such, and the defendant; and he was interested in maintaining the issues in his behalf, not only in his representative capacity, but individually also, to the extent, at least, that his compensation was affected by the amount recovered in the action. The statute has reference to the adverse character which the parties sustain towards each other as parties in the action at the time of the trial, and not necessarily to that relation as parties to the transaction which is the subject of the action or defense; and, unless these parties were adverse, there were none in the action, for they were the only parties. It is said the plaintiff might have resigned as executor, and then he would have been competent to testify as desired; but then he would no longer be a party to the action, and therefore not within the inhibition of the statute. But, being a party to the action when his testimony was offered, it was properly excluded. The objection to the testimony he was called on to give, on the ground that it was incompetent, was sufficient. It was not necessary to make an objection to the competency of the witness. He was not incompetent to testify to any matter falling within any one of the exceptions in the statute, and there might be room for contention that a general objection to the witness was too broad. The testimony which was sought to be elicited from the witness was incompetent, and an objection to it on that ground properly called for its exclusion.

Other questions arising upon the record were argued, and have been considered; but as to them we deem it necessary to say only that we find no prejudicial error. Judgment affirmed.

(146 Ind. 639)

**KOERNER LODGE, NO. 6, K. OF P., et al.
v. GRAND LODGE K. OF P.
OF INDIANA.**

(Supreme Court of Indiana. Jan. 28, 1897.)

BENEFICIAL ASSOCIATIONS—DISSOLUTION—SUFFICIENCY OF EVIDENCE—PROPERTY OF SUBORDINATE LODGE—POWERS OF SUBORDINATE LODGE—HARMLESS ERROR.

1. On the issue whether a subordinate lodge of a beneficial association had voluntarily dissolved and surrendered its charter, it appeared that a resolution had been passed that the lodge withdraw from the order; that at the meeting only 60 members out of 160 were present; and that a rule of the order provided that no subordinate lodge should be allowed to dissolve or surrender its charter as long as 9 members remained willing to sustain the lodge, except by special permission. *Held*, that it was error to exclude evidence to show that at the next meeting of the lodge 11 members had formally expressed their nonconcurrence in the resolution of withdrawal.

2. It was error to exclude evidence that the minutes of the meeting at which the resolution was passed were corrected at the following meeting.

3. Where the constitution of a beneficial association provided that on the dissolution of a subordinate lodge its property, etc., should be turned over to the grand lodge, a resolution of withdrawal from the order, providing that the property of the lodge should be turned over to a different association, was void, as being ultra vires.

4. Where the facts pleaded in a special paragraph of the answer are also admissible under the general denial, it was harmless error to sustain a demurrer to the special plea.

Appeal from circuit court, Marion county; Edgar A. Brown, Judge.

Action by the Grand Lodge Knights of Pythias of Indiana against Koerner Lodge, No. 6, Knights of Pythias, and others. From a judgment for plaintiff, defendants appeal. Reversed.

Florea & Seidensticker and Daniel Wait Howe, for appellants. Chambers, Pickens & Moores and John B. Cochrum, for appellee.

JORDAN, C. J. The appellee, by its complaint, alleges that it is a corporation organized pursuant to the laws of Indiana and a charter issued by the Supreme Lodge Knights of Pythias of the World, and that the appellant is a subordinate lodge of this order, deriving its powers from and subject to the jurisdiction of the grand and supreme lodges; that appellant is duly incorporated under the laws of Indiana, and its co-appellants are its officers and trustees. The complaint then proceeds to describe the objects of the order, and the character of its organization, and the control of the appellee over subordinate lodges, and the power which it has to suspend or dissolve the same, and the provisions regulating the surrender of the charters of subordinate lodges, whereby, upon such dissolution or suspension, it becomes the duty of the officers thereof to turn over all of the lodge property and effects to the grand chancellor of the grand lodge, and, in the event the lodge is not reinstated within one year, the grand lodge becomes the absolute owner of said property and effects. The pleading next alleges that the appellant has seceded from the jurisdiction of the grand lodge, and has been dissolved and disbanded as a subordinate lodge of the order of the Knights of Pythias. The facts upon this point are averred as follows: "That on or about the — day of — the said defendant Koerner Lodge, Number 6, Knights of Pythias, was, by authority of a dispensation from the Grand Lodge Knights of Pythias of Indiana, duly organized as a member of said order, and adopted and accepted all of the provisions and requirements of the constitution, laws, rules, and regulations and usages of said order, and was granted a charter by said grand lodge; that said Koerner Lodge continued as a subordinate lodge of said order, subject to the jurisdiction of the plaintiff, accepting, adopting, and acting upon the laws, rules, regulations, and usages of said order until on or about the 10th day of September, 1894,

when the said Koerner Lodge, No. 6, Knights of Pythias, withdrew and seceded from the jurisdiction of the said grand lodge, and dissolved and disbanded as a subordinate lodge of the order of Knights of Pythias. * * * The said Koerner Lodge, No. 6, Knights of Pythias, seceded and withdrew from the order of the Knights of Pythias, and dissolved and disbanded as a subordinate lodge of the said order, because of the fact, as plaintiff is informed and believes, and upon such information and belief charges the same to be true, that the supreme lodge of the Knights of Pythias of the World prohibited the use of the ritual of said order in German, which rule of said supreme lodge the said Koerner Lodge, No. 6, refused to obey." By other averments it is shown that at the time of the alleged dissolution and disbandment of appellant it had in its custody and charge, belonging to the widows' and orphans' fund, the sum of \$1,000, and also other property of the probable value of \$2,000 and over. It is then alleged that the officers and members of Koerner Lodge have organized, or attempted to organize, another society, and that its officers and trustees intend to turn over the money and property mentioned in the complaint to this new society. The prayer of the complaint, in substance, is for a decree requiring the defendants, now appellants, to surrender to the appellee all of said property, effects, and money, and that the latter have judgment for the amount thereof, and that appellants, and each of them, be restrained from transferring or disposing of said money and other property, and that on final hearing they be enjoined from withholding the same from the appellee, etc.

At the commencement of the action the lower court issued a restraining order as prayed, to continue in force until the final hearing. Appellant, having unsuccessfully demurred to the complaint, filed its answer in two paragraphs, the first being a denial. The second set up facts tending to negative some of the material allegations of the complaint. A demurrer was sustained to this paragraph of the answer, and the issues were then joined under the denial. A trial by the court resulted in a finding and judgment for appellee as against all of the appellants. Upon the evidence the court made the following finding: "The court, being fully advised, finds: That the allegations of the complaint herein are true. And the court further finds that the defendant Koerner Lodge, No. 6, Knights of Pythias, on the 10th day of September, 1894, was by unanimous vote of said lodge, duly assembled, voluntarily dissolved, and its charter surrendered, and its connection with the order of the Knights of Pythias severed and terminated. That at the time of said dissolution it had in its possession and under its control, belonging to it as such subordinate lodge, the following funds and property, to wit:

[Here follows a description of the money and property belonging to appellant.] And the court further finds that upon such dissolution said funds and property belonged to and became the property of the plaintiff, and plaintiff became entitled to the possession thereof." There is a further finding that Koerner Lodge has not been resuscitated, and under the constitution and laws of the order of Knights of Pythias its property now belongs to the appellee, to be disposed of by it in accordance with its constitution and laws. Appellants filed separate motions for a new trial, assigning, among other reasons, that the finding is not sustained by sufficient evidence, and that the court erred in excluding certain evidence. Each of these was overruled, and exceptions reserved.

The errors assigned in this court are predicated upon the rulings of the court on the demurrers to the complaint and answer, and in overruling the several motions for a new trial. Appellants' learned counsel contend that the court erred in sustaining the demurrer to the second paragraph of answer, and in their very able argument upon this question urge that, even if it be conceded that Koerner Lodge had been dissolved, as alleged in the complaint, its property nevertheless belongs to its members, and not to the grand lodge. All that need be said upon the action of the court in sustaining the demurrer to this paragraph of the answer is that, so far as the facts therein averred were pertinent as a defense, they were admissible under appellants' general denial; hence, even if the ruling of the court was erroneous, the error was harmless. *Supply Co. v. Ritter* (at this term) 45 N. E. 697, and the authorities there cited.

Appellants also insist that the evidence does not sustain either the allegations of the complaint or the finding of the court. The complaint proceeds upon the theory that appellant Koerner Lodge, on September 10, 1894, by its own action, dissolved and disbanded, and by reason thereof, under the laws, rules, and regulations of the order of Knights of Pythias, and especially by virtue of the constitution of appellee, the latter became the owner in trust and entitled to the possession of the money and property held by the former at the time of its alleged dissolution. In *Cummings v. Association*, 142 Ind. 600, 42 N. E. 213, in considering the theory of a case, we said: "This theory the complaint must outline, the evidence sustain, and the law support." The question, therefore, as to the right or title of appellee to the money and property as presented by the theory of its complaint must ultimately depend upon whether the evidence sustains the alleged dissolution of appellant as a subordinate lodge. The constitution, laws, and rules of the grand lodge, as exhibited in the complaint, do not show that appellee can acquire any right to the possession of the

money and other property of a subordinate lodge until it in fact has been dissolved or suspended. Therefore, if the evidence, under the law, does not sustain the alleged dissolution of Koerner Lodge, the question as to appellee's right to the property need not be determined. The finding discloses that in the opinion of the court the evidence established that appellant, on September 10, 1894, had voluntarily dissolved as a lodge and surrendered its charter. We may therefore proceed to an examination of the evidence given in the lower court, and address our inquiry to its sufficiency to sustain the finding, and also to the alleged error in excluding the evidence in dispute. At the trial, appellee introduced in evidence parts of the constitution of the grand lodge of Indiana and other laws, rules, and regulations of the order of Knights of Pythias, together with the charter and articles of incorporation of appellee, and the charter issued to appellant by the grand lodge. It is shown that Koerner Lodge, No. 6, was organized at the city of Indianapolis, Ind., in 1869, pursuant to authority from the supreme lodge; that subsequently a charter was granted to it by the grand lodge of Indiana. Prior to 1892 it was permitted to print its constitution and other laws in the German language, and the minutes of its meetings were kept and recorded in that language, and a German ritual was used in conferring the degrees of the order, for the reason that many of its members did not understand the English language. In 1892 the supreme lodge enacted a law requiring that the rituals used by all lodges, and the other work thereof, should be in the English language. Among the provisions of the constitution and laws of the grand lodge for the government and control of subordinate lodges are the following:

"Sec. 3. When a lodge is suspended or dissolved, it shall be the duty of its last chancellor commander, and all other officers, to deliver up its dispensation or charter, books, jewels, funds, emblems, regalia, and all other property and effects, together with a list of all members of said lodge in good standing at the time of its dissolution, to the grand chancellor, or his deputy; and if any officer or member having custody of any part of said property or effects refuses to surrender the same, he shall forever be excluded from the membership of the order.

"Sec. 4. Any lodge may voluntarily surrender its charter by a vote of the lodge, provided there are less than seven members who are willing to continue.

"Sec. 5. All funds and effects received by the grand lodge from a dissolved or suspended subordinate lodge shall be held by the grand lodge for a period of one year, and, in case said subordinate lodge shall be reinstated within one year, said funds and effects shall be restored to said subordinate lodge, on payment by said subordinate lodge of the actual expenses incurred in obtaining posses-

sion, shipment, care, and custody of said effects. And in case such subordinate lodge shall not be reinstated within one year after its dissolution, then the grand lodge may sell and dispose of the effects of said subordinate lodge, and all money and effects received from such lodge shall become the absolute property of the grand lodge."

"Article 1, § 24. All lodges working under a charter of this grand lodge shall enforce a strict adherence to the work of the order, according to the forms furnished by the Supreme Lodge Knights of Pythias of the World and the Grand Lodge of Indiana; and they shall neither adopt nor use any other charges, lectures, rank work, form of installation ceremonies, nor regalia or jewels, than those prescribed by the ritual and law of the supreme lodge and provided by the grand lodge."

A rule of the supreme lodge adopted in 1872, which is also incorporated into the constitution of appellee, provides as follows: "No subordinate lodge shall be allowed to dissolve or surrender their charter by their vote as long as nine members remain willing to sustain the lodge, except by permission of the grand lodge, or, during the recess of the grand lodge, by the grand chancellor of the jurisdiction."

There are other laws of the grand lodge in evidence, providing that no subordinate lodge shall be less than seven members, and that seven members present at a meeting shall constitute a quorum for the transaction of business.

On September 8, 1894, the keeper of the records and seal of appellant mailed to each of the members thereof a postal card, notifying him to be present at the lodge hall on Monday evening, September 10, 1894, stating therein as follows: "To consider a question on which the existence of the lodge depends. If you have any interest in the welfare of the lodge, you certainly will be present." On September 10, 1894, it appears that appellant was composed of 160 members, and at a regular meeting held on the night of that date at its hall in the city of Indianapolis, at which about 60 members were present, a certain resolution relative to the lodge severing its connection with the order was by those present unanimously adopted. It is apparent from the recitals in the preamble to this resolution that the members present on this occasion were indignant and felt aggrieved by reason of the action of the supreme lodge and the report of the supreme chancellor relative to German lodges of the order. The following is the resolution adopted at this meeting: "Resolved, (1) That Koerner Lodge, No. 6, sever connection with the order of Knights of Pythias. (2) That we do not impair the right of our members belonging to the endowment rank. (3) That we turn over our entire property to the German Mutual Aid and Benefit Society of Indiana."

Albert R. Holland, a witness in behalf of

appellee, testified, in substance, that he was janitor of the hall, and was acting as outer guard at the meeting in question, and that after the lodge had adjourned some three or four of the members came out of the hall, and said to him, "We have quit; we give up," and one of them handed to him the lodge's charter, and told him to give it to Mr. Bowers, who was then the keeper of the records and seal of the grand lodge; that the charter had been hanging in the lodge room before it was taken down by some one, and turned over to him; that he put it in one of the rooms connected with the hall, and reported to Mr. Bowers, and "after a day or so," at the request of the latter, witness delivered the charter to Bowers, the grand keeper of records and seal. The latter testified that on Wednesday after the meeting—being September 12th—he went to the lodge room of the appellant; that the charter at that time was in the ante room, and that he directed Holland, the janitor, to bring it to his office, which he did, and that it has remained there since that time; that when Schmidt, a member of the lodge, demanded possession of it, he declined to comply with the demand. This, in the main, was all the evidence introduced by appellee tending to show the dissolution of Koerner Lodge, and the surrender of its charter. To rebut the evidence of appellee upon the point that the charter had been surrendered, appellant introduced seven witnesses, who were members, and present at the meeting on September 10, to wit: William Brandt, the chancellor commander; John Weber, the vice chancellor; August Woerner, master of finance; Henry Zimmer; Gustav Pink; Charles Pink; Charles J. Schmidt; and Michael Speer. The substance of the testimony of these witnesses is as follows: After the meeting of September 10th had adjourned, William Brandt, the chancellor commander and presiding officer, left the hall, the charter then hanging in its usual place on the wall. The members were getting ready to leave, some being already in the ante room. Henry Zimmer, who was not then an officer of the lodge, without any direction from any one, took the charter from its accustomed place, and handed it to John Weber. At the same moment, August Woerner, the master of finance, stepped up, and said: "Here; this charter stays here. We are not going to take the charter along." They tried to hang it on the wall again, when Woerner remarked that they need not mind; that "Cal." (Holland, the janitor) had a step-ladder, and he would hang it up again. Weber then took it, and set it up on the stage back of the vice chancellor's chair, where it remained after all the members had left the hall; the last to leave being Weber, Koerner, Speer, William Dehue, and Hugo Klingstein. At the meeting of September 24, 1894, Charles J. Schmidt was appointed a committee to see Bowers about the charter. He saw Bowers, who told him that the char-

ter was in his possession, and that he did not like to give it up during the pendency of the suit, but that it was immaterial whether the lodge had its charter or not; that it was not suspended, and could go ahead with its meetings, "and everything would be forgotten; or something to that effect." There was evidence introduced tending to show that the minutes of proceedings had at a lodge meeting were usually read for approval at the next meeting, and that those of September 10, 1894, were not read or approved at that meeting, but were read for the first time on September 24th.

The contention of counsel for appellant in the lower court was that at the meeting held on September 10th the members present became excited over the action of the supreme lodge in depriving them of the use of German rituals, and also in regard to a report made by the supreme chancellor which they considered as an insult to the German members of the order, and under this excitement they did adopt the resolution in controversy; that the trustees did not, in fact, resign, nor was any of the appellant's property turned over to the German Mutual Aid Society, but said property is still held by the trustees of the lodge, who are co-appellants in this appeal. Appellant offered evidence to prove that on September 24, 1894, being the night for a regular meeting of Koerner Lodge, it again assembled at its regular place of meeting, all of its officers and 46 members being present; that, after certain corrections were made in the minutes of September 10, 1894, they were finally adopted as corrected; that the meeting of September 24th was opened in due form in accordance with the constitution and laws of the order, and that it proceeded to the transaction of its usual business; that at this meeting the minutes of September 10th were read for the first time, and that they were not approved as originally written, and that, certain erasures appearing in the minutes of September 10th, as introduced by appellee, were made by the order of the lodge at the meeting of September 24th, for the purpose of correcting the minutes of the former meeting. The proceedings of the meeting of September 24th were recorded in the same record containing the minutes of September 10th. At the meeting of September 24th, it appears by the offered evidence that Mr. Schmidt, one of the members present, was appointed a committee to see Bowers, and have the charter returned to the lodge room. Appellants also offered to show that at this meeting 11 members, then present, but who were not present on September 10th, filed and had recorded their written protest against the action of the lodge in attempting to sever its connection with the order. This protest is as follows: "The undersigned, members of Koerner Lodge, No. 6, Knights of Pythias of Indiana, who were not present at the meeting of said lodge on Monday night, September 10, 1894,

hereby protest against the action taken by the members of said Koerner Lodge, No. 6, on said evening, whereby they resolved to sever the connection of said lodge with the order of Knights of Pythias. (1) Fred Rase-man. (2) William Rathort. (3) John Koepen. (4) Chas. Albrecht. (5) Henry Miller. (6) Geo. Schoppenhorst. (7) Wolf Morris. (8) Abraham Marx. (9) Gottlieb Dippel. (10) Wm. Sogemeier. (11) Henry Schaub."

All of the above evidence offered by the appellants was, over their exceptions, excluded by the court, and the court also refused to permit the appellants to introduce the record of a meeting of October 1, 1894, which was held on the regular night, and at the regular place of meeting.

If, under the evidence given, it can be said that before the commencement of this suit Koerner had dissolved and surrendered its charter, and ceased to longer exist as a working lodge, this result must be attributed solely to the action of the minority of its membership in adopting the resolutions on September 10, 1894. In the absence of this, certainly it cannot be asserted that there is other evidence sufficient to show that the lodge, as a body, had invested Holland, the janitor, with authority to surrender its charter, or that Bowers, in his official capacity, had any warrant to accept and retain it. It is also shown that the minutes of the meeting of September 10th were not made up, read, corrected, and approved until the meeting in controversy, on the 24th. Appellants offered to show that at this meeting the minutes of the previous one were read for the first time, and that certain corrections were made therein relative to the proceedings on September 10th upon the resolution in dispute. At this meeting, it appears, from the evidence offered and excluded, that 11 members who were not present on September 10th entered and had recorded their protest against the action of the lodge taken at the previous meeting. Under the provisions of the constitution of the grand lodge and the laws of the supreme lodge, which govern and control the action of a subordinate lodge, it is disclosed that the latter may surrender its charter when there are less than seven of its members who are willing to continue; and a subordinate lodge is also prohibited from dissolving or surrendering its charter so long as nine of its members are willing to sustain it, except by permission of the grand lodge, or by the permission of the grand chancellor during a recess. There is no claim that appellant had been dissolved by virtue of any action or proceedings had by the grand lodge in accordance with its constitution or other canons of the order prior to the beginning of this suit, but the adoption of the resolution is relied upon as ipso facto effecting a dissolution of Koerner Lodge, and thereby giving the former, under its constitution, the right to the possession of its property, regardless of any sub-

sequent action of the lodge, or of nine or more of its members, in opposition to the alleged dissolution.

The authorities affirm that a beneficial association may be dissolved in the manner provided in its charter or constitution, and, in the absence of any provision on the subject, it cannot voluntarily be dissolved, except by the unanimous vote of its members. 2 Am. & Eng. Enc. Law, p. 178. We are of the opinion that the subsequent action of the Koerner Lodge at the meeting of September 24th, as offered to be shown by the appellant, was, under the circumstances, proper and legitimate. It appeared that the minutes of the meeting of September 10th were first read and presented for approval at the meeting on September 24th, and the offer was to show that certain corrections in regard to the proceedings had at the former meeting were then made. The meeting of September 24th seems to have been the first opportunity for the lodge to avail itself of the right to correct the record of the former meeting so as to make it conform to what had actually occurred. Again, it appears that this meeting was also the first opportunity which the 11 members who were absent on September 10th had to protest and object to the action of the minority of the lodge's membership at this latter meeting. As we have seen, the laws of the order forbid a voluntary dissolution or surrender of a lodge's charter in the event there are nine members willing to continue the organization. The policy or purpose of this rule manifestly is to prevent a dissolution of a subordinate lodge unless it be effected as near as practicable by unanimity upon the part of its members. If there are nine or more loyal ones, who are willing to sustain their organization as a lodge, and continue its existence and operations in obedience to the rules, regulations, and laws of the order, then a voluntary dissolution of the lodge, as such, cannot result, even though it be the will and desire of a large majority of its members, except by the permission of the grand lodge or its chancellor. This must be true if any controlling force or effect in this respect is to be given to the particular rule or law in question. This is a vital point in the case at bar, for, if it is shown that these 11 protesting members are willing to sustain and continue the existence of their lodge, then it is evident, we think, that the vote of its members at the meeting of September 10th upon the adoption of the resolution in controversy could not ipso facto result in its dissolution, or work a surrender of its charter. The evidence relative to the action taken by these protesting members therefore was very material in order to show, in consideration of the rule to which we have referred, that the action of the lodge relied upon by the appellee had not actually effected a voluntary dissolution and disbandment as claimed by the appellee, and upon

which it bases its right to the money and property involved. It would seem that nine members,—the number designated by this law,—being in excess of a quorum, and also of the number required to constitute a lodge, would still continue the organization of the lodge, and entitle it to hold its property and effects, notwithstanding the act of those in deciding to withdraw or sever their fraternal connections. See *Gorman v. O'Connor*, 155 Pa. St. 239, 26 Atl. 379; *McFadden v. Murphy*, 149 Mass. 341, 21 N. E. 868; *Chamberlain v. Lincoln*, 129 Mass. 70. The stockholders of a corporation which is chartered or organized under the laws of a state, as a general rule, cannot effect a voluntary dissolution except by a unanimous vote. 2 Beach, Priv. Corp. § 781; *Cook, Stock, Stockh. & Corp. Law*, § 629. That part of the resolution which declared in favor of turning appellant's property over to the German Mutual, etc., Society, was ultra vires, and would not warrant or justify its trustees and officers in carrying it into effect. The authorities fully affirm and sustain the doctrine that appellant's members had no right or power to divert the funds and property of their lodge from the source or specified purposes to which, under the rules and laws of the order, the same had been dedicated. *Nibl. Ben. Soc. & Acc. Ins.* § 121; *Duke v. Fuller*, 9 N. H. 536; *Bac. Ben. Soc.* § 39; *Council v. Sharp*, 38 N. J. Eq. 24; *Atlmann v. Benz*, 27 N. J. Eq. 331; *Grand Lodge K. of P. v. Manhattan Sav. Inst.* (Super. N. Y.) 34 N. Y. Supp. 253. We are of opinion that the court erred in excluding the evidence herein indicated as offered by the appellants, and the final judgment is therefore reversed, and the cause remanded, with instructions to the lower court to grant appellants each a new trial, and for further proceedings in accordance with this opinion. The restraining order to remain in force until the further order of the lower court.

(146 Ind. 673)

**HOME ELECTRIC LIGHT & POWER CO.
v. GLOBE TISSUE-PAPER CO.**

(Supreme Court of Indiana. Feb. 2, 1897.)

**WATER RIGHTS—INJUNCTION—PLEADING—APPEAL
—RECORD—REVIEW.**

1. A complaint for injunction, first attacked on appeal from a refusal to dissolve a temporary restraining order, need not make a case entitling plaintiff to relief at all events at the final hearing, it being sufficient if, in connection with the other pleadings and the evidence on the motion to dissolve, it makes a proper subject for an investigation in equity.

2. The weight of conflicting evidence on a motion to dissolve a temporary restraining order cannot be considered on appeal.

3. The fact that a riparian owner who has purchased a right to a certain number of cubic feet of water per minute constantly wastes part of the water so purchased does not entitle an upper owner, who took subject to the purchase, to withhold a part of the other's wa-

ter equal to the amount which the other wastes.

4. On appeal from a refusal to dissolve a temporary restraining order, the complaint, answer, and order appealed from should be in the record, and not in the bill of exceptions.

5. When the bill of exceptions embraces matters which belong in the record proper, the court need not consider such matters.

Appeal from circuit court, Elkhart county; H. D. Willson, Judge.

Action by the Globe Tissue-Paper Company against the Home Electric Light & Power Company. From an order refusing to dissolve a temporary restraining order, defendant appeals. Affirmed.

Dodge & Hubbell and Van Fleet & Van Fleet, for appellant. Chamberlain & Turner, Baker & Miller, and J. D. Osborn, for appellee.

MCCABE, J. The appellee sued the appellant to enjoin it from doing certain acts, asking a temporary restraining order until the final hearing. The trial court granted a temporary restraining order until the final hearing, and afterwards the defendant moved to dissolve the same, and affidavits were read in support of and against the right of the plaintiff to such an order. The motion to dissolve was overruled, and from this interlocutory order this appeal is prosecuted. Rev. St. 1894, § 658 (Rev. St. 1881, § 646). The errors assigned call in question the sufficiency of the facts stated in the complaint to constitute a cause of action for an injunction, or warrant relief by way of injunction, and the action of the circuit court in overruling appellant's motion to dissolve the restraining order, in granting the injunction upon the evidence, and in overruling appellant's motion to modify the judgment. We presume counsel mean to say, overruling appellant's motion to modify the restraining order, as there was no judgment, and their motion to modify was not to modify the judgment, but to modify the restraining order.

The substance of the complaint is: That the plaintiff, the Globe Tissue-Paper Company, is a corporation, organized under the laws of the state of Indiana, engaged in the manufacture of paper by water power, and has been so engaged for many years prior to May 29, 1891. That on said day the St. Joseph Hydraulic Company, a corporation, was the owner of an undivided third of the water power of the St. Joseph river, furnished and produced by reason of a dam constructed across said river in the city of Elkhart by the Elkhart Hydraulic Company some years prior thereto, which water, so owned by said St. Joseph Hydraulic Company, was to be and has been used on the north side of the St. Joseph river by means of a raceway owned by said St. Joseph Hydraulic Company on the north side of the St. Joseph river, which connects with the water of the St. Joseph river above said dam, and extends upon the north side of said river westward to a point below said dam. That said St. Joseph Hydraulic Company had arranged for factory sites for the purpose of

furnishing and leasing to factories and mills water power out of its said hydraulic headrace. That on said day there was standing upon the bank of said hydraulic headrace, and between it and the St. Joseph river, large factory buildings, which were then empty and unoccupied, but which had theretofore been used as a paper mill, and had flumes connecting with said buildings, and six water wheels, all set and ready for use, and a tailrace for the purpose of carrying off the water coming from said raceway and flumes, and through the water wheels in said buildings, and emptying the same into the St. Joseph river below said dam. That plaintiff was desirous of purchasing said buildings, and rearranging the machinery therein, for the purpose of operating a paper-mill plant, and to that end plaintiff and the St. Joseph Hydraulic Company on said day entered into a parol agreement, by virtue of which the St. Joseph Hydraulic Company, for the sum of \$2,000 yearly rental, payable quarterly by plaintiff, agreed to furnish the Globe Tissue-Paper Company 9,927 cubic feet of water per minute under a working head of 10 feet, and more or less proportionately as the head might vary below or above said 10 feet above named, from said hydraulic headrace, to be delivered to said Globe Tissue-Paper Company through said flumes adjacent to said race, for the term of 25 years. It was further agreed between said parties that said contract should be reduced to writing, and be signed by each. That afterwards plaintiff caused a formal written lease in accordance with the terms of said parol contract to be drawn up and signed by plaintiff. It was delivered to said hydraulic company, but said company as yet has not executed the same. That after said agreement was entered into, and upon the faith thereof and in reliance thereon, the plaintiff purchased said factory buildings and the land upon which they stand, and placed therein a large amount of costly machinery for the manufacture of paper, at an expense of over \$25,000. That at the time said agreement was made said St. Joseph Hydraulic Company well knew the condition, location, number, and height of the water wheels contained in said building, and well knew the location and condition of the tailrace connecting said mill and said wheels with the St. Joseph river. That plaintiff completed its said plant so purchased by it, and began the manufacture of paper in the same, on the 1st day of October, 1891, and has been in possession and so engaged ever since, except when said mill was temporarily shut down, caused by the wrongful conduct of the defendant hereinafter alleged, and plaintiff has during all that time kept and performed all its part of the agreement with said hydraulic company. It was further agreed on the part of said hydraulic company with plaintiff that the plaintiff company should have a priority of right to use said water out of said hydraulic race over all other lessees of said St. Joseph Hydraulic Company. That on or about the — day of May, 1894, the St. Joseph Hy-

draulic Company leased to the defendant, out of said headrace, certain water power, which defendant took with full knowledge of and subject to plaintiff's lease aforesaid. That defendant has drawn water from said race ever since, and threatens to continue so to do as hereinafter stated, with notice and knowledge of plaintiff's rights. That said defendant is a manufacturing corporation, and has constructed its plant 150 feet westward of plaintiff's plant. That defendant began operating its plant about the — day of —, 1894, and using as part of its power water power from said hydraulic company's headrace. That from the time said defendant began using water from said headrace, until about three weeks ago, said race furnished enough water so that plaintiff could run its said mill by the use of water from said raceway, but within the past three weeks, on account of the low stage of water in the St. Joseph river, there has not been enough in said headrace to furnish plaintiff 9,927 cubic feet of water per minute under a working head of 10 feet, the amount of water contracted for by it. That the amount of water coming down said headrace in the last three weeks has not been more than enough to make 9,927 cubic feet of water per minute, if plaintiff had had the use of all said water that came down said race. That the water wheels of plaintiff, located as they were at the time of the purchase of said buildings by plaintiff, and as they now are, will afford a 10-foot head in ordinary stages of the water in the St. Joseph river, when the water in said raceway is not drawn off and lowered by the wrongful use of said water by the defendant. That, notwithstanding the plaintiff's priority of right, the defendant has for the last three weeks and now continues to wrongfully and without right use said water without reference to plaintiff's rights, using nearly all of the water which has for the past three weeks come down said race. That for the past three weeks the defendant has been constantly, wrongfully, and without right drawing off water from said headrace, and has thereby decreased plaintiff's head to such an extent that plaintiff cannot get water enough from said race to run any of its said water wheels or machinery, nor the amount of water contracted for, and was obliged, by reason of the wrongful conduct of the defendant, to shut down plaintiff's said plant, and stop its said mill, throwing out of employment all of plaintiff's employes, 25 in number. That plaintiff has a large business in exporting and selling its manufactured paper, and has many orders for paper on hand from various parties, which are past due and coming due, but which plaintiff will be unable to fill and send out on account of the wrongful conduct of defendant aforesaid. That plaintiff has no other way of running its said mill than by said water power. That defendant has, in connection with its water wheels, a large boiler and two steam engines for the purpose of furnishing power for the defendant's said factory, which plain-

tiff is informed and believes are sufficient to run said factory without the use of said water power. The plaintiff has been damaged by defendant's said wrongs \$5,000. That all the plant and property of defendant is worth less than \$20,000. That the same is now mortgaged to Justus L. Broderick for \$20,000. That said defendant, as plaintiff believes, is or soon will be insolvent. Prayer for a temporary restraining order, restraining defendant from using any of said water power, excepting such surplus water in said headrace as may be therein contained hereafter over and above the amount of power so contracted for by plaintiff, to wit, 9,927 cubic feet of water per minute, and on the final hearing that the injunction be made perpetual during the remainder of the time plaintiff's contract is to run. The temporary restraining order was issued in accordance with the prayer.

The objections urged against this complaint are general, and amount to a contention that it fails to show an equitable right or a clear right to the water; that the injury is not permanent, but temporary; that the injury done and threatened is not irreparable, etc. But we think the complaint sufficient to withstand an attack on it for the first time in this court. It is true the trial court overruled a demurrer to it, but that ruling is not assigned for error. On an appeal from an interlocutory order overruling a motion to dissolve an injunction, as here, where one of the points made for reversal was the alleged insufficiency of the complaint, this court, borrowing from an approved author, said: "It is not, however, necessary that a case should be made out which would entitle the plaintiff to relief at all events at the hearing. It is enough if the court finds, upon the pleadings and the evidence, a case which makes the transaction a proper subject for investigation in a court of equity. The question for the court upon the interlocutory application is not the final merits of the case. When the cause comes to be heard, the final merits may be very different. But this consideration will not prevent the court from breaking in upon the proceedings at law, where, from the merits to be gathered from the pleadings and conflicting affidavits, there appears on the whole a case proper for the investigation of the court and a fair question to be reserved till the hearing." *Kerr, Inj. 14; Spicer v. Hoop, 51 Ind., at pages 371, 372.* The only evidence was by way of affidavits read on both sides. The affidavits in support of the application fully support the complaint, and warranted a temporary injunction. In such a case we can no more determine the weight of conflicting affidavits than we can settle conflicts in the evidence on appeal from a final judgment. *Spicer v. Hoop, supra; Schnurr v. Stults, 119 Ind. 429, 21 N. E. 1089; Railway Co. v. Hendricks, 128 Ind. 462, 466, 28 N. E. 58.*

The defendant's affidavits tended to prove

some of the allegations in the second paragraph of its answer, the first paragraph being a general denial. Those allegations are that "defendant says that it is the duty of the plaintiff to lower its wheels three feet, and to lower its tailrace two feet; that the plaintiff, under a seven-foot head, wastes constantly more than 56 effectual horse powers because of want of repairs in their wastes; that, under a greater head, it wastes more water; that the defendant's wheels are set skillfully, and three feet lower than the plaintiff's; that the plaintiff cannot use the water at a less head than four feet; that, when the plaintiff has four feet of water, the defendant has seven feet, and can use all the power it needs." The affidavits were conflicting on all these points, but the affidavits on behalf of the plaintiff concede that the plaintiff does waste some water, but not as much as the affidavits on the other side show, and no more than is ordinary in such cases. On this point appellee's counsel plant themselves in a vigorous contention that, there being no conflict on the point that there is a needless waste of water by appellee, there ought to be a reversal. But it is impossible to see how it should make any difference in the legal rights of the appellant if the appellee saw fit to waste all the water it had purchased. It is not contended that it at any time took more than 9,927 cubic feet per minute. This it had purchased and paid for, and it had a right to use it or waste it just as it chose. If the appellant desired to get the use of the part thereof not needed by appellee, it ought in good conscience to get the consent of the owner, and, if that consent could not be got without paying for it, that was its plain duty. What we have already said disposes of the motion to modify the temporary restraining order.

But we may suggest a serious question presented by the record, but not mentioned by counsel on either side, and this court does decide the question. The complaint, answer, and interlocutory order are all in a bill of exceptions filed and set out in the transcript. These are matters that belong to the record proper, without a bill of exceptions. Neither of these necessary parts of the record proper appear therein otherwise than in the bill of exceptions. The office of the bill of exceptions is to bring into the record matters which do not belong to or appear in the record proper; and, when the bill of exceptions embraces matters which in regular course ought to be in the record proper, the law does not require them to be considered on appeal, unless some statute so specially provides. *Bowen v. State*, 108 Ind. 411-414, 9 N. E. 378, and authorities there cited. *Gray v. Singer*, 137 Ind. 257, 36 N. E. 209, 1100; 3 Enc. Pl. & Prac. 404-406, and authorities there cited. Finding no available error in the record, the temporary restraining order is affirmed.

(146 Ind. 635)

PENNINGTON v. MARTIN.

(Supreme Court of Indiana. Jan. 28, 1897.)

LIS PENDENS—FAILURE TO FILE—BONA FIDE PURCHASER.

Where the reversal of a decree to enforce a vendor's lien has been entered in the lower court, and no lis pendens has ever been filed, one who, for value, and without actual knowledge of the pending suit, purchases the land before another decree is rendered, takes it discharged of the lien, under Rev. St. 1894, § 327 et seq. (Rev. St. 1881, § 325 et seq.), providing that a suit to enforce a lien on realty, not founded on an instrument executed by the party holding the legal title as appears of record, shall not operate as constructive notice as against a bona fide purchaser, unless a lis pendens has been filed.

Appeal from circuit court, Boone county; Charles M. Zion, Special Judge.

Action by James M. Martin against Isaac Pennington to quiet title. From a judgment in favor of plaintiff, defendant appeals. Affirmed.

Henry C. Wills and Ralston & Keefe, for appellant. T. J. Terhune, for appellee.

HACKNEY, J. The appellee, James M. Martin, sued the appellant, Isaac Pennington, to quiet his title to a tract of land in Boone county. The questions for decision arise upon exceptions to conclusions of law stated upon a special finding of facts. Briefly stated, the facts found were that in October, 1889, the appellant conveyed said tract to his son James, who, in July, 1891, conveyed, through another, to his wife, Laura F. Pennington. Later James died, and the appellant sued Laura to enforce a vendor's lien against the land for \$600, and he obtained a decree for \$206.83, and a lien in January, 1892. From that decree he appealed to this court, where he obtained a reversal, because of the insufficiency of the amount found in his favor. *Pennington v. Pennington*, 138 Ind. 8, 37 N. E. 336. On the day following the reversal, May 10, 1894, the clerk of the lower court noted upon the judgment docket, opposite the entry of the rendition of said decree, the fact of said reversal. On June 21, 1894, the appellee purchased from said Laura the lands in question, and received from her a deed of conveyance therefor, upon full consideration then paid. Until June 25, 1894, said Martin had no actual knowledge of any claim against said land, nor of the pendency of said suit, when an attorney for the appellant advised him of the suit and of the claim. On said day, for the first time, the appellant caused a lis pendens notice to be entered in said clerk's office. Thereafter said suit between said Isaac and Laura Pennington proceeded, without making Martin a party, until in January, 1895, when said Isaac obtained a decree for \$600, and a lien upon said land as against said Laura. The conclusions of law were that the appellee was not chargeable with actual or constructive notice of the appellant's lien, was not estopped by the last-mentioned decree, and that his title should be quieted.

The statute (Rev. St. 1804, § 327 et seq.; Rev. St. 1881, § 325 et seq.) provides that "whenever any person shall have commenced a suit, whether by complaint, or by cross complaint as defendant, to enforce any lien upon, or right to, or interest in any real estate upon any claim not founded upon an instrument executed by the party having the legal title to such real estate, as appears from the proper records," etc., "it shall be the duty of such person to file with the clerk of the circuit court, in each county where the real estate sought to be affected is situated, a written notice containing the title of the court, the names of all the parties to such suit, a description of the real estate to be affected, and the nature of the lien, right or interest sought to be enforced against the same," which notices shall be recorded in the "Lis Pendens Record." Until such notices are filed as thus required, "the bringing of suits for the purposes mentioned * * * shall not operate as constructive notice of the pendency of such suit, * * * nor have any force or effect as against bona fide purchasers or incumbrancers of" said real estate. The lien sought to be enforced by this appellant was one clearly within the provisions so requiring notice of the pending suit. What, then, was the effect of his failure to file the notice until after the appellee had purchased the land, paid his money, and received the conveyance? The answer of the statute is that, if the appellee was a bona fide purchaser, the failure shall defeat constructive notice of the pendency of the suit.

The learned counsel for the appellant suggest that courts do not favor lis pendens statutes, and will not construe them broadly. If this were true, we find no room for a construction which would eliminate or even modify the strong words of the statute that, until the notice is filed, the bringing of the suit "shall not operate as constructive notice." Statutes of this class are numerous, and have often been construed by the courts. The decisions are uniform in holding that "the lis pendens acts limit the method of creating lis pendens. They abrogate the common law upon the subject; and, if the statutory mode be not followed, there can be no lis pendens as to third parties." Benn. Lis Pend. § 321; Bensley v. Water Co., 13 Cal. 307; Corwin v. Bensley, 43 Cal. 263; Jorgenson v. Railway Co., 25 Minn. 206; Arnold v. Casner, 22 W. Va. 459; Burroughs v. Reiger, 12 How. Prac. 171; Tate v. Jordan, 3 Abb. Prac. 392; Abadie v. Lobero, 36 Cal. 391; Hammond v. Paxton, 58 Mich. 393, 25 N. W. 321; 13 Am. & Eng. Enc. Law, p. 895. In the authority last cited, the rule is stated that "where no notice of lis pendens is filed or recorded, and no actual notice to the party is shown, there is no binding lis pendens." See, also, Smith v. Gale, 144 U. S. 509, 526, 12 Sup. Ct. 674.

If constructive notice, without the filing required, is denied by statute, and since it is found that the appellee had no actual notice

of the suit or claim therein when he purchased, there seems no escape from the conclusion that he is not bound by the result of the suit. The decree which is relied upon by counsel for the appellant in support of his lien against the appellee's claim of title is that last rendered; and, in the nature of the case, this must be, since the first decree was held erroneous, and, when this suit was brought, stood for naught. If the pending litigation had been constructive notice to Martin of the amount of the claim or judgment of the appellant, and had the judgment continued in force, its lien as a judgment for money, and not as a specific decree declaring the lien for unpaid purchase money, might have been effective; but, in view of our statutory provisions, the specific lien constituted no constructive notice, and the reversal of the judgment relieved the property from the lien as a judgment upon a money demand. The case of *Arrington v. Arrington* (N. C.) 19 S. E. 351, is cited on behalf of the appellant, as holding, and it does hold, that in the county where the suit is pending for the enforcement of the lien, if the description of the land and the object of the suit appear from the complaint, the suit will be constructive notice to purchasers of the lands in such county even if the lis pendens notice is not filed. The lis pendens statute of North Carolina, under which that decision was made, differs widely from our statute. It is there provided that such notice may be filed. It is not required to be recorded, and the failure to so file it is not declared, as in our statute, to deny constructive notice from the pending suit. It is possible, under the statute of that state, to hold that the filing of a complaint containing all of the elements of notice required by the statute would constitute constructive notice. Such holding is not possible under our statute.

Nor do we observe the force of the suggestion of counsel for the appellant that the appellee should have sought to become a party to the suit between Isaac and Laura F. Pennington, after he became advised of the claim of said Isaac to a vendor's lien. Appellee then held the legal title to the lands, unaffected by constructive notice of the pending suit, and to have intervened would have accomplished nothing that was not then secured to him by his deed. In the absence of both actual and constructive notice of the vendor's lien, the appellee could certainly not be estopped to maintain his title by deed. The judgment is affirmed.

(146 Ind. 685)

O'TOOLE et al. v. HOWERY.

(Supreme Court of Indiana. Feb. 3, 1897.)
FIRM PROPERTY—SALE BY PARTNER—INJUNCTION
—PLEADING.

A complaint stating that plaintiff's partner had sold the firm's interest in standing corn, and that the purchaser was removing it; that the firm, the purchaser, and the other partner were insolvent; that such partner was indebted to the firm; and that plaintiff was

solvent and liable for all the firm debts,—is not cause for an injunction as against either party, in the absence of allegations that the corn was sold for less than its value, or that the proceeds would not be applied on firm debts, or that the purchaser knew that the firm was insolvent.

Appeal from circuit court, Shelby county; W. J. Buckingham, Judge.

Action by George W. Howery against John O'Toole and another for an injunction. From a judgment granting the writ, defendants appeal. Reversed.

Adams & Carter, for appellants. Hord & Adams, for appellee.

HOWARD, J. The appellee, George W. Howery, and the appellant Stephen Crawley were partners in the sawmill business, having for that purpose leased a "mill and some lands adjoining thereto." This action was brought by the appellee to enjoin the appellant John O'Toole from removing from said land certain growing corn, sold to O'Toole by Crawley. Crawley was made a party to answer as to his interest in the controversy. A temporary restraining order was issued as prayed for; and, on final hearing, O'Toole was perpetually enjoined from gathering or removing any of said corn. It is contended that the court erred in overruling demurrers to the complaint, and in overruling the motion for a new trial. The complaint, after stating the formation of the partnership of Howery and Crawley, and the leasing by them of the sawmill and adjoining lands, alleges that the firm "has contracted indebtedness to an amount of over \$400, and the said Crawley is indebted to the said firm in the sum of \$141, and that the said partnership is insolvent, and all the property of said firm was destroyed by fire, except some lumber of the value of \$100, and the one-half of 30 acres of growing corn of the value of \$300; that the said Crawley and the said O'Toole are insolvent, and the said Crawley has pretended to sell to the said O'Toole one-fourth interest of said firm in said growing corn, and he is now engaged in gathering and carrying off said corn, and will continue to do so until he has taken all of the full one-fourth thereof; that said O'Toole has already carried off about \$50 worth of said corn, and appropriated the same to his own use, and is threatening to carry off the residue thereof; that this plaintiff is solvent, and liable for said indebtedness, and will, if said property is taken away and lost, be required to pay the debts of said firm out of his own property." We do not think the allegations of the complaint sufficient to authorize the injunction against O'Toole. There is nothing to show why Crawley, as one of the partners, might not sell the partnership property in question. If the property was of a kind which, for any reason, should not be sold; or if, in any way, the sale was made to the injury of the partnership,

—the fact should be made to appear by proper allegation. From the circumstances that Crawley was insolvent, and was indebted to the firm, it does not follow that the transaction was dishonest. If the money received by Crawley for the corn were the full value of the property sold, and were used by him in part payment of the firm's indebtedness, we cannot see that any wrong was done by him in selling the corn. As a partner, unless the contrary were shown, he had the same right as Howery to dispose of the firm property. Nor is it clear why the corn should not be sold, as well as the lumber that was left. The mill was destroyed, the firm insolvent, the business ended, and all the property left was insufficient to pay the debts. That, under these circumstances, one of the partners should have made sale of "one-fourth interest of said firm in said growing corn," does not show any wrong on his part. If, instead of one-fourth, he had sold all the firm's corn for its full value, and made proper application of the proceeds, such sale would not have shown any wrongdoing on his part. Fraud cannot be presumed, but must be alleged and proved. But so far as O'Toole is concerned, against whom the injunction is directed, there seems even less reason why the decree should have entered. The sole allegation against him, if such it can be called, is that he is insolvent. But an insolvent man may purchase property without being thereby held to be guilty of wrongdoing. It is not said that O'Toole conspired with Crawley to engage in any fraud upon the firm or upon Howery. It is not even shown that O'Toole had any knowledge of the insolvency of the firm, or that he knew of any reason why one of its partners might not honestly sell him a part of the firm property. Even if Crawley had been engaged in any underhand proceeding, which is not alleged, still O'Toole should not for that be held chargeable with guilty knowledge of Crawley's wrongdoing. If the purchase was a fair, open transaction on O'Toole's part, certainly he should not be enjoined from gathering and carrying off the corn which he had so purchased. The allegations of the complaint fail to show any sufficient reason for the injunction. The judgment is reversed, with instructions to sustain the demurrers to the complaint, and with leave to amend.

HACKNEY, J., took no part in the decision of this case.

(16 Ind. App. 606)

KIRSHBAUM v. HANOVER FIRE INS.
CO. et al.

(Appellate Court of Indiana. Jan. 26, 1897.)

INSURANCE—ACTION ON POLICY—INTERPLEADER—PARTIES—ANSWER—REFORMATION—IMPEACHING WITNESS—HARMLESS ERROR.

1. Application of one to be made a defendant in an action on an insurance policy, alleg-

ing that he is a stockholder in the company on whose property the policy was issued, that he paid for the insurance, and that the policy should have been made payable to him, but by mistake, and without his knowledge, was made payable to plaintiff, shows an interest entitling him to be made a defendant.

2. An answer amounting to a general denial, though argumentative, is good against demurrer.

3. Error, if any, in overruling demurrer to a paragraph of a cross complaint, is harmless, the findings being based on another paragraph.

4. Where, in an action on a fire policy issued in the name of plaintiff on property of which he was mortgagee, *et. interpleaded*, alleging that he had paid the premium to the company, and directed it to issue the policy, so as to protect him and other sureties of the mortgagor, but that, by mistake, it was issued to plaintiff, and that judgments against the mortgagor and sureties, so far as paid, had been paid by H., and that, too, to an amount exceeding the insurance; and the company, by agreement with plaintiff and H., paid money into court, and was released by them from the further liability on the policy,—it was unnecessary, for determination of issues between plaintiff and H., that the other sureties be made parties.

5. Where, in an action on a policy, H. interpleads, claiming that he paid for the insurance, and directed that the policy be issued so as to protect him, but that, by mistake, it was issued to plaintiff, and the company, by agreement with them, pays the money into court, and is released from further liability on the policy, it is not necessary, to authorize judgment for interpleader, that the policy be reformed.

6. Where, in laying the foundation to impeach a witness, his attention is called to a conversation as one with a particular person in a particular building, it may be sufficient to fix the time thereof as "about one year ago."

Appeal from circuit court, Jay county; D. D. Heller, Judge.

Action by Raphael Kirshbaum against the Hanover Fire Insurance Company and another. John L. Hanlin was, on his application, made a defendant, and filed a cross complaint. From a judgment for Hanlin, plaintiff appeals. Affirmed.

Corwin & Smith and Headington & La Follette, for appellant. R. H. Hartford, for appellee.

ROBINSON, J. This action was brought by the appellant against the Hanover Fire Insurance Company to recover for a loss by fire to certain buildings and machinery of the Portland Milling Company. Jacob R. Jones and the appellee, Hanlin, were made parties defendant. The cause was put at issue, and was tried by the court. At the request of the appellant, the plaintiff below, the court made a special finding of the facts, and thereon stated its conclusions of law. To the conclusions of law, the appellant excepted. Over appellant's motion for a new trial, and exception, judgment was rendered in favor of appellee, Hanlin, for \$821.34. The facts found by the court were substantially as follows: On the 21st day of October, 1886, the Portland Milling Company, a corporation, executed to the appellant a mortgage upon a certain lot in Portland, Jay county, on which was situated

the buildings of the milling company, to secure an indebtedness of \$5,000 then owing by the company to the appellant. This mortgage was foreclosed by the appellant on the 27th day of February, 1894, and on the 24th day of March, 1894, the property described in the mortgage was sold by the sheriff; and, for the purpose of collecting his mortgage debt, the appellant purchased the property for the sum of \$5,960.68, the same being the amount of his judgment, interest, and costs; and on the 28th day of March, 1894, the appellant was the holder of the sheriff's certificate of purchase therefor. In the foreclosure suit, Jacob R. Jones was appointed receiver for the milling company, and was receiver on the 28th day of March, 1894. Leave was granted to make the receiver a party defendant to this action, to answer as to any interest the milling company might have in the policy of insurance sued on. On the 28th day of March, 1894, the building and machinery on which the appellant's mortgage was executed were destroyed by fire. The purchase of the property under the foreclosure proceedings was in full satisfaction of the appellant's judgment, and the execution and decree were returned by the sheriff fully satisfied. On the 27th day of February, 1894, the People's Bank recovered a judgment against the Portland Milling Company, as principal, and the appellee, Hanlin, Ira Denney, and Patterson M. Heam, for \$2,725.52, which judgment was paid in full on that day by appellee, Hanlin. On the same day, the Citizens' Bank of Portland, Ind., recovered a judgment against the milling company, as principal, and the appellee, Hanlin, Ira Denney, and Abraham Bergman, as sureties, for the sum of \$487.31; and on the same day the Citizens' Bank recovered another judgment against the milling company, as principal, and appellee, Hanlin, and Ira Denney, as sureties, for the sum of \$931.42; and the appellee, Hanlin, had paid \$900 on the judgment in favor of said Citizens' Bank. At the time the property was destroyed by fire, and for a long time prior thereto, the appellee, Hanlin, owned about \$6,000 of the capital stock of the milling company. On or about the 27th day of March, 1894, the appellee, Hanlin, applied to the agent, at Portland, of the Hanover Fire Insurance Company, for insurance on the milling company's property, for \$3,000, for the benefit of himself and the said Denney, Heam, and Bergman, from loss as surety for the milling company. The agent agreed to write such insurance for a premium of \$142.50, which appellee, Hanlin, was to pay to said agent. The appellee, Hanlin, not knowing how the insurance should be written to protect him and his co-sureties, the agent, having had long experience as such agent, agreed to write the insurance as appellee, Hanlin, had requested. Said Hanlin left the \$142.50, to pay the premium on said insurance when the policies were ready, with receiver Jones, who was to call on the agent,

and pay the premium, and procure the policies for appellee, Hanlin. The agent wrote two policies, for \$1,500 each,—one for the Farmers' Fire Insurance Company, and the other for the Hanover Fire Insurance Company, the last named being the policy in suit. Each was issued and dated March 27, 1894. After the policies were written, but before they had been delivered to Receiver Jones, and before the premiums had been paid, to wit, on the 28th day of March, 1894, the property so insured was destroyed by fire. The milling company was at that time, and has since been, wholly insolvent. On the 30th day of March, 1894, Receiver Jones, as appellee's (Hanlin's) agent, tendered to the insurance agent the premium money, and demanded the policies, which were refused; and said Jones, at the instance of the insurance agent, deposited the premium money in bank, and the policies were retained by the agent until the day of trial. The court further found that the agent, in writing the policies, disregarding the agreement to write them to protect appellee, Hanlin, and his co-sureties, wrongfully and fraudulently, and without the consent or knowledge of Hanlin and said sureties, inserted in each of said policies that the loss, if any should occur, by fire, should be paid to the appellant mortgagee, as his interest might appear; that neither Hanlin nor his co-sureties had any knowledge that the policies were so written until after the property burned. No part of the sums of money paid by appellee, Hanlin, on the People's Bank judgment, and the \$900 on the two judgments in favor of the Citizens' Bank, has ever been repaid to him. The insurance evidenced by the policy in suit was procured by the appellee, Hanlin, for the protection of himself and his co-sureties. Neither the appellant nor the receiver, for the milling company, paid or agreed to pay any part of said premium. At the time the policy in suit was written, the appellant held policies on the property to the amount of \$6,750. The Hanover Fire Insurance Company, by agreement made in open court with the appellant and appellee, Hanlin, and Receiver Jones paid into court the sum of \$821.34, and \$10 for costs, and was discharged from further liability on account of the policy sued on. Neither the appellee, Hanlin, nor the receiver, ever saw the policy in suit until the day of the trial. On the facts found, the court stated, as conclusions of law: "(1) That the plaintiff, Raphael Kirshbaum, take nothing by his complaint. (2) That the cross complainant Jacob R. Jones, receiver of the Portland Milling Company, take nothing by his cross complaint. (3) That the cross complainant John T. Hanlin should have and recover of and from the defendant the Hanover Fire Insurance Company the sum of \$821.34. (4) That the cross-complainant John L. Hanlin should have and recover of and from the defendants to his cross complaint, to wit, Raphael Kirsh-

baum and Jacob R. Jones, receiver, his costs by him in this suit paid, laid out, and expended, except such costs herein as have been paid by the defendant the fire insurance company."

The first error assigned calls in question the ruling of the court in admitting John T. Hanlin as a party defendant on his own application. In his application, he shows that he is a stockholder in the milling company on whose property the policy in suit was issued; that the policy should have been made payable to him, and not to the appellant, but by mistake of the insurance company's agent, and without his knowledge or consent, the policy was made payable to the appellant, of which fact he was ignorant until after the insured property was destroyed by fire; and that he paid for the insurance for which suit is brought by the appellant. We think this shows that he has such an interest in the subject-matter as entitles him to be made a party defendant, under section 274, Rev. St. 1894 (section 273, Rev. St. 1881). *Pickrell v. Jerauld*, 1 Ind. App. 10, 27 N. E. 433.

The demurrer to the second paragraph of appellee's (Hanlin's) answer admits that the facts therein set out are true; and, if so, they would defeat the plaintiff's right to recover. Under the general denial, a defendant may introduce any proof that will meet what the plaintiff is bound to prove in order to recover. This paragraph of answer amounts to an argumentative denial. It denies that the policy of insurance sued on was issued to the appellant, and there was therefore no material error in overruling the demurrer. *Leary v. Moran*, 106 Ind. 560, 7 N. E. 236; *Sohn v. Jervis*, 101 Ind. 578; *Clauser v. Jones*, 100 Ind. 123.

As we view the special finding, it must be considered as based exclusively upon the second paragraph of the cross complaint of Hanlin. This being true, there could be no reversible error in overruling the demurrer to the first paragraph of appellee's (Hanlin's) cross complaint. If there was error in such ruling, it was harmless. *Railroad Co. v. Fenn*, 3 Ind. App. 250, 29 N. E. 790; *Taylor v. Wootan*, 1 Ind. App. 188, 27 N. E. 502; *Hill v. Pollard*, 132 Ind. 588, 32 N. E. 564.

The demurrer to the second paragraph of the cross complaint was for want of facts; and "(2) that there is a defect of parties plaintiff, in this: that Ira Denney, John R. Perry, Patterson M. Heam, and A. Bergman should be made parties defendant." In any view of the pleading, the presence of the parties named was not necessary to a complete determination of the issues between the appellant and the appellee, Hanlin. They had paid nothing by reason of their suretyship, but all that had been paid was paid by the appellee, Hanlin, and the amount paid by him was in excess of the whole insurance. Nor did they pay or agree to pay the premium, or any part of it. Under an agree-

ment to which appellant was a party, the insurance company had paid into court the amount for which it was agreed it was liable under the policy, and was discharged from further liability on the policy; and the cross complaint, asking no judgment against the appellant, asks that the amount paid to the clerk be paid to the appellee in full discharge of the liability of the insurance company by reason of the insurance. The case of *Gilbert v. Allen*, 57 Ind. 524, is not in point. That case was a suit on a judgment that had been recovered by a firm composed of several persons, against Allen and another person named, and one only of the judgment creditors and judgment defendants, respectively, were made parties, and no reason shown for the omission. As the insurance company's liability on the policy had been determined by agreement in court, there could be no necessity for a reformation of the policy.

The appellant admits in his brief that the facts found are almost identical with the averments of the second paragraph of appellee's (Hanlin's) cross complaint. The facts found are substantially the facts alleged in that paragraph of the cross complaint, and, by his exception to the conclusions of law, the appellant admitted, for the purpose of the exception, that the facts were fully and correctly found by the court. *McCroory v. Little*, 136 Ind. 86, 35 N. E. 836; *Blair v. Blair*, 131 Ind. 194, 30 N. E. 1076; *Warren v. Sohn*, 112 Ind. 218, 18 N. E. 863. From the facts found, the conclusions of law stated by the court necessarily follow, that the appellant take nothing by his complaint, and that the appellee, Hanlin, was entitled to recover from the defendant insurance company the sum of \$821.34, and from the defendants to his cross complaint, *Kirshbaum and Jones*, receiver, his costs, except such costs as had been paid by the insurance company.

A new trial is asked because the finding is not sustained by the evidence, and that it is contrary to law. We have carefully examined the record, and it certainly contains evidence to support the finding, and, according to the familiar rule, that is sufficient. We are not informed why the finding should be held contrary to law. When a finding is within the issues presented by the pleadings, and is supported by the evidence, it cannot be contrary to law. *Ashmead v. Reynolds*, 134 Ind. 139, 33 N. E. 763.

It is also urged that the court erred in permitting certain impeaching questions to be asked a witness for the appellant, and in admitting the impeaching evidence itself, for the reason that the time fixed was too indefinite. In fixing the time of a conversation, the words "about one year ago" were used, and objection is made to this part of the question only. In laying the foundation for the impeachment of a witness, the time and place of the conversation, and the per-

son with whom it was held, should be specified with sufficient definiteness to enable the witness clearly to identify it. The name of the person and the particular building in which the conversation in question took place are given. In the case of *Bennett v. O'Byrne*, 23 Ind. 604, it is said: "The rule upon this subject is a practical one, and is founded upon clear principles of common sense. The exact time of a conversation it is often impossible to fix, and to require it would be simply to cut off all opportunity of impeachment in such cases. The object to be attained is to call the witness' attention to a particular conversation, so that he may not be taken by surprise. * * * Usually, dates are the least efficient of all means which can be used to refresh one's memory of events, and sometimes they afford no aid whatever." Under the circumstances of this case, we think the foundation for the impeaching evidence was sufficient.

The only remaining error complained of by appellant in his brief is in refusing to allow the plaintiff to prove by the witness Corwin that Hanlin had signed the proof of loss after the fire, and made no objection to the policy. We are not informed how an objection to the policy by Hanlin at that time could be material, and the same witness Corwin did afterwards testify that Hanlin signed the proof of loss.

We find no error in the record for which the judgment should be reversed. Judgment affirmed.

BLACK, J., absent.

(16 Ind. App. 662)

STATE ex rel. WRIGHT v. TOMLINSON
et al.

(Appellate Court of Indiana. Jan. 28, 1897.)
SPECIAL ADMINISTRATOR—ACTION ON BOND—LIFE
INSURANCE—ASSIGNMENT BY HUSBAND—VALIDITY.

1. Where a complaint, in an action on an administrator's bond, alleges that he received a certain sum and converted it to his own use, and that he knew of assets which he failed to preserve for the estate, an answer setting up a defense as to the special sum alleged to have been converted, but not answering the charge as to the failure to preserve the assets, is bad.

2. Under Horner's Rev. St. 1896, § 2237, providing that a special administrator shall collect and preserve the property of the estate until demanded by an administrator duly appointed, the special administrator has no authority to allow or pay claims, or enter into an agreed case in relation to the money collected by him.

3. A special administrator, under an agreed case, on order of the court, paid over certain insurance moneys to the widow of the deceased. The order of the court was reversed, and it was further ordered that the administrator appointed to succeed the special administrator should sue the latter and the widow to determine her right to such fund. Held that, where such administrator did not obey such order, he could not sue the special administrator on his bond for paying over such moneys to the widow.

4. Where an administrator claims that a special administrator paid out certain funds to

which the estate was entitled to another, in fraud of the estate, the burden is on him to sustain the averments.

5. Where a life policy does not declare an assignment without the consent of the company void, it may be assigned by a husband orally to his wife.

6. Where a husband took out a life policy in January, 1892, and assigned it to his wife in March, 1894, at which date he died, the transfer was valid, and not in fraud of creditors, except as to the amount of the premium paid for the two years.

Appeal from circuit court, Montgomery county; P. S. Kennedy, Special Judge.

Action by the state on the relation of Charles W. Wright, administrator, against George N. Tomlinson and others. Judgment for defendants, and plaintiff appeals. Affirmed.

Henley & Son, M. E. Clodfelter, and Joe L. Davis, for appellant. Paul & Vancleave, for appellees.

COMSTOCK, C. J. The complaint in this case is upon the bond of a special administrator, George N. Tomlinson, and his sureties, William Tomlinson and David Hartman. The complaint is in two paragraphs. A copy of the bond is filed with each paragraph. The breaches of the bond assigned are (1) that Tomlinson, special administrator, received the sum of \$1,971.88, which he converted to his own use and the use of others; (2) that said special administrator failed to preserve the property of the estate which came into his hands; (3) that said special administrator had knowledge of a large amount of personal property belonging to the estate, and failed and refused to preserve the same for the use of the estate; (4) that \$2,000 came into the hands of said special administrator, which he wasted and wrongfully turned over to others, whereby the same was lost to the estate. The breaches of the bond assigned in the second paragraph of complaint are, in effect, the same as those assigned in the first. The appellee G. N. Tomlinson filed his separate answer in three paragraphs. The first is a general denial. The second alleges, in substance, that in March, 1894, he was duly appointed and qualified as special administrator of the estate of Austin L. Tomlinson, late of Montgomery county, Ind., deceased, with bondsmen as set out in the complaint; that after his appointment there came into his hands the sum of \$1,971.88 from a certain insurance policy upon the life of his decedent; that Edith Tomlinson, the widow, claimed the money as her own, and demanded the same of him; that she had been substituted as beneficiary in said insurance policy, and threatened to bring suit against this defendant (appellee) for the recovery of the same; and that, being unwilling to pay her said money without an order of court, he and the said Edith Tomlinson, by agreement in good faith on an agreed statement of facts, submitted the question of ownership of said money to the circuit court

of Montgomery county, Ind., and thereupon the court found and adjudged that said money belonged to said Edith, and rendered judgment in her favor and against appellee, and ordered appellee to pay said money to her; and that afterwards, upon the faith of said order, appellee acting as such trustee, paid to the said Edith the sum of \$1,471.88, being the full amount of said money, after deducting \$500 therefrom, which he had paid for funeral expenses of decedent, on the order of court, with the consent of said Edith; that he paid said balance to the said Edith on the 12th day of April, 1894, and on the 16th day of April, 1894, he filed in said circuit court his report in final settlement of his said trust, showing his compliance with the order of the court, which said report the court approved, and discharged appellee and his sureties from all liability on the bond in suit, which order of approval and discharge were duly entered in the proper record of said circuit court; that this is the same money claimed by the relator and set out in his complaint. The third paragraph alleges that the money mentioned in complaint did not belong to said estate, but did of right belong to Edith Tomlinson, widow aforesaid, and the administrator had no right to the same. For first paragraph of reply to the second paragraph of the separate answer of appellee George N. Tomlinson, appellant alleges, in substance, that appellee's appointment as special administrator was procured by fraud and collusion between the special administrator and Edith Tomlinson, for the purpose of defrauding the creditors of said decedent, and as a part of the scheme the agreed statement of facts was entered into and submitted to the court, and the order procured for the payment of money to the widow aforesaid. The second paragraph of appellee's reply to second paragraph of answer admits the filing of the agreed statement of facts entered into by and between the special administrator and Edith Tomlinson, and that the court on said statement adjudged that the proceeds of said policy belonged to said widow, and ordered the payment of the same to her, but avers that the court had no jurisdiction to make such order upon said statement; that the estate was largely indebted, and the order procured for the purpose of defrauding the creditors of the estate, and that, after the appointment of the general administrator, relator herein had, upon petition to which Edith Tomlinson and George N. Tomlinson were made parties, procured the order of said court vacating said order; that the judgment setting aside the order made upon said agreed statement of facts was in full force and effect. The fourth paragraph of reply to the third paragraph of answer of George N. Tomlinson alleges that, George N. Tomlinson having procured himself to be appointed special administrator, having obtained the policy and presented it to the insurance company as special administrator,

having surrendered it and received the money thereon and deposited it in his name as special administrator, etc., he could not afterwards dispute the fact that it was his duty to receive the assets of the estate, preserve the same, and turn them over to the regular administrator. There was also a general denial. Demurrers to the second and third paragraphs of answer were overruled. Demurrer to the fourth paragraph of reply was sustained, and overruled as to the first and second. There was a trial had, and, upon request of appellant, the court made a special finding of facts and stated its conclusions of law.

The first error assigned is overruling appellant's demurrer to second paragraph of separate answer of appellee George N. Tomlinson. Appellee, by the facts averred in this paragraph, seeks to avoid liability on the ground that he, as special administrator, and Edith Tomlinson, entered into an agreed statement of facts concerning the ownership of the proceeds of the insurance policy upon which the court ordered the special administrator to pay the money to her, and that, after he had complied with the order of the court, he made a report of said trust, and resigned therefrom, which report was approved, and his resignation accepted, and he discharged; that this is the money referred to in the complaint. This paragraph, while addressed to the whole complaint, does not answer that portion of it which avers that the special administrator "wholly neglected and refused to receive more than \$500 of the property and assets of said estate, which came to his knowledge, and suffered and permitted the same to be wrongfully taken by others and converted to their own use." The complaint charges a neglect of duty as to money and other assets which he refused to receive. This allegation is not met by this allegation of answer. The demurrer, therefore, should have been sustained. *Farman v. Chamberlain*, 74 Ind. 82; *Dunn v. Barton*, 2 Ind. App. 444, 28 N. E. 717.

The demurrer should have been sustained for another reason. The powers of a special administrator are declared to be, by statute, "to collect and preserve the property of the testator or of the intestate until demanded by an executor or administrator duly authorized to administer the same when such special letters shall be deemed to be revoked." Rev. St. 1881, § 2237 (Rev. St. 1894, § 2391; *Horne's Rev. St. 1896*, § 2237). The question is passed upon in *Tomlinson v. Wright*, 12 Ind. App. 202, 39 N. E. 884. The court says, in speaking of the special administrator, appellee in this case, and of the money realized from the insurance policy mentioned in the answer, that "all he [special administrator] was authorized to do with it was to hold and possess it until an administrator shall be appointed, and then pay the same to him. He had no authority to allow or to pay claims, or to enter into an agreed

case in relation to the money which he had collected as such special administrator." Vide, also, *Cole v. Lafontaine*, 84 Ind. 446.

The third paragraph of the answer is addressed only to the averment of money in the complaint, alleging that it did not belong to the estate of Austin L. Tomlinson. It is pleaded in bar of the action, and, as it does not answer the entire complaint, the demurrer should have been sustained. *Farman v. Chamberlain*, supra.

The fourth assignment of error is the sustaining of the demurrer to the fourth paragraph of reply to the third paragraph of answer of appellee. It is pleaded as an estoppel, but, as we have held that paragraph of answer insufficient, it is not necessary to discuss this ruling.

The court, in the special finding of facts, found that Austin L. Tomlinson was, on the 1st day of March, 1894, and for a long time prior thereto had been, a resident of Montgomery county, Ind., and that on said date, while temporarily sojourning at Fullerton, Cal., he died intestate. That on the 3d day of March, 1894, George N. Tomlinson was, by the clerk of the circuit court of Montgomery county, in vacation, appointed special administrator of the estate of said deceased, and executed his bond, with his co-defendants in this action, William Tomlinson and David Hartman, as his sureties, which is the bond sued on in this action, which bond was duly approved, and he immediately thereafter qualified and entered upon the discharge of his duties as such special administrator. That on the 26th day of January, 1892, the said Austin L. Tomlinson, then an unmarried man, obtained a policy from the Equitable Life Assurance Society of the United States, a corporation organized under the laws of the state of New York, with its home office in New York City, insuring his life in the sum of \$2,000, made payable to his estate, which policy was in force at the date of his death. That the mode provided by said society for assigning policies or changing the beneficiary required the holder of the policy desiring the transfer or change to make out an application to the company, giving the number and date of policy and full name of beneficiary, which application should be accompanied by one dollar, to pay for issuing a new policy. That no such application was ever made, and that no new policy was issued, but that such mode was not stated in or on the policy. That on the 15th day of February, 1893, the said Austin L. Tomlinson married one Edith Guthrie, who continued to be and was his wife at the time of his death, and he had one child by her, still living. That on the 4th day of January, 1894, said Austin L. Tomlinson was the owner and in possession of a stock of groceries in Crawfordsville, Ind., of the value of \$800. That he had been engaged in the grocery business for more than two years prior to that date. That he had

notes and obligations owing him, the proceeds of said business, amounting to more than \$3,000. That he was indebted to divers persons, firms, and corporations for goods purchased in carrying on said business, the sum of \$4,000. That all of said groceries, notes, and obligations were in his lifetime applied to the payment of said indebtedness, and no part of the same came into the hands of said special administrator; and that on the date of his death said Austin L. Tomlinson had no rights, credit, property, or choses in action in the state of Indiana, except said policy of insurance. That, immediately after his appointment, said special administrator demanded and received of said Equitable Life Assurance Society, in payment of said policy, the sum of \$1,971.88, and gave his receipt therefor as special administrator. That he paid out, for funeral and burial expenses of said Austin L. Tomlinson, and court costs, \$500, taking receipts therefor as special administrator. That on the forenoon of his death he caused to be prepared, signed, acknowledged, and caused to be mailed to the general agents of said Equitable Life Assurance Society, at Indianapolis, the following instructions: "Fullerton, California, March 1, 1894. To Richardson & McCrea, Gen. Agents Eq. Life Assur. Co. of N. Y., Indianapolis, Ind.—Gentlemen: Please have life insurance policy taken out by me (A. L. Tomlinson) in 1892, for the amount of two thousand dollars, and made payable to my estate, transferred, and instead have the amount of said policy made payable to my wife, E. L. Tomlinson. [Signed] A. L. Tomlinson." Then he executed the foregoing instrument for the purpose of having said policy transferred and made payable to his wife. That before deceased left his home for California he expressed his intention of giving said policy to his wife, and after her arrival at Fullerton he informed her that he had done so. That the agents of said Equitable Assurance Company received said letter after the death of said Austin L. Tomlinson, and answered the same on the 6th of March, 1894, giving instructions as to the manner in which he should make out the application for change of beneficiary in his policy. The court further found that, between the 10th day of March, 1894, and the 1st day of April, 1894, said letter of the insurance company came into the possession of said Edith Tomlinson, and she and the said George N. Tomlinson placed the same in the hands of Paul & Bruner, attorneys of the said special administrator, and said attorneys, after having advised with the said widow and special administrator, prepared an agreed statement of facts, which was signed and verified by the said widow and special administrator. Said agreed statement of facts recites the fact of said Austin L. Tomlinson having taken out the insurance policy heretofore referred to in favor of his estate; his subsequent marriage

to said Edith; the birth of the child; the failure of the health of the said Austin; his trip to California for the benefit of his health; his letter to the assurance company requesting the change of beneficiary; the answer of the assurance company to said request; that he did not have said insurance policy; that it was at his home in Crawfordsville, in the possession of his wife; that his wife had not accompanied him to California; that several days before he died he had expressed his desire and intention of transferring said policy to his wife, but was persuaded to wait until her arrival; that, she not arriving, and fearing to wait longer, he made the assignment, thinking it sufficient to transfer all rights in the same to her; that George N. Tomlinson was appointed administrator, and was ignorant that said policy had been transferred; that deceased left no estate, unless the policy belonged to the estate; that, relying on the fact that said policy belonged to the estate, he had advanced expenses of last sickness and funeral expenses of deceased in the sum of \$500; that on the 2d day of April, 1894, said assurance company paid the amount due on the policy, \$1,971.88, to the special administrator, which amount is claimed by said widow; and asked the court to determine to whom said money belonged, and to make such order as the court deemed to be right. That said attorneys, Paul & Bruner, on the 12th day of April, 1894, presented the said agreed statement of facts to the judge of the circuit court of Montgomery county at chambers. That the same was filed and docketed in said court, and on said day, upon said agreed statement of facts, said court ordered and decreed that the proceeds of said policy, \$1,971.88, belonged to said Edith Tomlinson, and entered judgment in favor of said Edith, and against said special administrator. The court further finds that, in pursuance of said order, said special administrator paid to said Edith Tomlinson the proceeds of said policy, after deducting \$500 expended as aforesaid, viz. \$1,471.88, which sum she receipted to him for as special administrator. That on the 16th day of April, without any notice to the heirs or creditors, said special administrator presented to the court his final settled report, showing the receipts and expenditures as hereinbefore stated, and the payment to said Edith Tomlinson of the sum aforesaid, and that he had no other property or assets in his hands as special administrator; and he asked to have his report approved, and that he be discharged as special administrator, and the court made an order approving said report and discharging said special administrator. That said Paul & Bruner received from the said Edith Tomlinson, for services rendered as attorneys in the matter of said estate, and the procurement of said settlement, \$100 out of said insurance. That on the 2d day of May, 1894, Charles W. Wright, relator, having

been duly appointed and qualified regular administrator of said estate, filed his petition in said court, alleging, among other things, that said agreed statement of facts was procured, and the order and decree entered thereupon were obtained, by fraud practiced upon the court by the said George N. Tomlinson as special administrator, and that the court had no jurisdiction of the subject-matter to make such order upon such statement of facts; that said special administrator had no authority to make such statement of facts with said Edith Tomlinson; that said order was fraudulent and void; and that the same should be set aside and vacated. That on the 25th day of May, 1894, the court sustained said petition, and entered a judgment setting aside and vacating said order and decree, and all orders and decrees made under the same. The court further finds that all orders and decrees under said order and judgment were by said court, upon said petition, set aside and vacated, the court stating, as a reason, that it had no jurisdiction to make the same. That the said special administrator and said Edith Tomlinson were parties defendant to said petition, and appeared thereto by their attorneys, Paul & Bruner, and filed answers to said petition, and resisted the vacation of said judgment so made upon said agreed statement of facts. That afterwards the said George N. Tomlinson and said Edith Tomlinson appealed to the appellate court of the state of Indiana from said judgment vacating the order and judgment upon said agreed statement of facts. That the judgment so appealed from was afterwards by said appellate court affirmed. That claims have been filed against the estate of A. L. Tomlinson, and allowed, to the amount of \$1,400, which remain wholly unpaid. That said George L. Tomlinson had knowledge of such indebtedness when he made said agreed statement of facts, and at the time he paid said money to said widow. That, in connection with the order vacating the judgment on the agreed statement of facts, the court made the following order: "And it is further ordered by the court that the further proceedings in the cause No. 2,413, probate docket, that the plaintiff, W. Wright [relator], present administrator, * * * be substituted for George N. Tomlinson, formerly special administrator, and that George N. Tomlinson and Edith Tomlinson be made defendants, and that said administrator frame and tender issue to defendants that will determine the ownership of a certain insurance policy mentioned in the agreed statement of facts made on record in a former hearing of this cause, and also determine the right to the proceeds of said policy, and the said Wright is ordered to institute proceedings as above indicated, and prosecute the same to a speedy and proper conclusion." And the court finds that relator did not obey said

order. As conclusion of law the court stated that the plaintiff had no right of recovery.

The court having found, as facts, that the decedent left no assets in the state of Indiana at his death, to the possession of which a special administrator would have been entitled, unless said insurance policy belonged to his estate, and that the order made and entered upon the agreed statement of facts had been vacated and set aside, we cannot see that the appellant was harmed by the ruling of the court upon the demurrer to the second paragraph of appellee George N. Tomlinson's answer. The appellate court, in *Tomlinson v. Wright*, 12 Ind. App. 292, 39 N. E. 884, in affirming the judgment vacating the order made upon the agreed statement of facts, was careful to say that the merits of the controversy were not before it, and that the only question it deemed necessary to consider was whether the special administrator possessed such power as authorized him to enter into such an agreement with the widow of decedent, adding: "It is true, as a matter of course, if the appellant Edith Tomlinson was the equitable owner of the policy of insurance, then the administrator, whether special or general, had no right thereto, nor to the proceeds thereof, as against her. If, on investigation by the court having jurisdiction of the parties and of the subject-matter of the controversy, it is found that said Edith was, at the death of her husband, entitled to the money, the appellee will not be entitled to recover against appellants, or either of them." The court makes no finding that the relator was entitled to the proceeds of said policy, nor is there any finding of fraud on the part of the special administrator or said Edith Tomlinson. The burden was upon the relator (appellant) upon both of these averments of the complaint.

A life insurance policy is a chose in action, and may be assigned. Appellant contends that the common law will be presumed to be in force in California when the insured directed the change of beneficiary in the policy, and that under the common law choses in action are not assignable. Admitting that, under the common law, the policy could not be assigned so as to pass the legal title to the instrument, or the money, yet a transfer would be regarded as an equitable assignment, and enforced in equity. *Pomeroy v. Insurance Co.*, 40 Ill. 398. When the policy does not declare an assignment without the consent of the company void, a parol assignment is valid. *O'Brien v. Insurance Co. (Sup.)* 11 N. Y. Supp. 125. Knowledge of the assignment of a life insurance policy is important to the insurer, to prevent the possibility of its being compelled to pay both the assignee and the legal representatives of the insured. In fire insurance policies there is generally a condition that any assignment will be void without the assent of the insurer is first obtained. The reason is obvious,

—a company may be willing to issue a policy for one person, and not for another. *Cator v. Association* (Md.) 26 Atl. 959. A life insurance policy may be transferred by delivery, without writing. *Marcus v. Insurance Co.*, 68 N. Y. 625. A husband may orally assign a policy of insurance on his own life to his wife. *Chapman v. McIlwrath*, 46 Am. Rep. 1. In *Grand Lodge v. Child* (Mich.) 38 N. W. 1, the certificate of membership made the betrothed of the insured beneficiary, he retaining the certificate in his possession. She married another, and, the certificate having been lost, he made a statement of the loss, and applied for a reissue of the certificate to his son as beneficiary, and the application was refused. The rules of the organization required the change to be indorsed on the original certificate. By the advice of the officers of the organization, he attempted to make the change of beneficiary by giving power of attorney to collect the amount which should accrue under the certificate. The court held that such acts constituted an equitable change of beneficiary, and that the son was entitled to the fund. The general rule that the insured is bound to make such change of beneficiary in the manner pointed out by the policy and by-laws of the association is subject to exceptions, and one is that, if it be beyond the power of the insured to comply literally with the regulation, a court of equity will treat the change as having been legally made. *Supreme Conclave v. Cappella*, 41 Fed. 1. In short, subject to the claims of creditors to avoid a transfer made in fraud of their rights, any act which indicates an intention to transfer the interest in the policy, whether voluntarily or for a consideration, will be held good. *Bliss, Ins.* p. 547, § 331. From the findings of the court there can be no question as to the intention of the insured to transfer to his wife his rights in the policy under consideration, and in the light of the authorities cited, and many others to the same effect, there can be no doubt that an assignment in equity was made valid as to every one, unless the creditors of the assured are to be excepted.

Can this equitable assignment made by an insolvent debtor be upheld as against creditors? It is the duty of a husband and father to provide reasonably for his dependent family. The law favors the making of reasonable provision by a man for his dependent family, and in *Johnson v. Alexander*, 125 Ind. 575, 25 N. E. 706, the supreme court of Indiana has said: "It is not a violation of the statute, and in fraud of creditors, for a debtor, though insolvent, to contribute and pay a reasonable amount for insurance for the benefit of his family." In *Pence v. Makepeace*, 65 Ind. 345, it is held that only on the clearest proof of fraud, if at all, can the premiums paid by an insolvent debtor on a policy of insurance on his life for the benefit of his wife and chil-

45 N.E.—71

dren be revoked by his creditors, and in no event can any excess over the amount of the premium so paid be recovered. To the same effect is *Bank v. Hume*, 128 U. S. 196, 9 Sup. Ct. 41. In 2 *Bigelow, Frauds*, p. 129, it is said: "A debtor, though insolvent, may use his earnings to pay for insurance on his life in favor of his family." In *McCutcheon's Appeal*, 99 Pa. St. 133, it is held that when a person takes out a policy of insurance upon his own life, and subsequently assigns the same to his wife, child, or other dependent relative, the mere fact that the assignor in such case is insolvent at the time of making the assignment does not warrant the inference that the assignment was in fraud of creditors. Authorities in the same line to the same effect might be multiplied, but it is not necessary. There is nothing in the findings of the court to show bad faith. On the contrary, they show a commendable desire on the part of the husband to make some provision for his wife and child. The policy was taken out in January, 1892, and transferred March 1, 1894, at which date the insured died. At most, his creditors are injured if the transfer is upheld by the amount of the premium paid for two years. The amount might have been ascertained in the proceedings which appellant was ordered by the court below to institute to determine the ownership of the insurance policy in question, which order of court he failed to obey. In our opinion, the transfer of the policy was valid, and not in fraud of creditors. Upon the effect of the setting aside of the order, made on the agreed statement of facts, to pay the widow the balance of the proceeds of the insurance policy, after the special administrator had paid to the woman, under said order, said balance, we deem it only necessary to say that trustees acting under orders of the court having jurisdiction of the subject-matter will be protected thereby. If by reason of such order or decree money is paid to one not entitled thereto, the protection afforded to the trustee is not extended to the person so paid. In such cases the party really entitled to the money, if not a party to the previous suit, and bound by the decree, may have suit against the person to whom the money is paid. We find no error for which the judgment of the court below should be reversed. Affirmed.

(17 Ind. App. 22)

CHICAGO & E. R. CO. v. WAGNER.

(Appellate Court of Indiana. Feb. 3, 1897.)

Petition for rehearing. For former opinion, see 45 N. E. 76. Petition overruled.

HENLEY, J. Counsel for appellee contend that a rehearing should be granted in this case, and earnestly insist that the evidence is not in the record. We have carefully examined the record, and find therefrom that the

longhand transcript of the evidence was first filed in the clerk's office, that the same was certified as correct by the trial court, and that afterwards the bill of exceptions containing the longhand transcript was filed with the clerk. This is a compliance with the rule as established by the supreme court and followed by this court. We find no cause, upon examination of the evidence, to in any way change the decision of the learned judge who passed upon this appeal. A rehearing is denied.

(151 N. Y. 611)

**MAYOR, ETC., OF CITY OF NEW YORK
v. BRADY et al.**

(Court of Appeals of New York. Feb. 9, 1897.)

JUDGMENT—RES JUDICATA—INDEMNITY—ACTION ON BOND—EVIDENCE—VERDICT DIRECTED—SURETIES—PLAINTIFF'S FAILURE TO WITHHOLD MONEY DUE PRINCIPAL.

1. In an action by a city on the bond of a contractor, for indemnity after payment of a judgment recovered against it for personal injuries caused by a pipe left on the sidewalk, where the contractor had notice to come in and defend, the judgment roll in that action is conclusive evidence of the amount of the damages, the existence of the obstruction, and the freedom of the injured person from negligence. 30 N. Y. Supp. 1121, affirmed.

2. Where a city, which has paid a judgment against it for personal injuries caused by an obstruction left in the street by a contractor, sues on the contractor's bond for indemnity, it may show, by evidence dehors the record in the action by the person injured, that the negligent act for which the city was sued, and on which the verdict passed, was that of the contractor, and not that of the city. 30 N. Y. Supp. 1121, affirmed.

3. It was not error in such case to direct a verdict for plaintiff.

4. The sureties on a contractor's bond to indemnify a city against actions for personal injuries caused by the contractor's negligence are not discharged by the city's paying to the contractor the entire consideration for the contract, though it knew that an action was pending against it within the bond, where defendants also knew of the action and its nature, but served no written notice on the city, as they might have done under the contract, to withhold the money due to the contractor.

Action by the mayor, aldermen, and commonalty of the city of New York against John Brady and William Hollweg. From the affirmance of a judgment directed for plaintiff, defendants appeal. Affirmed.

For former reports, see 24 N. Y. Supp. 296; 28 N. Y. Supp. 324; 30 N. Y. Supp. 1121.

Clarence L. Barber, for appellants. Francis M. Scott, for respondent.

O'BRIEN, J. The defendants were held liable as sureties upon an indemnity bond executed to the plaintiff for the faithful performance of a certain contract. On the 31st of August, 1883, a firm of contractors entered into a written contract with the plaintiff for the construction of a sewer in Ninth avenue, between Eighty-First and Eighty-Third streets. This contract contains elaborate provisions, in which the obligations of the

parties are fully specified. A brief reference to one or two of the stipulations will be sufficient for all the purposes of this case. The contractors were bound to so guard the work while in progress as to prevent accidents to persons using the streets or sidewalks in a lawful manner, and agreed to indemnify the plaintiff and save it harmless from all suits and actions brought against it for damages for personal injuries resulting from negligence in the performance of the work, or in guarding the same, or for or by reason of any act or omission on the part of the contractors. The contractors also stipulated that the commissioner of public works, representing the city, might retain the whole or so much of the moneys payable on the contract until all suits or claims for damages for such injuries were settled and evidence of such settlement furnished to the commissioner, but the right to insist upon this was by the terms of the contract solely and exclusively at the option of the city. By another provision of the contract, the contractors consented that the commissioner might retain such amount of the contract price as might be necessary to pay all such claims for damages in favor of parties who had, before or within 10 days after the completion of the contract, given written notice to the commissioner that such claim for damages was unpaid. The contract was completed and the work accepted July 29, 1884; and on the 28th of August, 1884, the balance of the price of the work was paid by the plaintiff to the contractors. The bond which the defendants executed to the plaintiff bears even date with this contract, and refers to its terms, and was conditioned that if the contractors should well and truly perform the contract in accordance with its terms, and in every respect comply with its terms and conditions, then the obligation to be void; otherwise, to remain in full force and virtue. It appears that on the 17th of May, 1884, one Cruikshank brought an action against the plaintiff herein to recover damages for a personal injury sustained by him from an obstruction upon the sidewalk placed there by the contractors in the performance of the work. Both the contractors and their sureties (the defendants) had timely notice of this suit, that it was brought for the purpose of obtaining a judgment against the city for an act of the contractors, and they were notified to come in and defend the same. No attention was paid to this notice by the contractors or the sureties, and the action resulted in a verdict against the plaintiff for \$4,500, for which sum, with interest and costs, judgment was entered. The city paid this judgment, and then brought this action upon the bond for reimbursement for the loss. On the trial the court directed a verdict for the plaintiff for the amount of the judgment paid and interest. There was an exception to this direction, which raises the question here whether the defendants had

the right to have the case submitted to the jury.

The judgment roll in the action brought by Cruikshank against the city was conclusive evidence against the defendant therein, and also against these defendants and the contractors,—since they had notice of the pendency of the suit, and an opportunity to defend it,—of the amount of the damages, the existence of the defect or obstruction in the street, and that the injured party was himself free from negligence. These propositions have often been decided in actions of this character, where a liability over is sought to be established, and many of the cases have recently been reviewed and reaffirmed in this court. *Village of Port Jervis v. First Nat. Bank of Port Jervis*, 96 N. Y. 559; *Oceanic Steam Nav. Co. v. Campania Transatlantica Espanola*, 144 N. Y. 663, 39 N. E. 360; *Carleton v. Lombard, Ayers & Co.*, 149 N. Y. 137-152, 43 N. E. 422. The complaint in that action charged the city with negligence in permitting the obstruction on the sidewalk which had been placed there by the contractors to remain; and the plaintiff gave proof dehors the record that the negligent act for which the city was sued, and upon which the verdict passed, was that of the contractors, and not that of the city. When the proofs closed, there was no evidence upon which a verdict could be rendered that the city itself, and not the contractors, was the party primarily liable for the injury. The case against the sureties was made out by the judgment record in the former action, and the undisputed proof that the issue tried and submitted to the jury in that case was based solely upon the act of the contractors in obstructing the sidewalk in the progress of the work. There was not, therefore, any question to submit to the jury; and the court was warranted in directing a verdict for the plaintiff on the bond of indemnity, for the reason that it conclusively appeared that the city had been made liable in damages for an act of the contractors for which the sureties had undertaken to be responsible.

The only other question in the case that requires any notice arises upon the defendants' contention that they were discharged from the obligation by the act of the city in paying over to the contractors the balance of the contract price in its hands after the action by Cruikshank against it had been commenced, and when it knew that an outstanding claim for damages for the injury existed. The stipulations of the contract on this point covered two distinct classes of cases: One, where the claim was brought to the attention of the city by notice, in writing, to the commissioner, before the contract was completed, or within 10 days thereafter. In such a case the obligation on the part of the city to retain the fund was absolute, unless the claim had been shown to be discharged. There was no notice under this provision giv-

en by the defendants or any one, and hence it has no application to the facts of the case. The claim upon which this action was based does not fall within that provision of the contract. The other provision of the contract left it optional with the city, in cases where notice was not served upon the commissioner, either to retain the fund or to pay it to the contractor, and it could do either without any breach of the contract. The stipulations of the contract in this respect were a part of the defendants' undertaking. They became bound as sureties for the faithful performance by the contractors of their contract, with full knowledge that the city could, at its option in such a case, pay the balance of the contract price to the contractors; and they cannot complain if the city exercised that option in the manner stipulated. The defendants, when they guaranteed performance, with knowledge of this provision, virtually consented that the city might do what it did, and hence they have not been prejudiced. The contract was not changed in any of its terms, nor was there any departure from it in the performance. The city did nothing that it had not the right to do by the contract, or that the defendants had not consented in advance that it might do. The claim proved by the plaintiff fell directly within the conditions of the bond, and the defendants were not in any manner released or discharged from their obligation of indemnity against it, and so the judgment should be affirmed. All concur. Judgment affirmed.

(151 N. Y. 607)

PEOPLE v. MAYHEW.

(Court of Appeals of New York. Feb. 9, 1897.)

CRIMINAL LAW—APPEAL—ORDER DENYING NEW TRIAL.

An appeal does not lie to the court of appeals from an order of a trial court overruling a motion for new trial on the ground of newly-discovered evidence, made under Code Cr. Proc. § 465, subd. 7, on a suspension of sentence after a judgment of death has been appealed from and affirmed.

Appeal from supreme court, special term, Queens county.

Arthur Mayhew was convicted of murder in the first degree and sentenced to death, and the judgment was affirmed on appeal. 150 N. Y. 346, 44 N. E. 971. From an order denying a motion for a new trial, subsequently made, on the ground of newly-discovered evidence, he appeals. Appeal dismissed.

George W. Davison, for motion. William T. Emmet, opposed.

BARTLETT, J. This is a motion by the people to dismiss the appeal taken by defendant from an order denying motion for a new trial. In April, 1896, the defendant was convicted of murder in the first degree by a jury in the county of Queens, and sentenced to death. Under a stay of proceedings

an appeal from the judgment of conviction was argued in this court, and resulted in an affirmance. 150 N. Y. 346, 44 N. E. 971. In October, 1896, the defendant was resentenced. Before the day fixed for his execution, Mr. Justice Keogh, who presided at the trial, granted a stay of proceedings to enable the defendant to make a motion for a new trial on the ground of newly-discovered evidence, under section 465, subd. 7, Code Cr. Proc., which reads as follows: "Where it is made to appear, by affidavit, that upon another trial the defendant can produce evidence such as, if before received, would probably have changed the verdict, if such evidence has been discovered since the trial, is not cumulative, and the failure to produce it on the trial was not owing to want of diligence. The court in such cases can, however, compel the personal appearance of the affiants before it for the purposes of their personal examination and cross-examination, under oath, upon the contents of the affidavits which they subscribed." The newly-discovered evidence consisted of a retraction of the confession made by John Waynes, an accomplice of the defendant, who testified on the trial. Waynes was brought before Mr. Justice Keogh and examined orally as to the contents of the affidavit he had subscribed in support of the motion for a new trial. The learned trial judge denied the motion, and handed down a memorandum in writing, which is, in part, as follows: "On the trial Waynes testified that he was with the defendant at the time the murder was committed; that he saw Mayhew strike Stephen Powell a blow with a heavy substance in the end of a long stocking; that Mr. Powell fell, and was at once robbed by the defendant; and that he and Mayhew then ran along several streets, their course, as well as what they did as they ran, being described by him with great particularity. Waynes afterwards formally pleaded guilty to the crime of manslaughter as an accomplice of Mayhew in the murder of Mr. Powell, and was sentenced to 15 years' imprisonment. On this application for a new trial Waynes swears that all this testimony of his on the trial was false; that he did not see the defendant strike Mr. Powell, and was not with him at the time Mr. Powell was killed. The jury which saw and heard him testify has decided that his testimony then was the truth. It was corroborated by striking circumstantial evidence. * * * It is contended by the defendant's counsel that subdivision 7 of section 465 of the Code of Criminal Procedure gives the defendant the right to a new trial, irrespective of the truth or falsity of the testimony given by Waynes on this application, if it appears that such evidence, if given on the former trial, would probably have changed the verdict. The grounds upon which this application is based, and the reasons urged for granting it, do not present a case which comes within the meaning and intention of

the statute. The application is denied." Upon this decision an order was entered on the 6th day of January, 1897, formally denying the motion, and vacating the stay of proceedings. Thereupon the defendant was again resentenced, the death penalty to be inflicted during the week beginning March 7, 1897. The counsel for the defendant has appealed directly to this court from the order denying the motion for a new trial, and the district attorney now moves, on behalf of the people, to dismiss the appeal, on the ground that there is no statutory provision authorizing it.

Section 485 of the Code of Criminal Procedure provides, in eight subdivisions, what papers shall constitute the judgment roll, and the sixth subdivision reads as follows: "A copy of the minutes of any proceedings upon a motion either for a new trial or in arrest of judgment." Section 517 provides as follows: "An appeal to the supreme court may be taken by the defendant from the judgment on a conviction after indictment, except that when the judgment is of death the appeal must be taken direct to the court of appeals, and, upon the appeal, any actual decision of the court in an intermediate order or proceeding forming a part of the judgment roll, as prescribed by section four hundred and eighty-five, may be reviewed." This section contemplates that the motions for a new trial and in arrest of judgment will be made before the final appeal, and heard in this court as intermediate orders which constitute a part of the judgment roll. This court fully considered the point in *People v. Trezza*, 128 N. Y. 529-533, 28 N. E. 533. Judge Andrews said: "There is no statute provision authorizing an appeal from an order denying a new trial, except as incident to an appeal from the judgment." The counsel for defendant earnestly insists that there are provisions of the Code of Criminal Procedure under which this appeal can be entertained. Section 519, subd. 8, as amended in 1895 by adding this subdivision, is cited as in point, reading as follows: "From a final determination affecting a substantial right of the defendant." The fallacy of this contention appears upon reading the opening sentence of the section, which is as follows: "An appeal may be taken from a judgment or order of the appellate division of the supreme court to the court of appeals in the following cases and no other." This appeal is not from an order of the appellate division, but is taken directly from the order of the trial judge, in the same manner as an appeal from the judgment in capital cases under section 517. Section 528 is next urged upon our attention, which provides: "When the judgment is of death, the court of appeals may order a new trial, if it be satisfied that the verdict was against the weight of evidence or against law, or that justice requires a new trial," etc. The argument of the defendant's counsel is that, while this

statute applies primarily to the hearing of the appeal from the judgment, yet it is susceptible of such a construction as to cover the present appeal. We are unable to adopt this view, as the express language of the section makes it clear that it defines the powers of this court on appeal from the judgment of conviction. We find no change in the Code of Criminal Procedure since the decision of this court in *People v. Trezza*, 128 N. Y. 529, 28 N. E. 533, that authorizes this appeal, and it is clearly without statutory authority. The appeal from the order of January 6, 1897, denying defendant's motion for a new trial, should be dismissed. All concur. Appeal dismissed.

(151 N. Y. 598)

YALE v. CURTISS.

(Court of Appeals of New York. Feb. 9, 1897.)

BREACH OF MARRIAGE PROMISE—EVIDENCE—APPEAL
—QUESTION OF LAW.

1. In an action for breach of promise to marry, it appeared that defendant met plaintiff about January 1, 1886; that for two years thereafter he frequently took her home from church, and to public entertainments; that in 1888 he began to pay his addresses to another young lady; that plaintiff was told that defendant had only been going with her to please himself, and she asked him if this were true; that he said it was not, that he was true to her, and, if he lived, he would make her happy. It appeared that the parties had always treated each other formally, and that defendant addressed plaintiff as "Miss Yale." *Held*, that a contract to marry could not be inferred from the facts shown. 24 N. Y. Supp. 981, reversed.

2. In an action for breach of promise to marry, whether the facts sworn to constitute a contract to marry will be reviewed as a question of law.

Appeal from supreme court, general term, Fourth department.

Action by Nellie E. Yale against William R. Curtiss. From the affirmance of a judgment in favor of plaintiff (24 N. Y. Supp. 981), defendant appeals. Reversed.

Edward B. Thomas, for appellant. George W. Ray, for respondent.

HAIGHT, J. This action was brought to recover damages for a breach of promise to marry. The plaintiff, at the time of the trial, was 28 years of age, residing with her parents, in the village of Norwich. She was engaged in the teaching of music, and was a member and regular attendant of the choir and of the Congregational Church in that village. The defendant was born in Norwich, lived there until the year 1865, when he went to New York, and became a clerk in the banking office of Fiske & Hatch, and remained there for the period of 19 years. In the fall of 1884 he returned to Norwich, where he had inherited property upon the death of his father, and took up his residence with Mrs. Chapman, his sister. At the time of the trial he was 46 years of age, had received an academic education, and,

upon his return to Norwich, became a member and regular attendant of the choir of the Congregational Church. On the 16th day of December, 1885, he was introduced to the plaintiff at a wedding in that village; and on or about the 1st of January thereafter he accompanied her home from an evening prayer meeting, and subsequently escorted her to a band concert. He then went to the city of New York, and remained several weeks. After his return to Norwich, he again accompanied her home in the evening from church and prayer meeting, from time to time, during the spring and fall of that year, and occasionally during the summer, and these attentions continued through the year 1887, and until the early spring of 1888. He also escorted her to three entertainments during the spring of 1886, three more during the winter of 1886 and 1887, and one in the early spring of 1888. He also took her out riding on one or two occasions. After walking home with her, he often entered the house upon her invitation, and visited with her in the parlor until 10 or 11 o'clock, but never remaining after that hour. He did not always escort her home when he met her at church. On some occasions he escorted other young ladies, and did not always accept her invitation to go in upon reaching her home. He never called upon the plaintiff at her house except when he called to take her to the entertainments mentioned, and the occasions on which he accompanied her home from church. In the spring of 1888 he made the acquaintance of a Miss Hall in that village, and began paying his addresses to her. He escorted her to a banquet and other entertainments, and in June announced his engagement to her, and in the spring of 1889 they were married. There was never any express offer of marriage made by the defendant to the plaintiff, or an acceptance by her. It is claimed, however, that such offer and acceptance should be inferred from what was said and done. We shall therefore specifically call attention to the conversations from which it is claimed that a mutual promise to marry was understood between them. At the first time he accompanied the plaintiff home from prayer meeting in January, 1886, he spoke about the plaintiff being a friend of a Mr. Bishop who lived in New York, and of her being there the winter previous, and said: "I am going to New York soon, and I wish you were there this winter, instead of last, because I would like to accompany you to entertainments which I am expecting to enjoy when I am there." In the summer of 1887, their minister, a Mr. Upton, was going to Europe. On one occasion, when the defendant was accompanying the plaintiff from church, he remarked that Mr. Upton was very anxious that he should accompany him to Europe, but he said that he preferred to wait until another year; that he would like to remain longer than Mr. Upton was going

to remain. At this, the plaintiff stated that she had not any particular desire to go to Europe, on account of her fear of crossing the water. Nothing more was said upon the subject until they reached her home, at which time the defendant said: "Honestly and truly, would you allow the fear of the water to prevent you from going if you could go just as well as not?" The plaintiff made no direct reply to this question, but after a little said that it would be very lonesome for Mr. Upton to go alone, and that she thought it would be much pleasanter for him to go in a party, to which he replied: "Husband and wife is party enough for me if I go." On another occasion, in the year 1888, at the time the defendant took the plaintiff out riding, we are told that they drove down South Broad street, and that, in passing down the street, he pointed out two vacant lots, and asked her which location she liked best. He made no further remark with reference to the lots on that occasion, but on a former occasion he had remarked to her that he was going to build the nicest house in Norwich. On several occasions, when the plaintiff had invited him in after he had accompanied her from church, he declined, saying he was going to make her a long visit some time, or by and by. When he first commenced going with her, he made the remark several times that he would like to take her to entertainments which she would enjoy most. This is substantially the history of their courtship, as detailed by the plaintiff, until the defendant had commenced keeping the company of Miss Hall, in the spring of 1888. She then tells us that her mother told her of a remark that she had heard to the effect that the defendant had only been going with her to please himself, and to see how great a fool he could make of her. After hearing this, she met the defendant at church, and told him that she would like to have an interview with him. He thereupon asked if he should accompany her home, and she consented. She says that this occurred on the 15th or 20th of May. After they reached the house, she invited him in, and he entered, and took a seat. She then repeated to him what she had heard, and asked him if it was true. He said: "No; I would be a beast of a man to go with a young lady for such a purpose as that." He further stated that he admired her from the very first; that he sought her acquaintance; that it was her face and eyes that he admired; that he had found her to be what her face represented; and that he had never met a young lady that he regarded more highly. To this the plaintiff replied: "Had I not regarded you as highly as you did me, I never would have accepted your attentions as long as I have." He then remarked that he knew it; that he longed to make her happy; that he did not know what he would not do to rescue her from trouble; and that he would always protect her. He

further stated that, if the people were saying these unpleasant things about him, he would give up prayer meeting and everything else. She said: "No; don't on that account;" and he then asked if she would go to prayer meeting if he would, and she replied, "Certainly." He then said, "Then I know I shall have one friend there," and he did not know what he would not do to protect her. He then stated that, if she was not willing to take his word for it, he would like to have her go to Mr. and Mrs. Chapman, for he went to Mrs. Chapman with all his secrets, and that she knew just what his regards for her were. The plaintiff then told him that she did not care to go to Mrs. Chapman; that she was willing to take his word for it; that the most she wanted to know was that he was true; and he said that he was, and just before he left made the further remark, "If I live, I will make you happy." The plaintiff further testified that on that occasion he made the remark that he was unsettled in life, on account of his business, and that he did not know what business he should engage in; that he made inquiry as to whether her father and mother were offended at him; that she invited him to call again, and he replied that he would, but never did. She further testified that he never spoke any word of endearment to her except as above stated; that he never kissed her, or offered her any caresses; that he always treated her with politeness, and addressed her as "Miss Yale." The defendant had not at this time called upon the plaintiff for several weeks, and she knew that he was paying attentions to Miss Hall, and had met them at a banquet together. Very much of the conversation related by the plaintiff at this last interview was sharply controverted by the defendant, but, inasmuch as the verdict of the jury was in her favor, we are confined on this review to her statements.

Does this evidence establish a mutual promise to marry? We think not. It is not pretended that there was any offer of marriage prior to the last interview. There is nothing in the talk with reference to Europe, in which she was justified in drawing the conclusion that he was offering to take her with him as his wife. The query made with reference to the location of the vacant lots is one that might well have been made of any person with whom the defendant was acquainted, without a thought of marriage. The expression with reference to his making her a long visit on declining her invitation to go into the house after seeing her home from church would to the ordinary mind hardly suggest the idea of marriage. The most that could be reasonably claimed for it was that he intended some time to make her an independent call, which should not be cut short by other engagements. We are thus brought to the expressions made use of by him at their last interview. In construing these, we

must take into consideration the circumstances under which they were speaking. He, as we have seen, had formed the acquaintance, and on several occasions became the escort, of another lady, and this was known to the plaintiff. Word had come to her ears of an unpleasant remark with reference to her, and this she stated to him. It was with reference to this alleged remark that he made answer. To use her expression, he denounced it as beastly, and denied the truth of the remark, and then, to assure her that it was false, he proceeded to state his admiration of her, what her face and eyes had represented to him, and that he had never met a lady that he regarded more highly. He spoke of protecting her, and making her happy. Upon these expressions great stress is laid, and, were it not for the circumstances under which they were spoken, it is possible there would be some support for the respondent's contention with reference to them, but these circumstances she well understood. He doubtless had reference to the mental pain and suffering she had undergone by reason of the alleged remark, and he sought to remove that trouble from her mind, and assure her of his protection from further trouble of that character. His expression which follows is in accord with this view, for he says: "If the people are saying these unpleasant things, I will give up prayer meeting and everything else." He also told her to go to his sister, Mrs. Chapman, if she did not believe him, and find out from Mrs. Chapman how he regarded her. The same explanation may be given with reference to his expression that he was "true." The plaintiff must have understood him as speaking with reference to her suffering, for she thereupon asked him to call again, and, in answer to his question, stated that she would like their relations to continue as before. Prior to that time their relations had been those of friends. This is hardly in keeping with the theory that they had each then and there pledged each other their troth, and engaged to become man and wife.

The rule governing contracts of this character has been fully discussed in the case of *Homan v. Earle*, 53 N. Y. 267. Formerly, contracts of this character were often inferred or implied from proof of such circumstances as usually attend an engagement; but, after the statute was changed so as to permit parties to testify in their own behalf, they were expected to state all that was said and done, so as to remove from the field of speculation facts that had theretofore been inferred, thus leaving the court to determine whether the facts sworn to constituted a contract. In determining this question, however, while we may not imply facts not sworn to, we may infer the meaning and intention of the parties. In the absence of fraud and deception, there must be a contract. There must be a meeting of the minds of the contracting parties, and the evidence must be of such a character as to justify a

finding that such was the case. No form of words is required. A formal offer and acceptance is not necessary, but there must be an offer and an acceptance "sufficiently disclosed or expressed to fix the fact that they were to marry, as clearly as if put in formal words." The language used must be such as to show that the minds of the parties met. Contracts of marriage concern the highest interests of life, and should be sacredly guarded. If the conduct and declarations of the parties clearly indicate that they regard themselves as engaged, it is sufficient; otherwise, not. Mere courtship, or even an intention to marry, is not sufficient to constitute a contract. Thorough acquaintance with character, habits, and disposition is essential in order to make an intelligent contract. The parties, therefore, may form such an acquaintance without having the inferences of a contract attach. Applying these rules to the facts of this case, it is apparent that the evidence falls short of that which is necessary to establish a contract.

In considering this case, we have recognized the rule that the evidence most favorable to the plaintiff only can be considered; that, if there is any evidence sufficient to uphold the contract, the decision of the general term would be final; but when there is no evidence sustaining the contract, or when the evidence given does not show that there was a contract, then the question becomes one of law, which it is the duty of this court to review. Our conclusion is that the plaintiff failed to show facts from which a contract lawfully could be inferred, and that the judgment should be reversed, and a new trial granted, with costs to abide the event. All concur, except O'BRIEN, J., not voting. Judgment reversed.

(151 N. Y. 537)

HERZOG et al. v. HEYMAN et al.

(Court of Appeals of New York. Feb. 9, 1897.)

CONTRACT FOR SALE OF PATENT—INVALIDITY OF PATENT—DEFENSE OF WANT OF CONSIDERATION.

1. A contract for the sale of a patent for an invention implies the validity of the patent; and where a court of competent authority has declared the patent void, and has enjoined the manufacture and sale of the article patented, the purchaser may defend an action for the price on the ground of want of consideration. 28 N. Y. Supp. 74, affirmed.

2. A defense of want of consideration to an action in a state court on a contract is not precluded because the issue involves collaterally the determination of the validity of a patent. 28 N. Y. Supp. 74, affirmed.

3. A return or reassignment of a thing purchased is not necessary to enable the purchaser to plead want of consideration to an action for the price.

Appeal from superior court of New York City, general term.

Action by Hartwig Herzog and Aaron Herzog against Nathan H. Heyman and others to recover on a contract for the sale of a patent. From a judgment of the general term modifying a judgment of a jury term on a demurrer

(28 N. Y. Supp. 74), plaintiffs appeal. Affirmed.

Abraham L. Jacobs, for appellants. Alan D. Kenyon, for respondents.

ANDREWS, C. J. The agreement of April, 1888, was, in its main purpose, an agreement for the sale by the plaintiffs to the defendants of the patent No. 367,212, for an improved filter, issued by the United States to one Klein, July 26, 1887, which had been assigned by the patentee to the plaintiffs. The agreement of the defendants to pay to the plaintiffs a royalty of \$50 on each machine which should be sold by them was the consideration which the plaintiffs were to receive for the sale and assignment of the patent. The contingency which would change the obligation of the defendants from a royalty to a percentage of profits has not happened, and need not be considered. The seventh defense demurred to by the plaintiffs embraces the defense of want of consideration. It alleges that on about the 8th day of July, 1889, a suit was brought in the United States circuit court in Pennsylvania by Simon Uhlmann and Fred Uhlmann against the Arnholt & Schaefer Brewing Company, for an alleged infringement of a patent issued by the United States to one Stockholm, for a filtering process, February 21, 1888, of which patent the said Uhlmanns were assignees; that the alleged infringement consisted in the use by the brewing company of one of the filters made under the Klein patent, sold to the company by the defendants; that the defendants, on the sale, guaranteed the company against suits for infringement based upon its use of the Klein machine; that they appeared and defended this suit, which resulted in a decree January 4, 1893, adjudging that the use of the Klein filter by the brewing company was an infringement of the Stockholm patent, and enjoining its further use, and awarding damages to the plaintiffs in the action. 53 Fed. 485. The defense demurred to further alleges that the defendants and their customers have been ousted and evicted from the use of the Klein filters, and the defendants have been prevented from making and selling them; that the plaintiffs had no exclusive right of manufacture or sale under the Klein patent; but that their right or claim was subordinate to the rights of the owners of the Stockholm patent; and that the right or claim under the Klein patent was incapable of use, and worthless; and that the agreement sued upon was without consideration.

We think the defense demurred to was on its face a good answer to the action. The plaintiffs, not being parties to the suit in Pennsylvania, are not bound by the judgment rendered therein. But, so long as the judgment stands, it is conclusive as between the defendants and the owner of the Stockholm patent, that the Klein patent was an infringement of the Stockholm patent. The defendants can neither manufacture nor sell the

Klein machine, and they are liable to the owner of the Stockholm patent for damages for all machines sold by them, whether before or after the commencement of the suit in the United States court. If, therefore, it should also be established as against the plaintiffs, on the trial of this present action, that the Klein patent infringes the Stockholm patent, it will follow that there was no consideration for the promise of the defendants. The doctrine that the purchaser of a patent may defend an action for the purchase price, if the patent is void, has been recognized in many cases. *Marston v. Swett*, 66 N. Y. 212, and cases cited; *Id.*, 82 N. Y. 526. This is especially true where a decree has been found against the purchaser, rendered by a court of competent jurisdiction, adjudging the patent to be an infringement, thereby depriving him of any beneficial use thereof, and subjecting him to account to the owners of another patent for damages upon all sales by him of the infringing machine, whenever they may have been made. It is insisted, however, that all that the plaintiffs agreed to sell, or the defendants attempted to purchase, were the letters patent No. 367,212, irrespective of the fact whether they were valid or not. It was, as the plaintiffs insist, an agreement to sell their right, if any, under the letters, the defendants assuming the risk of their validity. It would, of course, have been competent for the parties to have entered into an agreement of the character suggested; but very clear evidence of such an agreement should be found before permitting a contract for the sale of letters patent to be so construed. The parties generally contemplate a transfer by the vendor to the vendee of an exclusive right vested in the former. "The thing to be assigned is not the mere parchment on which the grant is written; it is the monopoly which the grant confers; the right of property which it creates." *Gayler v. Wilder*, 10 How. 493. But reference to the agreement in this case discloses that the parties were dealing with what they regarded as a valid patent. It is recited that the parties of the first part (plaintiffs) "represent that they are the owners of certain letters patent"; that the parties of the second part "are desirous of acquiring a good and indefeasible title in and to said letters patent." It is declared that "in consideration of the foregoing recitals and of the payment," etc., an assignment shall be made of "an indefeasible title to said patent," and which assignment "shall vest in the parties of the second part the unquestioned right to said patent." It is further provided that, so long as the parties of the second part shall manufacture and sell the filtering machines "embraced in and protected by said letters patent," certain things are to be done. The clear import of the agreement is that both parties understood that they were dealing in respect to a real right secured under the patent, and that their mutual covenants were based on this assumption.

The point that the defense involved an inquiry by a state court as to the validity of a patent, and whether, as between two patents, one was an infringement of the other, which a state court has no jurisdiction to consider or determine, is not new. The issue made was that the agreement sued upon was without consideration. This is one of the most ordinary questions involved in actions upon contract. The jurisdiction of a state court to determine it is not precluded because the defense of want of consideration depends upon the construction or validity of a patent. The inquiry as to the validity of the patent comes in collaterally in determining the main issue of consideration, and of a question so arising the state courts have jurisdiction. *Marston v. Swett*, supra; *Hyatt v. Ingalls*, 124 N. Y. 98, 26 N. E. 285; *Merserole v. Collar Co.*, 6 Blatchf. 356, Fed. Cas. No. 9,488.

It was not necessary for the defendants to reassign the patent as a condition of interposing the defense. If they were seeking some affirmative relief, as a rescission of the agreement, or to recover money paid under the agreement, an offer to return the patent might be a condition precedent. We think the demurrer was properly overruled, and the order should therefore be affirmed. All concur. Order affirmed.

(151 N. Y. 592)

PEOPLE v. ST. NICHOLAS BANK OF
NEW YORK.

In re MILLS.

(Court of Appeals of New York. Feb. 9, 1897.)

LANDLORD AND TENANT—VACATION BY INSOLVENT
TENANT—LIABILITY OF RECEIVER FOR RENT.

A re-entry and reletting by the landlord, under the terms of a lease, after the premises were vacated by the receiver of an insolvent lessee, and a presentation of a claim by the landlord to the receiver for the difference between the amount of rental reserved in the first and second leases, is not a cancellation of the open, subsisting engagement, and substitution of a claim for a contingent liability of the original lessee, which the receiver had no power to recognize. *In re Hevenor*, 39 N. E. 393, 144 N. Y. 271, distinguished. 38 N. Y. Supp. 379, affirmed.

Appeal from supreme court, appellate division, First department.

This is a claim presented by Mr. Mills to the receiver of the St. Nicholas Bank for rent to become due under a lease made to the bank. The following facts will sufficiently show the situation of the parties: The bank was the lessee of Mr. Mills of certain premises, under a lease for a term of five years, and at a rent of \$12,000 a year. During the term the bank became insolvent, and, in statutory proceedings on behalf of the people for the dissolution of the corporation, Mr. Grant was appointed its receiver. Shortly after his appointment, he vacated the premises, whereupon Mr. Mills re-rented the same, as he might do under the lease, to the

German-American Bank, at a rent of \$9,000 a year, for three years, being the balance of the term named in the lease to the St. Nicholas Bank. The claim presented to the receiver was for the difference between the amount of rental reserved under the original lease and the amount reserved in the subletting to the German-American Bank, viz. the sum of \$9,000. The receiver rejected the claim, and, the same being referred by the court to a referee, he reported in its favor. The order of the court at special term confirming the report of the referee was affirmed, upon appeal, by the appellate division of the supreme court, in the First department (38 N. Y. Supp. 379), and that court has certified to us the following question of law for our review, viz.: "Whether or not the claimant, D. O. Mills, by re-renting the premises to the German-American Bank, canceled the open, subsisting engagement, and substituted a claim for a contingent liability of the bank, which the receiver had no power to recognize." Answered in the negative, and order affirmed.

John M. Bowers, for appellant. Henry B. Anderson, for respondent.

GRAY, J. We think that there is a certain and a well-marked distinction between the present case and that of *In re Hevenor*, 144 N. Y. 271, 39 N. E. 393. Our decision in the *Hevenor Case* rested upon the facts therein disclosed, and upon the effect of the deed of assignment in measuring the duties and powers of the assignee of Hevenor's estate. The distinction was correctly apprehended by the learned justice who wrote the prevailing opinion below, and we should hardly suppose that the learned justice who wrote in criticism of the *Hevenor Case* could have found reason for his observations, had he more carefully considered the grounds for our conclusion in that case. The question was whether the assignee of Hevenor could approve and pay the claim of Hevenor's lessor, and that turned upon the terms of the authority conferred by the deed of assignment. That undoubtedly directed the assignee to pay all the debts and liabilities of the assignor, then due or to grow due; but, as we endeavored to point out in the opinion, that language did not mean to include a liability thereafter to be created, and contingent upon after-occurring events. It meant, and the will of the assignor was, that whatever was a debt at the time of his assignment, or whatever he had rendered himself liable to pay, although the liability had not yet matured into an actual debt, his assignee should meet by the application of the assets in his hands. The difficulty there was that, while Hevenor's lessor might have at once presented a claim for the rental to accrue during the balance of the unexpired term of the lease, upon re-entering, as he might do under the provisions of the lease, by his acts he put an end to Hevenor's fixed

obligation, and made it uncertain as to whether and when there would be any loss at all upon which a claim might be based. Whether the lessor would suffer any loss from the subsequent renting of the premises during the period of the term for which Hevenor had made himself responsible was contingent, and would only be ascertainable in the future. How, then, could it be said that, within the terms of the deed of assignment, which restricted the assignee, in the distribution of the assignor's assets, to what were then the debts and liabilities of the latter, there was any authority in the assignee to recognize and approve as a claim against the estate a liability which was in fact dependent upon the acts of the claimant? Was the distribution of the estate in the hands of the assignee to be kept in suspension indefinitely, to await the result of the acts of Hevenor's lessor, until it could be determined what success would attend his efforts in re-renting the premises? What was observed in our opinion in that case was that it was left for the future to determine whether there would be any claim at all. The liability of the assignor could only have been for a possible deficiency, which, in the nature of things, and because of what the lessor had done, could only arise subsequently to the assignment. In *Re Lewis*, 81 N. Y. 421, the power of such an assignee was held to be only that which he derived from the deed of assignment. He was said to be empowered to distribute the proceeds of the estate according to the directions and under the sole guidance of the deed of assignment, and that the courts could not direct him to make any payment in violation of its terms. A comparison was made, in the opinion in the *Lewis Case*, between what might be done in the case of a general assignment and in the case of a bankrupt's estate; and it was said that in the latter case the law dictates the distribution, and, by force of direct enactment, the court takes possession of the estate, which the bankrupt is unable to hold, while in the former case the right to control the distribution remains in the assignor. In *Brainerd v. Dunning*, 30 N. Y. 211, the question was as to the meaning of the provision in a general assignment for the payment of debts, etc., due or to grow due; and it was held that it evidently applied only to claims then in existence, and whether due or to grow due was deemed to be immaterial. It should be clear, as we think, that no discretion is vested in an assignee with respect to the distribution of the estate in his hands, and that he must follow closely, in doing so, the terms of the assignment. There should be no construction of its provisions which would permit the delaying of creditors. The presentation and allowance of a claim by Hevenor's lessor for a certain sum, as due from the lessee upon the cessation of occupation under the lease, would have been unobjectionable as a debt or liability of the as-

signor, and would in no wise have tended to delay the distribution of the assigned estate among the creditors. The liability of the assignor was fixed at the time of the re-entry by the lessor, and would have consisted in an indebtedness stated by the lessor, either as the whole amount of rent to accrue during the unexpired term of the lease, or as such lesser amount as would represent the difference between the whole amount of the rent thereafter to accrue and the amount of rent reserved in a reletting of the premises for the unexpired term.

In the present case, as it was well observed in the opinion below, the situation of a receiver of an insolvent corporation is quite different from that of an assignee for the benefit of creditors, limited in his authority and power by the terms of the deed of assignment. The receiver is subject to the direction of the court that appointed him, and to the provisions of the statutes regulating the distribution of the assets of an insolvent corporation. He is required to make a fair and just distribution of the property of the corporation among its fair and honest creditors. Code Civ. Proc. § 1793. He is made a trustee of the insolvent estate for the benefit of the creditors of the corporation and of its stockholders. He is required to give notice to all persons holding any open or subsisting contract of the corporation to present the same, and provisions are made in the Revised Statutes for the presentation of such claims up to the time of the payment of a second dividend. 2 Rev. St. p. 464, pt. 3, c. 8, tit. 4. The whole matter is within the discretion of the court, and questions are to be determined upon equitable principles, subject only to what limitations may possibly be found in the Revised Statutes. It is quite apparent that greater latitude of judgment and action is contemplated by the provisions of the statutes on the part of a receiver, and in the supervisory powers of the court. The conditions are altogether other than those which exist under a deed of assignment for the benefit of creditors. What the lessor, Mills, did in this case was to present as his claim against the estate in the hands of the receiver an indebtedness which was definite, and without any element of contingency. Instead of claiming from the receiver the payment of all the rent which was to accrue during the unexpired term of the lease, Mills only claimed as an indebtedness the precise loss resulting from what he had been able to relet the premises for during the unexpired term. There was no question of a contingent liability, only to be ascertained to be such by the occurrence of future events. There was simply the presentation of a claim for a definite sum, as the loss which the lessor had suffered by the dissolution of the corporation, and the consequent termination of the subsisting engagement between it and its lessor. If we concede that the two cases might be regarded as parallel, there is an

important and material distinction in such facts; but the concession is unnecessary, and the situation of a receiver placed in possession of the assets of an insolvent corporation by force of the decree of the court, and with the broad and equitable powers conferred by the statute, bears little comparison with the situation of an assignee under a general assignment for the benefit of creditors, whose scope of powers and duty is prescribed by that instrument. The question, therefore, which is certified to us, is answered in the negative; and the order appealed from, so far as it is affected by that question, should be affirmed, with costs. All concur. Order affirmed.

MEMORANDUM DECISIONS.

In re AMERICAN FINE ARTS SOC. (Court of Appeals of New York. Dec. 1, 1896.) Julien T. Davies, Charles Francis Stone, and Herbert Barry, for appellant. Francis M. Scott and James M. Ward, for respondents. No opinion. Judgment affirmed, with costs, on opinion below. See 6 App. Div. 496, 39 N. Y. Supp. 564. All concur.

BANK OF AMERICA, Respondent, v. EAST RIVER SILK CO., Appellant. (Court of Appeals of New York. June 9, 1896.) John Sabine Smith, for appellant. Charles E. Rushmore, for respondent. No opinion. Order affirmed, with costs. All concur. See 90 Hun, 608, 35 N. Y. Supp. 1102.

BLISS et al. v. FOSDICK. (Court of Appeals of New York. Dec. 1, 1896.) James E. Chandler, John W. Weed, and William Hildreth Field, for appellant. J. Hampden Dougherty, for respondents. No opinion. Order affirmed, and judgment absolute ordered on stipulation, with costs, on opinion below. See 86 Hun, 162, 33 N. Y. Supp. 317. All concur.

BREEN et al., Respondents, v. UNION RY. CO. OF NEW YORK CITY, Appellant. (Court of Appeals of New York. Dec. 22, 1896.) Motion to dismiss an appeal from a judgment of the appellate division which affirmed a judgment in favor of plaintiffs entered upon the report of a referee, on the grounds that the appellate division unanimously decided that the findings of fact were sustained by the evidence, and that no question of law is presented for review. John F. Coffin, for the motion. George Hoadly and William H. Page, opposed. No opinion. Motion denied, with costs. See 9 App. Div. 122, 41 N. Y. Supp. 164.

CLIFT, Respondent, v. MOSES et al., Appellants. (Court of Appeals of New York. Dec. 1, 1896.) Louis Marshall, for appellants. William G. Tracy, for respondent. No opinion. Judgment affirmed, with costs, on opinion below. ANDREWS, C. J., and GRAY, O'BRIEN, and HAIGHT, J.J., concur. BARTLETT, J., not voting. MARTIN and VANN, J.J., not sitting. See 75 Hun, 517, 27 N. Y. Supp. 728.

CONNOLLY, Respondent, v. MANHATTAN RY. CO. et al., Appellants. DE BLAINE, Respondent, v. SAME, Appellants. INNES, Respondent, v. SAME, Appellants (three cases). (Court of Appeals of New York. Dec. 8, 1896.) Motions to dismiss appeals from judgments of the appellate division, which affirmed judgments in favor of plaintiffs in actions to restrain the operation of defendants' elevated railroads, on the ground that defendants had exacted conveyances from plaintiffs. Henry A. Forster, for the motions. Brainard Tolles and Julien T. Davies, opposed. No opinion. Motion denied in Connolly's case, with \$10 costs. Motions denied in other cases, without costs. See 2 App. Div. 620, 38 N. Y. Supp. 1142, and 3 App. Div. 541, 38 N. Y. Supp. 286.

CORK, Respondent, v. JONES et al., Appellants. (Court of Appeals of New York. Dec. 1, 1896.) Charles M. Williams, for appellants. Horace L. Bennett, for respondent. No opinion. Judgment affirmed, with costs. All concur, except HAIGHT, J., not sitting. See 81 Hun, 615, 30 N. Y. Supp. 1130.

CRANDALL, Appellant, v. LEHIGH VAL. R. CO., Respondent. (Court of Appeals of New York. Dec. 22, 1896.) John D. Teller, for appellant. John M. Brainard, for respondent. No opinion. Judgment affirmed, with costs, on opinion below. See 72 Hun, 431, 25 N. Y. Supp. 151. All concur, except HAIGHT, J., not sitting, and VANN, J., not voting.

CROSBY, Respondent, v. WORKINGMEN'S CO-OPERATIVE ASS'N OF UNITED INS. LEAGUE OF NEW YORK, Appellant. (Court of Appeals of New York. Dec. 8, 1896.) Motion to dismiss an appeal from a judgment of the appellate division, which affirmed a judgment in favor of plaintiff, upon the ground that the appellate division has unanimously decided that there was evidence supporting or tending to sustain the findings of fact. Fettretch, Silkman & Seybel, for the motion. William B. Donihue, opposed. No opinion. Motion denied, with \$10 costs. See 6 App. Div. 440, 39 N. Y. Supp. 678.

DRAKE, Respondent, v. NEW YORK, L. & W. RY. CO., Appellant. (Court of Appeals of New York. Dec. 24, 1896.) Robert T. Turner, for appellant. Frederick Collin, for respondent. No opinion. Judgment and order affirmed, with costs. All concur. See 75 Hun, 422, 27 N. Y. Supp. 739.

ELLEN SOHN, Appellant, v. KEYES et al., Respondents. (Court of Appeals of New York. Dec. 15, 1896.) Isaac N. Miller, for appellant. William B. Hornblower and Edward C. Perkins, for respondents. No opinion. Appeal dismissed, with costs. All concur. See 6 App. Div. 601, 39 N. Y. Supp. 774.

EMPIRE STATE SAV. BANK OF BUFFALO, Respondent, v. BEARD et al., Appellants. (Court of Appeals of New York. Dec. 15, 1896.) John G. Milburn, for appellant. Charles Berrick. Herbert F. Bissell, for appellant. Russell H. Potter. George J. Sicard, for appellants. Daniel C. Beard and Henry H. Otis. Frank C. Ferguson, for appellant. Peter J. Ferris. Charles Daniels. Charles H. Daniels, and George A. Lewis, for respondent. No opinion. Judgment reversed, and demurrer sustained, with costs, on the authority of O'Brien v. Fitzgerald, 150 N. Y. 572, 44 N. E. 1126, with leave to plaintiff to amend within

20 days on payment of the costs of the demurrer and of the appeals. All concur, except HAIGHT, J., not sitting. See 81 Hun, 184, 30 N. Y. Supp. 756.

FANNING, Respondent, v. NEW YORK CENT. & H. R. R. CO., Appellant. (Court of Appeals of New York. Dec. 1, 1896.) Hiscock & Doheny, for appellant. Lawrence T. Jones and George McGowan, for respondent. No opinion. Judgment affirmed, with costs. All concur, except MARTIN and VANN, JJ., not sitting. See 78 Hun, 616, 28 N. Y. Supp. 1125.

FARMERS' LOAN & TRUST CO. v. NEW YORK & N. RY. CO. et al. (Court of Appeals of New York. Dec. 22, 1896.) No opinion. Motion for reargument denied, with costs. See 150 N. Y. 410, 44 N. E. 1043.

FWLER et al., Appellants, v. WOOD, Respondent. (Court of Appeals of New York. Dec. 22, 1896.) No opinion. Motion for reargument denied, with costs. See 150 N. Y. 584, 44 N. E. 1124.

GOODRICH, Respondent, v. GILLIES, Appellant. (Court of Appeals of New York. Dec. 1, 1896.) Thomas F. Magner, for appellant. George S. Hastings, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 82 Hun, 18, 31 N. Y. Supp. 76.

HARRIMAN et al., Respondents, v. BAIRD, Appellant. (Court of Appeals of New York. Dec. 8, 1896.) Motion to dismiss an appeal from a judgment of the appellate division, which affirmed a judgment in favor of plaintiff upon the report of a referee made on the ground that no question of law is involved, and the findings of fact below have been upheld by an unanimous decision that they were sustained by the evidence. Harriman & Fessenden, in pro. per. Pettretch, Silkman & Seybel, opposed. No opinion. Motion denied, with costs. See 6 App. Div. 518, 39 N. Y. Supp. 592.

HENDERSON, Respondent, v. HADDEN et al., Appellants. (Court of Appeals of New York. Dec. 8, 1896.) Motion for a new undertaking or to dismiss an appeal. James Henderson, for the motion. No opinion. Motion granted, and appellants required to file new undertaking, and serve copy thereof within 20 days after service of copy of order herein, or the appeal to be dismissed, and the order or judgment appealed from executed as if original undertaking had not been given, with \$10 costs of this motion to respondent to abide event. See 2 App. Div. 617, 37 N. Y. Supp. 1146.

HOPKINS, Respondent, v. CLARK et al., Appellants. (Court of Appeals of New York. Dec. 8, 1896.) Motion to dismiss an appeal from a judgment of the appellate division, which affirmed a judgment entered upon a verdict, and also affirmed an order denying a motion for a new trial, on the ground that no questions of law are raised by the appellants' exceptions. Edgar J. Nathan, for the motion. John W. Houston, opposed. No opinion. Motion denied, with costs. See 7 App. Div. 207, 40 N. Y. Supp. 130.

JACOBS et al., Appellants, v. HOWARD INS. CO. OF NEW YORK, Respondent. (Court of Appeals of New York. Dec. 1, 1896.) Thomas F. Wickes, for appellants. T.

Henry Dewey, for respondent. No opinion. Judgment and order affirmed, with costs. All concur. See 28 N. Y. Supp. 1133.

JEWELERS' MERCANTILE AGENCY, Limited, Respondent, v. ULMANN et al., Appellants. SAME, Respondent, v. JEWELERS' WEEKLY PUB. CO. et al., Appellants. (Court of Appeals of New York. Dec. 8, 1896.) Motion to consolidate appeals. Leopold Sondheim, for the motion. Howard Mansfield, opposed. No opinion. Motion to advance denied, and motion to stay argument of the appeal from order granted until argument of the appeal from judgment. Both appeals to be heard together as one. See 84 Hun, 12, 32 N. Y. Supp. 41, and 6 App. Div. 499, 39 N. Y. Supp. 700.

JONES, Appellant, v. WITTNER, Respondent. (Court of Appeals of New York. Dec. 24, 1896.) Adolph Cohen, for appellant. David Leventritt and Harold Nathan, for respondent. No opinion. Judgment affirmed, with costs. All concur, except ANDREWS, C. J., and BARTLETT, J., not voting. See 79 Hun, 283, 29 N. Y. Supp. 372.

KAM, Respondent, v. FRED HOWER BREWING CO., Limited, et al., Appellants. (Court of Appeals of New York. Dec. 24, 1896.) Motion for an order designating this action as a preferred cause, and placing it upon the calendar as such. Rufus O. Catlin, for the motion. No opinion. Motion denied, without costs, on opinion in Colton v. Railroad Co., 151 N. Y. 266, 45 N. E. 546. See 39 N. Y. Supp. 1124.

In re KEMP'S ESTATE. (Court of Appeals of New York. Dec. 1, 1896.) Treadwell Cleveland and William V. Rowe, for appellants. Emmet R. Olcott and Edgar J. Levey, for respondent. No opinion. Order affirmed, with costs, on opinion below. See 7 App. Div. 609, 40 N. Y. Supp. 1144. All concur.

KITCHELL, Respondent, v. BROOKLYN HEIGHTS R. CO., Appellant. (Court of Appeals of New York. Dec. 1, 1896.) Matthew Hale and Albert O. Tennant, for appellant. Frederick E. Crane, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 10 Misc. Rep. 277, 30 N. Y. Supp. 1079.

KOEPKE v. BRADLEY et al. (Court of Appeals of New York. Dec. 1, 1896.) Klein & Rendich, for appellant. Pickett & Quintard, for respondent. No opinion. Order affirmed, with costs, on opinion below. See 3 App. Div. 391, 38 N. Y. Supp. 707. All concur.

KOSTERS, Respondent, v. BROOKLYN, B. & W. E. R. CO., Appellant. (Court of Appeals of New York. Dec. 1, 1896.) A. O. Tennant and Matthew Hale, for appellant. George W. Miller, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 10 Misc. Rep. 18, 30 N. Y. Supp. 531.

KUHLMANN et al., Appellants, v. CITY OF BROOKLYN, Respondent. (Court of Appeals of New York. Dec. 8, 1896.) No opinion. Motion for reargument denied, with \$10 costs. See 149 N. Y. 534, 43 N. E. 988.

LAMMING, Appellant, v. GALUSHA et al., Respondents. (Court of Appeals of New York. Dec. 24, 1896.) Henry W. Conklin, for appel-

lant. Charles J. Bissell, for respondents. No opinion. Judgment affirmed, with costs, on opinion of BRADLEY, J., below. See 81 Hun, 247, 30 N. Y. Supp. 767. All concur, except HAIGHT, J., not sitting.

LANEY, Respondent, v. ROCHESTER RY. CO., Appellant. (Court of Appeals of New York. Dec. 22, 1896.) Charles J. Bissell, for appellant. Quincy Van Voorhis, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 79 Hun, 609, 29 N. Y. Supp. 1145.

McCRUDEN, Respondent, v. ROCHESTER RY. CO., Appellant. (Court of Appeals of New York. Dec. 1, 1896.) Charles J. Bissell, for appellant. Thomas Raines, for respondent. No opinion. Judgment affirmed, with costs, on opinion below. See 77 Hun, 609, 28 N. Y. Supp. 1135. All concur, except HAIGHT, J., not sitting, and MARTIN, J., not voting.

McNANEY, Appellant, v. HALL et al., Respondents. (Court of Appeals of New York. Dec. 24, 1896.) Motion for an order designating this action as a preferred cause, and placing it upon the calendar as such. John A. Reynolds, for the motion. No opinion. Motion denied, without costs, on opinion in Colton v. Railroad Co., 151 N. Y. 266, 45 N. E. 546. See 33 N. Y. Supp. 518.

MAHONY, Respondent, v. CLARK et al., Appellants. (Court of Appeals of New York. Dec. 8, 1896.) Motion to dismiss an appeal from a judgment of the appellate division, affirming a judgment in favor of plaintiff on a verdict, on the ground that the appellate division has unanimously decided that the verdict was supported by evidence, and that no questions of law are raised by the appellants' exceptions. Thörnall & Pierce, for the motion. Niles & Johnson, opposed. No opinion. Motion granted. See 1 App. Div. 196, 37 N. Y. Supp. 138.

MERRELL, Respondent, v. BLANCHARD, Appellant. (Court of Appeals of New York. Dec. 22, 1896.) Motion to dismiss an appeal from a judgment of the appellate division, on the ground that the record discloses no question of law. Tyler, Pratt & Hibbard, for the motion. William M. Safford, opposed. No opinion. Motion denied, with \$10 costs. See 7 App. Div. 167, 40 N. Y. Supp. 48.

MERZ, Respondent, v. INTERIOR CONDUIT & INSULATION CO. et al., Appellants. (Court of Appeals of New York. Dec. 15, 1896.) Eugene H. Lewis, for appellants. David Gerber and A. J. Dittenhoefer, for respondent. No opinion. Appeal dismissed, with costs. All concur. See 87 Hun, 430, 34 N. Y. Supp. 215.

MILLS, Respondent, v. BROOKLYN CITY R. CO., Appellant. (Court of Appeals of New York. Dec. 1, 1896.) P. S. Dudley and Thomas S. Moore, for appellant. J. Stewart Ross, for respondent. No opinion. Judgment affirmed, with costs. O'BRIEN, BARTLETT, MARTIN, and VANN, JJ., concur. ANDREWS, C. J., and HAIGHT, J., not voting. GRAY, J., not sitting. See 10 Misc. Rep. 1, 30 N. Y. Supp. 532.

NEARING, Respondent, v. VAN FLEET, Appellant. (Court of Appeals of New York. Dec. 22, 1896.) Lewis E. Carr, for appellant.

William H. Crane, for respondent. No opinion. Judgment affirmed, with costs. The case of Brick v. Gannar, 36 Hun, 52, approved. All concur. See 71 Hun, 137, 24 N. Y. Supp. 531.

NEWTON, Respondent, v. CENTRAL VERMONT R. CO., Appellant. (Court of Appeals of New York. Dec. 1, 1896.) Louis Hasbrouck, for appellant. J. P. Badger, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 80 Hun, 491, 30 N. Y. Supp. 488.

PEOPLE v. COMMERCIAL ALLIANCE LIFE INS. CO. BAHKE v. GILBERT. (Court of Appeals of New York. Dec. 15, 1896.) Henry D. Hotchkiss, for appellant. Henry B. Corey, for respondent. No opinion. Order affirmed, on opinion below, with costs. See 5 App. Div. 273, 39 N. Y. Supp. 117. All concur.

PEOPLE ex rel. CONSOLIDATED TELEGRAPH & ELECTRICAL SUBWAY CO., Respondent, v. BARKER et al., Commissioners of Taxes, Appellants. (Court of Appeals of New York. Dec. 15, 1896.) Francis M. Scott and James M. Ward, for appellants. John C. Tomlinson, for respondent. No opinion. Order affirmed, with costs. All concur. See 7 App. Div. 27, 39 N. Y. Supp. 776.

PEOPLE ex rel. EDWARDS, Appellant, v. TAPPEN et al., Park Commissioners, Respondents. (Court of Appeals of New York. Dec. 1, 1896.) Adolphus D. Pape, for appellant. Francis M. Scott and Terence Farley, for respondents. No opinion. Order affirmed, without costs. All concur. See 15 Misc. Rep. 20, 36 N. Y. Supp. 773.

PEOPLE ex rel. HAVERTY, Respondent, v. BARKER et al., Tax Commissioners, Appellants. (Court of Appeals of New York. June 9, 1896.) D. J. Dean, for appellants. Thomas C. O'Sullivan and Gilbert D. Lamb, for respondent. No opinion. Order affirmed, with costs. All concur. See 1 App. Div. 532, 37 N. Y. Supp. 555.

PEOPLE ex rel. HAZLETT, Appellant, v. WHITE, Commissioner of City Works, Respondent. (Court of Appeals of New York. Dec. 15, 1896.) J. Stewart Ross, for appellant. Joseph A. Burr, for respondent. No opinion. Order affirmed, with costs. All concur. See 80 Hun, 603, 30 N. Y. Supp. 163.

PEOPLE ex rel. LAWYERS' SURETY CO. OF NEW YORK, Respondent, v. ANTHONY, Appellant. (Court of Appeals of New York. Dec. 1, 1896.) Henry T. Sanford and Raymond C. Haff, for appellant. Carlisle Norwood, for respondent. No opinion. Order affirmed, on opinion below, with costs. See 7 App. Div. 132, 40 N. Y. Supp. 279. All concur.

PEOPLE ex rel. McKEEVER et al., Appellants, v. WILLIS, Commissioner of City Works, Respondent. (Court of Appeals of New York. Dec. 15, 1896.) Almet F. Jenks and Jerry A. Wernberg, for appellants. Joseph A. Burr, for respondent. No opinion. Orders affirmed, on the construction given to the charter by the courts below, with costs. See 6 App. Div. 231, 39 N. Y. Supp. 987, and 6 App. Div. 610, 39 N. Y. Supp. 1131. All concur.

PEOPLE ex rel. RAILWAY ADVERTISING CO., Respondent, v. **ROBERTS**, Comptroller, Appellant. (Court of Appeals of New York. Dec. 1, 1896.) T. E. Hancock, for appellant. Latham G. Reed and John M. Bowers, for respondent. No opinion. Order affirmed on opinion below, with costs. See 4 App. Div. 288, 39 N. Y. Supp. 448. All concur.

PEOPLE ex rel. WASHINGTON MILLS CO., Respondent, v. **ROBERTS**, Comptroller, Appellant. (Court of Appeals of New York. Dec. 1, 1896.) G. D. B. Hasbrouck, for appellant. George W. Wickersham and Henry S. Wardner, for respondent. No opinion. Order affirmed, with costs, on opinion below. See 8 App. Div. 201, 40 N. Y. Supp. 417. All concur.

PITTS, Respondent, v. **NEW YORK, L. E. & W. R. CO.**, Appellant. (Court of Appeals of New York. Dec. 8, 1896.) Motion to open default. Reynolds, Stanchfield & Collin, for the motion. Bacon & Aldridge, opposed. No opinion. Motion granted, upon payment of \$10 costs. See 79 Hun, 546, 29 N. Y. Supp. 871.

QUIGLEY, Respondent, v. **CITY OF ROCHESTER**, Appellant. (Court of Appeals of New York. Dec. 1, 1896.) A. J. Rodenbeck, for appellant. Werner & Harris, for respondent. No opinion. Order affirmed, and judgment absolute ordered against the defendant, with costs, on opinion of trial judge. See 79 Hun, 609, 29 N. Y. Supp. 1148. All concur.

QUINN, Respondent, v. **O'KEEFFE**, Appellant. (Court of Appeals of New York. Dec. 8, 1896.) Motion to dismiss an appeal from a judgment of the appellate division upon the ground that the action was to recover damages for a personal injury, and the affirmation, by the appellate division, was unanimous. James C. Cropsey, for the motion. James D. Bell, opposed. No opinion. Motion granted. See 9 App. Div. 68, 41 N. Y. Supp. 116.

REYNOLDS, Appellant, v. **CITY NAT. BANK OF WATERTOWN et al.**, Respondents. (Court of Appeals of New York. Dec. 22, 1896.) Hannibal Smith, for appellant. John Lansing, for respondents. No opinion. Judgment affirmed, with costs, on opinions below. See 71 Hun, 386, 24 N. Y. Supp. 1134. All concur.

REYNOLDS, Appellant, v. **MILLER**, Respondent. (Court of Appeals of New York. Dec. 1, 1896.) William Carter, for appellant. Eugene Van Voorhis, for respondent. No opinion. Judgment affirmed, with costs, on opinion below. See 79 Hun, 113, 29 N. Y. Supp. 405. All concur, except HAIGHT, J., not sitting.

ROULSTON, Respondent, v. **ROULSTON et al.**, Appellants. (Court of Appeals of New York. Dec. 1, 1896.) John C. Keeler, for appellants. R. E. Waterman, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 78 Hun, 909, 28 N. Y. Supp. 1117, and 30 N. Y. Supp. 1134.

ROWELL et al., Appellants, v. **LAMBERT**, Respondent. **SAME**, Appellants, v. **TUCK**, Respondent. **SAME**, Appellants, v. **WINSTON**, Respondent. (Court of Appeals of New York. Dec. 1, 1896.) Philip Carpenter and

Edward Hassett, for appellants. Dickinson W. Richards, for respondents. No opinion. Judgments dismissing the complaints, without requiring the defendants to give any proof, reversed, and new trials granted, costs to abide event. All concur. See 79 Hun, 614, 29 N. Y. Supp. 1149.

SCIOLINA, Respondent, v. **ERIE PRESERVING CO.**, Appellant. (Court of Appeals of New York. Dec. 1, 1896.) Simon Fleischmann, for appellant. John C. Hubbell, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 39 N. Y. Supp. 916.

SMALL, Respondent, v. **BROOKLYN CITY & N. R. CO.**, Appellant. (Court of Appeals of New York. Dec. 1, 1896.) Matthew Hale and Albert C. Tennant, for appellant. Isaac M. Kapper, for respondent. No opinion. Judgment affirmed, with costs. All concur. See 10 Misc. Rep. 266, 30 N. Y. Supp. 1076.

SMITH et al., Respondents, v. **REICH**, Appellant. (Court of Appeals of New York. Dec. 22, 1896.) H. H. Benjamin, for appellant. Charles Robinson Smith and Newell Martin, for respondents. No opinion. Judgment affirmed, with costs, on opinion of general term. See 80 Hun, 287, 30 N. Y. Supp. 167. All concur.

STAPF, Respondent, v. **LOEWER'S GAMBRINUS BREWERY CO.**, Appellant. (Court of Appeals of New York. Dec. 22, 1896.) Motion to dismiss an appeal from a judgment of the appellate division which affirmed a judgment in favor of plaintiff, on the grounds that the appellate division unanimously decided that the verdict was supported by evidence, and that no question of law is presented for review. Alfred & Charles Steckler, for the motion. C. J. G. Hall, opposed. No opinion. Motion denied, upon authority of Kaplan v. Biscuit Co., 151 N. Y. 171, 45 N. E. 353, but without costs, and with the privilege to renew the motion in the case of an amendment of the record showing the decision by the appellate division to have been unanimous. See 1 App. Div. 405, 37 N. Y. Supp. 256.

In re **SWAN**. (Court of Appeals of New York. Dec. 22, 1896.) Motion by Ralph C. Swan to be made a party plaintiff and respondent in an action between Robert H. Sherwood, plaintiff, and Maitland B. Graves, defendant, upon the ground that the petitioner is interested in, and entitled to a share of, the judgment appealed from. Frank W. Angel, for the motion. James W. Eaton, opposed. No opinion. Motion denied. See 31 N. Y. Supp. 660.

THOLEN, Respondent, v. **BROOKLYN CITY R. CO.**, Appellant. (Court of Appeals of New York. Dec. 1, 1896.) Albert C. Tennant and Matthew Hale, for appellant. Isaac M. Kapper, for respondent. No opinion. Judgment affirmed, with costs. All concur, except GRAY, J., not sitting. See 10 Misc. Rep. 283, 30 N. Y. Supp. 1081.

VAN HOUTEN, Respondent, v. **PYE**, Appellant. (Court of Appeals of New York. Dec. 22, 1896.) Motion to dismiss an appeal taken after the dismissal of a previous appeal. Frank Comesky, for the motion. No opinion. Motion granted, on default. See 91 Hun, 640, 36 N. Y. Supp. 1134.

WELDON, Respondent, v. THIRD AVE. R. CO., Appellant. (Court of Appeals of New York. Dec. 8, 1896.) Motion to open default in failing to file and serve a return upon an appeal from a judgment of the appellate division. Hoadly, Lauterbach & Johnson, for the motion. Foley & Wray, opposed. No opinion. Motion granted, upon payment of \$10, and performance within 10 days. See 3 App. Div. 370, 38 N. Y. Supp. 206.

WEST, Respondent, v. BUTTNER, Appellant. (Court of Appeals of New York. Dec. 1, 1896.) J. J. Kennelly, for appellant. Frank Hopkins, for respondent. No opinion. Judgment affirmed, with costs. All concur, except MARTIN, J., not sitting. See 80 Hun, 605, 31 N. Y. Supp. 1135.

CALUMET RIVER RY. CO. v. SHEAFF. SOUTH CHICAGO & S. R. CO. v. SAME. HAND v. SAME.¹ (Supreme Court of Illinois. June 11, 1896.) Appeal from superior court, Cook county; Kirk Hawes, Judge. Petition by John M. Sheaff against the Calumet River Railway Company, the South Chicago & Southern Railroad Company, William H. Hand, and others. Decree for petitioner. The defendants named appeal. Affirmed. Loesch, Brothers and Robert B. Kendall, for appellants. H. S. McCartney and William Prescott, for appellee.

PHILLIPS, J. These three appeals are based on the same record, and are from the same decree, and the assignments of error involve the same questions, and they have been consolidated. The appellee in these cases filed his petition on October 17, 1891, to establish record title in fee under the burnt records act to the following described lands, to wit: Lots 25 to 33, both inclusive, and lots 38 to 43, both inclusive, in block 2; lots 1 to 10, both inclusive, and 22 to 24, both inclusive, in block 3; lots 1 to 12, both inclusive, lots 44 to 48, both inclusive, and lot 26, in block 5; lots 1 to 24, both inclusive, in block 6; lots 1 to 14, both inclusive, and lots 25 to 48, both inclusive, in block 7,—all in Kizer & Williams subdivision of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of section 31, township 37 N., range 15 E., of the third principal meridian, in Cook county, Ill. Represents that the public records of Cook county, so far as they relate to the title of said real estate prior to the 9th day of October, A. D. 1871, were destroyed by fire in Chicago, in said Cook county, on the 8th and 9th days of October, A. D. 1871, and that the original title deeds, conveyances, and instruments of writing appertaining to said real estate prior to said fire have been lost or destroyed, and it is not in the power of petitioner to produce the same. Petitioner represents that his title to said real estate is derived from the following persons, in the manner hereinafter set forth. The petitioner then sets forth his title, showing the lands were originally granted by the United States to Stephen A. Douglas, by patent, on October 1, 1855, and by various mesne conveyances the title was vested in him. To that petition numerous parties were made defendants, but the only contesting defendants on hearing in the trial court are those who are appellants here. Appellee's title, as thus derived, was under the survey of 1834, made under authority of the United States. The appellants set up title derived under patents issued under a survey made under order and direction of the commissioners of the United States land office in 1874. On hearing, the court found for the

petitioner, and established and confirmed title in him, and ordered possession should be delivered to him, etc. The rights of riparian owners on this body of water known as "Wolf Lake," was fully discussed in *Fuller v. Shedd* (opinion not yet officially published) 44 N. E. 286, and their rights as such riparian owners were stated in that opinion. We also there held that the survey of 1874 was illegal and unauthorized by law, and patentees thereunder took no title. That opinion disposes of all the legal questions involved in this case. Whatever right the appellants had was under the survey of 1874 and the patents issued thereunder; and as that survey was unauthorized and void, and the patents issued thereunder conveyed no title, the defense made to this proceeding fails, and the appellee was entitled to the relief prayed. The decree of the superior court was proper, and it is affirmed.

SUTHERLAND et al. v. DONNELL. (Supreme Court of Indiana. Jan. 27, 1897.) Appeal from circuit court, Washington county; S. B. Voyles, Judge. Remonstrance by Henry B. Sutherland and others against the granting of a liquor license to Frank O. Donnell. A motion by the applicant to dismiss the remonstrance as to some of the remonstrators was overruled by the board of commissioners, but on appeal to the circuit court the motion was granted, and the other remonstrators appeal. Reversed. Harvey Morris, for appellants. Mitchell & Mitchell and Zaring & Hottel, for appellee.

MONKS, J. The questions presented in this case are the same as those in *Sutherland v. McKinney* (this term) 45 N. E. 1048. Upon the authority of that case, this case is reversed, with instructions to overrule the motion to dismiss the remonstrance as to the 52 persons named, and for further proceedings.

KIRSHBAUM v. FARMERS' FIRE INS. CO. et al. (Appellate Court of Indiana. Jan. 29, 1897.) Appeal from circuit court, Jay county; D. D. Heller, Judge. Action by Raphael Kirshbaum against the Farmers' Fire Insurance Company and another. John L. Hanlin was, on his application, made a party defendant, and filed a cross complaint. From a judgment for cross complainant, plaintiff appeals. Affirmed. Corwin & Smith and Headington & La Follette, for appellant. R. H. Hartford, for appellees.

ROBINSON, J. The same questions are involved in this appeal as were in the case of *Appellant v. Hanover Fire Ins. Co.* (decided at the present term) 45 N. E. 1113, and upon the authority of that decision the judgment in this cause is affirmed.

BLAKIE v. BROOKLINE GASLIGHT CO. (Supreme Judicial Court of Massachusetts. Suffolk. Nov. 12, 1896.) Exceptions from superior court, Suffolk county; J. B. Richardson, Judge. Action by Christina Blakie against the Brookline Gaslight Company for injuries caused by a leak in its gas mains caused by its negligence. Verdict for plaintiff, and defendant brings exceptions. Exceptions overruled. D. E. Ware, for plaintiff. John Lowell and John Lowell, Jr., for defendant.

PER CURIAM. There was evidence for the jury of the due care of the plaintiff, and of the negligence of the defendant, and that the plaintiff received her injuries in consequence of this negligence of the defendant. Exceptions overruled.

¹ Rehearing denied Jan. 14, 1896.

